National Domestic and Family Violence Bench Book

Entry Page Design By Nadine Dividson-Wall

Using the National Domestic and Family Violence Bench Book

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4. Embedded Links connecting to external sources and related material within the bench book.
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6. Any bench book page and case summaries for each jurisdiction can be converted to a PDF and emailed or printed.

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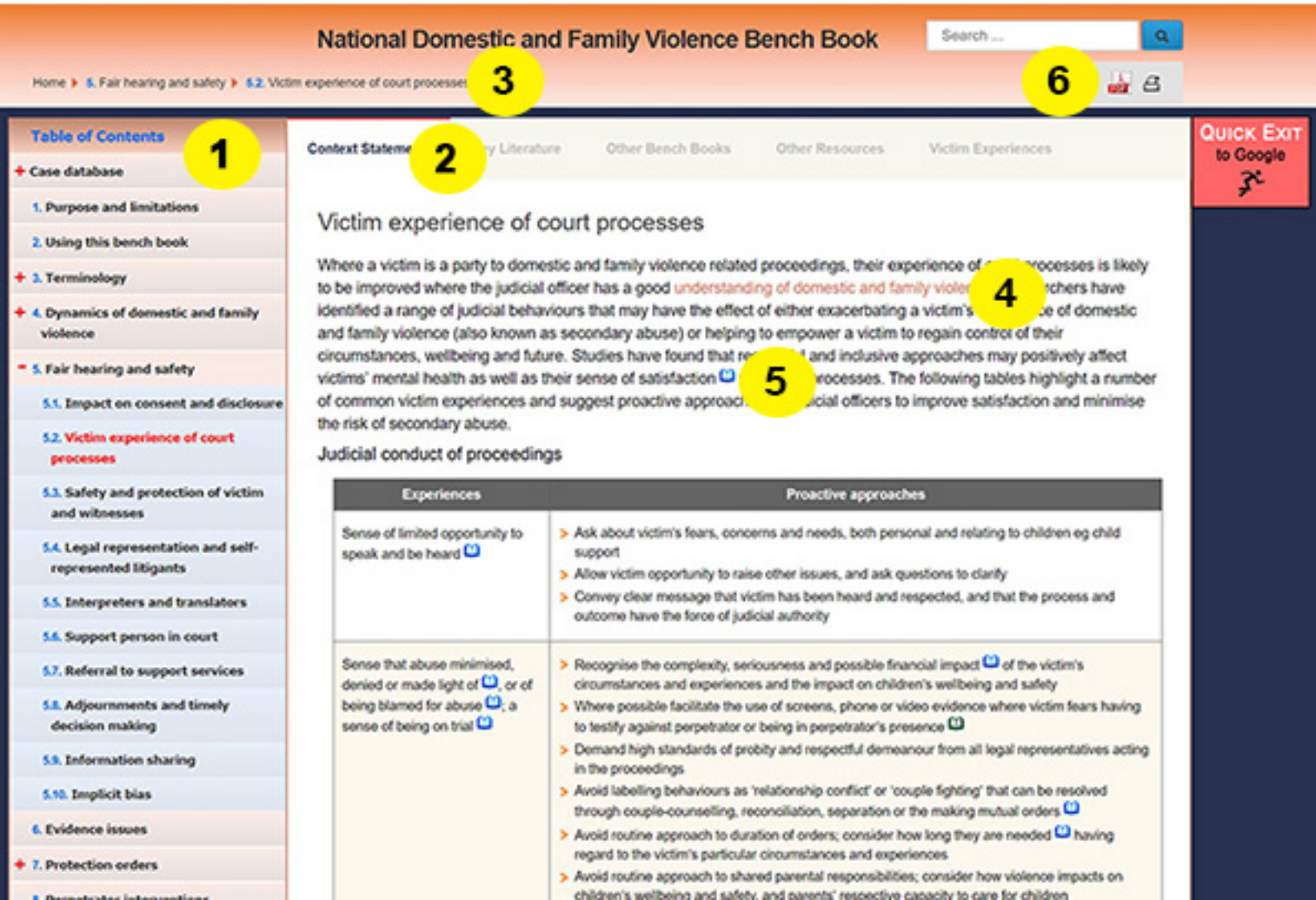

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Case database

The case database contains case summaries of mostly higher court decisions in domestic and family violence related proceedings in the High Court of Australia, Family Court of Australia, Federal Circuit Court of Australia and the courts of the states and territories.

Please note that the civil and criminal appeals process in each jurisdiction differs, which means that cases involving domestic and family violence are appealed to different courts in accordance with the statutory appeals regime in each particular jurisdiction.

Where the judgment transcript is open access, the citation is live-linked to its external host. There is a PDF and print function available for individual case summaries and for the complete set of case summaries in each court listed in the database.

This database has been developed with the assistance of the project's Judicial Reference Group and is up to date as at June 2020. This database will contribute to efforts aimed at encouraging, where possible, greater consistency in the handling of domestic and family violence cases and the application of laws both within and across jurisdictions.

Commonwealth

High Court of Australia

Dansie v The Queen **[2022] HCA 25 (10 August 2022) – High Court of Australia**

'Adverse inferences' – 'Appeal against conviction' – 'Circumstantial case' – 'Drowning' – 'Evidence' – 'Independent assessment of evidence' – 'Inference of guilt' – 'Murder' – 'People with disability and impairment' – 'Reasonable hypotheses consistent with innocence' – 'Unreasonable verdict' – 'Unreasonableness ground'

Charges: Murder x 1.

Proceedings: Appeal against conviction.

Facts: By special leave the defendant appealed the majority decision of the South Australian Court of Criminal Appeal (Parker and Livesey JJ, Nicholson J dissenting) to uphold his conviction following trial by judge alone (Lovell J) in the Supreme Court of South Australia for the murder of his wife. He argued that the trial judge's verdict could not be supported having regard to the evidence.

Following a stroke in 2005 the female victim was confined to a wheelchair and she could no longer speak. For two years before her death she had been living in a nursing home. The Crown alleged that while on an outing her husband pushed her wheelchair into a pond, resulting in her drowning. Lovell J drew inferences adverse to the appellant's credit from the appellant's behaviour during interviews with police 'that his relationship with his wife had changed since she had been living permanently in the nursing home, such that he had come to see her as "taking up his time" and no longer had a caring relationship with her.' In assessing the appellant's account of his wife's death as implausible, Lovell J found support for the prosecution case in circumstantial evidence that he had left his watch, wallet and a spare change of clothes in the car and had done internet searches on funerals in the month before. Lovell J found 2 distinct interconnected motives, financial and relationship, concluding the only rational inference available on the whole of the evidence was that the appellant deliberately pushed the wheelchair into the pond with intent to kill his wife and therefore his guilt was proved beyond reasonable doubt.

Ground: The majority in the Court of Criminal Appeal erred in how it approached the ground that the verdict

was unreasonable or could not be supported having regard to the evidence. In particular, the majority misinterpreted and misapplied the approach required to be taken to that ground in accordance with *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 as applied in *Filippou v The Queen* [2015] HCA 29; (2015) 256 CLR 47.

Decision and reasoning: Appeal allowed, conviction set aside and the matter remitted for rehearing. Livesey J's judgment in the Court of Criminal Appeal, with which Parker J agreed, erred. 'What was missing from this analysis, because it had been eschewed as raising "jury" questions, was any independent consideration of whether the evidence left open reasonable hypotheses consistent with innocence' [35].

***Peniamina v The Queen* [2020] HCA 47 (9 December 2020) – High Court of Australia**

'Appeal against conviction' – 'Exclusion of provocation' – 'Murder' – 'Partial defence of provocation'

Charges: Murder x 1.

Proceedings: Appeal against conviction.

Facts: The appeal concerned the partial defence of provocation, which operates to reduce what would otherwise be murder to manslaughter, under s 304(1) of the *Criminal Code* (Qld). Section 304 was amended in 2011 to exclude the defence (save in circumstances of a most extreme and exceptional character) in the case of the unlawful killing of the accused's domestic partner where the sudden provocation is "based on anything" done by the deceased, or anything the accused believes the deceased has done, to end or to change the nature of the relationship or to indicate in any way that the relationship may, should or will end or change. The 2011 amendments placed the burden of proof of the defence on the accused. The issue raised by the appeal is whether in discharging this burden the appellant was required to prove that the provocation was not "based on" anything done (or believed to have been done) by the deceased to change the relationship, notwithstanding that such conduct (or believed conduct) was not the conduct that he claimed had induced his loss of self-control. The appellant killed his wife in circumstances that left it open to find he was angered by a belief that the deceased had been unfaithful and planned to leave him. But the appellant's case was that, for the purpose of s 304(1), his loss of self-control was 'based on' the deceased "grabbing [a] knife, threatening [him] with it and cutting his right palm." The jury found the appellant guilty of murder. On appeal, the Queensland Court of Appeal held that the trial judge was entitled to direct the jury to consider whether the exception set out in s 304(3) excluded the availability of the partial defence under s 304(1).

Grounds of appeal: The Court of Appeal erred in holding that the exclusion of the defence of partial provocation pursuant to the exception in s304(3) was not confined to the provocative conduct of the deceased which the defence relied upon as causative of the appellant's loss of self-control.

Held: Appeal was allowed. The majority (Bell, Gageler and Gordon JJ) found that, correctly understood, s 304(3) excludes the defence of provocation where the accused was in a domestic relationship with the deceased and his/her loss of self-control was induced by anything done (or believed to have been done) by the deceased to change the relationship. Whether the defence does not apply is a question of law.

Here, it was the appellant's defence that it was the deceased's conduct with the knife that induced his loss of self-control. There was no evidentiary foundation to suggest that the conduct with the knife was itself a thing done to change the relationship. It was therefore not open to find that the defence was excluded under s 304(3). The trial judge was wrong to direct the jury that, in addition to proving the elements of the defence, the appellant was required to prove that his loss of self-control was not based on anything done by the deceased to change the relationship.

Note: The appellant was subsequently retried and convicted of manslaughter (the sentencing judge found that the jury accepted the partial defence of provocation, and that the appellant's belief that the victim had been unfaithful was reasonable) and resentenced: *R v Peniamina (No 2)* [2021] QSC 282 (25 October 2021).

***Roy v O'Neill* [2020] HCA 45 (9 December 2020) – High Court of Australia**

'Admissibility of evidence' – 'Domestic violence order' – 'Female perpetrator' – 'Implied licence to enter' – 'People affected by alcohol misuse' – 'Police powers' – 'Pro-active policing' – 'Whether police had any basis to request to submit to a breath test' – 'Whether police have powers to attend the threshold of private property to ensure compliance with a domestic violence order'

Proceedings: Appeal from the decision of the Northern Territory Court of Appeal *O'Neill v Roy* [2019] NTCA 8 (4 September 2019).

Issue: Scope and limits of implied licence.

Facts: The respondent woman was the subject of a DVO that protected her male domestic partner (Mr Johnson, the victim). The DVO contained various conditions including that she was restrained from consuming and/or being under the influence of alcohol and other intoxicating substances when in the

company of the victim [2]. In April 2018, the Northern Territory Police Force conducted Operation Haven which was designed to address issues concerning domestic violence and alcohol related crime and as part of that operation three officers from the Northern Territory Police Force visited the respondent and victim's unit. One of the attending officers gave evidence that he had observed 'antisocial behaviour coming from the property over the weeks prior to the operation' [3]. One of the officers had previously observed the respondent in an intoxicated state 'and she was in an intoxicated state every time he had dealt with her'.

Officers approached the shared unit and observed that the respondent "appeared to be just sort of laying on the ground" through the window and called her to come to the door "for the purposes of a domestic violence order check". Officers noted that the respondent's eyes were bloodshot, her speech was slurred and had "a very strong odour of liquor on her breath", which lead them to conduct a breath test. The respondent was taken to Katherine Watch House after testing positive to alcohol for further breath analysis.

The apartment was accessible to the public and there were no signs suggesting the police were not welcome to approach the unit and knock on the front door. They were not asked to leave by the occupants.

The Northern Territory Court of Appeal held that the case involved an implied licence from the occupier of the premises for visitors to be on the footpath and approach the door of the unit rather than an implied licence for a specific purpose. The respondent sought special leave to appeal. The application regards the scope of the licence. It was agreed that the content of the implied licence is determined objectively while the infringement of the implied licence is determined by reference to some subjective characterisation of purpose.

Judgment: The Court per Kiefel CJ, Keane and Edelman JJ dismissed the appeal, having earlier granted special leave to appeal subject to noting that the proposed grounds of appeal might be reframed with greater precision HCATrans 43 (20 March 2020). Keane and Edelman JJ observed that the making of a coercive direction is beyond the scope of the licence generally implied by the law to enter the curtilage of a property but that there was no need for a coercive direction here as Ms Roy complied with the request for a breath test. No question of coercion would arise unless and until Ms Roy refused to consent to provide a breath test, and Constable Elliott decided to invoke the power conferred by reg 6(1)(a). [93]

Kiefel CJ held that either of two lawful purposes (to check compliance with a domestic violence order where Ms Roy was known to be invariably intoxicated or to ascertain the state of Ms Roy and Mr Johnson by way of a proactive domestic violence check) was sufficient for the law to imply a licence for Constable Elliott to enter the dwelling unit in question. He was not a trespasser. The evidence of the results of the breath test was

admissible.

Director of Public Prosecutions v Dalgliesh (a pseudonym) **[2017] HCA 41 (11 October 2017) – High Court of Australia**

'Crown appeal against sentence' – 'Current sentencing practice' – 'Instinctive synthesis' – 'Manifestly inadequate' – 'Sentencing' – 'Worst category of case'

Charges: Incest x 2; Sexual penetration of a child under 16 x 1; Indecent assault x 1.

Appeal type: Crown appeal against sentence.

Facts: The charge subject of the appeal was one count of incest. The appellant pleaded guilty, and was sentenced to 3 years and 6 months' imprisonment. The total head sentence was 5 years' and 6 months' imprisonment with a non-parole period of 3 years ([12], [23]).

Section 5(2)(b) of the Sentencing Act 1991 (Vic) provided that the court must have regard to current sentencing practices when sentencing an offender. The Court of Appeal stated that 'but for the constraints of current sentencing practice', it would have imposed a longer sentence ([33]).

Issues: Whether the sentence for the charge of incest was manifestly inadequate. In resolving this question, the High Court clarified the relevance of 'current sentencing practices' to sentencing.

Decision and Reasoning: The appeal was allowed, and the matter was remitted to the Victorian Court of Appeal for determination of the appeal against sentence ([77]). The High Court (Kiefel CJ, Bell and Keane JJ, Gageler and Gordon JJ agreeing) held that the Court of Appeal erred by treating the range established by current sentencing practices as decisive of the appeal before it ([2]).

Kiefel CJ, Bell and Hayne JJ stated: 'the terms of s 5(2) are clear such that, while s 5(2)(b) states a factor that must be taken into account in sentencing an offender, that factor is only one factor, and it is not said to be the controlling factor' ([9]).

Further, their Honours stated at [50]:

> section 5(2)(b) of the Sentencing Act informs the process of instinctive synthesis as a statutory expression of the concern that a reasonable consistency in sentencing should be maintained as an aspect of the rule of law. Reasonable consistency in the application of the relevant legal principles does

not, however, require adherence to a range of sentences that is demonstrably contrary to principle.

***Hughes v The Queen* [2017] HCA 20 (14 June 2017) – High Court of Australia**

'Meaning of "significant probative value"' – 'Tendency evidence'

Charges: Sexual offences against underage girls x 11.

Appeal type: Appeal against conviction.

Facts: The defendant was Robert Hughes, the star of the TV show *Hey Dad!* The 11 complainants were friends of his daughters or workers on the set. The prosecution sought to adduce the evidence of each of the 11 complainants to support each of the other counts. The prosecution sought to prove tendencies of 'having a sexual interest in female children under 16 years of age' and 'using his social and familial relationships … to obtain access to female children under 16 years of age so that he could engage in sexual activities with them' ([3]). The tendency evidence was admitted, and the appellant was convicted ([8]).

Issues: Whether tendency evidence is required to display features of similarity with the facts in issue before it can be assessed as having "significant probative value". This issue had been the subject of diverging lines of authority between the Victorian and New South Wales Court of Appeal.

Decision and Reasoning: The High Court (4:3) dismissed the appeal.

The majority (Kiefel CJ, Bell, Keane and Edelman JJ) held that the evidence was admissible. The majority identified that there is likely to be a high degree of probative value when (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged ([41]).

The majority endorsed the test for "significant probative value" posed in Ford, that 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged ([40]). The majority at [40] added the following qualification:

it is not necessary that the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. Of course, where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is

admissible.

Gageler, Nettle and Gordon JJ dissented.

Gageler J advocated for a more conservative approach: his Honour argued that admitting all the evidence risks the jury placing too much emphasis on the series of allegations, and not assessing each charge individually ([109]).

Nettle J emphasised that the fact that an accused has committed one sexual offence against a child is not, without more, sufficiently probative of the accused committing another sexual offence against a child ([158]). Something more is required, for example a similarity in the relationship between the alleged victims, a connection between the details and circumstances of each offence, or a system of offending ([158]). Nettle J also reiterated the dangers in admitting tendency evidence ([174]).

Gordon J agreed with Gageler and Nettle JJ and set out her Honour's own set of principles at [216].

***The Queen v Kilic* [2016] HCA 48 (7 December 2016) – High Court of Australia**

'Appeal against sentence' – 'Appeal allowed' – 'Dousing with petrol and setting alight' – 'Drug misuse' – 'Intentionally causing serious injury' – 'Methylamphetamine' – 'Pregnancy' – 'Sentencing' – 'Worst category of offence'

Charges: Intentionally causing serious injury x 1; Using a prohibited weapon x 1; Dealing with suspected proceeds of crime x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The defendant and victim were in a relationship; the victim was 12 weeks' pregnant with the defendant's child ([5]). The defendant pleaded guilty to dousing the victim with petrol and setting her alight ([10]). The victim's injuries were 'horrendous' ([11]), and she terminated her pregnancy ([13]). The sentencing judge said that he found it hard to recall a more serious example of the charge in his 38 years of working in criminal law ([14]). The sentencing judge imposed a head sentence of 15 years with a non-parole period of 11 years ([1]). The Court of Appeal allowed the defendant's appeal against sentence on the basis that there was 'such a disparity between the sentence imposed and current sentencing practice' ([1]).

Issues: Whether the Court of Appeal erred in holding that the sentence was manifestly excessive.

Decision and Reasoning: The High Court (Bell, Gageler, Keane, Nettle and Gordon JJ) overturned the Court

of Appeal's decision and reinstated the original sentence. The High Court discussed two aspects of the Court of Appeal's decision: first, the Court of Appeal employing the term 'worst category' of offending; and second, the Court of Appeal's interpretation of 'current sentencing practice'.

First, the High Court held that it is an error to describe offences as being within 'the worst category of cases' if the offence does not warrant the maximum penalty ([19]), as the term is likely to cause confusion ([17]-[20]).

Second, the High Court remarked that 'current sentencing practice' is likely to change over time, 'current sentencing practices for offences involving domestic violence [may] depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations' [21]. The High Court found that the cases were too few to establish a pattern, one case was 12 years old, and most did not occur in a domestic violence context ([25]-[31]). The High Court said that 'violence perpetrated in the course of a domestic relationship against the offender's female partner … involve the abuse of a relationship of trust', and such violence 'must steadfastly be deterred' ([28]). This was a distinguishing factor from cases with comparable serious injuries ([28]).

***Munda v Western Australia* [2013] HCA 38 (2 October 2013) – High Court of Australia**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Antecedents and personal circumstances' – 'Denunciation' – 'Deterrence' – 'Manslaughter' – 'Sentencing' – 'Social disadvantage' – 'Traditional Aboriginal and Torres Strait Islander punishment'

Charge/s: Manslaughter

Appeal Type: Appeal against sentence.

Facts: The appellant, an Aboriginal man, pleaded guilty to the manslaughter of his de facto spouse. He was sentenced to five years and three months' imprisonment with a non-parole period of three years and three months'. The DPP appealed to the Court of Appeal on the basis that the sentence was manifestly inadequate. The Court of Appeal upheld the appeal and resentenced the appellant to seven years and nine months' imprisonment with the same parole eligibility conditions. The appellant and the deceased had been in a relationship for approximately 16 years. On the day the deceased was killed, the appellant and the deceased spent the afternoon at a local tavern and both became intoxicated. After returning home, an argument ensued and the appellant assaulted the deceased in a prolonged and brutal way. He threw the deceased about the room, rammed her head into walls and repeatedly punched her on the face and head. There was a history of

significant domestic violence in the relationship, including a conviction for grievous bodily harm for which the appellant was sentenced to 12 months' imprisonment (conditionally suspended) as well as a conviction for common assault. The appellant was subject to a lifetime violence restraining order in favour of the deceased which prohibited him from having any contact with her. However, this order had been ignored by both parties and the relationship had continued.

Issue/s: Some of the issues concerned –

1. Whether the Court of Appeal incorrectly applied the principles which govern manifest inadequacy of a sentence.
2. Whether the Court of Appeal erred by failing to pay sufficient regard to the appellant's antecedents and personal circumstances, in particular the systemic deprivation and disadvantage (including endemic alcohol abuse which is prevalent in Aboriginal and Torres Strait Islander communities) that the appellant faced.

Decision and Reasoning: The appeal was dismissed by majority (Bell J dissenting).

1. The joint majority (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) found no error in the Court's approach to the issue of manifest inadequacy. In the Court of Appeal, McLure P made express reference to the gross over-representation of Aboriginal people in the criminal justice system (particularly in relation to manslaughter) which is directly related to alcohol and drug abuse. Her Honour also made reference to various 'weighting errors' in the sentencing at first instance. The Court held that there was no error in this approach. See in particular at [37], where the joint majority noted *'her Honour was proceeding to make the point that, even in the context of the circumstances of social disadvantage in which domestic violence commonly occurs, the seriousness of the offence is such as to make a compelling claim on the sentencing discretion. And that is so notwithstanding that the number of Aboriginal offenders (and victims) is "grossly disproportionate".*

   See also McLure P's statement quoted at [41] – *"In this case, the offence is one of the most serious known to the law. The maintenance of adequate standards of punishment for a crime involving the taking of human life is an important consideration. While the role of the criminal law in deterring the commission of violent acts is problematic, and particularly so in relation to Aboriginal communities, it is important to indicate very clearly that drunken violence against Aboriginal women is viewed very seriously".* The joint majority approved these remarks at [42] – '*The passage of time has not lessened*

the force of that statement. While the appellant's offence may not have been in the very worst category of offences of manslaughter, it is not easy to think of worse examples. Given that the maximum available sentence was 20 years imprisonment, and given the prolonged and brutal beating administered by the appellant upon his de facto spouse, a conclusion that the sentence imposed at first instance was manifestly inadequate cannot be said to have been wrong.'

2. The appellant did not submit that 'Aboriginality per se warrants leniency' (see at [47]). Rather, the appellant contended that social and economic issues commonly associated with Aboriginal communities affected the appellant and that these should have been treated as mitigating factors. He also contended that he was likely to receive traditional Aboriginal and Torres Strait Islander punishment when released from prison and that he was 'willing, and indeed anxious' (see at [49]) to subject himself to this payback. He submitted that this should have received greater significance as a mitigating factor.

   In dismissing these arguments, the Court noted that while mitigating factors such as social disadvantage need to be afforded appropriate weight in sentencing, this cannot result in the imposition of a penalty which is disproportionate to the gravity of the offending. In particular, the Court noted at [53] – *'To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity' and 'Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.'*

   The Court also addressed the argument that general deterrence has less significance in relation to crimes which are not premeditated in the context of social disadvantage. In dismissing this assertion, the Court noted that the criminal law is not limited to the 'utilitarian value of general deterrence' and stated that the obligation of the State is 'to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence' (see at [54]). Furthermore, the gravity of the offending in this case was extremely high - see at [55] –

   'A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and

punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.'

In relation to the appellant's alcohol addiction, McLure P held that this factor would increase the weight to be given to personal deterrence and community protection. The joint majority of the High Court agreed and noted that the fact the appellant was affected by an environment of alcohol abuse should be taken into account in assessing personal moral culpability, but this has to be balanced with the seriousness of the offending. See further at [57] where the majority of the High Court said– 'It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.'

In relation to the relevance of traditional Aboriginal and Torres Strait Islander punishment, the High Court's disposition was that the appellant's willingness to submit to this punishment was not a relevant consideration in sentencing. However, the first instance judge did take it into account, which was not challenged in the Court of Appeal. While the joint majority of the High Court did not offer a conclusive opinion, they noted that the courts cannot condone the commission of an offence or 'the pursuit of vendettas' and held that the appellant did not suffer injustice because the prospect of traditional punishment was given only limited weight (see at [61]-[63]).

Bell J dissented. Her Honour held that it was open to the primary judge to reach the sentence that he did, based on comparable authorities. Bell J was also critical of the practice of giving too much weight to the maximum penalty, given the wide variety of circumstances in which manslaughter convictions can arise. Her Honour stated that a sentence well short of half the maximum penalty does not of itself give rise to legal error.

***Roach v The Queen* [2011] HCA 12 (4 May 2011) – High Court of Australia (appeal from Queensland Court of Appeal)**

'Assault occasioning bodily harm' – 'Directions and warnings for/to jury' – 'Probative value' – 'Propensity evidence' – 'Relationship evidence'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against conviction.

Facts: Mr Roach was convicted of assault occasioning bodily harm of his female partner. At trial, Howell DCJ admitted evidence of previous (uncharged) assaults that Mr Roach committed on the complainant during their relationship. The relevant Queensland provision—s 132B of the *Evidence Act 1977*—applies to proceedings for assault occasioning bodily harm and provides that '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding'. However, s 130 of the *Evidence Act 1977* gives the judge power to exclude otherwise admissible evidence if it is deemed unfair to the accused to admit.

Issue/s: Whether the trial judge should have applied the test in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 and whether 'viewed in the context of the prosecution case, there is a reasonable view of [the relationship evidence] which is consistent with innocence'. Only if there is no reasonable view, can the evidence be admissible because its probative value outweighs its prejudicial effect on the accused.

The appellant argued that in considering whether to admit evidence under s 132B, the trial judge ought not to admit that evidence if there was a reasonable view of that evidence consistent with innocence ('the rule in *Pfennig*'). The appellant argued that the rule in *Pfennig* recognises the prejudicial effect of evidence used to prove a propensity of the accused ("propensity evidence"), and applies at common law to propensity evidence as a measure of the probative force of that evidence. (see *Roach v The Queen* [2010] HCATrans288 (5 November 2010)).

Decision and Reasoning: The appeal was dismissed. French CJ, Hayne, Crennan and Kiefel JJ of the High Court held firstly that s 132B has a 'potentially wide operation'. Section 132B contemplates evidence of other acts of domestic violence throughout the relationship being admitted. The section could also be used to admit similar fact evidence to prove the accused's propensity to commit similar crimes. The Court found it could also be used to admit other types of evidence including evidence of a person's state of mind, evidence of the circumstances of the crime or to provide context to the history the relationship. It could also be used as evidence in a provocation or self-defence case, or where the offender is a victim of domestic violence. (See at [30]-[31]). The Court then held that the *Pfennig* test has no application to the common law residual discretion enshrined in s 130. As such, the test of admissibility under s 132B is whether the evidence is relevant, which is subject to the exercise of the discretion preserved in s 130.

The purpose of admitting the evidence here was not to show a propensity of the accused (re the rule in *Pfennig*); rather, the evidence:

'was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear "out of the blue" to the jury and inexplicable on that account, which may readily occur where there is only one charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury' at [42].

The High Court noted the permissible ambit of 'relationship evidence', and the need for clear directions for juries about the use of such evidence and the purpose for which it is tendered:

[45] In the present case the evidence, if accepted, was capable of showing that the relationship between the appellant and the complainant was a violent one, punctuated as it was with acts of violence on the part of the appellant when affected by alcohol. Without this inference being drawn, the jury would most likely have misunderstood the complainant's account of the alleged offence and what was said by the appellant and the complainant in the course of it. To an extent Holmes JA acknowledged this in the conclusions to her reasons. Whilst her Honour identified the relevance of the evidence as showing the particular propensity of the appellant, she also concluded that it made the appellant's conduct in relation to the alleged offence intelligible and not out of the blue.

[47] The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true.

[48] The directions in this case were sufficient. At the conclusion of the evidence the trial judge directed the jury of the need to exercise care and that it would be dangerous to convict on the complainant's evidence alone unless they were convinced of its accuracy. His Honour told the jury that the history of the relationship between the complainant and the appellant had been led "for a very specific purpose" and that they must be "very, very careful in relation to the limited use that [they] may make of such evidence." He explained how

evidence could be used as evidence of propensity and directed them that they were not to use the evidence in that way. His Honour informed the jury that the evidence was led so that the incident charged was not considered in isolation or in a vacuum but "to give [them] a true and proper context to properly understand what the complainant said happened on the 13th of April 2006."

***Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009) – High Court of Australia**

'Adjournments' – 'Amendment' – 'Appeal' – 'Case management' – 'Pleadings' – 'Practice and procedure'

Hearing: Appeal against decision to allow amendments to statement of claim.

Facts: ANU applied for an adjournment at trial to make substantial amendments to its statement of claim against Aon. The adjournment was granted and the primary judge allowed the application to amend the statement of claim. Aon appealed against the decision.

Decision and Reasoning: This case did not concern family violence but contained a number of relevant statements regarding adjournments. French CJ referred to the decision in *Sali v SPC Ltd*, which concerned the refusal by the Full Court of the Supreme Court of Victoria to grant an application for an adjournment of an appeal. By majority, the High Court held there 'that in the exercise of a discretion to refuse or grant an adjournment, the judge of a busy court was entitled to consider 'the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties'' (see [26]). Brennan, Deane and McHugh JJ went on to say:

'What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources'.

Toohey and Gaudron JJ dissented in the result but acknowledged that:

'The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales. The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard'.

In the present case, French CJ stated at [27]:

'The observations made in the two joint judgments in Sali were linked to the particular knowledge that a judge or court, called upon to exercise a discretion to adjourn, would have of the state of that court's lists. However, the mischief engendered by unwarranted adjournments and consequent delays in the resolution of civil proceedings goes beyond their particular effects on the court in which those delays occur. In that connection, there have been a number of cases after Sali in which it has been accepted, in the context of Judicature Act Rules, that the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn'.

***Osland v R* [1998] HCA 75; 197 CLR 316 (10 December 1998) – High Court of Australia**

'Battered woman syndrome' – 'Directions and warnings for/to jury' – 'Evidence' – 'Expert testimony - psychologist' – 'History of abuse' – 'Murder' – 'Physical violence and harm' – 'Provocation' – 'Self-defence'

Charge/s: Murder

Appeal Type: Appeal against conviction.

Facts: The appellant and her son were jointly tried in the Supreme Court of Victoria for the murder of her husband Mr Osland (the appellant's son's step-father). The jury convicted the appellant but was unable to reach a verdict with respect to her son. Her son was later retried and acquitted. The prosecution case was that the appellant and her son planned to murder her husband. The appellant mixed sedatives with her husband's dinner in sufficient quantity to induce sleep within an hour. The appellant's son later completed the plan by hitting Mr Osland on the head with an iron pipe while he was asleep. He and the appellant then buried Mr Osland in a grave they had earlier prepared. At trial, the appellant and her son relied on self-defence and provocation raised against 'an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years' which had allegedly been 'escalating in the days prior to his death' (at [4]). The prosecution accepted that Mr Osland had been violent in the past but maintained that this behaviour had ceased well before he was murdered. The appellant raised expert evidence of the 'battered woman syndrome' (BWS) in support of her case. A psychologist's evidence indicated that the appellant's relationship with her husband was 'consistent with it being a battering relationship' (at [50]).

The psychologist outlined the general characteristics of battered women as follows (at [51]):

1. they are ashamed, fear telling others of their predicament and keep it secret.
2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed.
3. they have an increased arousal and become acutely aware of any signal of danger from their partner.
4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family.
5. in severe cases, they may live with the belief that one day they will be killed by the other person.

Issue/s: Some of the issues concerned –

1. Provocation - Whether the trial judge erred in 'failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of provocation' (see at [155]).
2. Self-defence – Whether the trial judge erred in 'failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of self-defence' (see at [155]).

Decision and Reasoning: The appeal was dismissed by majority (Gaudron and Gummow JJ dissenting). However, all members of the Court were unanimous in holding that the trial judge's directions with respect to 'battered woman syndrome' (BWS) were appropriate.

Gaudron and Gummow JJ:

"Expert evidence is admissible with respect to a relevant matter about which ordinary persons are "[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area" and which is the subject "of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"" (at [53])

"…there may be cases in which a matter of apparently slight significance is properly to be regarded as evidence of provocation when considered in light of expert evidence as to the battered woman's heightened arousal or awareness of danger. And evidence of that may also be relevant to the gravity of the provocation, as may the history of the abusive relationship." (at [55])

"So, too, expert evidence of heightened arousal or awareness of danger may be directly relevant to self-

defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk. And, of course, the history of the particular relationship may bear on the reasonableness of that belief." (at [56])

"…there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put." (at [60])

Callinan J (while agreeing that the directions with respect to BWS were appropriate) held that to adopt a new and separate defence of BWS 'goes too far for the laws of this country' (see at [239]). His Honour also noted that these issues could be matters for expert evidence as well as matters of common sense for a jury to decide with the assistance from the trial judge.

McHugh J did not make any comments on BWS.

Kirby J:

His Honour discussed the relevance of the BWS defence in abusive relationships. His Honour was of the opinion that the term should not be restricted to women because there may be situations where men are the victims such as similarly abusive same-sex relationships, and 'unlike conception and childbirth, there is no inherent reason why a battering relationship should be confined to women as victims' (at [159]).

His Honour was broadly supportive of BWS evidence but did note some controversies around it and was somewhat critical of it: *"…it appears to be an "advocacy driven construct" designed to "medicalise" the evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data'* (at [161]).

Further, he was critical of the term itself and stated it should not be used. He was also aware that the syndrome was 'based largely on the experiences of Caucasian women of a particular social background' (whose) '"passive" responses may be different from those of women with different economic or ethnic

backgrounds' (at [161]).

Ultimately however, his Honour was supportive – '*Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of "traumatic bonding" which may occur in abusive relationships'* (at [167]).

***M v M* (1988) 166 CLR 69; [1988] HCA 68 (8 December 1988) – High Court of Australia**

'Allegations of sexual abuse' – 'Custody order' – 'Risk' – 'Test to be applied' – 'Unacceptable risk'

Proceedings: Appeal against custody order.

Facts: The trial judge made an order giving the wife guardianship and custody of the child. The wife alleged that the father had sexually abused the child and that the child's welfare would be put at risk in allowing the father custody. The trial judge was not satisfied that the father had abused the child. However, His Honour considered that there was a possibility that the child had been sexually abused by the father. Accordingly, in the interests of the child, His Honour held that he should eliminate the risk of such abuse by denying access to the father. The father appealed this decision.

Issue/s: What is the correct approach in dealing with sexual abuse allegations and unacceptable risk?

Reasoning/Decision: The appeal was dismissed. The approach to be taken in these matters is not one of competing rights of the parents or ever purely a finding for or against either based on the evidence in support of the allegations. The approach is to determine on all of the evidence what is in the best interests of the child.

The Court concluded and held at [25]:

'Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm", "an element of risk" or "an appreciable risk", "a real possibility", a "real risk", and an "unacceptable risk". This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from

sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse'.

With regards to the consideration of risk, it is in "achiev[ing] a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access". A finding of sexual abuse need not be made to make a finding of unacceptable risk.

***Wilson v The Queen* [1970] HCA 17; (1970) 123 CLR 334 (17 June 1970) – High Court of Australia**

'Directions and warnings for/to jury' – 'Evidence' – 'Murder' – 'Relationship evidence' – 'Relevance' – 'Statements made by deceased's wife charging accused with desire to kill her'

Charges: Murder.

Appeal Type: Application for special leave to appeal against conviction.

Facts: The facts of this case were summarised concisely by Martin CJ (with whom Pullin JA and Hall J agreed) in *O'Driscoll v The State of Western Australia* [2011] WASCA 175 (10 August 2011) [DT1] at [26] as follows -

'[T]he appellant was convicted of the murder of his wife by shooting her in the back of the head. A critical issue at trial was whether she was deliberately shot or whether the gun had discharged by accident. The Crown led evidence that the deceased said to the accused, in the presence of other witnesses, 'I know you want to kill me for my money' and 'I know you want to kill me, why don't you get it over with'. These statements were admitted by the trial judge, subject to a direction that the jury should not treat them as evidence of the state of mind of the accused.

Issue/s:

1. Whether the statements made by the appellant's wife were admissible.
2. If they were admissible, whether they should have been excluded by the trial judge because their probative value was outweighed by the potential prejudice to the accused.

Decision and Reasoning: The Court unanimously dismissed both grounds of appeal and held that the evidence was admissible.

1. Barwick CJ noted at [3] that, 'The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone.' Evidence of the 'nature of the current relationship between the applicant and his wife' was relevant to the appellant's guilt. Evidence of a 'close affectionate relationship' could be used by the jury to conclude that the appellant was not guilty. Evidence of hostility in the relationship could be used by the jury to conclude that the appellant's argument that the shooting was accidental lacked credibility. His Honour did concede that if the deceased's statements 'had not been part of the evidence of a quarrel of a significant kind' ([8]), they would have been inadmissible. However, in this case the statements were part of a 'quarrel' between the parties and were indicative, 'of the nature of the quarrel and of the levels which the mutual relationship of the parties had reached' (see at [8]). More generally, his Honour concluded that 'evidence of the relations of the accused with others' is admissible not only in cases where it establishes motive, though this may be the most common way in which it is used. This type of evidence could also be admissible if it explains an 'occurrence' or assists in the choice between two explanations of an 'occurrence' because such evidence satisfies the test of relevance (see at [7]).

   Menzies J (with whom McTiernan J and Walsh J agreed) reached the same conclusion – 'To shut the jury off from any event throwing light upon the relationship between this husband and wife would be to require them to decide the issue as if it happened in a vacuum rather than in the setting of a tense and bitter relationship between a man and a woman who were husband and wife'(see at [4]).

2. Barwick CJ held that while the deceased's statements were damaging to the appellant, they were not prejudicial, and showed, 'the depths to which the relationship of the parties, as husband and wife, had sunk' (see at [9]).

***Briginshaw v Briginshaw* (1938) 60 CLR 336; HCA 34 (30 June 1938) – High Court of Australia**

'Civil cases' – 'Evidence' – 'Standard of proof'

Proceedings: Petition for divorce on the ground of adultery.

Facts: The applicant sought a dissolution of his marriage to his wife on the ground of her adultery.

Issue/s: What is the standard of proof required in civil matters?

Decision and Reasoning: In explaining the civil standard of proof, Dixon J stated that ‘when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence…It cannot be found as a mere mechanical comparison of probabilities’. His Honour went on to explain that the standard is one of ‘reasonable satisfaction’:

‘But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency’.

Family Court of Australia – Full Court

***Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 (25 March 2020) – Family Court of Australia (Full Court)**

'Application to adduce further evidence re criminal history and family violence' – 'Family law' – 'Fatal strangulation' – 'Hague convention' – 'History of family and domestic violence' – 'Intolerable situation' – 'Non' – 'Physical violence and harm' – 'Separation' – 'Systems abuse' – 'Victims as (alleged) perpetrators'

Issue: Application for leave to appeal, application to adduce further evidence re criminal history and family violence.

Grounds:

- The primary judge erred in the application of the grave risk of physical or psychological harm defence (Ground 1);
- The primary judge erred in the finding that there is no immediate prospect of a resumption of the parental relationship (Ground 2);
- The judge erred by assuming that the current protection orders in New Zealand would remain in place (Ground 3);
- The intolerable situation defence applies (raised by the Court).

Facts: The appellant fled New Zealand with the assistance of New Zealand Police with her two children, in mid-2019 she believed the children's father posed a real risk to her and the children. The father had an extensive criminal history which demonstrated "a pattern of increasingly serious charges against the father (not all of which resulted in convictions), domestic violence offences and breaches of bail and parole" [29]. The mother gave evidence of her intention to remain separated from the father but argued that the extensive history of repeated reconciliations between them meant the court should not have accepted that her intention to remain separated would ensure the children's safety if they were returned to New Zealand. The father invoked the Hague Convention on the Civil Aspects of International Child Abduction (the 'Abduction Convention') to secure the children's return [1]. The application for recovery was made by the Secretary of the Department of Communities and Justice (NSW) as the "Central Authority" under the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"), an Independent Children's Lawyer (ICL) was appointed and argued at first instance against the Hague Convention Application being granted, but the

judge accepted the mother's evidence she would not resume cohabitation with the father and the application was granted. The mother sought leave to appeal and applied to lead more evidence of the father's criminal history and family violence history. The ICL did not participate in the application for leave to appeal despite the order for their participation remaining on foot.

Judgment: Leave to appeal granted. Appeal allowed on basis of the intolerable situation defence (not raised as a ground of appeal but by the Court).

Both Ground 1 and Ground 2 contended that the primary judge erred in finding that there is no immediate prospect of a resumption of the parental relationship. This error was based on the judge's acceptance "of the mother's evidence that she had permanently separated from the father and had taken necessary steps to keep him away from her and the children" [51]. In support of these contentions, the mother submitted that the primary judge should have considered her history of separation and reconciliation with the father and instead concluded that it was thus unsafe to assume she would cooperate with attempts to keep her and the children safe. The Court noted that this position was inconsistent with the evidence submitted by the appellant at trial and concluded that "given the manner the case was run at trial" the grounds could not succeed [534].

Ground 3 contended that the primary judge erred in assuming that the protection orders against the father in New Zealand would remain in place. As the mother did not submit as part of her case at trial that she would agree to the father's application to discharge these protections orders being granted, nor was there evidence that the father's application had any prospect of success, the third ground was "not made good" [55].

Ryan, Aldridge and Watt JJ all, in separate judgements, granted leave and allowed the appeal after considering the intolerable situation defence under reg 16(3) of the Family Law (Child Abduction) Regulations 1986 (Cth). It was noted that the father's previous convictions and violence, the pattern of parental separation and reconciliation, and the totality of the circumstances in which the children would find themselves if they were to return to New Zealand were unsafe and intolerable [63].

Ryan and Aldridge JJ criticised the role of the Secretary of the Department of Communities and Justice (NSW) as the Central Authority in pursuing the matter: [78] 'We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The NSW Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance with the highest professional standards. Relevantly, this includes not

requiring the other party to prove a matter which the state or an agency knows to be true.'

[79] 'In this case, the application disclosed the father's final term of imprisonment in NSW. Even though the Requesting Authority knew that the father was permanently banned from Australia, had effectively been deported and had lived in New Zealand for many years, it would seem that no attempt was made to establish his criminal antecedents or the involvement (if any) of child protection agencies in New Zealand in relation to his other children. The same applies in NSW. To be fair, the Requesting Authority and the Central Authority disclosed the mother's application for a protection order and thereby flagged that, on the mother's case, serious risk issues arose.'

[80] 'It is our understanding that systems are in place in NSW which enable the Central Authority to access/request information from the NSW Police. We assume New Zealand operates in the same fashion. Thus, the Requesting Authority and Central Authority were able to examine and present the father's complete criminal history and an entire set of COPS records. Instead, it was left to the mother and the ICL to gather records from New Zealand and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious.'

Stringer & Nissen (No. 2) **[2019] FamCAFC 185 (23 October 2019) – Family Court of Australia (Full Court)**

'Appeal' – 'Failure to consider evidence relevant to the child's best interests' – 'Parenting orders' – 'Relocation'

Case type: Appeal against interim parenting orders as to with whom the child, X, should live.

Facts: The parties separated in 2015 when X was around 6 months old. In 2015, the parties entered into a parenting plan. In early 2019, the mother and X moved from Town A to live in Sydney. The mother did not tell the father she was leaving Town A because she was afraid of what he might do to her or X, and said that, during the relationship, the father was aggressive and abusive towards her. After leaving Town A, the parties made arrangements for X to spend time with the father until March 2019. At the end of that time, the father refused to return the child to the mother. The primary judge ordered that the parties have equal shared parental responsibility of X and that if the mother returns to live in Town A, then X will live with her, but that if the mother does not return to Town A, then X will live with the father. At the heart of the Court's decision was

the denunciation of the mother's unilateral decision to move away from Town A.

Issue: Whether it was in the best interests of X to live with his mother in Sydney or with his father in Town A?

Held: The Full Court of the Family Court of Australia allowed the appeal against the orders of the primary judge. Their Honours found that the primary judge did not engage in a careful consideration of the evidence, as he failed to take into account the mother's evidence that she did not tell the father she was moving because she feared him. The Full Court was also perplexed as to why the father's unilateral decision not to return X to his mother was not denounced in the same way as the mother's unilateral decision to relocate without telling the father. The Full Court also found that the primary judge misapprehended the nature and extent of the family violence and misapplied legal principles.

At [45], the Court found:

"The allegations of family violence, together with the mother's concern as to the father's alcohol abuse were matters on which she relied to demonstrate that it would not be in the child's best interests to live with the father and his Honour ignored a fundamental integer of the mother's case which was that there was a risk to the child from being exposed to family violence. The orders she sought for time would however, provide for the maintenance of the child's relationship with the father while he remained living with his mother. His Honour's approach was erroneous in principle and to the facts."

***Keating & Keating* [2019] FamCAFC 46 (21 March 2019) – Family Court of Australia (Full Court)**

'Contributions' – 'Domestic violence' – 'Kennon principles' – 'Property settlement'

Case type: Appeal.

Facts: The husband was a tradesman and operated a business, called the Keating Group, through a complex trust and corporate structure. The Group traded throughout the marriage, and since the parties separated in 2010, the husband managed and operated it. Its value and dramatic increase in the husband's director loan account to the Group were key issues in the proceedings. The primary judge separated the parties' property into 2 pools: non-superannuation assets and property and liability, and superannuation. The non-superannuation property was worth $1,784,854; however as a result of the husband's indebtedness to the Group and expenses associated with a failed taxation minimisation scheme, liabilities exceeded assets by $804,805. The husband's and wife's contributions were assessed at 70% and 30% respectively. Their

superannuation contributions were assessed as equal. No adjustment was made under section 75(2) of the *Family Law Act 1975* (Cth).

The wife was ordered to retain her personal possessions, her bank account, car and $12,000 previously received by way of partial property settlement. She also received a superannuation split of $119,000 and 50% of any payment received as a result of a pending class action relating to the tax scheme. The husband retained the Group, which had an annual turnover of $4 million and which provided him with a superior standard of living. He remained personally liable for his loan account and debts due in relation to the tax minimisation scheme.

The wife alleged that she was subject to family violence at the hands of the husband during and after their relationship. Her evidence included that the husband broke her nose, beat her on an overseas trip until she passed out, and that she suffered serious bruising and broken ribs. The primary judge dismissed all incidents of violence towards the wife except that which resulted in her broken wrist, apparently because her evidence was uncorroborated ([41]).

Issue: The wife appealed the property settlement orders on 7 grounds. Relevant grounds of appeal include that:

- The primary judge failed to give adequate reasons for his conclusions and to sufficiently engage with the wife's case (Grounds 1 and 5).
- The wife claimed an adjustment, which the primary judge refused to make, arising from family violence under the *'Kennon'* principles (Ground 4).

Held: The Full Court allowed the appeal against the property order.

Grounds 1 and 5.

At [23]-[24], Ainslie-Wallace and Ryan JJ held –

> *'[H]is Honour went no further than to say that the wife was 'aware' that the investment scheme was unsuccessful…The issue was whether she knew of and supported the husband's investment in the scheme to the extent that she should shoulder half of the resulting debt. In the result, his Honour's decision to fix both parties with responsibility for the debt was made '…because [the debt] actually exists…'*

> *'His Honour's finding that the wife was 'aware' that the investment scheme failed falls considerably short of engagement with the reasons why the wife said she ought not to be fixed with joint responsibility for the debt. The same applies to the finding that the debt 'actually exists'. Although parties would ordinarily be expected to take the good with the bad, there was no active engagement by the primary judge with the wife's case that the husband should bear sole responsibility for the debt and why.'*

Given the primary judge's failure to engage with the wife's case on these matters, the Court held that Grounds 1 and 5 had been established.

Ground 4.

The wife argued that she was exposed to significant family violence by her husband during and after the relationship. She sought an adjustment under the principle in *Kennon & Kennon* (1997) FLC 92-757 where it was held that family violence, which is demonstrated to have a significant adverse impact upon one party's contributions to a marriage, is a relevant consideration to the assessment of contributions within section 79. According to the Court in *Kennon*, it is necessary to adduce evidence to prove the incidence and effect of domestic violence, and to enable the court to quantify the effect of that violence upon the parties' capacity to 'contribute' under section 79(4) ([37]). The Court in *Kennon* also stated that family violence will be relevant if the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party ([36]).

However, at [33] the Full Court held –

> *'The fact that the wife gave evidence of family violence during periods when the parties were separated and after they separated for the last time ought not to have minimised the significance of her evidence of that which occurred during the relationship.'*

The Court went on to state that *Kennon* should not be interpreted as laying down a precise rule that 'post-separation family violence to a spouse who seeks to continue to contribute to the welfare of the family as a parent is irrelevant'. The reference to 'quantification' in *Spagnardi & Spagnardi* [2003] FamCA 905 appeared 'to elevate the need for an evidentiary nexus or 'discernible impact' between the conduct complained of and its effect on the party's ability to make relevant contributions, requiring expert or actuarial evidence of the effect of the violence.' Their Honours stated that perhaps the use of the word 'quantification' in *Spagnardi* was 'infelicitous' when in truth, the Court 'was merely reinforcing the need for there to be an evidentiary nexus between the conduct complained of and the capacity (and or effort expended) to make relevant contributions'

([39]). Their Honours also affirmed the well-settled view that a party does not require his or her evidence to be corroborated before evidence of family violence can be accepted ([42]).

The Court could not conclusively determine whether the primary judge's decision not to make a '*Kennon'* type adjustment was wrong due to the absence of a transcript ([43]). While *Kennon* appears to remain sound law, its considerations apply to 'a relatively narrow band of cases' ([67]).

Atkinson v Atkinson **[2017] FamCAFC 266 (13 December 2017) – Family Court of Australia (Full Court)**

'Allegations of domestic and family violence' – 'Alleged false allegations of child abuse' – 'Appeal against recovery order' – 'Interim parenting orders' – 'Recovery order' – 'Separation' – 'Systems abuse'

Proceedings: Father's appeal against interim parenting orders, including a recovery order.

Facts: The mother applied for, and was granted, a recovery order for the return of the child after the father failed to return the child to the mother following fortnightly weekend contact. The father argued that the mother physically abused the child and the mother alleged that the father engaged in a pattern of emotional abuse such as to constitute family violence by persistent allegations that the mother physically abused the child.

Issue: Whether the primary judge erred in failing to appoint a single expert before making a recovery order.

Judgment: Appeal dismissed. Interim orders that the child reside with the mother.

In finding that the primary judge did not err in failing to appoint a single expert before making interim orders including a recovery order after the father retained the child Ryan J noted (Johnston and Thackray JJ agreeing):

> [49] …the mother's application was for a recovery order after the father retained the child. The application demanded a prompt response and in my view an adjournment for in all probability many months would not have been in the best interests of the child.

Ralton and Ralton **[2017] FamCAFC 182; (7 September 2017) – Family Court of Australia (Full Court)**

'Appeal' – 'Application of domestic and international human rights law under the family law act 1975 (cth)' – 'Bias' – 'Children' – 'Costs' – 'Family law' – 'No merit' – 'Procedural fairness' – 'Self-represented litigant' – 'Unsuccessful

application for stay of proceedings' – 'Weight of evidence'

Matter: Mother's appeal against parenting orders that the children B and C reside with the father, he have sole parental responsibility and the mother have limited supervised contact, to progress to alternate weekends and half the school holidays.

Facts: Earlier orders made in 2010 had provided for the children to reside with the mother and have contact with the father. In 2014 and 2015 the children only spent time with the father intermittently. B, in particular, became reluctant to spend time with the father, and in 2016 twice avoided contact by running away from school. The trial judge found that the children were "at risk of longer-term psychological harm in the mother's household" and would not have any real relationship with their father if they remained in the mother's care [4]. The Independent Children's Lawyer ('ICL') supported the father's position.

Grounds: The mother's grounds of appeal were "difficult to follow and understand" and her submissions "did not seek to explain why the primary judge erred but were rather a lengthy and detailed assertion of wrongdoing by his Honour.

Decision: ICL granted leave to appear. No error established and appeal and applications in an appeal dismissed. Mother to pay the father's costs of the appeal.

Parental alienation was considered in circumstances where the mother appealed against parenting orders on the basis that orders had been made with insufficient consideration of the alleged family violence of the father and the expert witnesses were biased (the Full Court - Bryant CJ, Strickland & Aldridge JJ).

[187] The primary judge was at pains to avoid the use of labels such as "parental alienation" or "enmeshment". Speaking of the Associate Professor's evidence, which included a discussion of these concepts, his Honour said:

The issues that he raises with respect to the concept of alienation as a syndrome are well set out in the literature. However, to become focused upon the academic discussion of alienation and whether or not it is a syndrome – and it seems clear that it is not – becomes more of a distraction than anything in this individual case. What is necessary in this case is a careful analysis of the evidence of the parties, the circumstances confronting these two children in each of the households and the behaviours exhibited in order to ascertain what is going to be in their best interests. (quoting from the primary judgment at [70])

[192] … There is therefore no need for us to consider whether or not the evidence justified a finding of

parental alienation or enmeshment or whether or not they are valid concepts.

***Saska & Radavich* [2016] FamCAFC 179 (1 September 2016) – Family Court of Australia (Full Court)**

'Definition of family violence in section 4ab' – 'Key statutory provisions in the family law act' – 'Meaning of 'family violence'' – 'Mother a family member by operation of section 4(1ab)' – 'Parenting orders' – 'Presumption of equal shared parental responsibility' – 'Section 61da' – 'Whether mother a member of the family of the father within the meaning of section 4ab'

Proceedings: Appeal - parenting orders.

Facts: The trial judge made final parenting orders which included an order that the mother have sole parental responsibility for the child of the mother and the father. In making these orders, the trial judge found that the father's behaviour towards the mother amounted to 'family violence' within the meaning of s 4AB of the *Family Law Act*. As a result of this family violence, the presumption of equal shared parental responsibility for the child in s 61DA of the Act did not apply: s 61DA(1). Further, even if the presumption had applied, the trial judge held that it would still not have been in the best interests of the child for the parents to have equal shared parental responsibility: s 61DA(4). The father appealed against these orders.

Issue/s: Some of the grounds of appeal included –

- The trial judge erred in finding that the father's behaviour towards the mother constituted family violence within the meaning of s 4AB(1) because the mother was not 'a member of the [father's] family' as defined in s 4(1AB). Accordingly, the trial judge erred in finding that the presumption of equal shared parental responsibility was rebutted because the father had not engaged in family violence: s 61DA(2)(b).
- The trial judge erred in finding in the alternative that the presumption was rebutted because equal shared parental responsibility was not in the best interests of the child: s 61DA(4).

Reasoning/Decision: The appeal was dismissed. The Full Court held that the father's appeal was always doomed to fail because it rested on a misconceived interpretation of s 4(1AB) of the Act. Relevant to the proceedings, the combined effect of s 4(1AB)(e) and s 4(1AC) was that the child was a member of the father's and a member of the mother's family. It was never in issue in the proceedings that the mother resided with the child at the material times, the child being a member of the father's family. Thus, by operation of subparagraph (h) of s 4(1AB), the mother was a member of the father's family. Further, within the meaning of subparagraph (i) of s 4(1AB) each of the mother and the father, respectively and alternatively, 'is or has been

a member of the family of a child of [the other]'. Accordingly, the father had engaged in family violence against 'a member of his family' (see [17]-[24]).

The father's contention that the trial judge erred in rebutting the presumption of equal shared parental responsibility because the father had committed family violence was therefore dismissed. As demonstrated above, the contention that there was no family violence in this case because the mother was not a member of the father's family was based on an erroneous reading of the Act.

Additionally, while the trial judge was correct to apply s 61DA(2) and conclude that the presumption did not apply, it was also well within her discretion to conclude that even if the presumption had applied, it would have been rebutted in the child's best interests: s 61DA(4).

The father also argued that the mother wasn't fearful, and so the finding of family violence was erroneous. For this argument to be effective, the words of s 4AB(1) would need to be read conjunctively, not disjunctively, as the section is worded. The family member being 'fearful' is one possible manifestation of family violence, but is not necessary to make a finding of family violence.

Salah & Salah **[2016] FLC 93-713; [2016] FamCAFC 100 (17 June 2016) – Family Court of Australia (Full Court)**

'Ignoring allegations of family violence' – 'Interim parenting orders' – 'Treatment of issues of family violence'

Appeal type: Appeal against interim parenting orders.

Facts: At the contested interim hearing, the mother made allegations of significant family violence perpetrated by the father in the presence of the children. In light of this and one of the children's epilepsy and developmental delay, she sought an order directing the father's care of the children to be supervised by another adult. The father disputed the allegations of family violence. In making interim parenting orders, the trial judge said (see [23]-[27]):

'The evidence lead [sic] as to alleged family violence made by each parent is not capable of sustaining a finding at this interim stage of proceedings. In circumstances of conjecture given no other evidence. The presumption for equal shared [parental] responsibility is still applicable.

[…]

Findings with respect to whether either party perpetrated family violence cannot be made at this interim stage given the conflicted evidence. The civil standard of proof is met by neither.

As such and for the same reasons the need for the father's time with the children to be either in the "presence of" or "supervised by" another adult is not made out'.

Issue/s:

1. The trial judge made several errors of principle in considering the issues of family violence namely, His Honour erred in his consideration of the family violence issues, failed to have regard to s 61DA(3) of the Act and failed to follow the legislative pathway in his determination of the interim issues.
2. The trial judge failed to take into account relevant facts.
3. The trial judge failed to give adequate reasons for his determination.

Reasoning/Decision: The appeal was allowed. The Court noted at [36] that, '[i]t is very common in interim parenting proceedings to see factual disputes which cannot be determined without the evidence being tested in the context of a trial'.They continued at [39]-[40]:

'In SS v AH [2010] FamCAFC 13, the majority of the Full Court (Boland and Thackray JJ) said:

> *…Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue.*

The trial judge here faced just that challenge. His Honour, when confronted with significant allegations of violence was required to do more than merely note the contention (or "conjecture") and not to "simply ignore an assertion because its accuracy has been put in issue" (see SS v AH)'.

The Court held that while the trial judge was correct in stating that, at that point, he could not make findings on the disputed allegations, he erred by ignoring the allegations of family violence and finding that the presumption of equal shared responsibility applied. His Honour further erred in his treatment of the allegations of family violence by suggesting with that comment 'given no other evidence' that the mother's allegations required corroboration or objective support and erred in incorrectly referring to the civil standard of proof (see

[41]-[45]). Grounds two and three were also successful for similar reasons (see [60],[65]).

***Holsworth & Holsworth* [2016] FamCAFC 98 (9 June 2016) – Family Court of Australia (Full Court)**

'Children' – 'Interim orders' – 'Physical violence and harm' – 'Where the trial judge could not make findings on allegations of family violence until the evidence was properly tested at trial'

Proceedings: Appeal of interim procedural orders in relation to parenting proceedings

Facts: The parties reached agreement in November 2010 that the children live with the mother and spend time with the father. Almost a year later the mother was "psychiatrically unwell" and the children began to live with the father and spend time with the mother. After many years of litigation, including the appointment of an ICL, one child had returned to live with the mother and was to spend time with the father. The matter was listed for trial and an updated family report was ordered.

One ground of appeal was that "[t]he trial judge failed to give sufficient weight to the mother's evidence of family violence and did not accept the mother's evidence of it because she had not produced "third party evidence".

Issues: In the context of apprehended bias, was the trial judge correct in not determining issues of family violence at an interim hearing?

Reasoning/Decision: The Full Court found that the mother's assertions regarding the trial judge's consideration of the evidence of family violence were "unsupported by the transcript". In addition, her Honour was correct in not making findings "until such time as the evidence had been tested" – something which would happen at the final hearing of the matter. Despite the grounds purportedly being a challenge to the trial judge's "failure to recuse herself", it was apparent to the Full Court that they were really a complaint that the trial judge did not accept the mother's evidence, including that of family violence, at the interim stage of proceedings.

The appeal was dismissed.

***Baghti & Baghti and Ors* [2015] FamCAFC 71 (5 May 2015) – Family Court of Australia (Full Court)**

'Evidence' – 'Expert testimony' – 'Family reports' – 'Findings of fact in relation to allegations of family violence' – 'Following harassing, monitoring' – 'Physical violence and harm' – 'Weight on the expert evidence'

Proceedings: Appeal against parenting and property orders

Facts: There is one child of the marriage. The parties married in 2002 and separated in late 2008/ early 2009, continuing to live under the same roof until November 2009. The mother claimed that up until November 2004 she was the primary carer for the child and the father worked. In November 2004 the mother went back to work and the father became the primary care-giver for the child. The child had health issues which would require visits to the hospital. The father consulted medical practitioners about the child's weight and would weigh the child after time in the mother's care. Around "September 2009 the husband arranged for ongoing surveillance of the wife". In October the mother became aware of the surveillance and asserted stress and digestive issues as a result. This also affected the child. A consultant psychiatrist provided a Family Report to the Court on 9 January 2011. This report included discussion of risk associated with physical violence during the marriage in addition to the conflict and hostility between the parties in association with the child's medical issues. It also included risk to the child in regards to the father's obsession with "health and welfare".

Issues: Whether the judge erred in attributing significant weight to the family report.

Whether the judge should have made a finding in relation to family violence.

Reasoning/Decision: Despite the father having opportunity to cross-examine the report writer at trial, and opportunity to raise his concerns about the report with the writer, and opportunity for the father to submit to the judge that the report be given little weight, no such cross-examination was forthcoming at trial, and no like submission was made to the trial judge. It was determined that not only was the judge entitled to rely on the expert report as he did, the father was not entitled to make his complaint about its handling to the appeal court.

In the "background facts" of the judgment the trial judge discussed allegations of family violence made by the mother but made no finding that the violence, as alleged, had occurred. The trial judge was not in error by not making findings – "A court need only determine those facts that are necessary for the determination of the issues between the parties".

Slater & Light **[2013] FamCAFC 4 (5 February 2013) – Family Court of Australia (Full Court)**

'Children' – 'Emotional and psychological abuse' – 'Notice of risk' – 'Parenting orders and impact on children'

Case type: Appeal against final parenting orders.

Facts: The parties had three children together and separated in 2006. In March 2010, Magistrate Coates made interim parenting orders. The father unsuccessfully appealed against those interim orders (see *Slater & Light* (2011) 45 Fam LR 41; [2011] FamCAFC 1 (11 January 2011)).

Subsequently, final orders were made providing that the mother have sole parental responsibility for the children, that the children live with the mother and spend supervised time for two hours per fortnight with the father. The order for supervised time was for an indefinite duration (see *Slater & Light* [2011] FMCAfam 1021 (22 September 2011) ([1]).

Magistrate Coates' orders turned on a finding that the father posed an unacceptable risk of emotional harm to the children ([2]). The emotional harm was said to take the form of imposing on the children negative views of their mother, alienating the children from their mother and a chaotic regime for the children ([22]).

Issues: Whether Magistrate Coates erred in:

- finding that there was an unacceptable risk of harm to the children; and
- ordering supervised time of an indefinite duration ([2], [29]).

Decision and Reasoning: The appeal was partially allowed. The Court held that the Magistrate did not err in finding that the father posed an unacceptable risk of harm to the children ([69]). This conclusion was open on the psychiatric reports

However, the Court found that the Magistrate erred in ordering an indefinite supervision order, when this was not requested by either the mother or the Independent Children's Lawyer ([69]-[70]).

The issue of the time and the circumstances in which the father should spend time with the children be remitted for rehearing by a Federal Magistrate other than Federal Magistrate Coates (see Order 3).

***McGregor v McGregor* (2012) FLC 93-507; [2012] FamCAFC 69 (28 May 2012) – Family Court of Australia (Full Court)**

'Contact proceedings' – 'Emotional and psychological abuse' – 'Failure to properly admit academic opinions as evidence' – 'Information sharing' – 'Opinion evidence' – 'Parenting orders and impact on children' – 'Parties unaware of use of material' – 'Reliance upon academic literature as basis for orders'

Appeal type: Appeal against parenting orders and property orders.

Facts: Prior to the trial, the three children of the relationship lived with the father. In parenting and property proceedings, the Federal Magistrate concluded that the father had been physically and verbally aggressive to the mother and that the father had alienated the children from the mother. The Federal Magistrate accordingly made orders for the children to live with their mother. In reaching this conclusion, the Federal Magistrate referred extensively to external literature. The father appealed against this decision.

Issue/s: One of the grounds of appeal was that the magistrate failed to accord the husband natural justice/procedural fairness because the husband was not given the opportunity to cross-examine, respond to or introduce contrary evidence in relation to a number of academic opinions relied upon by the magistrate in reaching his decision.

Reasoning/Decision: The appeal was upheld and the matter remitted for hearing. The Full Court held that the Federal Magistrate placed considerable reliance on the academic literature on the topic of alienation of children. None of it was introduced into evidence as opinion evidence, and accordingly no consideration was made by the Federal Magistrate as to whether to exclude the evidence and, if not, to consider what weight to give it. Accordingly, none of this evidence was able to be tested by the father nor was it the subject of submissions or contrary evidence. There was therefore a failure to afford the father natural justice and procedural fairness (see [118]-[121]).

Baranski & Baranski **(2012) 259 FLR 122; [2012] FamCAFC 18 (10 February 2012) – Family Court of Australia (Full Court)**

'Children' – 'Procedural fairness' – 'Property settlement' – 'Where the court was not persuaded that the learned federal magistrate erred in his approach to the wife's claim for a 'kennon type adjustment'' – 'Where undisturbed findings of fact made by the learned federal magistrate amply supported the conclusion he reached in relation to this issue' – 'Whether the learned federal magistrate impermissibly relied upon extrinsic material and failed to accord the parties procedural fairness'

Appeal type: Appeal against parenting and property orders.

Facts: The parties had twins. Serious incidents of family violence occurred during their relationship and after separation. At the hearing of the trial, the father was in prison having been convicted of aggravated assault on the mother. Mother granted sole parental responsibility and the children to live with her. The father was to

have supervised time (these orders were interim). Property – 25% adjustment re *Kennon*.

Issues: In making findings regarding family violence and its effect on the mother and children, did his Honour impermissibly take account of extraneous material? Did his Honour err in making a "*Kennon* type adjustment"?

Decision/Reasoning: The Court held that despite including reference to the mother's conduct in the courtroom when faced with the father and the discussion about a report, the passages of which were included and relied upon in *Re: L (Contact: Domestic Violence)* [2000] 2 FLR 334, a decision of the England and Wales Court of Appeal (Civil Division). They were on the public record and so "materially different from matters appearing in reports" which have not yet undergone judicial consideration. While this alone does not guarantee that procedural fairness is achieved in circumstances where the parties were not on notice about the report and did not have opportunity to cross-examine accordingly, the Full Court held that "anything said in *Re: L* was not necessary to establish the relevance of the findings" made by the Federal Magistrate.

Regarding the property settlement and the "*Kennon* type adjustment", the Full Court found that while it represented the "top of the range" it did not "exceed the bounds of a reasonable exercise of discretion". Regarding the violence that was perpetrated post-separation, the Full Court held it was correctly included by the Federal Magistrate and was a relevant consideration in determining whether the mother's contributions as a whole were more arduous.

***Wolfe & Director-General, Department of Human Services* [2011] FamCAFC 42 (4 March 2011) – Family Court of Australia (Full Court)**

'Allegations of child abuse' – 'Child abduction' – 'Hague convention' – 'History of domestic and family violence' – 'Parenting proceedings'

Matter: Hague Convention return order appeal.

Facts: The mother unsuccessfully opposed the father's application for return of the children to New Zealand. There were ongoing parenting proceedings between the mother and father in New Zealand, where the mother conceded the children had been habitually resident for their whole lives. The current New Zealand orders (made following a hearing in which the mother alleged the father had abused the children and been violent towards her) provided that the children reside with the mother and have one and a half hours contact with the father each weekend. The mother's new partner was violent towards her and the children were exposed to

that violence. The mother fled New Zealand and returned to her native Australia after leaving her new partner. She gave evidence that the children were fearful to return to New Zealand due to concerns about her new partner.

Held: Appeal dismissed.

Bryant CJ, Finn and May JJ noted the first instance judge's comments with approval:

"[i]n part, she relied on her own refusal to establish that a return of the children would place them in an intolerable situation". Her Honour disposed of this aspect of the mother's case by saying, correctly, in our view, that "[i]t is well established that, ordinarily, the objects of the Convention should not be frustrated by a parent's refusal to return with children to their country of habitual residence". [32]

Slater & Light **(2011) 45 Fam LR 41; [2011] FamCAFC 1 (11 January 2011) – Family Court of Australia (Full Court)**

'Children' – 'Notice of risk' – 'Parenting orders and impact on children' – 'People with mental illness' – 'Psychiatric report' – 'Risk'

Appeal type: Appeal against interim parenting orders.

Facts: The parties had three children together and separated in 2006. In March 2010, the Federal Magistrates Court made interim parenting orders. The effect of these orders was to allocate parental responsibility for the children solely to the mother, require the children to live with the mother and require the children to spend weekly supervised time with the father at a contact centre. The orders were made pending the preparation of a psychiatric report on the risk the father presented to the children. These orders radically altered previous arrangements, as the Federal Magistrate was concerned about the need to protect the children from physical or psychological harm that would arise from them being exposed or subjected to abuse, neglect or family violence. The father appealed against these orders.

Issue/s:

- Whether the Federal Magistrate erred in finding that it was in the best interests of the children (a) for the father's time to be supervised and (b) to significantly reduce the time they spent with the father.
- Whether the Federal Magistrate had erred by allocating parental responsibility solely to the respondent.

Decision/Reasoning: The appeal was dismissed. In dismissing the first ground of appeal, the Court held, amongst other findings, that if evidence of abuse or family violence is adduced at trial, the Court is obliged to deal with it. The Court must always critically assess the evidence placed before it in determining the issue (see [46]). It was also noted that a finding of family violence may be made in the absence of a Form 4 Notice.

The Court held that it was clearly open on the evidence for the Federal Magistrate to find that family violence had been perpetrated by the appellant.

In relation to the second ground of appeal, the appellant contended that the Federal Magistrate relied upon erroneous finding of family violence to then improperly find that the presumption of equal shared responsibility did not apply. The Court dismissed this argument by again noting that the finding of family violence was open to the Federal Magistrate (see [64]-[69]).

Note: final orders were subsequently made, but the finding of family violence was not affected (see *Slater & Light* [2013] FamCAFC 4 (5 February 2013)).

***Vasser & Taylor-Black* [2010] FamCAFC 36 (11 March 2010) – Family Court of Australia (Full Court)**

'Parenting orders' – 'Re F: litigants in person guidelines' – 'Self-represented litigants'

Proceedings: Appeal against parenting orders.

Facts: This was an appeal by the mother from parenting orders that challenged part of the process followed and some of the rulings made during the conduct of the trial. On the final day of the hearing, the self-represented mother sought to tender a 52 page document in response to the report of an expert witness.

Issue/s: One of the grounds of appeal was that trial judge failed to provide the mother with procedural fairness in not ascertaining the reason behind the preparation of this document and in not advising her that she may wish to seek legal advice before tendering the particular document, contrary to the litigants in person guidelines: *Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001).

Reasoning/Decision: The appeal was dismissed as the mother here was not the victim of unfairness. Although this appeal did not relate to family violence, the Court relevantly observed that the *Litigant in Person Guidelines* were no more than guidelines.

See *Re F: Litigants in Person Guidelines* [2001] FamCA 348 (4 June 2001).

Amador & Amador **(2009) 43 Fam LR 268; [2009] 43 FamCAFC 196 (3 November 2009) – Family Court of Australia (Full Court)**

'Determining allegations in relation to family violence' – 'Evidence' – 'Parenting orders and impact on children' – 'Relevance of family violence in cases concerning the welfare of children' – 'Requirement of corroboration'

Proceedings: Appeal against parenting and relocation orders.

Facts: The parties met online and were married in Belgrade. Their child, who had autism, was born in Belgrade. The mother and the son came to live in Australia with the father when the child was 20 months old. The parties subsequently separated, with the mother alleging that the father had perpetrated domestic violence and sexual assault against her. The father denied these allegations. In 2008, a Federal Magistrate made orders granting the mother sole parental responsibility for the child. The mother was also permitted to relocate to Serbia with the child and the father's contact time with the child was reduced from weekly to possible annual contact. The father appealed against these orders.

Issue/s: One of the grounds of appeal was that the Federal Magistrate erred in accepting the mother's uncorroborated evidence that domestic violence and sexual assault was perpetrated by the father on the mother.

Reasoning/Decision: This ground of appeal was dismissed but the appeal was allowed on other grounds. In dismissing this ground of appeal, the Court held that a positive finding may be made on the evidence of the victim without corroborating evidence. See [79].

The Court expressed concern at the manner in which the Federal Magistrate had expressed a finding of insufficient evidence re family violence. They were concerned that the Federal Magistrate had felt in some way constrained by law in being able to make a positive determination in relation to allegations of violence even if the evidence had satisfied her on the requisite standard that the violence occurred as alleged. See [95]-[96].

Oakley & Cooper **[2009] FamCAFC 133 (30 July 2009) – Family Court of Australia (Full Court)**

'Children' – 'Full court referred to, and discussed, the best practice principles for use in parenting disputes when family violence or abuse is alleged' – 'Physical violence and harm' – 'Whether the federal magistrate erred by giving

insufficient weight to issues of family violence'

Proceedings: Appeal against parenting orders

Facts: The parties were together for approximately 7 years, separating in March 2006 – there were 2 children of the relationship. The mother had 6 children from previous relationships. The Federal Magistrate described their relationship as "extremely volatile", ending in an incident of domestic violence. The Federal Magistrate made findings *inter alia*: that the parties were unable to effectively communicate with each other due to them being "aggressive, provocative … show[ing] a lack of maturity and complete absence of child focus"; that the mother used physical discipline on the children; and that on at least one occasion the mother's behaviour at changeover was "appalling and did severely distress the children". The family report included the opinion that the children "have positive attachments to both parents, but experience some trauma associated with the continuing conflict in their parents' relationship". Despite the conflict between them, the parties agreed to an order for equal shared parental responsibility. As such, the Federal Magistrate was obliged to consider equal time, or significant and substantial time with each parent. Orders were made that the children live with the mother 9 nights a fortnight and with the father for 5. The father appealed these orders.

Issues: Did the Federal Magistrate give appropriate consideration to the evidence and findings of family violence when making the parenting orders that he did?

Reasoning/Decision: The appeal was dismissed. The Full Court referred to the 2009 publication "Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged", specifically Section F of the 2009 principles which sets out considerations where children are ordered to spend time with a parent where positive findings of family violence have been made against that parent.

The Full Court found that while they agreed with the argument of the mother's counsel, that the discussion of weight in relation to family violence had been "clipped" they found that there was no appealable error established. The Federal Magistrate had evidence of both parties and their associates hitting the children, and that both parties were verbally and physically abusive of one another in the presence of the children. Despite acknowledging that the mother's behaviour was, at times, worse than the father's, when taken in the context of the best interests of the children, the conclusion was that it was in their best interests to remain predominantly in the care of their mother.

***M & L* (2007) FLC 93-320; (2007) 37 Fam LR 317; [2007] FamCA 396 (4 May 2007) – Family Court of Australia (Full Court)**

'Aboriginal and Torres Strait Islander people' – 'Parenting orders' – 'Physical violence and harm' – 'Relevance of cultural evidence'

Proceedings: Appeal against parenting orders.

Facts: Both parents were Aboriginal and Torres Strait Islander, and lived in the NT, one close to Darwin, one quite remote. There was family violence where the father would physically and verbally abuse the mother. On one occasion the paternal grandfather punched the father for hitting the mother. The mother had been the primary care giver of the children. At trial evidence was led about the communities in which each parent lived. The trial judge found that the children would have a greater connection to their father's culture by living with him.

Issues: Whether the trial judge had adequately considered the evidence of family violence and its potential effects on the children.

Reasoning/Decision: The Full Court held that there was inadequate consideration of the risk to the children given the father's history of violence and alcohol consumption. The lack of consideration of the evidence that the children had been primarily cared for by the mother, and that there was no evidence that her care was lacking was overlooked, was also an error. A finding was made by the trial judge that the mother's parenting was reliant on others in the community, referring to it as "collectivist". He based his finding on an anthropological report quoted in another judgment. There was no anthropological evidence that the mother's community engaged in such "collective" parenting, and that the mother was not, herself, the children's primary care-giver. The trial judge's finding that the best interests of the children would be met by them living with their father cannot be sustained when evidence of the mother's adequate care, the fact she was the primary care giver and the father's violence towards the mother, is balanced against the finding of the cultural benefits to the children of living in the father's community.

***Napier & Hepburn* (2006) FLC 93-303; (2006) 36 Fam LR 395; [2006] FamCA 1316 (5 December 2006) – Family Court of Australia (Full Court)**

'Contact' – 'Risk' – 'Unacceptable risk'

Proceedings: Appeal against residence and contact orders.

Facts: The proceedings involved competing applications for residence and contact to the child of the parties. The mother made allegations that the father sexually abused the child. While no finding of abuse was made, the Trial Judge did make a finding of unacceptable risk. On appeal, the father challenged the orders made for contact, in particular, the requirement that the contact be supervised.

Issue/s: The trial judge provided inadequate reasons supporting his finding of unacceptable risk of abuse.

Reasoning/Decision: Although this case did not relate to family violence, the Court made observations relevant to the assessment of unacceptable risk. Bryant CJ and Kay J held at [84] that:

'There remained an obligation on the trial judge to not only evaluate the harm that might befall the child if there is a future act of abuse, but to also evaluate the prospect of such an act occurring. This is not a search for a solution that will eliminate any prospect of serious harm. It is a search to balance the harm that will follow if the risk is not minimised and the harm that will follow if a normal healthy relationship between parent and child is not allowed to prosper'.

***S & S (Spagnardi & Spagnardi)* [2003] FamCA 905 (8 September 2003) – Family Court of Australia (Full Court)**

'Contributions must be affected by the violence' – 'Impact of violence on past contributions' – 'Kennon adjustment' – 'Property proceedings' – 'Reference to exceptional cases should not mean rare'

Appeal type: Appeal against property orders.

Facts: The parties had two adult children and separated in 2000. The trial judge made a *Kennon* style adjustment in favour of the wife. His Honour held that the evidence clearly revealed that there had been some violent behaviour by the husband towards the wife. Although there was no explicit evidence from the wife as regards to the effect of the violence on her contributions, the trial judge accepted that the wife's contributions must have been made significantly more arduous than they ought to have been because of the violence inflicted upon her by the husband.

Issue/s: One of the grounds of appeal was whether the trial judge erred in adjusting the wife's contributions to account for the domestic violence perpetrated by the husband?

Reasoning/Decision: The appeal was allowed. Here, the evidence could not have properly led to a *Kennon* adjustment under section 79 (see [48]). In reaching this decision, the Court made a number of statements of principle, elaborating upon the decision in *Kennon*.

It was held that evidence of violence alone is not enough, but that the "violent conduct by one party towards the other" must be demonstrated to have an effect on contributions.

In addition, the Court also stated that the reference in *Kennon* to 'exceptional' cases should not be understood to mean rare. They adopted the trial judge's comments that *'the references to 'exceptional cases' and 'narrow band of cases' occurs in the context of the principle of misconduct in general rather than the more narrow formulation about domestic violence. … It seems to me that reading these passages carefully, the key words in a case where there are allegations of domestic violence are 'significant adverse impact' and 'discernible impact'.* (see [47]).

***B & B* [2003] FamCA 274 (8 April 2003) – Family Court of Australia (Full Court)**

'Failure to provide adequate reasons to deal with the allegations relating to violent and abusive behaviour' – 'Family violence' – 'Kennon adjustment' – 'Kennon not an award for damages' – 'Parenting orders' – 'Property orders' – 'Relevance of family violence in cases concerning the welfare of children'

Proceedings: Appeal against parenting orders and division of property.

Facts: The parties had two children together. At trial, the mother made extensive allegations of physical, verbal and emotional abuse against the father, much of which the father conceded (see [38]). The trial judge made an order that the children should predominately be in the care of their father. Additionally, the trial judge rejected the wife's submission that the division of property ought to be adjusted to 60/40 from 70/30 division on the basis of the decision in *Kennon*.

Issue/s: Some of the issues were –

- Did the trial judge err in failing to provide adequate reasons to deal with the allegations relating to violent and abusive behaviour?
- Did the trial judge err in attributing responsibility for the domestic violence that occurred during the marriage to the wife?
- Did the trial judge err in his application of the *Kennon* principle.

Reasoning/Decision:

The Court held that the trial judge was *'obliged to adjudicate the violence issue as raised by the wife and to make specific findings in respect of the course of conduct conducted by the husband in the course of the marriage so that he could properly assess relevant aspects of the behaviour of each of the parents in determining in whose care he should place the children'.* However, from reading His Honour's reasons for judgment, it was not clear that he considered and evaluated the relevant evidence and took all the relevant factors into account. The issues raised by the wife in the grounds of appeal could not be described as 'pernickety or overly critical' (*AMS v AIF*) when matters of such significant serious and prolonged violence were clearly raised and left virtually undiscussed in the judgment (see [32]-[53]).

Secondly, the Full Court found that, the trial judge did not attribute responsibility for the domestic violence to the wife: while the trial judge found the wife to have engaged in passive/aggressive conduct, His Honour indicated in the clearest terms that he was not condoning the husband's conduct in response to such behaviour(see [54]-[57]).

Thirdly, the Full Court held that the application of the principles in *Kennon is "not the equivalent of an award for damages",* but used to determine whether the husband's conduct had the effect of making the wife's contributions more arduous.

T & S **(2001) FLC 93-086; [2001] FamCA 1147 (29 October 2001) – Family Court of Australia (Full Court)**

'Administration of justice' – 'Effect of family violence' – 'Parenting orders' – 'Procedural fairness' – 'Re f: litigants in person guidelines' – 'Self-represented litigants'

Proceedings: Appeal against parenting orders.

Facts: This was an appeal by the mother against orders made by the trial judge in relation to the residence, contact and other specific issues relating to the child of the parties' relationship. The effect of the trial judge's order was that the father was to have residence of the child and be responsible for the child's day to day care, welfare and development; and that the mother was to have specified contact with the child. The mother was unrepresented for five days of the six day hearing. A claim by the mother of domestic violence at the hands of the father was raised but the trial judge did not accept the mother's evidence. The trial judge instead made a number of adverse findings against the mother.

Issue/s: A major ground of appeal advanced on the Mother's behalf was that she did not receive a fair trial and that a new trial should be ordered. The gravamen of the Mother's case was that because she was a victim of domestic violence who was unrepresented at trial, she was unable to effectively meet the case of the Father and present her own case. As a consequence, and because the Mother suffered from a personality disorder, the trial judge made negative findings against her, and in particular against her credibility.

Reasoning/Decision: The appeal was allowed on the basis of further evidence tendered on appeal which contained detailed evidence of ongoing domestic violence by the husband, and reports from a psychologist and social worker providing evidence as to the effect of the domestic violence on the mother's ability to conduct her case at trial. The Court held that if the evidence had been tendered before the trial judge, it would have produced a different result and the best interests of the child required a re-hearing.

***B & K* [2001] FamCA 880 (14 August 2001) – Family Court of Australia (Full Court)**

'Parenting orders' – 'Relevance of family violence in cases concerning the welfare of children' – 'Sexual and reproductive abuse'

Proceedings: Appeal against residence orders and property settlement.

Facts: The parties had two children. The trial judge made an order for shared residency of the children. The trial judge accepted evidence that the husband had anally raped the wife.

Issue/s: Did the trial judge give sufficient weight to the family violence the husband had inflicted on the wife and the subsequent effect or impact on her of that violence in making residence orders?

Reasoning/Decision: The appeal was dismissed. At [32] the Court noted the authorities referred to by counsel for the wife in support of the argument that the trial judge did not give sufficient weight to the effect of the domestic violence perpetrated by the husband against the wife: *JG and BG* (1994) FLC 92-515, *Patsalou* (1995) FLC 92-580, *Blanch v Blanch & Crawford* [1998] FamCA 1908; (1999) FLC 92-837, and *Re Andrew* [1996] FamCA 43; (1996) FLC 92-692.

The Full Court determined that consideration of the family violence and its effect upon the wife was adequate and orders for fortnight-about care of the children was within the trial judge's discretion.

Re F: Litigants in Person Guidelines **(2001) FLC 93-072; [2001] FamCA 348 (4 June 2001) – Family Court of Australia (Full Court)**

'Contact orders' – 'Guidelines for matters involving self-represented litigants' – 'Parenting orders and effect on children' – 'Self-represented litigants'

Appeal type: Appeal against parenting and contact orders.

Facts: While not a case specifically dealing with family violence, there is a large proportion of self-represented litigants in family law proceedings and as such the guidelines set out in this case pertain.

Issue/s: Did the trial judge contravene the guidelines in respect of the litigants in person set out by the Court in *Johnson v Johnson* (1997) FLC 92-764?

Reasoning/Decision:

The Full Court provided guidelines as follows (taking a number from *Johnson v Johnson* (1997) FLC 92-764):

1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses;
3. A judge should explain to the litigant in person any procedures relevant to the litigation;
4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;
5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has

a possible claim of privilege, to inform the litigant of his or her rights;

8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (*Neil v Nott* [1994] HCA 23; (1994) 121 ALR 148 at 150);
9. Where the interests of justice and the circumstances of the case require it, a judge may:
    - draw attention to the law applied by the Court in determining issues before it;
    - question witnesses;
    - identify applications or submissions which ought to be put to the Court;
    - suggest procedural steps that may be taken by a party;
    - clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

In the Marriage of Blanch; Blanch v Blanch and Crawford **(1999) FLC 92-837; (1998) 24 Fam LR 325; [1998] FamCA 1908 (27 November 1998) – Family Court of Australia (Full Court)**

'Children' – 'Custody proceedings' – 'Erroneous findings of fact' – 'Incorrect attribution of fault to the victim' – 'Perpetrator responsibility' – 'Physical violence and harm' – 'Relevance of family violence' – 'Relevance of family violence in cases concerning the welfare of children'

Appeal type: Appeal against parenting orders.

Facts: The parties were married but separated after seven years. There were two children of the marriage. The wife made allegations of domestic violence against the father; these were denied by the father. The trial judge found at [325] that both parties were responsible for violence in the relationship, and that the relevance of family violence in custody proceedings was to be indicative of a risk 'to … children in later years that … could cause them harm'. The wife brought an appeal against orders made by the trial judge that the children of the relationship reside with their father.

Issue/s:

Whether the trial judge erred in his findings regarding domestic violence?

Decision/Reasoning: The appeal was allowed.

Counsel for the wife submitted that the trial judge addressed the questions of the husband's domestic violence 'in almost a passing manner', despite the presence of overwhelming evidence from the wife that she was the victim of consistent and frequent violence and abuse. It was held that *"in cases such as this, where a case of sustained and severe domestic violence by one party is advanced by the other, the court is obliged to give a clear indication whether it accepts or rejects that case and, in any event, to explain why it has reached that conclusion"* (see [333]).

In addition it was held that the trial judge's conclusion that the responsibility for violence between the parties was fairly evenly shared was not available on the evidence.

Other aspects of His Honour's treatment of domestic violence were also in issue. First, His Honour's perception of the relevance of violence to the overall welfare of the children was inadequate. The trial judge failed to consider the significant risk of such violence to the children's emotional development such as "insecurity, fear, unhappiness, anxiety and hyper vigilance": *Patsalou and Patsalou* [1994] FamCA 118 and *JG and BG* (1994) FLC 92-515 (see [334]). Second, Lindenmayer J also strongly disapproved of the trial judge's finding that the husband's violence towards the wife was a product of the marital relationship rather than of the husband's personality.

***Re: Cassandra Kathleen Kennon (Appellant/Wife) and Ian William Kennon (Cross-Appellant/Husband) Appeal* (1997) FLC 92-757; [1997] FamCA 27 (10 June 1997) – Family Court of Australia (Full Court)**

'Contributions' – 'Property proceedings' – 'Relevance of domestic violence' – 'Section 79' – 'Significantly more arduous'

Proceedings: Property settlement.

Facts: The parties cohabited for approximately five years before separating. The husband was very wealthy and the wife had far more modest means. The property pool was nearly $9 million. There were no children of the marriage. In 1994, the wife filed a property application under s 79 of the Family Law Act. The husband filed a cross application. The wife subsequently filed an amended application which included a claim under the cross-vesting legislation that the husband pay her damages for assault and battery. The husband denied

the allegations of assault and restated his position regarding the property claim. The trial judge accepted that a number of assaults had occurred and awarded damages, but found that the husband's conduct had not affected the wife's contributions to allow an adjustment in relation to s 79(4).

Issue/s: The wife did not challenge the trial judge's finding that the husband's conduct had not affected her contributions. Consequently, the Full Court's comments on the relevance of domestic violence in claims under s79 of the Family Law Act were made in obiter.

Decision/Reasoning: The appeal was dismissed but the Full Court took the opportunity to clarify the relevance of violence in s79 property adjustments. The Full Court said that earlier authorities on s 79 precluding evidence of domestic violence were no longer binding, acknowledging that the 'pervasiveness and destructiveness of domestic violence' was now better recognized by the Australian community and courts.

The Full Court cautioned that s 79 of the Act is not a source of 'social engineering' or to be used as 'a means of evening up' the financial positions of the parties. They held:

'Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of "negative contributions" which is sometimes referred to in this discussion'.

The Court also referred to this principle as including 'exceptional cases' and noted, *'[i]t is essential to bear in mind the relatively narrow band of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party*'.

(See also subsequent interpretation in *S & S (Spagnardi & Spagnardi)* [2003] FamCA 905 (8 September 2003), *Baranski & Baranski & Anor* [2010] FMCAfam 918 (1 September 2010) and *Damiani & Damiani* [2012] FamCA 535 (9 July 2012).)

Re Andrew (1996) FLC 92-692; [1996] FamCA 43 (23 May 1996) – Family Court of Australia (Full Court)

'Contact proceedings' – 'Family violence' – 'Fear of violence' – 'Supervised access order' – 'Unacceptable risk to

child' – 'Weight to be given to impact of access on custodial parent'

Proceedings: Appeal against supervised access orders.

Facts: The parties separated. Satisfactory access arrangements were in place for 3.5 years. However, the relationship between the parties deteriorated and the husband assaulted the wife. The wife held a genuine belief that the husband had tried to kill her and the child on this occasion and subsequently denied the husband access to the child. The husband filed an application for unsupervised access.

The trial judge found that each parent alone could provide adequately for the needs of the child. However, the wife's fears had become even more entrenched over time and these fears were a major impediment to access, because they were genuine even if they may not be founded in fact. Her capacity to provide care to the child would be impaired and cause detriment to the child if the husband was given unsupervised access. The trial judge made orders for supervised access.

Issue/s: The trial judge gave too much weight to the mother's attitude and not enough weight to the benefits to the child of unsupervised contact with the father.

Reasoning/decision: The Full Court dismissed the appeal. After citing extensively from past authorities, it was concluded that the finding that the wife's genuine fear of the husband would significantly affect her ability to provide adequately for the needs of the child as custodial parent despite the benefits to the child from contact with the father was open to the trial judge.

In the Matter Of: N Appellant/Wife and S Respondent/Husband and the Separate Representative **[1995] FamCA 139 (20 December 1995); (1996) FLC 92-655; (1995) 19 Fam LR 837. – Family Court of Australia (Full Court)**

'Assessment of unacceptable risk' – 'Unacceptable risk'

Proceedings: Appeal against custody orders.

Facts: Not a family violence case, but it discusses principles in determining unacceptable risk in the context of sexual abuse allegations. In custody proceedings, the mother alleged that the father sexually abused their child and sought to have access by the husband to the child prevented. The trial judge was not satisfied on the civil standard of proof that the sexual abuse had occurred. However, he did not conclude that the abuse certainly did not happen. The mother was steadfast in her belief that the child had been abused by the father.

The trial judge did not find the father unfit to have custody or access to the child by reason of sexual abuse or unacceptable risk of abuse, however, mitigated against the concerns and effect on the mother by making interim supervised contact orders.

Issue/s: Whether the trial judge erred in finding that the father was not an unacceptable risk?

Reasoning/Decision: The appeal was dismissed by majority. The Full Court held that the trial judge should not have made interim custody orders and failed to take into consideration the effect this would have not only on the child but also on the mother's ability and capability to parent effectively. However, as the interim custody order was not challenged the Full Court did not set it aside. As regards to no finding of unacceptable risk, on the evidence, this was open to the trial judge.

***Patsalou and Patsalou* (1995) FLC 92-580; [1994] FamCA 118 (27 October 1994) – Family Court of Australia (Full Court)**

'Child welfare' – 'Custody proceeding' – 'Evidence' – 'Impact of family violence on children' – 'Independent research by judge' – 'Relevance of family violence' – 'Social science research'

Appeal type: Appeal against custody orders.

Facts: Allegations of family violence were made in custody proceedings. The trial judge accepted the wife's evidence that prior to separation the husband had been hitting her on a regular basis, in front of the children on a number of occasions. Her Honour stated that the denigration of one parent by the other and the perpetuation of violence by that parent against the other is of importance when assessing where the interests of the children lie and what future arrangements might best advance their welfare. Her Honour also noted a number of articles on the effect upon children of inter-spousal violence including that such effects may be profound and long-lasting. The trial judge concluded that the children's welfare would be best promoted by remaining in the custody of the wife.

Issue/s: Some of the grounds of appeal were –

- Whether the manner in which the trial judge dealt with the violence and denigration by the husband of the wife was inappropriate and contrary to law.
- Whether the trial judge erred in referring to the body of research as the articles cited did not constitute evidence before her and the parties were not invited to make submissions with respect to them.

Reasoning/Decision: The Full Court upheld the trial Judge's finding that allegations of domestic violence were relevant to custody proceedings and found that the reference by the trial judge to published social science literature about the impact of family violence on children was permissible as the published research was referred to as background information rather than evidence.

Evidence of family violence was held to be relevant in custody matters, to the extent that it assisted the court to determine what is in the best interests of the children, as its impact could be '*profound and long-lasting'.* The Full Court approved the comments by the trial judge that denigration and assault cause '*considerable unnecessary strain*' to the victim and '*may erode the confidence, dignity and self-esteem of the children's other parent*'. Baker, Kay and Tolcon JJ agreed with the trial judge that such conduct modelled inappropriate behaviour for children and could '*impinge upon the quality of parenting able to be offered to the children'* and *'reflects poorly upon the assailant's capacity to provide children with a positive role model for their own behaviour and methods of resolving disputes and dealing with tensions and stress*'.

Between: R Appellant/Husband and C Respondent/Wife **[1993] FamCA 62 (25 June 1993); *Russell & Close* (Unreported, Full Court of the Family Court of Australia, Fogarty, Baker & Lindenmayer JJ, 25 June 1993) – Family Court of Australia (Full Court)**

'Allegations of sexual abuse' – 'Best interests of the child' – 'Interpreter' – 'Meaningful relationship' – 'Parenting proceedings' – 'Separate representative/independent children's representative' – 'Unacceptable risk to child' – 'Weight to be given to impact of access on custodial parent'

Appeal type: Appeal against access orders.

Facts: Post separation, an access arrangement for the two children of the relationship was established. The relationship between the parties deteriorated and the mother refused to allow the husband access to the children. One child was found to have been sexually abused, but it was not possible to identify the perpetrator. The mother believed that the father was the perpetrator, however the trial judge was not satisfied that the father had sexually abused the child. The trial judge made orders giving the father unsupervised daytime access to the children to reduce the risk of the mother from making unfounded allegations in the future. The father appealed against these orders. The mother did not challenge the orders, but cross-appealed in relation to findings of fact made by the trial judge.

Issue/s:

- Whether it was open to the trial judge to make orders giving the husband unsupervised daytime access, where the court was not satisfied that the father had sexually abused the child.

Decision/Reasoning: The appeal was allowed in part. Amendments were made to the trial judge's orders, clarifying the father's access period and altering the proposed changeover location. The mother's appeal against factual findings made by the trial judge and the father's appeal against daytime access were dismissed.

The Full Court found that the relevant considerations when making access orders in cases involving sexual abuse of children were whether sexual abuse had occurred, whether the perpetrator could be identified, the potential risk of harm to the child from sexual abuse, the potential benefit to the child from parental access and the impact of the custodial parent's beliefs on the welfare of the children. The Full Court said that the custodial parent's beliefs regarding the child's exposure to harm are relevant to the extent that they are likely to adversely affect that parent's parenting ability and that a subjective test is used to assess the custodial parent's beliefs.

The Full Court was satisfied that it was open to the trial judge to draw inferences regarding the likely future conduct of the mother. As the trial judge had found the mother genuinely believed the child had been sexually abused, that it was highly likely the mother would make further allegations of sexual abuse against the father if unsupervised overnight access was granted and that this risk did not apply to unsupervised daytime access, it was at the trial judge's discretion to give the husband unsupervised daytime access.

Family Court of Australia

Bennett & Bennett [2021] FamCA 182 (21 April 2021) – Family Court of Australia

'Abuse of children' – 'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Family violence evidence' – 'Kennon principles' – 'Parenting proceedings' – 'Property proceedings' – 'Sexual abuse'

Proceedings: Parenting and property proceedings.

Facts: The mother and father separated in 2016. The father was found guilty of assault and aggravated indecent assault in relation to their children. He was also found guilty of multiple assault and intimidation charges against the wife and children.

Issues:

1. Application to change the children's surnames, issue of passports and overseas travel, and the father's access to school information.
2. Division of net available asset pool.

Decision and reasoning: Parenting and property orders made.

Parenting orders: It was in the children's best interests that they eradicate their father's name from their names, given the damage and violence he inflicted on them, noting that "[t]he children need to close this chapter in their lives and this is one practical way of assisting them to do so" (at [124]).

Property orders: The decision of *Kennon v Kennon* was highly relevant to the facts: "where there is a course of violent conduct during the marriage which is demonstrated to have had a significant impact upon that party's contribution to the marriage, this is a factor which the trial Judge is entitled to take into account in assessing the parties' respective contributions under section 79 of the Act." As per Baker J in *Kennon* at [84]:

> "The incidence of domestic violence in a marriage would generally be a relevant factor when a court comes to assess contributions…for the reason that the contributions made by a party who has suffered domestic violence at the hands of the other party may be all the more onerous because of that violence and therefore attract additional weight."

The wife's entitlement was to 95% of the property comprising of the following:

- The husband's violence and conduct towards the children and wife made her role as a parent and homemaker far more arduous than it needed to be. Her entitlement for past contributions was assessed at 70% being direct financial contributions, contributions as parent and homemaker, and solely since separation in the most difficult of circumstances (given the husband's behaviour and offending).
- In relation to her future needs, her contribution to the children post-separation would continue to be overwhelming. Moreover, "the husband's conduct towards the children…made her parenting role more arduous as the children have suffered psychologically from their father's violence." She would be solely financially, emotionally and psychologically supporting the children for the next 6 years. An adjustment of 25%.

The husband was entitled to 20% of the pool, reducing the wife's entitlement to 80%.

***Pollard and Nordberg* [2019] FamCA 365 (7 June 2019) – Family Court of Australia**

'Alleged child victims' – 'Appeal against recovery order' – 'Best interests of the child' – 'History of domestic and family violence' – 'Interim parenting orders'

Proceedings: Appeal against grant of recovery order.

Facts: The father had sought, and been granted, a recovery order for the return of the children following the mother's unilateral removal of the children from the family home in Victoria. She took the children with her to her mother's home in New South Wales. The mother alleged that the father has been violent to the children, independently of the allegations of his violent behaviour towards the mother.

Issue: Whether the recovery order ought to be revoked pending a final order hearing.

Judgment: Wilson J upheld the mother's appeal against the father's recovery order on the basis of family violence allegations against him, despite no expert report being admitted:

> [155]If I dismiss the mother's appeal, the recovery order will operate in such a way that the children are physically, and if necessary, forcibly, returned by police to the father in Victoria. If the allegations of family violence are proved at trial, that means I will order the children to be returned to a violent environment. It must not be overlooked that the mother has alleged that the father has been violent to the children, independently of the allegations of his violent behaviour towards the mother. I refuse to make an interim order returning the children to the father in circumstances where the father may at trial

be found to have engaged in family violence. In my judgment this court must act protectively towards the children and remove them from any risk associated with family violence. To do so is consistent with the imperative recorded in s 60CC(2A).

***Behn & Ziomek* [2019] FamCA 298 (10 May 2019) – Family Court of Australia**

'Assault child' – 'Best interests of child' – 'Coercive control' – 'Family law' – 'Financial abuse' – 'Protection order' – 'Relocation' – 'Sexual abuse' – 'Supervised contact' – 'Systems abuse' – 'Unacceptable risk'

Matter: Application for children's orders for relocation, mother to have sole parental responsibility, supervised contact

Facts: The German national mother wished to return the Germany with the child. The court considered whether the child faced an unacceptable risk in spending time with the father.

Issue: Application for leave to appeal.

Decision and reasoning: Relocation allowed; mother to have sole parental responsibility.

McClelland DCJ accepted that the child faced an unacceptable risk spending time with the father because (1) he had an extensive history of coercive and controlling behaviour towards the mother, and (2) his controlling nature manifest itself in physical violence towards the child.

[200] His Honour accepted evidence that the father had a history of engaging in controlling and coercive conduct in respect to the mother and that that controlling nature had manifested in physical violence to the child. Matters found to constitute controlling and coercive conduct during the relationship included setting up a camera in their home, telling the mother an investigator was following her while she was overseas, questioning her presence at her brother's wedding, frequent accusations of infidelity, inspecting her used underwear and telling her it tested positive for sperm; attending her medical appointments and attempting to sexually belittle mother by asking questions of and making comments alleging her infidelity to multiple doctors, sending her a divorce kit in response to an argument about money and financially controlling her by draining her bank account and using her credit card.

His Honour accepted that the father's post-separation manner of conduct of the proceedings and behaviour questioning medical treatment of the child amounted to coercive and controlling behaviour, as did calling the police for seven times for unnecessary police welfare checks. His Honour also accepted that the father's

assault of the child was child abuse.

***Frangoulis and Xennon* [2019] FamCA 103 (28 February 2019) – Family Court of Australia**

'Anger management' – 'Application in a case' – 'Disputed compliance with therapy order' – 'Family law' – 'Family violence' – 'Interim parenting orders' – 'Substantially supervised contact' – 'Therapist's expertise disputed'

Matter: Father's application in a case for reinstatement of contact with the three children X, Y and Z, additional make up contact and that the child X engage in re-unification therapy with the father with a therapist to be agreed or as nominated by the Independent Children's Lawyer.

Facts: The mother alleged serious family violence against the father. A previous interim order required the father to engage with either Mr B or another therapist nominated by the Independent Children's Lawyer ("ICL"). The parties were in dispute as to whether the father had complied, the mother disputing the professional expertise of the father's chosen therapist, who was neither Mr B nor nominated by the ICL. The father contended the ICL approved the father's proposal to undertake the therapy with Mr F.

Earlier orders provided for the father to have contact with the children supervised by Mr and Ms C in the first week on Saturday from 2:00pm until 5:00pm and in the second week on Sunday from 2:00pm until 5:00pm save and except that the father's time with X is subject to her wishes. The mother stopped contact pursuant to that order alleging he had spent time with the children without supervision. Berman J had previously held that the father had contravened the supervision order.

The mother referred to a report of Mr B dated 28 August 2017 which observed:

"[the father] was not open to consideration of any difficulties with reactivity or emotional regulation. He was not open to consider any role that he might play in the conflict with [the mother] or any contribution to [X]'s difficulties or possible dilemmas that might arise for the other children. I have decided to terminate contact with [the father] after 2 visits, rather that continue for 6 consultations as had been initially ordered. I did not feel that further contact would enable any helpful resolution to this matter and was concerned that continued discussion might only serve to further entrench a fixed and limited position." [17]

The mother unequivocally stated she would reinstate the father's contact once he had complied with the therapy requirement. Berman J expressed surprise that the parties had been unable to negotiate a resolution to the issues in the application.

Decision: Inter alia, Berman J ordered:

1. That the father will attend upon Mr F for a further two (2) sessions and at the conclusion of which Mr F will prepare a report directed to the following matters:
   (a) A summary of his expertise, experience or skillset in respect of family violence and anger management;
   (b) A report directed to the father's engagement with therapy and focussing on anger management and family violence;

2. That to assist with the therapeutic intervention by Mr F, the father will provide to him the following:
   (a) The report of Mr B;
   (b) The report of Ms D;
   (c) The judgments of 27 July 2018 and 19 November 2018.

3. That upon the expiration of twenty one (21) days from the provision of the report by Mr F, indicating that the father has successfully engaged with counselling and therapy directed to family violence and anger management, the father's time with the children will be reinstated pursuant to paragraph 1 of orders made 4 August 2017, with further amendment that his time with the children will only require the substantial presence of either Mr or Ms C.

Berman J considered the father's application for reunification therapy with his child:

[49] … For reunification therapy to be appropriate I consider that there needs to be an assessment undertaken that would satisfy the Court that the potential risk to the child of engaging in what can be an intensive program is outweighed by the reasonable prospect of a successful reinstatement of X's relationship with her father.

[50] The concept of reunification therapy is not a matter of abstract consideration but rather, should be the subject of evidence that it is a proper therapeutic process and will be undertaken by a practitioner with demonstrated expertise.

[51] A report should be obtained from the nominated practitioner that brings to account the issues raised in the proceedings and provides an assessment as to the prospects of success, limited or otherwise.

***Farina & Lofts and Ors* [2019] FamCA 27 (23 January 2019) – Family Court of Australia**

'Damaging property' – 'Family violence evidence' – 'Kennon principles' – 'Physical violence and harm'

Case type: Interim ruling.

Facts: The applicant and first respondent were in a de facto relationship for 14 years and have two children. They agreed that their respective contributions during the relationship (apart from the *Kennon* argument) should be regarded as equal ([8]-[10]). The first respondent alleged that the applicant's conduct amounted to family violence, occurring during and subsequent to their relationship. Her evidence of such violence included a history of protection orders made against the applicant; allegations of physical, verbal, psychological, financial, emotional and mental abuse; allegations of property damage and animal cruelty; and allegations of exposing the children to family violence ([13]).

Issue: The applicant sought a ruling on whether or not family violence evidence relied upon by the first respondent sufficiently met the requirements of the *Kennon* principles and resulted in an 'additional adjustment' to the first respondent.

Held: Carew J ruled that the first respondent's evidence was insufficient to establish that the Court should make an adjustment on the basis of the *Kennon* principles. Her Honour stated that '[w]hile it is settled at law that family violence can be a relevant factor in determining contributions in property proceedings, the difficulty often faced by a trial judge is the inadequacy of evidence to support any relevant finding and adjustment'. Even if there is no direct evidence as to how the conduct affected the victim's ability to make his or her contributions, the impact may be inferred provided that the evidence clearly supports it. A person's conduct will be relevant if it has had a 'significant adverse' or 'discernible' impact on the contributions of another ([6]).

The applicant submitted that the evidence failed to demonstrate a discernible or significant adverse impact on the first respondent's contributions ([15]). In relation to direct and indirect financial contributions, the first respondent deposed to finding it difficult to contribute financially because of the domestic violence inflicted upon her by the applicant. In relation to non-financial contributions for the welfare of the family, she gave evidence that the applicant also made it difficult for her to contribute as a 'mother' ([17]). The applicant further submitted that the first respondent's evidence to occasionally feeling nervous or humiliated represented a personal impact on the first respondent, but fell short of establishing that those feelings had any discernible or significant impact on her ability to contribute ([18]).

Carew J noted that the need to establish 'fault' has been replaced by a 'no-fault' system in order to obtain a divorce or other relief, such as a property settlement or spouse maintenance. The repeal of the 'fault' based system avoids the humiliation and expense associated with presenting the necessary evidence ([22]). Nevertheless, according to the *Kennon* principles, there are circumstances where conduct will be relevant to the determination of a property settlement application ([23]).

Her Honour accepted the applicant's submission that the evidence relied upon by the first respondent was insufficient to establish the impact of the conduct on her ability to make contributions or the quantification of that impact on her contributions, either expressly or impliedly ([24]).

***Garrod & Davenort* [2018] FamCA 825 (12 October 2018) – Family Court of Australia**

'Coercive control' – 'Economic abuse' – 'Emotional and psychological abuse' – 'History of domestic and family violence' – 'Physical violence' – 'Systems abuse'

Issue: Parental responsibility.

Facts: The mother alleged that the child was repeatedly struck by the father causing bruising and that the father engaged in intimidating conduct towards her and the child, often following drug use by the father. The father was subject to several intervention orders, none of which successfully prevented his violent and intimidatory conduct. One incident of violence followed the mother's discovery the father had spent money set aside for payment of bills. The father was persistently in arrears of his child support obligations and viewed child support as a benefit to the mother.

The mother led evidence that the father's conduct towards her and the child made her highly anxious. The child allegedly made disclosures to the mother in July 2014 after spending time with the father that 'daddy hit me' and 'he was just angry and he hit me'. The following day, the mother alleged a bruise appeared on the child's hip. [344]

Decision and Reasoning: The mother have sole parental responsibility for the child, the father have no contact with the child and there be a moratorium on the father seeking further parenting orders for a period of two years. The father's conduct towards the mother and the child had made the mother highly anxious.

It was held that that 'the father's behaviour ha[d] been manipulative and the violence, which has been physical violence as well as coercive controlling violence, insidious. It was often perpetrated in the presence

of the child.' [5]

Despite the father's recent admissions regarding his conduct, the Court was unconvinced that he does not pose an unacceptable risk to the child's safety and wellbeing.[5]

The Court considered the definition of 'coercive controlling violence'. It was held that: 'Coercive controlling violence is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control, and does not always involve physical harm.' [223]

Xuarez & Vitela (No 3) **[2017] FamCA 1108 (22 December 2017) – Family Court of Australia**

'Abuse of process' – 'Child-related proceedings' – 'Systems abuse' – 'Vexatious proceedings'

Case type: Application by both parties for a vexatious proceedings order.

Facts: Mr Xuarez and Ms Vitela (both pseudonyms) had been involved in court proceedings in relation to parenting orders for over 10 years ([7]-[21]). The father had filed 19 separate Applications in a Case between 11 April 2012 and 16 November 2017 ([16]), which were all dismissed, and Notices of Appeal in relation to the dismissals ([17]). Both the mother and the father filed applications for a vexatious proceedings order pursuant to s 102QB of the *Family Law Act 1975* (Cth).

Issues: Whether the Court should make the vexatious proceedings order against the mother or the father or both.

Decision and Reasoning: The application made by the mother was granted, while the application by the father was dismissed. An order was made prohibiting Mr Xuarez from instituting proceedings against Ms Vitela or any of her legal representatives and dismissing all extant applications ([45]).

Justice Carew at [29] cites Perram J in *Official Trustee in Bankruptcy & Gargan (No 2)* [2009] FCA 398 to set out 11 principles to consider when making an order in relation to vexatious litigants. Applying the principles to the father's conduct, Carew J highlighted the facts that most of the applications were instituted without reasonable grounds, the father sought orders that the Court did not have jurisdiction to make, and the repetitive nature of the applications amounted to an abuse of process ([34]). It was noteworthy that in 2010, the father was declared a vexatious litigant in another court, in relation to proceedings where the father stalked the mother's former legal representative ([37]). These facts justified the order being made against the

father.

***Janssen & Janssen* [2016] FamCA 345 (1 February 2016) – Family Court of Australia**

'Discretion to admit the audio recordings and transcripts into evidence' – 'Evidence' – 'Independent children's lawyer' – 'Recordings made without consent' – 'Serious allegations of family violence' – 'Whether recordings were reasonably necessary to protect lawful interests'

Proceedings: Application relating to the admissibility of evidence and application as to whether the rules of evidence ought to apply in a Family Court hearing.

Facts: On the first day of a four day hearing, counsel for the applicant (the mother) sought leave to tender voice recordings and transcripts that had been made without the knowledge of the father. Under s 7 of the *Surveillance Devices Act 2007* (NSW), it is unlawful to record private conversations without the consent of the parties to that conversation unless the recording of the conversation falls within one of the exceptions in s 7(2) and (3).

Issue/s:

- Whether both the voice recordings and transcripts were admissible.
- Whether there were 'exceptional circumstances' as per s 69ZT(3) requiring the proceedings to be determined according to the rules of evidence set out in the *Evidence Act* and not according to the procedures set out in s 69ZT(1) and (2) of the *Family Law Act 1975* (Cth) ('the FLA').

Reasoning/Decision: First, McClelland J held that both the voice recordings and the transcripts were admitted in evidence under s 7(3) of the *Surveillance Devices Act 2007* (NSW) (the recordings were reasonably necessary to protect the applicant's lawful interests) and, in the alternative, under s 138 of the *Evidence Act* (the desirability of admitting the evidence outweighed the undesirability of admitting evidence that had been obtained improperly).

McClelland J noted the 'floodgates' caution from senior counsel for the father i.e. that there was a danger of parties to a marital relationship experiencing difficulties surreptitiously recording their partner. However, in this regard, His Honour stated that his decision was very much one based on the facts of the case, including the allegations that the father had maintained a charming public face but had engaged in conduct within the family home that was alleged to have constituted family violence in terms of the provisions of s 4AB of the

FLA. His Honour also had regard to the potential difficulty of obtaining evidence of family violence when it occurs behind closed doors without any witnesses present other than the perpetrator and victim. Further, His Honour noted that the recordings and transcript would be directly relevant to the issue of credibility as to whether family violence occurred in the proceedings (see [6]-[14]).

Notwithstanding the findings above, senior counsel for the father submitted that the Court ought to exclude the voice recordings (permitting the inclusion of the typed transcript) because the danger of the evidence being unfairly prejudicial to the father outweighed its probative value (s 135 *Evidence Act*). This was because the mother had knowledge and control of the recording and the circumstances in which the conversation occurred and was recorded. McClellan J dismissed this argument and held the voice recordings were admissible. This could be a matter for cross-examination by the father: *Huffman & Gorman (No. 2)*. Further, His Honour noted submissions from counsel for the applicant and counsel for the Independent Children's Lawyer that an important aspect of the evidence contained in the tapes was not simply what was said but how it was said. This was relevant to whether the father's behaviour could be modelled or mimicked by the children and whether the parenting abilities of the primary carer had been compromised as a result of the content and tone of the communication (s 69ZN of the FLA) (see [15]-[23]).

Second, McClelland J held that the rules of evidence were to be applied in respect to the issues of the events on 10 September 2013 (these events were the subject of criminal proceedings) and to the issue as to whether the father made threats to the children or to the mother in respect to the children (s 69ZT(3)). For the remainder of the issues, the rules of evidence would not apply (s 69ZT(1) and (2)) and His Honour would therefore have the discretion to consider the probative value of such evidence. His Honour stated, *'evidence in relation to the question of family violence will have to be established clearly, and matters of opinion put in appropriate context and given appropriate weight, depending upon who was expressing the opinion and on what basis, and the establishment of the necessary background facts'* (see [24]-[34]).

***Sawyer & Sawyer* [2015] FamCA 982 (10 November 2015) – Family Court of Australia**

'Application to discharge the icl' – 'Independent children's lawyer' – 'Legal practitioners' – 'Negligence or bias'

Proceedings: Numerous applications including an application to discharge the ICL.

Facts: The mother and the father separated in 2009.There were three children of their relationship. In 2012, a final parenting order was made with the consent of the parties and the Independent Children's Lawyer (ICL).

There was continued conflict between the parents. Numerous applications were considered by the court in this case in particular, an application brought by the father to discharge the ICL.

Issues: Whether the ICL had been negligent and demonstrated bias towards the mother?

Reasoning/Decision: The application was dismissed. Forest J referred to his previous discussion (in *Dean & Susskind* [2012] FamCA 897 at [19]-[28]) of the principles applicable to such an application:

'…

The role is to be discharged independently and professionally, but it is not inconsistent with that duty for an ICL to make submissions to the Court that particular findings of fact, supported by the evidence, be made or that particular evidence be preferred over other evidence, or that a particular course of action be taken by the Court. It is also beyond doubt that an ICL's duty to advance what he or she independently considers is in the best interests of the children in the case, does not require the ICL to slavishly follow what the children might want or what either one or both of the parents consider is in the best interests of the children.[20]

I consider it to be accepted principle that a court should be slow to remove or discharge an ICL simply where one party complains, in an unsubstantiated way, about the ICL because they do not like or accept the position being taken by the ICL overall or in respect of any particular aspect of the conduct of the case by the ICL. [21]

…

It will, in my opinion, be a matter of considering the evidence presented on each application for the removal of an ICL to determine if it demonstrates sufficient lack of objectivity and professionalism on the part of the ICL such as to justify his or her discharge. The mere appearance of partiality to a particular party's position will not necessarily suffice to warrant the ICL's removal. [26]

Parents, particularly in high conflict parenting litigation, must understand that as part of his or her role, the ICL may legitimately and responsibly say things that are challenging and confronting to the parent in respect of his or her views about parenting and the best interests of his or her children in the particular circumstances of the case, but that does not necessarily mean that the ICL is not acting in accordance with his or her duty in the case'. [27]

The father submitted a number of facts as evidence of bias. First, the ICL sought the appointment of a new, female report writer (Ms C). The father argued that the ICL failed to give him an opportunity to argue against

Ms C's appointment and, by retaining Ms C, evidenced 'significant gender bias' by removing 'the only male person within our entire court process'. The fact that the ICL disagreed with the father on the issue of appointing a new family report writer, as she was entitled to do, did not prove that the ICL failed to adequately consider the father's argument. Further, the selection of a report writer alone, who happened to be female, did not demonstrate or prove gender bias (see [58]-[63]).

Second, the father argued that the ICL demonstrated negligence or bias against him because she would not give him a copy of her instructions to the report writer. Forrest J noted that there is nothing in the Federal Circuit Court Rules or the Family Court Rules that obliges an ICL to provide copies of her instructions to an expert retained by her to each of the parents. Further, the father did not actually request the ICL to provide him with a copy of her instructions; he instead asked whether he would receive a copy of the instructions to which the ICL replied 'you don't see the letter of instruction'. In these circumstances, the ICL had not demonstrated negligence or bias that warranted her disqualification (see [65]-[70]).

Third, on the day of the interviews for the report, the father argued that the ICL demonstrated bias in directing the waiting arrangements in her office for the parents and children. Forrest J held that, at the interim stage, where the evidence invited a number of possible findings that could not be made without cross-examination of deponents, he was not in a position to say that the ICL had acted in a way that warranted her immediate discharge (see [71]-[78]).

Finally, the father asserted that the ICL was incompetent as well as negligent and biased against him. Forrest J was not persuaded by the father's evidence and held that (see [79]-[81]):

'It is most certainly not the case that where a parent might be able to point to a mistake made by an ICL that the Court will necessarily accede to an application by that parent to discharge that ICL. The authorities I have discussed clearly disclose that significantly more than that is required'.

***Theophane & Hunt* [2014] FamCA 1038 (24 November 2014) – Family Court of Australia**

'Family reports' – 'Impact of loss of relationship with parent' – 'Independent children's lawyer' – 'No contact orders' – 'Parenting orders and impact on children' – 'People with mental illness' – 'Protection of the parent' – 'Protection orders' – 'Rape' – 'Self-represented litigants' – 'Sexual and reproductive abuse' – 'Statutory framework' – 'Systems abuse' – 'Vexatious proceedings'

Proceedings: Application for final parenting orders.

Facts: The parties had one child together. During the relationship, the mother alleged that the father often forced her to have non-consensual sex with him. The parties separated and the mother obtained a DVO against the father. The mother initiated proceedings seeking parenting orders and over the next four years a number of parenting orders were made and amended. However, after an incident at handover, the wife formed the belief the husband would abduct or remove the child from her care, and she attacked the father whilst in a dissociative state. She was convicted of unlawful wounding and sentenced to 18 months imprisonment, and immediately released on probation.

The applicant father sought orders for sole parent responsibility for the child, who would live with him and spend supervised weekend and school holiday time with the mother. He argued that the mother presented an unacceptable risk of sexual, physical and emotional harm to the child (the mother suffered sexual abuse as a child). At the time of these proceedings, the father was committed to stand trial on six charges of rape of the mother and one charge of grievous bodily harm against the mother.

The mother sought orders, supported by the Independent Children's Lawyer, that she have sole parental responsibility for the child, who would live with her and spend no time, nor have any contact or communication with the father. She later amended her orders and sought to include provision for a card or letter for her birthday and for Christmas. The mother sought no contact as she believed any continued interaction between her and the father in relation to the child, was likely to adversely affect her capacity to parent the child.

Issue/s: What parenting order was in the best interests of the child?

Reasoning/Decision: Orders were made providing for the mother to have sole parental responsibility for the child and sole custody of the child, and for the father's access and communication with the child to be limited to postal correspondence twice a year until the child turned eighteen. His Honour also made a vexatious litigant order against the father, restraining him from bringing further proceedings without leave of the court.

In relation to making a no contact order, his Honour stated that it is a serious matter that a child neither spend time with nor communicate with a parent. Accordingly, such orders ought to be restricted to cases where the outcome is plainly mandated in the best interests of the child, and no other regime of orders is appropriate or workable. Three scenarios were considered in which 'no contact' orders had been made in the past. First, these orders are commonly employed where the Court is satisfied that a parent poses an unacceptable risk of harm to a child. Second, 'no contact' orders have been made where the other parent entertained a genuine,

but not necessarily reasonable, belief that such a risk of harm existed (on the basis of protecting the child from the consequences of that parent's belief): *Re Andrew*. Finally, this approach was taken one step further in *Sedgley & Sedgley* where the Court held that while the welfare of the child may require some continuity of contact with the non-custodial parent, the need for peace and tranquillity in the custodial parent's household may be a more compelling need for the child. However, a Court would only cut the relationship between the child and parent on such a ground with considerable hesitation (see [55]-[58]).

The best interest considerations in s 60CC let the court to determine the child live with her mother. His Honour accepted that by time the child turned 12 she would likely come into conflict with the father and was at real risk of harm from his coercive, controlling, dominating and self-serving personality traits (see [177]-[178]). Further, the father was to have no contact with the child except for a card/letter at Christmas and on the child's birthday. It was found that the father deliberately calculated his interaction with the mother with a view to destabilising her mental health conditions, and even the smallest opportunity for debate or conflict with the mother would be seized upon by the father. If the mother was required to continue to interact with the father in any form of co-parenting, there was a substantial risk that she will either attempt to kill herself, attempt to kill the father, or both.

It was ultimately decided that the prospect and magnitude of the risk of harm to the child if her mother was required to maintain contact with the father far outweighed any benefit the child would obtain by a continuation of any time or communication with her father. It was held that the best interests of the child lay with making a no contact order.

In relation to family violence, his Honour was satisfied that on occasion the father had engaged in non-consensual sexual intercourse with the mother. However, it was both unnecessary and undesirable to make a finding regarding the father's conduct in relation to the criminal offence of rape (see [168]-[169]). However, the father's controlling and domineering behaviour was considered and had bearing on the court's decision for no contact (see [170]-[171]).

His Honour considered each of the many proceedings instituted by and conducted by the father and was "satisfied that on numerous occasions, either the proceedings have been instituted vexatiously or they have been conducted vexatiously." He was "therefore satisfied that the father has frequently instituted or conducted vexatious proceedings."[243]

At [246] his Honour stated:

> I am satisfied that many of the applications that the father has brought or prosecuted in relation to the mother have been vexatious, although I accept that some, on occasion, have had merit. Some have been vexatious in the sense that they were intended to harass and intimidate the mother into either a further destabilisation and perhaps dissociation, or to attempt to otherwise coerce her to his will. Some were vexatious as being without reasonable foundation. Some may have been both.

And at [248]:

> I accept that it is a grave matter to deny a parent the opportunity to litigate in relation to their child. However upon analysis, my order does not prevent the father doing so *per se*: if there is a legitimate basis for further litigation, sufficient to warrant a grant of leave, then he may do so. However he cannot be trusted with the unfettered right to issue proceedings against the mother in relation to the child, because he will abuse it. For that reason, any application for leave should be, in the first instance made *ex parte*: s 102QE(4).

Note: this case was confirmed on appeal, see *Theophane & Hunt and Anor* [2016] FamCAFC 87.

***Cannon & Acres* [2014] FamCA 104 (6 March 2014) – Family Court of Australia**

'Family violence' – 'Parenting orders' – 'Systems abuse' – 'Vexatious litigant' – 'Views of the child'

Proceedings: Parenting orders and vexatious proceedings order.

Facts: Over many years, the mother and the 12 year old child experienced harassment, physical violence and stalking behaviour by the father. The father had little or no insight into the impact of his behaviour on the child. This was the third final parenting hearing. The current proceedings were brought about by the father in circumstances where the application was doomed to fail. Seeing the profound impact of these fresh proceedings on her mother, the child resolved that she no longer wanted to see or communicate with her father. Benjamin J was satisfied that the views were her own.

Issue/s:

- What parenting orders were in the best interests of the child?
- Whether in the circumstances of this proceeding a vexatious proceedings order should be made and if so the nature and extent of that order.

Reasoning/Decision: In making parenting orders, Benjamin J noted that the presumption of equal shared

parental responsibility in s 61DA of the Act did not apply because there were reasonable grounds to believe here that the father had perpetrated family violence. This family violence included the father's entrenched pattern of behaviour (referred to by a psychologist), the father's stalking behaviour, the verbal abuse, harassment and the assaults by him on the child. Further, shared parental responsibility could not effectively operate given the views of the child, the approach adopted by the father and the impact upon the mother. Accordingly, Benjamin J made an order that the mother have sole parental responsibility for the child (see [379]-[384]). Benjamin J also made an order that the child spend no time with the father and have no communication with the father (see [387]-[404]).

Benjamin J made a vexatious proceedings order prohibiting the father from instituting further proceedings without leave. This order was made under s 102QB(2) of the *Family Law Act 1975* (Cth). At [420], His Honour noted that the fundamental differences between the old section (s118) and s 102QB were: (1) the test was no longer a court having frivolous or vexatious proceedings before it but rather whether or not there was a history of a person having frequently instituted or conducted vexatious proceedings; and (2) Vexatious proceedings were now defined by statute in s 102Q(1).

To make an order under s 102QB(2), Benjamin J noted at [438] that a two part threshold test needs to be met, namely:

- That there have been vexatious proceedings instituted or conducted in Australian courts or tribunals; and
- That the person, in this case the father, has frequently instituted or conducted such proceedings.

Applying this test, Benjamin J proceeded in three parts. First, His Honour determined a number of proceedings initiated by the father constituted vexatious proceedings on the facts (see [441]-[481]). Second, His Honour held that the proceedings amounted to the father 'frequently' instituting and conducting vexatious proceedings. In making this determination, Benjamin J noted that the test of 'frequently' was used as opposed 'habitually and persistently'. The term 'frequently' is a relative term and is to be considered in the context of the facts of an individual case and, in this case, in the context of the litigation between these parties. This test was said to be satisfied on the facts (see [482]-[494]).

Finally, with the threshold being met, Benjamin J considered whether to exercise the discretion set out in s 102QB(2) of the Act and make a vexatious proceedings order. His Honour noted that a vexatious proceedings order must be considered in the context where there is a need to balance the serious step of restricting a person from commencing proceedings against the need to protect the mother and the child from the constant

impact of litigation. In the circumstances, a vexatious proceeding was made (see [495]-[540]).

***Modlin & Anstead and Anor* [2013] FamCA 955 (6 December 2013) – Family Court of Australia**

'Family reports' – 'No contact orders' – 'Parental capacity' – 'Parenting orders and impact on children' – 'People with mental illness' – 'Protection of the parent' – 'Protection orders' – 'Self-represented litigants' – 'Single expert report'

Proceedings: Application for parenting orders.

Facts: The mother and the father, who both had compromised mental health: the mother diagnosed as Bipolar and the father also being previously diagnosed as Bipolar, had two children together. Both children had intellectual and developmental disabilities. The parties separated and reconciled several times before final separation, with the mother obtaining Apprehended Domestic Violence Orders (ADVO) on a number of occasions. The father breached one of these orders in February 2010 by breaking into the mother's home and assaulting the mother. He was charged and spent time in a psychiatric facility. The mother formed a relationship with another man ('the stepfather'). In 2011, one of the children went temporarily missing in a National Park under the care of the father, the father deliberately sent photographs of his penis to the mother, and one of the children told the mother that the father swore at her. Contact ceased between the father and the children and the mother received victim's compensation in relation to domestic violence by the father. Proceedings were commenced in relation to the parenting of the children.

Issue/s: It was agreed that the mother and the stepfather would have parental responsibility for the children. However, some of the remaining issues were –

- Whether the father should have shared parental responsibility or no responsibility for the children;
- Whether or to what extent the father should spend time or communicate with the children.

Reasoning/Decision: Orders were made giving the mother and stepfather equal shared parental responsibility for the children, giving the father no parental responsibility, making provision for the children to live with the mother and stepfather and to have no contact with the father, restraining the father from approaching the children, their school and residence and the parents from discussing proceedings with or near the children.

The Court found that the s 61DA presumption of equal shared parental responsibility did not apply as the father engaged in family violence. Further, in relation to the children's best interests, including consideration of the evidence about family violence, the Court determined that in any case the presumption would be

rebutted on the evidence. It was held that any further contact between the father and the mother would destabilise the mother and prevent her from being able to adequately care for the children (see [197]-[205]). Additionally, on this basis, it was ordered that the father spend no time with either child (see [206]-[210]).

Loughnan J also made a number of orders restraining the father from communicating with the children or the mother or stepfather. These orders were necessary for the physical and mental protection of the mother, especially in light of the evidence of family violence. However, Loughnan J ordered that, if required, the father communicate with the step-father through a post office box and be notified if the family relocated from the region (see [217]-[232]).

***Schieffer & Schieffer* [2013] FamCA 168 (20 March 2013) – Family Court of Australia**

'Best interests of the child' – 'Children' – 'Inconsistency of parenting orders with existing family violence order made by state court' – 'Independent children's lawyer' – 'Intersection of legal systems' – 'Living arrangements' – 'Parenting orders and impact on children' – 'Presumption of equal shared parental responsibility' – 'Protection orders'

Proceedings: Application for parenting orders.

Facts: The parties separated and made consensual arrangements for the care of their child. In June 2012, the father detained the child citing a belief that the child had been sexually abused by the mother's partner. Subsequently the mother, having happened upon the child and the father's partner, attempted to detain the child herself. This resulted in an Apprehended Violence Order (AVO) being made against the mother in favour of the father's partner. It applied to the child and the father as well as they lived with Ms E.

The mother refuted the allegation of sexual abuse but her relationship with her partner had ended and the mother acceded to an order precluding any future contact between the child and her former partner. The father then contended that the mother's deteriorated emotional state constituted a further risk of harm to the child and militated against the child's return to live with the mother.

Issue/s: What orders regarding the residence of the child and shared parental responsibility were in the best interests of the child?

Reasoning/Decision: The Court was persuaded to make an order for the parties to have equal shared parental responsibility for the child, consistent with their mutual wish, the Independent Children's Lawyer's suggestion and the Family Consultant's recommendation (see [95]-[100]). His Honour ordered that it was in

the child's best interests to live predominately with the mother. Although both parents were equally capable of meeting the child's intellectual needs, he considered that the mother was better able to meet the child's physical and emotional needs (see [106]). The child was to spend substantial and significant time with the father (see [105], [109]-[116]).

The parenting orders were inconsistent with the existing family violence order, as the AVO prohibited the mother from approaching and contacting the child or the father. Although the order made an exception for contact that occurred pursuant to the Act, it was only for the restricted purpose of 'counselling, conciliation, or mediation'. It was noted that where the terms of the parenting and family violence order were inconsistent, the parenting order should take precedence to facilitate communication between the parents regarding the child and to ensure the child was exchanged for periods of contact (see [91]-[94]).

***Damiani & Damiani* [2012] FamCA 535 (9 July 2012) – Family Court of Australia**

'Court to consider family violence (60cc)' – 'Family violence in property proceedings' – 'Kennon adjustment' – 'People with mental illness' – 'Property proceedings'

Proceedings: Application for property orders.

Facts: The parties married and lived together for 19 months. They had one child. The husband contributed the bulk of the capital to the marriage and was on a far superior income. The wife had cared for the child since separation, nearly eight years prior. During the marriage, the husband perpetrated family violence against the wife on five occasions, over a period of 15 months. This caused the wife to suffer from post-traumatic stress disorder. The wife claimed the family violence made her contributions in the role of homemaker and parent significantly more arduous. The husband had financially supported the wife and the child during the period since separation.

Issue/s: Whether the court should make a Kennon style adjustment in the property settlement proceeding?

Reasoning/Decision: The Court referred to the Full Court in *Kennon* where the principles regarding family violence making contributions more arduous lie. The Full Court's further refinement of the *Kennon* principles in *Spagnardi & Spagnardi* was also noted (see [138]-[144].

The Court discussed the approach regarding family violence in property proceedings as broken down into three steps: (1) Make findings of fact about one party's conduct; (2) (If applicable) make findings about the

physical or psychological effect of the conduct on the other party; and (3) Make findings of fact about the effect of the conduct of one party upon contributions made by the other party. It was also noted that it could not be assumed in a particular case that an effect on a party's condition automatically means there is an effect upon the party's contributions. At trial, the wife had to establish to the judge's satisfaction a connection between any proven family violence in the case and the contributions she made (see [145]).

On the facts, Watts J first concluded that the wife's contributions in the role of homemaker and parent during the period over which the violence took place were made significantly more arduous by the violence of the husband. Second, while His Honour also held that the wife's role as parent post-separation was made significantly more arduous by the family violence during co-habitation, His Honour observed that it was more difficult to make such an assessment. The wife did experience apprehension and heightened emotion around dealing with the husband's time with the child after the separation. However, the effect of violence on contributions was not constant over the previous eight years, with the wife's post-traumatic stress disorder having significantly dissipated (see [174]-[179]). Accordingly, it was appropriate to increase the wife's assessed contributions by 25 per cent for the duration of the relationship and by 5 per cent post separation to take account of the effect of the husband's conduct on the mother (see [179].

Russell & Russell **[2012] FamCA 99 (7 March 2012) – Family Court of Australia**

'Alleged breach of indian dowry law' – 'Dowry' – 'Family law' – 'Final parenting and child orders' – 'History of domestic and family violence' – 'Overseas relocation to india' – 'Parenting orders' – 'People from culturally and linguistically diverse backgrounds' – 'Rebuttal of presumption of equal shared parental responsibility' – 'Relocation' – 'Sole parental responsibility order'

Matter: Application for final parenting and child orders.

Proceedings: Final parenting and child orders hearing, including application for overseas relocation.

Facts: The mother had limited English skills, poor work prospects and no family support in Australia and there was a high level of conflict between the parties exacerbated by cultural issues. Both parties' extended families remained in India. The mother alleged a history of family violence perpetrated by the father against the mother. The father stated that it was his intention to remain in Australia regardless of the final outcome. There were allegations that India's dowry laws had been breached by the demand for and payment of dowry by the wife's family to the husband's family.

Issue: Was the presumption of shared parenting responsibility rebutted? Ought the mother be allowed to relocate to India with the child?

Judgment: Presumption of shared parenting responsibility rebutted, relocation allowed.

Young J found the presumption of shared parental responsibility was rebutted due to the conflict between the parties, their lack of communication and cultural issues.

The mother was permitted to relocate to India where she had family support available.

***Kreet v Sampir* [2011] FamCA 22 (18 January 2011); (2011) 252 FLR 234; (2011) 44 Fam LR 405 – Family Court of Australia**

'Forced marriage' – 'Marriage occurring in a country other than australia' – 'Nullity application'

Proceedings: Nullity application.

Facts: Ms Kreet (the wife), an Australian born woman, married Mr Sampir (the husband) on June 2009 in India. She travelled to India with her parents believing she was going to marry her Australian boyfriend, Mr U. Upon arrival, her parents confiscated her passport and was introduced to Mr Sampir. Her father told her that he would have Mr U's sisters and mother kidnapped and raped if she refused to marry Mr Sampir. Under duress, the wife married Mr Sampir and submitted his Australian visa application to the authorities. She returned to Australia, resumed her relationship with Mr U and withdraw her sponsorship of the respondent's visa application. She obtained an indefinite Intervention Order against her father.

Issue/s: Whether the marriage was void?

Reasoning/Decision: Section 23B(1)(d) of the *Marriage Act 1961* (Cth) states that a marriage is void if 'the consent of either parties is not real consent because: (i) it was obtained by duress or fraud; (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony'.

While the legislation does not define duress in the context of a marriage, Cronin J found that 'there was no reason to give it any other meaning than that which is normally known to the law. It must be oppression or coercion to such a degree that consent vanishes: *In the Marriage of S* (1980) FLC 90-820' (see [39]).

Cronin J was satisfied that 'the wife's physical state at the time of the ceremony was such that she was

physically and mentally overborne. Her consent was not real because it was obtained by duress' (see [43]).

***Harridge & Harridge* [2010] FamCA 445 (4 June 2010) – Family Court of Australia**

'Children' – 'Risk assessment' – 'Unacceptable risk'

Proceedings: Parenting orders.

Facts: The father of the two children subject to the parenting proceedings was convicted of three offences involving child pornography.

Issue/s: What parenting orders were in the best interests of the child?

Reasoning/Decision: Although this case did not relate to family violence, it contains observations relevant to risk assessment. The Court held that an allegation of potential risk of harm ought not to divert the court from the central task of assessing the best interests of the children. At [53] Murphy J quoted from an article by psychiatrist and barrister, Mahendra, who stated that risk assessment in any situation involves, in essence, asking the following questions:

- What harmful outcome is potentially present in this situation?
- What is the probability of this outcome coming about?
- What risks are probable in this situation in the short, medium and long term?
- What are the factors that could increase or decrease the risk that is probable?
- What measures are available whose deployment could mitigate the risks that are probable?

***Maluka & Maluka* [2009] FamCA 647 (24 July 2009) – Family Court of Australia**

'Children' – 'Coercive control' – 'Controlling behaviour' – 'Family law' – 'History of domestic and family violence' – 'Stalking' – 'Systems abuse' – 'Threats to kill' – 'Unacceptable risk'

Matter: Application that mother have sole parental responsibility, the children live with the mother, the mother be permitted to change the children's names and relocate without notice to the father, that the father be restrained from bringing applications in relation to the children for a period of time.

Facts: The mother alleged serious history of domestic and family violence throughout the history of the

relationship, including “serious assaults of the mother, stalking, vandalism to property of the mother and her present partner, intimidation, threats of violence (including a history of death threats), verbal abuse, controlling behaviour, isolation and dominance”[4] such that the mother and children live in terror of the father and have done for years.

Held: Mother have sole parental responsibility for the children and they reside with the mother, the mother be permitted to everything necessary to change the children’s surnames, the mother be permitted to relocate the residence of the children to any place in Australia without notice to or permission of the father, the father be subject to a restraining order.

[396] “In many ways the facts as between the parties that I have determined in this case fit most, if not all, of the indicators of coercive controlling violence. The father has used coercion, control, violence, intimidation and threats throughout the relationship, including after separation. He seeks to intimidate and control the mother with the attendant violence, abuse, isolation and aggression. From time to time he focuses this on the children. He dominates and controls the children, particularly X, but his behaviour with regard to Y and her reaction to his verbal abuse of her in June 2008 is indicative of his continuing coercive controlling violence.

[397] The father exercised economic power to control and manipulate the mother and effectively the children. He endeavoured to isolate mother and in effect continues to do so. In that process he denies or minimises his involvement and culpability.

[399] The effect of that long term violence, control and manipulation imposed by the father on the mother has from time to time undermined the mother’s parental authority and undermined her parenting role…”

Note this case was subject to further litigation, although the judge’s comments about the type of family violence experienced were not challenged. See for example Maluka & Maluka [2011] FamCAFC 72; (31 March 2011).

***HZ & State Central Authority* [2006] FamCA 466 (7 June 2006) – Family Court of Australia**

‘Child abduction’ – ‘Hague convention’ – ‘History of domestic and family violence’ – ‘Parenting proceedings’ – ‘Separation’

Matter: The mother’s appeal against orders made by Bennett J on 11 April 2006 requiring the return to Greece of three children, C, D and E pursuant to the provisions of the Family Law (Child Abduction

Convention) Regulations 1986.

Facts: The mother was an Australian-born woman of Greek parentage and the father was Greek. They met and married in Greece and throughout the marriage the mother and three children resided with the father's parents in Greece. With the father's consent the mother brought the children to Australia for what she said was a holiday and conceded that the habitual residence of the children was Greece. There was evidence of threatening text messages from the husband to the wife and the eldest child's evidence of the father's violence and threatening behaviour towards the mother and his own mother in the presence of the children supported the mother's allegations.

Grounds: The trial judge erred in failing to find that Article 13(b) (grave risk of physical or psychological harm or place them in an intolerable situation) and Article 13(c) (the eldest child's views should be taken into account) should prevent the return of the children.

Held: Appeal dismissed. The court was unable to identify error in the trial judge's decision.

The court acknowledged the limitations of the Hague Convention in cases where domestic and family violence is alleged:

[48] The operation of the Convention which has the effect of potentially sending a mother back into a situation of risk to her own physical wellbeing has been a matter of significant academic criticism …

[75]…As we have already indicted, the return of these children to Greece was anticipated to be in their mother's company. She had found accommodation for herself remote from that of the father. She led no evidence to suggest that the Greek authorities would be unable to provide her and the children with appropriate protection pending her utilising lawful means to relocate the children from Greece. The finding by the trial Judge that the mother had not persuaded her that the return of the children to Greece would raise a grave risk of harm to the children or otherwise place them in an intolerable situation was a finding clearly open to the trial Judge.

[78]…Given that these were children who were born in Greece and had spent effectively the entirety of their life in Greece until the mother unilaterally determined to retain them in Australia, Greece was clearly the appropriate forum for issues relating to the welfare of these children to be determined. In those circumstances it was appropriate for her Honour to place significant weight on the first of the objects referred to in Article 1 of the Convention namely the prompt return of the children who had been wrongfully retained in Australia.

***T and N* (2003) FLC 93-172; [2003] FamCA 1129 (4 November 2003) – Family Court of Australia**

'Anger management course' – 'Applications' – 'Applications and orders for child residence, contact and parenting orders (in fam law proc)' – 'Children' – 'Consent orders' – 'Contact proceedings' – 'Family violence' – 'Inadequate undertakings' – 'Independent children's lawyer' – 'Judge refusal to accept consent orders for unsupervised contact' – 'Legal representation' – 'Parenting proceeding' – 'People affected by substance abuse' – 'People with children' – 'Safety and protection of victim and witnesses' – 'Women'

Proceedings: Orders sought by consent for supervised and unsupervised time with the father

Facts: The parties had two children. There was a history of violent and abusive conduct by the father against the mother and one of the children (including that he bit the child as a baby). This resulted in a number of periods of separation and reconciliation, with a number of Apprehended Violence Orders being brought against and breached by the father (see [17]-[24], [27]-[28]). The father also regularly smoked cannabis (see [25]-[26]). In April 2001, the mother left the family residence without notice, taking the children with her. At the hearing, the parties attempted settlement. The parties and the Independent Children's Lawyer proposed consent orders for children to progress from supervised to unsupervised to block periods of time with the father, who would give undertakings regarding his conduct, discipline of the children, substance use and participation in an anger management course.

Issue/s: What orders were appropriate in the best interests of the children?

Decision and Reasoning: Moore J declined to make the consent orders as proposed as the untested evidence raised concerns for the judge that the orders may not be in the children's best interests. Instead, the judge made orders by consent for supervised contact only. The allegations against the father indicated him to be a violent and abusive person who represented a high risk of harm to the well-being of the mother and a high risk of harm to his children.

While Her Honour acknowledged that the parents' consent to arrangements about their children is a powerful, and in most cases a deciding, factor, consent does not displace the obligation of the Court to make orders that are in the best interests of children (see [39]). Moore J also expressed her concern that the Independent Children's Lawyer would provide support for the proposed consent orders in the face of behaviour that had the potential to place the children in serious jeopardy and in light of orders that would give no protection whatsoever to the children (see [40]).

***M & M* [1998] FamCA 1742 (12 November 1998) – Family Court of Australia**

'Children' – 'Contact' – 'Exposing children' – 'Family violence' – 'Impact of violence on children' – 'Inability to acknowledge inappropriateness of behaviour' – 'Relevance of family violence in cases concerning the welfare of children' – 'Supervised by court'

Proceedings: Contact orders.

Facts: The parents had two children together (B and E) and the mother had another son from a previous relationship (D). The children had witnessed violence by the father against their mother, siblings and extended family. The father had several convictions for assault against the mother and one against D, and had been subject to AVOs. After separation, B and E lived with the father, with interim orders made for the mother to have contact with the children. At trial, the parties agreed that B and E should live with the mother but a number of issues were left to be determined. At hearing, a counsellor gave evidence that both children displayed concerning behaviours consistent with early onset and repetitive physical violence.

Issue/s: One of the issues was what contact should the children have with the father?

Reasoning/Decision: On the evidence, the Court held that it was in the children's best interest that all but in the very short term they should have no contact with the father. Orders were made to reduce contact over the space of 12 months to minimise the distress that could be caused to the children by immediate complete separation (see [96]-[100]). The Court held that the father's abusive behaviour presented a 'multi-faceted danger for the children' including danger of injury as well as "fear, insecurity & vigilance". It was held there was a risk of the children learning behaviour from the father which would affect their future interactions e.g. the daughter accepting abuse as part of life and the son believing violence is acceptable. See [94]-[95].

***In the Marriage of JG and BG* (1994) 122 FLR 209; (1994) FLC 92-515; (1994) 18 Fam LR 255 (30 September 1994) – Family Court of Australia**

'Child welfare' – 'Children' – 'Custody proceedings' – 'Impact of domestic violence on children' – 'Impact of family violence on children' – 'Parenting' – 'Parenting proceedings' – 'Parties represented by counsel' – 'People with children' – 'Relevance of family violence in cases concerning the welfare of children'

Facts: The case concerned the custody of two children aged four and two. The wife alleged that the husband

had been physically and verbally violent towards her on a number of occasions.

Issue/s: What is the relevance of family violence in custody, guardianship and access matters?

Decision and Reasoning: The court accepted that the relevance of family violence will vary according to the nature of the proceedings.

Chisholm J went on to consider the relevance of family violence in proceedings relating to children. His Honour considered at [257] that although it is 'not the objective of the law in custody and similar proceedings to punish wrongdoers or to provide compensation or redress for victims', family violence is by no means irrelevant. His Honour held that '[family violence] is to be taken into account if it is relevant to the determination of the child's welfare, which is the paramount consideration'. The standard of proof is the civil standard on the balance of probabilities. However, the conduct of a parent is relevant in custody matters only to the extent that it relates to the welfare of the children.

Where violence is directed at the children themselves, or occurs in the presence of the children, it is obviously and directly relevant to their welfare (see [260]). However, other forms of violence could also be relevant to the welfare of the children such as violence affecting the custodial parent, threats, etc. The Court must assess the nature and extent of the harm in light of the evidence and findings before them. See [261].

The Court also stated that it may be possible for the court to decline to make findings in relation to family violence, where it could determine the case without reference to them.

In the Matter Of: Re K Appeal **[1994] FamCA 21; (1994) FLC 92-461 (10 March 1994) – Family Court of Australia**

'Alleged murder of mother by father' – 'Custody' – 'Family law' – 'Murder' – 'Over-emphasis of conduct of father' – 'People from culturally and linguistically diverse backgrounds' – 'Prejudice' – 'Separate representation' – 'Welfare of child'

Matter: Father, grandparents and paternal aunt's appeal against orders granting sole guardianship and custody of the child to the maternal aunt and permission for her to remove the child from Australia to the United States where she resided.

Facts: The mother died and the father was charged with her murder and was awaiting trial at the time of the hearing before the trial Judge. Those proceedings concerned applications by the maternal aunt and the

paternal grandparents and aunt for custody of the only child of the marriage. The applicant father indicated that he supported the application of the grandparents and paternal aunt that they be granted custody of the child. The trial Judge made a finding that on the balance of probabilities the husband shot the wife.

Grounds:

Husband:

- As he was unrepresented and awaiting trial for murder the trial judge should have made interim rather than final orders, exercised his discretion to stay or adjourn the proceedings, or at least adjouned final determination until the conclusion of the criminal proceedings.
- The trial judge failed to give reasons or adequate reasons for his decision to make final orders.
- It was neither necessary or desirable for his Honour to have made the finding that the husband shot the wife.

Grandparents and paternal aunt:

- The trial judge failed to give adequate weight to the evidence of Mrs Holmes in support of the appellants' case, particularly in relation to methods of dealing with grief in eastern European families.
- The trial judge over-emphasized the conduct or involvement of the husband in the wife's death and this influenced him against the proposals of the appellants.

Intervention by Commonwealth Attorney-General:

The case warranted the appointment of a separate representative pursuant to s 65 of the Family Law Act because (a) permanent removal of the child from the jurisdiction was contemplated which would likely lead to cessation of any contact with the father; and (b) the relationships between and circumstances involving the parties and interveners.

Decision and reasoning: Appeal dismissed.

In considering the Attorney-General's intervention, the Full Court (Nicholson CJ, Fogarty and Baker JJ) suggested guidelines for appointment of separate representatives for children involved in proceedings, one of which was that separate representatives should normally be appointed where there is an apparently intractable conflict between the parents:

[95] In this regard we lay stress upon the words "intractable conflict". There is a dispute of course in all

contested custody cases and there is usually a degree of conflict, but we have in mind that category of cases where there is a high level of long standing conflict between the parents. In such cases the child is very much a pawn in the dispute and is often used as such by either or both parents. In these circumstances we think it important that the child have the support and assistance of an independent person and that the Court similarly have the assistance of such a person to present the child's point of view.

[96] If the child is alienated from both parents, the need for such representation is obvious. Where the child is alienated from one of them, this may or may not be for good cause and may have been largely brought about or contributed to by the conduct of the parent from whom the child is not alienated. In most cases it seems to us to be highly desirable for the child to have access to a person independent of the conflict who will have his or her interests at heart and who will be capable of assisting the child and putting both the child's view and submissions as to the child's best interests to the Court: see Law Council of Australia (1989) "Law Council Submission on Role of Separate Representatives" Vol. 4 No. 4 Australian Family Lawyer, 15. In this regard we also see the separate representative as having an investigative role which may be of great assistance to the Court. Further, the separate representative may well, in this and the previous category of cases, perform the role of an "honest broker" as between the child and or the parents.

Murray & Director of Family Services ACT **[1993] FamCA 103 (6 October 1993) – Family Court of Australia**

'Child abduction' – 'Hague convention' – 'History of domestic and family violence' – 'Motorcycle gang' – 'Parenting proceedings' – 'Separation' – 'Weapons'

Matter: Appeal against Hague Convention return order.

Facts: The husband was a member of the New Zealand motorcycle gang known as "the Mongrel Mob". The mother brought her children aged five, four and two to Australia from New Zealand. Her evidence was that she was the victim of several violent attacks which included head butting, punching, kneeing her at the base of the spine. She had received death threats. The acts of violence either took place in the presence of or in close proximity to the children.

She said the husband had an arsenal of weapons which included firearms, knives, chains and meat cleavers and was likely to use the weapons against her. The husband whilst admitting to a 'turbulent' relationship with the wife and some incidents of violence said her claims were exaggerated. The trial Judge had rejected

regulation 16(3)(b) defence commenting that it was not possible to determine the veracity of the allegations and that the evidence relating to them would be available only in New Zealand.

Held: Appeal dismissed.

The Full Court in rejecting the mother's appeal characterised the evidence as:

“almost entirely directed at the prospective threat to the wife of a return to New Zealand and more particularly to a return by her to Dunedin.” [170]

They said:

[171] Whilst there is nothing that requires the wife to return to New Zealand, it is obviously desirable and from the point of view of the children that she does so. However, there is no requirement imposed by this court that she or they must return to Dunedin. It is open for her to return to another part of New Zealand where the danger to her may be less and it is of course open to her to seek orders from the New Zealand courts both for personal protection and interim and final custody immediately upon her arrival in New Zealand. She can also, if she wishes, seek leave from the New Zealand court to take the children to Australia.

[172] As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

[173] It would be presumptuous and offensive in the extreme for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts.

[174] In our view and in accordance with the views expressed by this Court in Gsponer's case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available…

[175] For us to do otherwise would be to act on untested evidence to thwart the principal purposes of the Hague Convention which are to discourage child abduction and where such abduction has occurred to return such children to the country of habitual residence so the courts of that country can determine where or with whom their best interests lie. These children are New Zealand citizens who have lived all their lives in New Zealand and it is for a New Zealand court to determine their future.

***In the marriage of Merriman and Merriman* [1993] FamCA 115; (1994) FLC 92-497; (1993) 116 FLR 87 – Family Court of Australia**

'Allegations of violence and abuse' – 'Interim custody application' – 'Issues of welfare of children and stability' – 'Physical violence and harm'

Proceedings: Interim custody application

Facts: Parties married in 1978 and separated under one roof in March 1993. There are 2 children of the marriage aged 13 and 9 at the hearing. There was corroborated evidence of violence perpetrated by the father on the mother. The husband was convicted of assault upon the wife earlier in the same year of the hearing. He was "ordered not to assault, molest or interfere with" the mother. Regardless of these orders he continued to contact the mother and make threats to her and her family. The husband also verbally abused and belittled the mother in front of the children during the marriage. There were also multiple occasions of physical abuse throughout the marriage. Since separation the husband had given the 13 year old daughter Rohypnol and shared a bed with her. He was advised by the Department of Community Services not to do this. Also post separation, the father took out a life insurance policy for the mother. The mother moved from the matrimonial home to her mother's house in June 1993. The children remained with the father.

Issues: In light of the father's history of domestic violence and threats, what interim arrangements should be made for the care of the children?

Reasoning/Decision: Due to the violence of the father, the Court held that he was a risk to the children both physically and developmentally (he is an "inappropriate role model"). It was held that the children were to remain in the former matrimonial home to "preserve stability for the children and for their safety" and their mother was to have interim care of the children. The father was restrained from coming within 2 miles of the home due to "serious concerns as to the safety of the wife and the children".

Federal Circuit Court of Australia

Khoury and Ganem [2021] FCCA 869 (1 April 2021) – Federal Circuit Court of Australia

'Allegations of serious family violence' – 'Application for no contact with father' – 'Application for sole parental responsibility' – 'Arranged marriage' – 'Child present' – 'Child's fear and anxiety' – 'Children' – 'Coercive control ** financial abuse' – 'Criminal charges' – 'Family law' – 'Independent children's lawyer' – 'Parenting applications' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Protection order' – 'Social isolation' – 'Strangulation' – 'Threats to family' – 'Threats to kill family'

Matter: Parenting applications: father's application for interim orders that he and the child X attend ongoing reunification therapy at his expense and subject to the recommendations of the therapist, he spend supervised time with X; mother's application that she have sole parental responsibility for X, X reside with her and X only spend time with the father in accordance with X's wishes. The Independent Children's Lawyer sought orders in the terms proposed by the mother, and a restraint on the father attending X's school. Earlier final parenting orders made by consent had provided for X to have graduated contact from supervised contact to each Thursday to Sunday. Between 2013 and 2015 the father had sporadic contact with X and each alleged the other was to blame for the lack of contact. Proceedings were recommenced in 2018 and orders made for the parties and child attend therapy with a view to reunification. The reunification therapy was unsuccessful with the therapist reporting the session was terminated early due to the father's inability to focus on the child's feelings or regulated his behaviour in response to the child, pressuring the child who was crying and distressed, despite the therapists attempts to encourage the father to engage in behaviour which was not experienced by the child as threatening.

Among other orders the father sought orders for reunification therapy in circumstances where the mother argued it was not in the child's best interests to see the father because of controlling behaviours, disrespect of women and extreme religious beliefs [98]. The father denies the mother's allegations.[99]

Decision: *Inter alia* X reside with the mother, the mother have sole parental responsibility and the father have contact in accordance with X's wishes, the father be restrained by injunction from attending or being within 500 metres of any school X attends, the mother obtain therapeutic counselling for X to better address her fears and anxieties.

Per Bender J:

[100] As has been set out in this judgment, therapeutic reunification counselling to assist in rebuilding the relationship between X and the Father was not successful and was a distressing and unhappy experience for X.

[101] [expert witnesses] both expressed the view that a further attempt at such therapy could be too distressing for X, especially given her current levels of anxiety and fear and her resistance to spending any time with the Father.

[102] Therefore, the real question for this Court is whether the risk to X of a meaningful relationship with the Father is outweighed by the emotional and psychological risk to X in forcing her to undertake further counselling in the hope that a relationship with the Father might be achieved.

***Boden & Boden* [2018] FCCA 82 (25 January 2018) – Federal Circuit Court of Australia**

'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Parenting orders and impact on children' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility rebutted' – 'Unacceptable risk of harm'

Proceedings: Contested parenting application.

Facts: The father was physically violent and verbally abusive to the mother and children ([79]). There were two Domestic Violence Orders in favour of the mother ([217]). The two eldest daughters suffered from depression and anxiety, cut themselves, and had self-esteem issues ([2]). The youngest son was diagnosed with autism, but the father refused to accept the diagnosis, and refused to make arrangements to reduce the son's emotional distress ([162]).

Issues: Parenting orders to be made.

Decision and Reasoning: Judge Willis identified 'grave concerns' about the father's ability to regulate his emotions and about his parenting skills to independently parent ([248]). The children had 'suffered catastrophically' from their parents' separation and their exposure to the family violence ([2]). Due to the father's admissions to family violence, the presumption of equal shared parental responsibility was rebutted ([238]).

Judge Willis remarked at [247]:

> I have the impression that the mother has significant insight into her own behaviour and that of all of the children. She is acutely aware and has the skills to deal with Z and Y cutting themselves, of them suffering depression and anxiety and having self-esteem issues. Some of these issues will, no doubt, be directly related to their exposure to family violence. Day in day out, experts in this Court talk about the effect of family violence in children and their inability to sustain relationships, become depressed and blame themselves for breakdowns. All of these things have happened for Y and Z.

Judge Willis ordered that the father undertake an anger management course, and that the mother undertake a Domestic Violence course in relation to the cycle of violence ([232]-[233]). The judge ordered that the son have limited contact with the father (see Orders).

***Atkinson & Atkinson (No 3)* [2016] FCCA 2284 (2 September 2016) – Federal Circuit Court of Australia**

'Coercive control' – 'History of domestic and family violence' – 'Parental responsibility' – 'Systems abuse'

Matter: Mother's application for residence, sole parental responsibility and contact for child X; Father's application for residence, sole parental responsibility and contact for child X.

Issues: Best interests of child, whether the Father has been violent towards the Mother; and whether the Mother suffered from any mental illness or disorder which "significantly negatively affects her parenting".

Facts: Each party's evidence was that the other was not an appropriate parent. The mother alleged the Father perpetrated family violence against her and the Father alleged the mother had a mental illness or disorder which caused her to manufacture malicious allegations against the Father. The father had engaged in a pattern of coercive and controlling behaviour by repeated texts and telephone calls and at least one late night attendance at her home. The Court expressed concerns that the Mother's reports of the Father's domestic violence towards her to hospital staff following hospital attendance whilst injured and pregnant were not investigated by the Department of Family and Children's Services of New South Wales ("the Department") as the parties had resumed their relationship when the mother refused service.

It emerged in cross-examination of the Father that he had failed to disclose his involvement in other litigation, in the Family Court with his ex-wife and various local courts in relation to other family violence matters. The Father had made repeated groundless, repeated, repeated allegations against the Mother to Police, the Department and various medical practitioners. He also failed to comply with procedural and counselling requirements expeditiously.

Decision and reasoning: Ordered that the mother have sole parental responsibility and reside with the mother, the father to have contact. The father denied all allegations against him and had a complete lack of insight into the impact of his behaviour.

The allegations raised by Mr Atkinson at various points in the proceedings have, on their face, appeared highly concerning. The Court has, accordingly, proceeded with some caution and consumed vast resources in the determination of serial Interim Applications. When each of those allegations, serious on their face, have been examined they have been found wanting substantial, if any, support. Indeed, the actions taken by Mr Atkinson in seeking to obtain evidence, photographing the child, presenting the child to a Doctor on a weekly basis and presenting the child to the Police, is, upon the evidence as it has unfolded, far more injurious to the child than that complained of. The repetition of those behaviours is a far greater concern as to future risk than anything complained of as regards the mother.[440]

In light of the findings that have been made by the Court regarding the perpetration of family violence by Mr Atkinson upon Ms Atkinson, it would be entirely unreasonable and onerous to impose upon Ms Atkinson a burden to consult and endeavour to make joint and consensual decisions with Mr Atkinson. To that end and whilst it is submitted on behalf of Mr Atkinson that the Court should find that these parents have "*differing parenting styles rather than family violence*", I make clear that this submission is rejected. What has occurred in the relationship between Mr and Ms Atkinson is, I am satisfied, family violence.[473]

***Corby & Corby* [2015] FCCA 1099 (16 April 2015) – Federal Circuit Court of Australia**

'Admissibility' – 'Evidence' – 'Independent children's lawyer' – 'Parenting orders and impact on children' – 'Recorded conversations' – 'Sexual and reproductive abuse' – 'Whether recordings were reasonably necessary to protect lawful interests'

Proceedings: Application for the admissibility of evidence.

Facts: On the first day of the final parenting hearing in relation to the parties' only child X, counsel for the mother sought the Court's leave to tender four short audio recordings of conversations between the mother and father that took place prior to separation. The mother accepted that these recordings were made without the knowledge of the father, that they are 'private conversations' and were therefore prima facie made in contravention of s 7 of the *Surveillance Devices Act 2007* (NSW). However, counsel for the mother submitted that the recordings were admissible because the recordings were 'reasonably necessary' to protect her lawful

interests (s 7(3)) or, alternatively, the evidence ought to be admitted under s 138(1) of the *Evidence Act 1995* (NSW) because the desirability of admitting the evidence outweighed the undesirability of doing so.

Issue/s:

- Whether the recordings were reasonably necessary to protect the mother's lawful interests and consequently, admissible?
- Whether the recordings ought to be admitted on the basis that the desirability of the evidence outweighed the undesirability of admitting the evidence?

Reasoning/decision: Sexton J held that the mother's conduct was lawful under s 7(3)(b)(i) of the *Surveillance Devices Act 2007* (NSW) and therefore the recordings were admitted on this basis. In making this finding, Sexton J held that first, s 7(3)(b)(i) was satisfied in relation to the term 'lawful interests' as the mother had the right to protect her interest not to be intimidated or harassed, and not to be forced to respond to the father's demands for sexual activity: *DW v R* (see [19]-[23]).

Second, Sexton J was satisfied that the recordings were 'reasonably necessary' ('reasonably appropriate' as opposed to 'essential' and judged objectively at the time of the recordings) to protect those lawful interests: *DW v R*. Here, the mother made the recordings for the purpose of having evidence which she could use to convince others to believe her, or to corroborate her word, or to protect herself and the child from further behaviour. Sexton J stated that, '[w]hile the complainant in the present case is an adult, she was, if her evidence is accepted, caught up in an abusive relationship with a man who damaged her self-worth and left her miserable and exhausted. If this was so, as the Court found in *R v Coutts*, it may not have been a realistic option for her to report her predicament to police and obtain a warrant for conversations with her husband to be recorded' (see [29]). The evidence also disclosed that the father may have had a very different public face to his private face. The mother was not trying to obtain a confession but to establish her credibility if there was ever a dispute about what actually happened (see [24]-[31]).

Although the matter did not turn on the issue, Sexton J also considered whether the evidence should be admitted on the basis that the desirability of admitting the evidence outweighed the undesirability of admitting the evidence. Sexton J concluded that had it been necessary, she would have exercised the discretion to admit the evidence for a number of reasons including that the evidence was highly probative to making parenting orders in the best interests of the child, the allegations were extremely serious and it was necessary for the court to determine if the child was at risk in the father's care, the impropriety of the mother in making

the recordings was not of the “worst kind”, and it was “unlikely” the mother could have gained consent to make the recordings (see [32]-[36]).

Federal Circuit and Family Court of Australia (Division 1) Appellate Division

Carter and Wilson **[2023] FedCFamC1A 9 (10 February 2023) – Federal Circuit and Family Court of Australia (Division 1)**

'Appeal from order for equal shared parental responsibility' – 'Coercive control' – 'Context of coercive and controlling behaviour' – 'Controlling conduct' – 'Costs' – 'Equal shared parental responsibility' – 'Family law' – 'Father perpetrator' – 'Findings of family violence' – 'Genuine concerns for child's welfare' – 'Limitation of contact'

Matter: Mother's appeal from order for equal shared parental responsibility.

Facts: A final parenting order made 8 April 2022 provided that the parties have equal shared parental responsibility for their child, X, born in 2016. The order was made subsequent to a consent order which provided for a graduated increase in the father's contact with the child to the point he spends alternate weekends and one night in the alternate week with the father. The father had been physically violent towards the mother on one occasion and the father accepted that he had held his hand over his older daughter, Y's mouth to prevent her screaming. No criminal charges were laid re Y's allegations but she was named as the protected person in a protection order issued against the father and had not had contact with him since September 2017. The primary judge held that the father's admission of violence against the mother was relevant to the determination that the presumption of equal shared parental responsibility did not apply to the matter. The primary judge held that the mother's conduct in limiting the time the child spent with the father and her insistence upon supervision amounted to controlling conduct for the purpose of the definition of family violence in s4AB of the Family Law Act 1975 (Cth).

Held: Appeal dismissed, costs certificates issue in favour of the mother, the father and the independent children's lawyer.

The primary judge's error in finding that the mother's behaviour amounted to controlling conduct did not impact the result of the case, and therefore the appeal was dismissed.

McClelland DCJ and Campton JJ) observed that 'controversially… the primary judge also found that the mother's conduct in limiting the amount of time the child spent with the father and her insistence upon such time being supervised amounted to controlling conduct for the purpose of the definition of family violence as set out in s 4AB of the Act' [6], noting:

[16] In the context of the facts and circumstances of this case, we respectfully agree with Bennett J that the

conduct of the mother in limiting the amount of time that the child spent with the father could not reasonably be determined to be coercive or controlling conduct for the purposes of s 4AB(1). In that respect, there was no finding that the mother's concerns for the welfare of the child were other than genuine in the context where she had herself been the subject of one violent assault by the father and had witnessed the father's admittedly unacceptable conduct towards Y. There was no finding that the mother acted capriciously or maliciously. Indeed, as noted by Bennett J, the mother was acting in accordance with orders of the Court after 30 January 2019.

[17] The mere fact that the mother's conduct in limiting the child's time with the father *could* fall within the example provided in s 4AB(2)(i) does not, in and of itself with nothing more, condemn the conduct as being family violence as defined in s 4AB(1). Context is all important. There was no finding that the mother was acting other than protectively towards the child. Such conduct, in the context of the Act, which has a strong focus on the promotion of the welfare of children and protecting them from being exposed to violence, cannot, in our respectful opinion, in the circumstances of this appeal, reasonably ground a finding of family violence as defined in s 4AB of the Act.

Bennett J observed:

[71] Section 4AB of the Act is drafted in very wide terms in order to catch behaviour which is thought to be undesirable. In so doing, the section also catches behaviour which is both acceptable and necessary (for example, exerting control over a child in the exercise of the parenting powers). Therefore, in practical terms and save for blatant acts of family violence, an evaluation of evidence to ascertain the context in which alleged behaviour took place may be a precondition to the Court characterising behaviour as family violence within the meaning of s 4AB. Contextualising the behaviour calls for findings of fact.

[85] In placing the mother's behaviour in context, I assume that the relevant period during which the primary judge found that the mother's behaviour constituted family violence was from the child's birth until the first parenting order, that is, from 2016 to 30 January 2019. However, there is no analysis of evidence or reasoning by the primary judge as to why the mother's behaviour around the child spending time with the father "initially" (or otherwise) is evaluated as behaviour that controlled the child in the sense contemplated by s 4AB(1) as family violence.

[87] Whilst it is uncontroversial that the mother did not allow unsupervised time between the father and the child when she and the father were living separately and apart prior to orders being made, the primary judge

does not identify the extent to which the father's limited participation in the first three years of the child's life is attributable to the mother's behaviour, or why the control exercised by the mother was not consistent with steps taken by a parent who is acting protectively.

[88] The primary judge refers to the mother's behaviour as controlling of the child, the father and of the child's relationship with the father. However, his Honour's reasons do not include an analysis of the evidence or findings about the respects in which he was satisfied that the mother's behaviour exceeded legitimate parental control and should be characterised as family violence.

***Isles v Nelissen* [2022] FedCFamC1A 97 (1 July 2022) – Federal Circuit and Family Court of Australia (Division 1)**

'Child abuse' – 'Child exploitation material' – 'Child protection' – 'Children' – 'Family law parenting' – 'Risk of sexual abuse of child by father' – 'Sexual assault' – 'Sexual interest in children and adolescents' – 'Unacceptable risk' – 'Use of tendency evidence'

Matter: Appeal against family law parenting decision.

Facts:

The appellant father and first respondent mother had four children. When he was nearly 7, their eldest son alleged that his father had sexually assaulted him. As a result, the mother sought to prevent the father from having access to all four children. The father argued that the mother had encouraged the son to make false allegations against him. The mother agreed to consent orders allowing the father to have unsupervised access to the children knowing that the second respondent, the Department of Communities, would intervene to prevent this [66]. The independent children's lawyer was also party to the proceedings.

At trial, the central issue was whether the father posed an unacceptable risk of harm to the children [69]. The primary judge found that, although it was not possible to find on the balance of probabilities that the father had perpetrated the abuse, he posed an unacceptable risk to the children and contact should be supervised [75].

Grounds:

(1) In relation to the standard of proof, the primary judge misapplied s140 of the *Evidence Act* (balance of probabilities in civil cases) and should have made a finding about unacceptable risk on this basis.

(2) In relation to tendency evidence, the primary judge considered tendency evidence that should not have been admitted under Part 3.6 of the *Evidence Act 1995* (Cth), regardless of the father's failure to object [98].

Held: Appeal dismissed.

The court noted the comprehensive and prescriptive requirement to consider "unacceptable risk" when making parenting orders:

> [58] …s 60CG of the [Family Law] Act [1975] exhorts courts to avoid making orders which expose any person to an "unacceptable risk of family violence" and, when determining how children's best interest will be advanced, s 60CC(2)(b) of the Act obliges courts to heed any need to protect children from physical or psychological harm through their subjection or exposure to "abuse", "neglect" or "family violence", for which purpose the terms "abuse" and "family violence" are very widely defined in ss4(1) and 4 AB of the Act respectively.

(1) On the standard of proof, the primary judge was correct in separating the need to make a finding on the balance of probabilities in relation to fact (ie did the father sexually assault his son?) and the question of future risk (ie is the father an unacceptable risk to the children?) [83]. While the question of future risk is 'evidence-based' and 'not discretionary' [85], the court held that even if the risk were only possible, not probable, it would be unacceptable [86].

(2) On tendency evidence, under Part VII of *Family Law Act* (children), large tranches of the *Evidence Act* do not normally apply [88]. However, given that the mother and Department sought a finding that the father had committed the criminal offence of sexual assault, the primary judge decided under s69ZT(3) before proceedings had commenced that the *Evidence Act* would apply [91]-[93]. The relevant tendency evidence was the father's apparent sexual interest in other adolescents and his alleged interest in child exploitation material [103]. Although the father could have objected to the admission of this evidence at trial, he did not and so could not object on appeal [95, 97]. Despite the admission of this evidence, the primary judge was unable to find that the father had committed the sexual assault, so the appeal court held that the father had suffered no prejudice [103].

Federal Circuit and Family Court of Australia (Division 2) Family Law

***Campi and Ferrin* [2022] FedCFamC2F 1621 (24 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

'Application in a proceeding' – 'Best interests of the children' – 'Family law' – 'Family report' – 'Interim hearing' – 'Parental alienation' – 'Psychologist evidence' – 'Reportable intensive family therapy' – 'Significant risk of psychological harm'

Matter: Mother's application in a proceeding, seeking orders for reportable intensive family therapy to be conducted by Dr B. to address alleged parental alienation of the mother by the father.

Facts: The children resided with the father and there was evidence the children's relationship with the mother was fractured and the children had been resistant to contact with the mother since March 2022 when they last had supervised contact with the mother at a contact centre. It appeared the children had refused to participate in contact pursuant to a consent order made September 2022 that the younger child have unsupervised contact with the mother from after school until 7 pm each Friday afternoon which the older child could join if he desired. The court was unable to consider the mother's allegation that the father had alienated the children from her in the interim hearing.

Newbrun J considered proposals for children to attend intensive family therapy in the context of mother's allegations of parental alienation by father:

[9] The Court has a real concern that the children may be exposed to a significant risk of psychological harm if they participate in the intensive therapy Reportable Intensive Family Therapy ("RIFT") model proposed by the Mother to be afforded by the psychologist Dr B. And further, the Court has a real concern that should the children be required to participate in the proposed intensive therapy RIFT model that they may well become even more resistant to spending time with the Mother; if this risk comes to pass, then the prospect of restoring the children's relationship with the Mother may become even more difficult.

[38] As to the Mother's proposed order that Dr B be permitted to conduct intensive four day family therapy RIFT model [Reportable Intensive Family Therapy], and provide an expert report in relation to the issue of parental alienation, the Court is of the view that such an order would not be in the best interests of the children, and nor would such an order be in the interests of justice, and in reaching these views, and in summary, takes into account the following matters having regard to rule 7.04 and section 13C(1)(c) *Family*

Law Act 1975 (Cth):

(a) The Court's concern that the children may be exposed to psychological harm if subjected to the proposed intensive four-day family therapy RIFT model;

(b) The lack of material before the Court relating to risk screening of the children prior to participating in the proposed intensive family therapy;

(c) The lack of material before the Court relating to the nature of the proposed intensive family therapy;

(d) The lack of any independent evaluation of the proposed intensive family therapy;

(e) The content of the Family Report does not suggest that expert evidence from a clinical psychologist such as Dr B and/or further family therapy is required to elucidate the issue of parental alienation;

(f) The Family Report writer, appointed under section 62G of the *Family Law Act 1975* (Cth) to provide a Family Report, is well able to provide appropriate evidence and opinions in relation to the issue of parental alienation (the Family Report writer, refers to and/or discusses the issue of parental alienation in paragraphs 76, 100, 102, 104, 108, 111, 112, 113 albeit she does indicate that the Court needs to conduct a further assessment of this issue). The Court is of the view that it is not necessary in this case for it to have a range of opinion on the issue of parental alienation;

(g) The content of the Family Report does not refer to and/or support Dr B's proposed intensive four day family therapy RIFT model.

***Wylder v Wylder* [2022] FedCFamC2F 1366 (9 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

'Best interests of child' – 'Child abuse' – 'Coercive control' – 'Covert recording' – 'Manipulation' – 'No contact order' – 'Parenting' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Selective misrepresentation' – 'Social media' – 'Suicide threat' – 'Systems abuse' – 'Technology facilitated abuse' – 'Threats to kill' – 'Unacceptable risk' – 'Victim as (alleged) perpetrator' – 'Weapons'

Case type: Appeal against parenting order.

Facts: The father was an Australian resident who met and married the mother in Country B. They moved to Australia where their daughter was born in 2017. The father made repeated notifications to the Department of

Child Safety alleging that the mother used corporal punishment to discipline the child contrary to Australian standards [44], [68]. From videos posted on social media by the father, it was evident that the father did not listen to the child and coached her to make allegations of violence against the mother [56], [111]. The mother did not speak English well and she yielded to the father's demands to agree to his unsupervised contact with the child in consent orders [26]-[30].

In previous proceedings the Court ordered the father be assessed for drug and alcohol use but he refused to participate [19]. In a search of the premises executing a recovery order for return of the child, police found weapons at the father's house and charged him with offences under the Weapons Act [36]. In 2015, the father was self-medicating with anti-anxiety drugs when he admitted himself as an inpatient in a mental health unit. He said he had daily intrusive thoughts about killing the mother [124]. He discussed with other inpatients a plan to stalk his treating psychiatrist with intent to harm him and his family [129]. The father's mother (ie the child's paternal grandmother) applied for a domestic violence order against the father in 2019 [143]. The Court considered that there was 'ample evidence' that the father had engaged in family violence towards the mother [149].

Issue: The best interests of the child.

Held: The Court ordered that the mother have sole parental responsibility for the child, that the child live with the mother and that the mother be permitted to relocate with the child. The Court ordered that the father should have no time and no communication with the child.

The mother did not pose a risk to the child [116]. After an intervention by police and a social worker, the mother changed her approach and reduced her reliance on physical discipline [67]. The child was happy living with the mother [290].

The father was assessed by a forensic psychiatrist as being a high risk of suicide and murder-suicide, including kidnapping and absconding with the child, and an even higher risk to others generally [234]. He was also assessed as having a narcissistic personality and an anti-social personality disorder [219]. His postings on social media and abusive threats against his wife were in breach of a court order and he demonstrated contempt towards the Family Court and legal processes [305].

Although the father claimed to be the victim of physical violence from the mother, what concerned Judge Vasta was the father's coercive control of the mother:

81. However, it is not the spectre of physical violence that concerns this Court; rather, it is the spectre of coercive control. Whilst it had been documented that the parents had separated on occasions, the mother said that the father spoke to her in such a way that she felt compelled to return to the relationship. The father denies any such conduct.

82. What has been of concern is the documented history of the litigation. It is incongruous that the mother would make the complaints that she made during the previous filing in this Court (BRC 11666/2019); have a Court make an order that mandated supervised visits between the father and the child; and, then choose to ignore that and, instead, come to a compromise solution with the father that gave him unsupervised equal time with the child.

83. There seems to be no other rational explanation for this other than the father implementing coercive control over the mother to the extent that she felt that she had no other choice but to comply with the father's demands. The judicious use of covertly recorded conversations with one parent by the other parent and then referring to selective excerpts is a feature that is often found in cases of coercive control.

84. In this case, the father did give to the Court such selective recordings. The father pointed to one particular recording where the mother made an "*admission*" that the father was the favoured parent by the child. In another recording, the mother "*admitted*" that the father treated her like a queen. In another recording, the mother is said to convey that she arranged custody arrangements for her financial benefit. In a further recording, the mother has "*conceded*" that she was "*not going back to court again*". And in a final recording, the mother "*admitted*" that the father would never hurt his daughter.

85. These recordings were used by the father to intimidate the mother into not pursuing any parenting matter because these recordings would be used against her, as if they were repudiations of her stance. Of course, they have little evidentiary value as they are excerpts from a larger conversation upon which the Court has no information, and therefore, no context.

86. The behaviour in making constant notifications to the Department of Child Safety can also be seen as a manifestation of the coercive control. Further, posting the videos to social media can also be seen as a manifestation of coercive control. One such video records a "Tik Tok" dance that the mother had uploaded to social media. The father recorded himself watching the video where the father made derogatory comments suggesting that the manner of solo dancing in the video was not befitting that of a woman who had a boyfriend, let alone a woman who was a mother.

87. ….

88. The father will attempt to draw the child into his world; a world where the mother is evil and cannot be trusted and a world where institutions such as the police and the Courts are malevolent and must be resisted. This was perfectly illustrated by the manner in which the father dealt with the child when making the videos. He ignored what the child was saying and imposed his own version of the facts and would not brook any variation to that. The child will never be truly free under the care of the father and she will not have the opportunity to grow and experience life because she will be made to conform to his world view.

89. And this is just part of the danger that the father represents. The evidence that the father planned to do harm to his treating psychiatrist because that psychiatrist would not support his application for a pension is concerning enough. But when this is added to the father's manipulation of the mother to avoid having to endure supervised visits with the child, the reaction of the father to police attempting to serve him with the police protection order, the obsessive determination with which he wished to expose a "rapist" at the school, his Facebook comments to a Member of Parliament as to his capacity for violence and the nonchalance with which he violated a Court order and injunction about posting on social media, the jeopardy at which he places X cannot be overstated.

90. There are absolutely no safeguards that the Court could put in place that would allow the father to have any form of contact with X and yet keep the child safe.

91. It is never an easy task for a Court to make orders that prohibit contact between a parent and child, however there are those rare cases where such an order is the only order that can be made in the best interests of the child. This is one of those cases.

***Ramzi & Moussa* [2022] FedCFamC2F 1473 (4 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

'Application that child spend no time with a parent' – 'Arranged marriage' – 'Children' – 'Coercive control' – 'Cultural and spiritual abuse' – 'Culturally and linguistically diverse backgrounds' – 'Deprivation of liberty' – 'Economic and financial abuse' – 'Exposing children to domestic violence' – 'Fear' – 'Following, harassing and monitoring' – 'Forced marriage' – 'Harassing' – 'Humiliation' – 'Impact on mother's parenting capacity' – 'Injunctive orders' – 'Isolation' – 'Mitigation of risk' – 'Monitoring' – 'No time ordered' – 'Parenting arrangements' – 'Physical violence' – 'Poor literacy

skills' – 'Protection orders' – 'Sexual abuse' – 'Social abuse' – 'Sole parental responsibility' – 'Threats' – 'Unacceptable risk'

Proceedings: The proceedings were for the determination of parenting arrangements for a five-year old child (X) of the two parties.

Issue: The parties agreed that the child should live with the mother. However, at issue was:

1. Whether the mother should be ordered to return to Melbourne with the child;
2. How parental responsibility for the child should be exercised;
3. Whether the father poses a risk of harm to the child;
4. If the child is to spend time with the father in Melbourne, how much time should be allowed and should it be supervised

The alleged risks posed by the father were that:

1. X had been exposed to and would be exposed to family violence;
2. He had engaged in coercive and controlling behaviour;
3. Orders allowing contact may pose a risk to the mother's caring capacity.

Facts: The mother left her home country at a young age for another foreign country for an arranged marriage with the father and the couple later moved to Australia. The mother had only a basic level of education and spoke very limited English.

The parties separated after living together in Melbourne for two years. The mother applied for a protection order and the child (X) lived with her. Pursuant to an interim parenting order, X spent a few hours of supervised contact with his father each week. Subsequently, unsupervised contact was ordered with changeover at a supervised contact centre. The mother was late to changeover on several occasions and eventually stopped bringing X altogether before moving with the child to Sydney.

The mother made extensive allegations of family violence against the father which occurred over the course of their marriage and afterwards. These included coercive and controlling behaviour, physical abuse such as choking and beatings, sexual assault, threats and humiliation (both from the father and family/community members), monitoring her movements, denying her economic autonomy and depriving her of liberty.

The alleged risks posed by the father were that:

1. X had been exposed to and would be exposed to family violence;
2. He had engaged in coercive and controlling behaviour;
3. Orders allowing contact may pose a risk to the mother's caring capacity.

Reasoning: Beckhouse J accepted the mother's account, finding that:

- family violence was established (*Family Law Act 1974* (Cth) s4AB(1)); and
- the risk of X being subject or exposed to violence outweighed the benefit of having a meaningful relationship with his father (s60CC).

Beckhouse J stated that it was not necessary to make factual findings about the occurrence of each alleged individual incident ([202], s4AB(1)). The lack of eye-witnesses, inconsistencies and delayed reporting were not an impediment, particularly given the cultural barriers to disclosure. The mother's evidence was detailed and specific, corroborated by external agencies and was understood in the context of the cyclical nature of family violence and her cultural and personal background. The father's 'blanket denials' offered no plausible explanation or alternatives.

Beckhouse J found that this risk could not be ameliorated. The father had displayed a lack of responsibility for his conduct and demonstrated no desire to change. His extensive familial and community support network was viewed as a 'double-edged sword,' as the paternal family potentially helped conceal his conduct and he failed to understand how ongoing communication with the maternal family impacted the mother.

It was determined that contact orders would cause the mother stress and anxiety, to the detriment of her parenting ability. Given this and the risk that X would be leveraged as a weapon, both supervised time and video communication were deemed unviable.

Orders: The child reside with the mother and she have sole parental responsibility. The child have no contact or communication with the father, the child be removed from the international travel watchlist and the mother be permitted to obtain a passport for the child and travel overseas without the father's consent.

Additionally, the father was permitted to send X a birthday message every year.

Backhouse J noted at [243] that in establishing whether a person is 'fearful' under s4AB(1) : "fear can arise from a culmination of events and patterns of behaviour".

Backhouse J observed at [202]:

…There are some specific individual characteristics in this matter that lead me to place less weight on inconsistent versions of events given by the mother. English was not the mother's first language. She was poorly educated. She spoke through an interpreter. I cannot be satisfied she would have understood how domestic and family violence is defined in Australia.

Federal Magistrates' Court of Australia

***Heilig & Cabiness* [2011] FMCAfam 97 (2 March 2011) – Federal Magistrates' Court of Australia**

'Children' – 'Coercive control' – 'Exposing children to domestic and family violence' – 'Family law' – 'History of domestic and family violence' – 'Parental responsibility' – 'People affected by drug misuse' – 'People with mental illness' – 'Separation'

Issue: Contact.

Facts: Orders for the children to reside with the mother and have alternate weekend contact with the father had been made following trial in 2003. The father has multiple criminal convictions for violent family violence offending against numerous former partners which predated the first trial for which he was convicted after the 2003 trial. The father commenced the current proceedings by filing a contravention application, which related to his lack of contact in accordance with the 2003 orders for a seven-year period (a portion of which time he was in custody serving a term of imprisonment for violent offending against the mother and two other former partners). Interim orders suspended all previous contact orders. The father sought orders for contact and to receive updates on the children's educational progress.

The father had a long history of illicit drug consumption, controlling abusive behaviours to domestic partners, had mental health issues and conceded that, at the time of the hearing, had no meaningful relationship with the children. It was also conceded that the children were present in the same building in which quite serious family violence occurred up until 2004, though it was not conceded that the family violence was necessarily perpetrated against the mother.

Decision and Reasoning: It was ordered that the mother have sole parental responsibility for the children, the children reside with the mother and have no contact with the father.

At [30], the Court favourably refers to research quoted in the decision of the Court of Criminal Appeal on the Crown manifest inadequacy appeal in relation to the father's sentencing, cited as *R v Hamid* [2006] NSWCCA 302 (20 September 2006) at [77]:

> An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the

violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pages 6-7.

It was concluded, on the basis of the father's criminal history, the children's fear of and lack of relationship with their father that no order for contact or communication should be made. The children were found to be at risk of psychological or physical harm if their relationship with the father was to resume.

Administrative Appeals Tribunal of Australia

***1807390 (Refugee)* [2022] AATA 4216 (5 October 2022) – Administrative Appeals Tribunal of Australia**

'Ability to leave abusive relationship' – 'Child abuse' – 'Coercive control' – 'Cultural and spiritual abuse' – 'Emotional abuse' – 'Exposing children to domestic and family violence' – 'Forced marriage' – 'Humiliation' – 'Isolation' – 'People from culturally and linguistically diverse backgrounds' – 'People with children' – 'People with mental illness' – 'Physical violence' – 'Post traumatic stress disorder' – 'Sexual abuse' – 'Strangulation'

Charges: Assault occasioning bodily harm whilst armed x 1; common assault x 1.

Proceedings: Application for review of decision to refuse protection visa under s 65 of the *Migration Act 1958 (Cth)*.

Facts: The female applicant and her husband were in an arranged marriage in Sri Lanka. Over the course of the marriage her husband was physically violent – including striking and choking her,– he humiliated her, verbally abused her with sexual language, tormented her about her religion and forced her to do sexual acts. He prevented her from contacting her family over a17 year period. The husband was emotionally and psychologically abusive towards their daughter and on one occasion threw their 8-year-old son against the wall when the applicant disobeyed him. Given her husband's respected status as a doctor and the lack of responsiveness of the Sri Lankan police to domestic violence reports, the applicant never reported the conduct.

She fled to Australia in 2012 on the pretence of visiting her son and daughter who had moved here to study, ceased contact with her husband and subsequently applied for a Protection Visa.

Issue: Did the applicant have a well-founded fear of persecution from her husband upon returning to Sri Lanka such that she was a person to whom Australia has protection obligations as a refugee pursuant to s36(2)(a) *Migration Act 1958 (Cth)*.

Decision and reasoning: The tribunal accepted the applicant's evidence that she was subjected to domestic and family violence from her husband in Sri Lanka and she had a well-founded fear of persecution. The tribunal acknowledged that some confusion and possible exaggeration from the applicant in giving evidence "may be attributable to the impact of past trauma and her psychological disorder, as referenced by her treating psychiatrists", citing the National Domestic and Family Violence Bench Book on trauma-informed judicial practice[28]. The tribunal accepted that the experience of domestic violence victimisation may

negatively impact memory and recount in court. The Tribunal accepted that the applicant and her daughter's evidence described constant controlling and threatening behaviour by the applicant's husband, referring to the description of coercive control in the National Domestic and Family Violence Bench Book.

The Tribunal found that while the applicant had not had contact with her husband for ten years, his past behaviour, her defiance of him and his proximity to the applicant's family home in Sri Lanka posed a real risk that he would try to harm her [36]. The intentional and selective nature of the harm involved systematic and discriminatory conduct [37], s5J(4)(c) and was characterised as gender-based violence, meaning that her fear of persecution related to membership of the social group of women in Sri Lanka [38], s5J(1)(a). DFAT country information evidenced the unchecked occurrence of such violence in Sri Lanka and lack of effective protection available [40]-[42]. Cultural factors also substantiated the applicant's claim that internal relocation would not mitigate the risk of harm, as the presence of a single woman would attract attention and likely enable her to be found [43].

X (a pseudonym) **(Migration) [2022] AATA 1149 (21 March 2022) – Administrative Appeals Tribunal of Australia**

'Administrative law' – 'Application for review' – 'Cancellation of visa' – 'Deportation' – 'Extensive criminal history' – 'History of domestic and family violence' – 'Immigration' – 'People affected by drug and alcohol misuse' – 'People with mental illness' – 'Risk to domestic partners' – 'Risk to health, safety and good order of community' – 'S.116 of the migration act 1958 (the act)'

Note: Names have been anonymised at the request of the Administrative Appeals Tribunal of Australia.

Proceedings: Application for review of the decision made by a delegate of the Minister for Immigration to cancel Subclass 444 (Special Category) visa under s.116 of the *Migration Act 1958* (the Act).

Facts: The applicant, Mr X, came to Australia at the age of 7 and was 47 years old at the date of decision. He had an extensive criminal history commencing in 1996 including multiple series of domestic violence offending, the first commencing December 2001, the second commencing November 2007 and the third in 2009. There was also a series of domestic violence offences in 2016 and 2018. Mr X's explanations did not fully correlate to the convictions and tended to minimize his offending. His former partner's children were removed from her care following the offending and returned to her care after Mr X's visa was revoked and he was taken into immigration detention. He has a history of breaches of community corrections orders, bipolar

disorder and drug and alcohol misuse (addressed while in prison). He is the father of 4 children, 3 of whom are adults, the youngest 17 years old, and has contact with and good relationships with 3 of his children. He has no family or support in New Zealand. The delegate relied on his ongoing risk of offending to women with whom he may be in a domestic relationship pursuant to s116(1)(e) of the Act.

Issues:

1. Whether the ground for cancellation in s116(1)(e) of the Act - Mr X is or may be, or would or might be, a risk to:
   - the health, safety or good order of the Australian community or a segment of the Australian community; or
   - the health or safety of an individual or individuals;

is made out, and if so,

2. whether the visa should be cancelled.

Decision and Reasoning: Decision to cancel the applicant's Subclass 444 (Special Category) visa affirmed.

The Tribunal held that Mr X may be a risk to individuals in the community and in particular previous and future domestic partners and a risk to children in the household (shown by the removal of his former partner's children). The factors which favour Mr X remaining in Australia do not outweigh the risk he poses to a segment of the community.

The Tribunal considered the distress and hardship Mr X would experience if returned to New Zealand, the likely impact on his children and mental health, his strong ties to the Australian community, his continued minimization of his offending, longstanding issues of aggression towards domestic partners and repeated non-compliance with court orders. The Tribunal also considered the fact that if the decision to cancel his visa is affirmed, he will be removed from Australia and be unlikely to be able to return. Consideration was also given to the fact that since his visa was cancelled he was sentenced to a further period of imprisonment, meaning he has a substantial criminal record as defined in s 501(7) of the Act; thus, if the visa cancellation is revoked his visa is likely be cancelled again.

A (a pseudonym) and Child Support Registrar **(Child support) [2021] AATA 5499 (7 September 2021) – Administrative Appeals Tribunal of Australia**

'Administrative law' – 'Application for review' – 'Child support' – 'Child support agency' – 'Children' – 'Counselling records' – 'Domestic and family violence' – 'History of domestic and family violence' – 'Non-compliance with parenting orders' – 'Percentage of care' – 'Risk to children' – 'Section 51, child support (assessment) act 1989' – 'Separation' – 'Special circumstances'

Note: Names have been anonymised at the request of the Administrative Appeals Tribunal of Australia.

Proceedings: The mother's application for review by the Social Services and Child Support Division of the Administrative Appeals Tribunal (the tribunal) of a decision to dismiss her objection to the determination of Services Australia – Child Support (the Agency) that the care percentages of 80% to the mother and 20% to the father of the two younger children should be reflected in the child support assessment for an interim period.

Facts: The mother and father are parents of three children in respect of whom there has been a child support assessment in place since 8 January 2020, which reflected that the mother had 100% care of all three children In March 2021 the father advised the Agency that since September 2020 there had been court orders in place granting him 14 per cent care of the children and that the mother had withheld care since November 2020. On 7 December 2020 the father filed an application for interim orders seeking 100% care of the children and to enforce the existing orders and commenced contravention proceedings on 11 February 2021. The Agency made an interim care decision that from the November 2020 to September 2021 the care record must reflect that the father had a care percentage of 20% care on the basis the mother withheld care and the father was taking reasonable action to have the court-ordered care arrangement complied with. The mother's evidence was that the children ran away from the father when he attended their school to collect them, that they are fearful of him due to his history of violence towards the mother during the relationship, and that they have not had contact with the father for three years. The mother consented to disclosure of confidential notes from counselling sessions with her psychotherapist (including some sessions with the children in which they expressed their fear of the father) spanning a 10 year period from the time of separation.

Issues:

1. Whether the father (for the purpose of section 51, *Child Support (Assessment) Act 1989* (the Act) was

taking reasonable action to ensure the court orders were complied with; and

2. whether there were special circumstances such that an interim care determination should not be made.

Decision and Reasoning: The decision under review was set aside, and in substitution the tribunal decided that from 7 November 2020 the mother has had 100 per cent care of the children for the purpose of s51 of the Act.

The tribunal was satisfied that the father took reasonable action to ensure the court-ordered care arrangements were complied with for the purposes of section 51 of the Act. In respect of the father, as required by subsections 51(2), (3) and (4) of the Act, the first care percentage is 14% while the second percentage is 0%.

In the special circumstances of this case as they relate to the children of the assessment, the father should not have the benefit of an interim period. On balance, the tribunal was satisfied that the father's own behaviour had significantly contributed to the care arrangements not being complied with. The tribunal placed significant weight on contemporaneous counselling records which reflected that the children had disclosed that they were exposed to family violence perpetrated by the father and were subsequently fearful of the father.

B and C (pseudonyms) **(Child support) [2021] AATA 5500 (3 September 2021) – Administrative Appeals Tribunal of Australia**

'Administrative law' – 'Application for review' – 'Child support' – 'Domestic and family violence' – 'Non-compliance with parenting orders' – 'Percentage of care' – 'Protection order' – 'Risk to child' – 'Section 51, child support (assessment) act 1989' – 'Suicide threat by child'

Note: Names have been anonymised at the request of the Administrative Appeals Tribunal of Australia.

Proceedings: The father's application for review by the Social Services and Child Support Division of the Administrative Appeals Tribunal (the tribunal) of the decision to dismiss his objection to the determination of Services Australia – Child Support (the Agency) pursuant to s51 *Child Support (Assessment) Act 1989* that the mother's actual 100 per cent care of the child should be reflected in the child support assessment and no interim care determination should be made.

Facts: The mother and father are parents of one child (aged 12) in respect of whom there has been a child

support assessment in place since 30 September 2009. Parenting orders dated June 2020 provide that the child will spend 5 nights per fortnight and half of each school holidays in the care of the father. The pre-existing care determination was 33% care to the father and 67% care to the mother, which accorded with the care provided for in the parenting orders. On 18 December 2020 the mother advised the Agency that the child was in her 100% care due to a medical crisis, namely that the child had threatened suicide if returned to the father's care. The child's psychiatrist directed the child should reside with the mother and not be required to reside with the father. Medical records confirming this advice were adduced at the hearing. The father disagreed with the care change due to the court orders. The father did not respond to a disputed care contact letter issued by the Agency and on 16 February 2021 a delegate of the Agency decided that care of the child was 100% to the mother and 0% to the father from 2 November 2020. The father provided the court orders and reason for decision which make mention of the child's mental health and the mother provided a provisional protection order made on 8 March 2021 for the protection of the child (which was later withdrawn). On 24 March 2021 an objections officer disallowed the father's objection and the father sought review by the tribunal.

Issues:

1. What were the care arrangements in relation to the care of the child in the relevant care period and should a new determination of a percentage of care for the child be made? If so, what is the percentage of care and from when should it apply?
2. Should an interim care determination be made in relation to the care of the child, or were there were special circumstances such that an interim determination should not be made?

Decision and Reasoning: Decision affirmed.

From 20 November 2020 the child's actual care was 100% to the mother and 0% to the father. The tribunal acknowledged that there was a court-ordered care arrangement in place that was not being adhered to, and that the father contended that he was taking reasonable action to have his court-ordered care restored. However, the tribunal found that special circumstances existed on the basis of the psychiatrist's advice that the child remain wholly in the mother's care due to his medical crisis, and that it was therefore appropriate to determine the respective care percentages based on actual care, rather than making an interim care determination by reference to the parenting orders.

Simpson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) **[2021] AATA 78 (1 February 2021) – Administrative Appeals Tribunal of Australia**

'Another reason to revoke mandatory cancellation decision' – 'Application for review of decision not to revoke cancellation of visa' – 'Character test' – 'Criminal history' – 'People affected by substance misuse' – 'Uncharged acts'

Proceedings: Application for review of decision not to revoke cancellation of visa.

Facts: A delegate of the Minister (the respondent) mandatorily cancelled the applicant's visa under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") on the basis that he did not pass the character test and was serving a full-time custodial sentence. The applicant made written representations to the respondent requesting revocation of the cancellation of the visa. The respondent declined to revoke the cancellation.

Issues: Under s 501CA(4) of the Act, the original decision may be revoked if –

1. The applicant passed the character test (subsection (b)(i)).
2. There is another reason why the decision to cancel the applicant's visa should be revoked (subsection (b)(ii)).

Decision and reasoning: Application for review of decision not to revoke cancellation of the applicant's visa was dismissed.

Issues 1: The applicant had a "substantial criminal record". He did not pass the character test defined in s 501(6) of the Act and could not rely on s 501CA(4)(b)(i) as a reason for the mandatory cancellation of the visa to be revoked.

Issue 2: The Tribunal was required to consider "Primary Considerations" under Direction 79 (as well as "Other Considerations").

On Primary Consideration A "Protection of the Australian community from criminal or other serious conduct", the Tribunal member noted that under the Direction she was "not limited to considering proven offences" but "required to consider the nature and seriousness of the applicant's 'conduct to date'." This included an incident where the applicant damaged his ex-partner's new partner's car, grabbed his ex-partner, and threatened her and her new partner with violence. This was "very serious conduct" (at [52]). The applicant had also committed 34 criminal offences and had a lengthy traffic history. There was a moderate risk he

would commit further offences. Primary Consideration A weighed heavily against revocation of the cancellation of the Applicant's visa ([49]-[84]).

D (a pseudonym) **(Migration) [2020] AATA 3488 (30 June 2020) – Administrative Appeals Tribunal of Australia**

'Administrative law' – 'Application for review' – 'Domestic and family violence' – 'Evidence of de facto relationship' – 'Evidence of family violence' – 'Immigration' – 'No family violence' – 'Partner visa' – 'S.65 of the migration act 1958'

Note: Names have been anonymised at the request of the Administrative Appeals Tribunal of Australia

Proceedings: Application for review of the decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Partner (Temporary) visa (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).

Facts: The applicant, Ms. D claimed that her relationship with Mr P, the visa sponsor, had ceased and she had been the victim of family violence. She applied for Partner (Temporary) visa (Class UK) visa under s.65 of the *Migration Act 1958* (the Act). A delegate of the Minister refused to grant a visa to the applicant on the basis that she did not meet cl.820.211(2)(a) of the *Migration Regulations* (1994) because the evidence failed to demonstrate that the applicant was the de facto partner of the sponsor, as defined under section 5CB of the Act.

Issues: To grant a Partner (Temporary) visa (Class UK) visa, the Tribunal must be satisfied:

1. The evidence is sufficient to demonstrate the applicant and the sponsor had been in a de facto relationship and that the relationship has ceased to exist.
2. The evidence is sufficient to demonstrate family violence.

Decision and Reasoning: The Tribunal found that there was a de facto relationship and it had ceased but found there was no family violence, so affirming the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

After considering the financial and social aspects of the relationship, the nature of the household and the persons' commitment to each other, the Tribunal member was satisfied that the applicant and sponsor had been in a de facto relationship, and the relationship had ceased [14].

Relying on statutory declarations provided by a social worker and a psychologist and a mental health plan written by a medical practitioner, the applicant made a non-judicially determined (see r1.24 and 1.25 *Migration Regulations* (1994)) claim of family violence.

After considering the evidence, the Tribunal member was not satisfied that the applicant had suffered relevant family violence. The Tribunal member found no evidence of physical violence and was not convinced that the psychological trauma experienced by the applicant met the test required by the legislation to sustain a claim of family violence [28]. The Tribunal sought the opinion of an independent expert.

The Independent expert report (the report) found that "the sponsor's conduct did not cause [Ms. D] to reasonably fear for, or to be reasonably apprehensive about, her well-being or safety. … [Ms. D] said that she has maintained a friendship with the sponsor despite him reportedly continuing to verbally abuse her."[33] The report found the applicant had not experienced family violence outlined in r1.21 *Migration Regulations* (1994).

The applicant challenged the report. The Tribunal member was concerned as to whether the applicant had been afforded procedural fairness [42] and a second hearing took place.

The Tribunal member considered the written responses of the applicant and her agent to the report, the responses of the independent expert to the matters raised by the applicant and her agent and discussed these issues with the applicant and her agent at the second hearing [62]. The Tribunal member found that the applicant had not suffered family violence committed by the sponsor.

***Hamilton and Secretary, Department of Social Services (Social services second review)* [2020] AATA 1918 (26 June 2020) – Administrative Appeals Tribunal of Australia**

'Covid-19 pandemic' – 'Domestic violence' – 'Financial abuse' – 'New start allowance' – 'Special circumstances' – 'Workers compensation'

Case type: Review

Facts: The female applicant sought review of the decision of the Administrative Appeals Tribunal Social Services and Child Support Division, which affirmed the decision of the Department of Human Services rejecting her new start allowance claim because she had a compensation lump sum preclusion period from 2 March 2010 to 21 April 2025. The applicant had received a workers compensation lump sum payment for

injuries suffered in a motor vehicle accident. Her evidence was that she suffered severe financial hardship as her abusive male ex-partner had accessed and gambled her savings. She terminated the relationship and had to sell her home due to her financial difficulties, retaining about $400,000. The relationship resumed and he used her ATM card to take money from her bank account threatening to beat her if she did not provide access to her funds. The applicant finally terminated the relationship and said he had taken all the money which she had following the sale of her house which represented all that remained of the settlement sum she had received ([67]). The applicant was unable to obtain continuous employment and was experiencing severe financial hardship ([79]).

Issue: Whether special circumstances exist.

Held: The Tribunal set aside the decision and held that the applicant's circumstances were "special" pursuant to s 1184K, such that much of her compensation payment should be treated as not having been made so as to reduce the preclusion period applicable to her compensation payment so that it ended on 21 May 2020 ([82]). The special circumstances in accordance with s 1184K(1) related to the totality of the applicant's circumstances, including her financial hardship, her injuries, her financial deprivation following domestic violence and financial abuse ([79]).

The hearing was conducted via telephone in accordance with the provisions of the Tribunal's COVID-19 Special Measures Practice Direction - Freedom of Information, General and Veterans' Appeals Divisions ([29]).

Australian Information Commissioner

'WZ' and CEO of Services Australia (Privacy) [2021] AICmr 12 (13 April 2021) – Australian Information Commissioner

'Audit of policies, procedures and systems' – 'Complainant had notified of separation from partner' – 'Following, harassing and monitoring' – 'Privacy' – 'Protection orders' – 'Residential address disclosed to the complainant's former partner'

Proceedings: Complaint under s 36(1) of the *Privacy Act 1988* (Cth) (Privacy Act).

Facts: The female complainant was receiving Centrelink payments administered by Services Australia (the respondent) while living with her former male partner. She obtained an Apprehended Violence Order (which her partner was imprisoned for breaching). The complainant notified the respondent of her separation from the partner, but the respondent considered the separation unverified. Their online records continued to be linked meaning that if the complainant updated her address online, her partner's address would also be updated. Her former partner posted a screenshot of the complainant's new address to social media and made threats against her and her current partner.

Issues: Whether Services Australia interfered with the complainant's privacy as defined in the *Privacy Act 1988* (Cth).

Decision and reasoning: The Commissioner found that the respondent interfered with the complainant's privacy by:

1. Disclosing the complainant's personal information, namely, her new address to her former partner, for a purpose other than that for which it was collected, in breach of Australian Privacy Principle (APP) 6.
2. Failing to take reasonable steps to ensure that it used accurate and up-to-date personal information of the complainant in the form of her relationship status having regard to the purposes of its use, being to update her former partner's address, in breach of APP 10.2.
3. Failing to take reasonable steps to ensure that it used accurate and up-to-date personal information of the complainant in the form of her address at which she could be contacted in breach of APP 10.2.
4. Failing to take reasonable steps to protect the complainant's personal information, being her updated address, from unauthorised disclosure to her former partner in breach of APP 11.1.

In addition to ordering compensation for non-economic loss (including re-activation of psychological symptoms and distress) and expenditure incurred in association with the privacy complaint, and ordering an apology, the Agency was required to undertake an audit of policies, procedures, and systems to ensure the privacy breach was not repeated or continued. The Commissioner noted at [156]-[160]:

> The effect of this privacy breach on the complainant has been significant. This is in large part due to the fact that she feared harm from the former partner… While the changes the respondent has made are encouraging, I remain concerned that individuals are at risk of their personal information being disclosed to former partners.
>
> […]
>
> It is appropriate for the respondent to put in place more robust measures where the consequences for individuals are more significant. It is therefore appropriate to have special measures in place to protect individuals identified as being at risk of domestic violence. However, I remain concerned about the risks to individuals seeking to update their own address and not that of their former partner, where the respondent is not satisfied that the individual has in fact separated from their partner, regardless of whether they have a history of family or domestic violence. The 'reasonable steps test' is one that takes into account all relevant circumstances, including what is practical and what is required where the adverse consequences to particular individuals are significant.
>
> I therefore see no reason to limit the audit to a particular cohort of individuals, including those at risk of family domestic violence. It is appropriate in order to address the grievance to target the situation where an individual makes unverified claims to have separated from, or to be no longer living with, their partner, and seeks to update their address, whether online or in person."

'ST' and Chief Executive Officer of Services Australia (Privacy) **[2020] AICmr 30 (30 June 2020) – Australian Information Commissioner**

'Damages for non-economic loss' – 'Disclosure for tribunal proceedings' – 'Following, harassing and monitoring' – 'Information privacy principles' – 'Privacy'

Proceedings: Complaint under s 36(1) of the *Privacy Act 1988* (Cth) (Privacy Act).

Facts: The female complainant's complaint concerned the disclosure of her personal information, collected by

the former Child Support Agency for a Tribunal hearing, to the complainant's ex-partner. She claimed that the personal information revealed the places she visited which she had attempted to keep hidden from the ex-partner as she feared harm.

Issues: Whether Services Australia interfered with the complainant's privacy as defined in the Privacy Act.

Decision and reasoning: Services Australia interfered with the complainant's privacy, breaching the Information Privacy Principles (IPP), by disclosing the complainant's personal information in breach of IPP 11. The locational information disclosed was not relevant to the decision under review by the Tribunal and the complainant was therefore not likely aware that information of its kind would be disclosed.

In terms of damages, the Commission accepted that the complainant had already disclosed some of the places she had frequented through other processes. The Commissioner noted at [75]-[76]:

> "I do not consider that the previously disclosed information negates the complainant's claim to have feared the ex-partner locating her. The complainant clearly went to some lengths to redact certain information from the documents she provided in the primary decision process and I accept her claim that she thought carefully about what information to disclose."
>
> "However, I am of the view that in all the circumstances, the degree by which the disclosure contributed to the complainant's fear of being located by the ex-partner was not significant. I place weight on the fact that the complainant had disclosed some locations to the ex-partner during the COA process and that she continued to maintain a PO Box at the same post office as the ex-partner. I also note the absence of any evidence showing that the complainant sought the assistance of police. While I accept the complainant's claims to have feared being located by the ex-partner, these claims are not so specific and detailed (nor are they supported by specific and detailed corroborating evidence) as to cause me to form the view that the disclosure exacerbated her fear of being located to a significant extent."

The Commissioner was satisfied that the privacy breach had caused the complainant distress, but no other claimed damage. She was awarded $3,000 for non-economic loss.

***'PJ' and Australian Federal Police (Freedom of Information)* [2018] AICmr 64 (10 September 2018) – Australian Information Commissioner**

'Confidentiality' – 'Freedom of information' – 'Public interest' – 'Systems abuse' – 'Whether disclosure of personal

information unreasonable'

Proceedings: Review of refusal access decision under *Freedom of Information Act 1982* (Cth).

Facts: The applicant applied to the Australian Federal Police (AFP) for access to "any notes made on myself by the Australian Federal Police. Not criminal records, but any and all police files/notes made on me." The AFP exempted access to 13 folios in part under s 47F (the personal privacy exemption) of the *Freedom of Information Act 1982* (Cth). Some exempt material included names, dates of birth and contact details of third party individuals, and information pertaining to an alleged domestic violence incident.

Issues: Whether the material the AFP found to be exempt under s 47F was conditionally exempt. If so, whether giving the applicant access to conditionally exempt documents would, on balance, be contrary to the public interest (s 11A(5)).

Decision and reasoning: Access to personal information of third party individuals and about an alleged domestic violence incident involving the applicant was refused.

Taking into account the nature of the information, that the information was provided for a limited purpose and was not well-known or available from other public sources, the Commissioner accepted the AFP's submission that disclosure could undermine a range of processes intended to protect individuals and could discourage those who may be affected by domestic violence from coming forward to police. The Commissioner was satisfied disclosure would be unreasonable and the relevant material was conditionally exempt under s 47F. It was also contrary to the public interest to give the applicant access to the conditionally exempt documents at this time.

***'DK' and Telstra Corporation Limited* [2014] AICmr 118 (30 October 2014) – Australian Information Commissioner**

'Family law judge' – 'Following, harassing and monitoring' – 'Non-economic loss' – 'Privacy'

Proceedings: Complaint under s 36(1) of the *Privacy Act 1988* (Cth) (Privacy Act).

Facts: The complainant worked as a judge in the family law jurisdiction. He requested that Telstra connect a phone line to his home for the sole purpose of an alarm system installed by the Court. Telstra set up the phone line and published the complainant's name, address and the phone number in both the White Pages online and in the hard copy directory.

Issues: Whether Telstra had breached the complainant's privacy.

Decision and reasoning: Telstra interfered with the complainant's privacy by failing to take reasonable steps to provide notice to the complainant that it would use and disclose his personal information for the purpose of publishing it in the White Pages, in breach of National Privacy Principle (NPP) 1.3. Telstra was ordered to apologise, review its processes and review its Privacy Statement.

Telstra was also ordered to pay the complainant $18,000 for non-economic loss. In reaching this amount, the Commissioner noted the following evidence from the complainant:

> "Since the publication of my details a litigant from a matter decided by me has begun to loiter at and about our home. As my details and those of my partner are suppressed on every public register I infer his knowledge of our address is the White Pages site…
>
> "We have just moved to our home and our enjoyment of it has been rudely interrupted…We both jump whenever the street bell rings. I have applied to be transferred interstate. On moving we will incur moving costs, expenses re sale of our home and costs of resettling… We will both have expenses travelling to visit family and friends as our lives, to date, have been in [omitted]…
>
> "The invasion of and prejudice to my privacy and personal safety can be readily envisioned as arising for others such as victims of crime, women fleeing domestic violence and the like."

In awarding compensation, the commissioner was guided by severity of the impact of the privacy breach on the complainant (with concerns for his/his partner's safely leading him to move interstate); the added security threat he/his partner were exposed to; the responsibility of Telstra as an organisation to have appropriate measures in place; and the extent of the publication to a very wide audience in both online and hard copy form.

'AG' and Department of Immigration and Citizenship [2013] AICmr 55 (26 April 2013) – Australian Information Commissioner

'Freedom of information' – 'Material obtained in confidence' – 'Personal privacy exemption' – 'Request for access to documents' – 'Visa application'

Proceedings: Review of refusal access decision under *Freedom of Information Act 1982* (Cth).

Facts: The applicant applied to the Department to access specific documents related to his ex-wife. The Department refused access to 11 documents saying disclosure would reveal information provided in confidence and personal information about third parties, of which disclosure would be unreasonable and contrary to public interest.

Issues: Whether the documents were exempt under ss 45 (material obtained in confidence) and 47F (personal privacy exemption) of the FOI Act.

Decision and reasoning: Access refused.

Documents exempt under s 45 included statutory declarations made by the applicant's ex-wife and other third parties in relation to her application for permanent residency in Australia, as well as a record of interview with the ex-wife and letter sent by a third party. The commissioner was satisfied that disclosure of the documents sought would cause detriment to the applicant's ex-wife. The Commissioner was satisfied that disclosure of the documents sought would be a breach of confidence and the documents were exempt under s 45.

Documents exempt under s 47F were general correspondence in relation to the applicant's ex-wife visa applications. The documents contained personal information of the applicant's ex-wife, the applicant and or third parties, which was of a sensitive and personal nature (including names/other information). Disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy, and an agency's ability to obtain confidential information and to obtain similar information in the future. Giving the applicant access to the documents was contrary to the public interest.

In reaching the decision, Acting Information Commissioner Pirani stated:

"[20] The Department has created Form 1040 for the purposes of a visa applicant providing documentation in relation to family violence matters. This was the form used by the applicant's ex-wife in support of the visa application. Form 1040 states that the information provided in the form 'is given and received on the understanding that it will be treated in confidence'."

***'AF' and Department of Immigration and Citizenship* [2013] AICmr 54 (26 April 2013) – Australian Information Commissioner**

'Freedom of information' – 'Material obtained in confidence' – 'Request for access to documents' – 'Visa application'

Proceedings: Review of refusal access decision under *Freedom of Information Act 1982* (Cth).

Facts: The applicant's relationship with his former partner ended and she applied for a Subclass 100 visa on domestic violence grounds. The applicant applied to the Department for access to all material in any form relating to his former partner. The Department applied the material obtained in confidence exemption (s 45) and the personal privacy exemption (s 47F) to statutory declarations made by the applicant's former partner and a competent person in relation to a visa application made by the applicant's partner under the family violence provisions of the Migration Regulations.

Issues: Whether the documents were, inter-alia, exempt under s 45 (material obtained in confidence).

Decision and reasoning: Access refused. In particular, the Commission was satisfied that the statutory declarations were communicated and received on the basis of a mutual understanding of confidence between the applicant's former partner and the Department and the competent person. Disclosure "would result in detriment to the authors of the statutory declarations as it would reveal private matters relating to the allegations of family violence. The disclosure of this information may cause a level of embarrassment and discomfort to the authors of the statutory declarations". The Commissioner was satisfied that unauthorised disclosure of the information contained in the documents would cause detriment to the applicant's former partner and the competent person.

Australian Capital Territory

Court of Appeal

***NS v Hotchkis* [2021] ACTCA 13 (2 June 2021) – Australian Capital Territory Court of Appeal**

'Breach of protection order' – 'Common assault' – 'Evidence issues' – 'Protection orders' – 'Self-represented litigant'

Charges: Common assault x 1; Contravening a Family Violence Order x 1.

Proceedings: Appeal from ACT Supreme Court against convictions imposed in the ACT Magistrates Court.

Facts: The male appellant and female complainant were married and living together. The appellant kicked the complainant's leg during an argument. The applicant breached a family violence order by engaging in offensive or harassing behaviour towards the complainant or by harassing, threatening or intimidating her. The complainant made an audio-recording and a central issue in the appeal was whether the magistrate in the initial hearing had erred in ruling that the audio recording was admissible. The appellant's appeal to the Supreme Court against his conviction was dismissed: *NS v Hotchkis* [2019] ACTSC 309 (8 November 2019).

Grounds of appeal: The primary appeal judge erred in dismissing the first appeal on grounds that:

1. The magistrate erred in ruling that the audio recording made by the complainant was admissible (pursuant to ss4 and 5(2)(d)-(e) of the *Listening Devices Act 1992* (ACT) (LDA).
2. The convictions were unreasonable and could not be supported having regard to the evidence.

Held: Appeal dismissed.

Ground 1: There was no error in the primary judge's conclusion that ss 4 and 5 were not breached, as the complainant believed, on reasonable grounds, the recording was necessary for the protection of her lawful interests. Further, there was no error in concluding there was no prohibition in s 10 for the admissibility of the conversation. No question of the application of s 138 of the Evidence Act arose.

Ground 2: The primary judge reviewed the evidence, set out findings of fact and reasons given by the magistrate, and referred to the appellant's submissions that the statements made did not breach the family

violence order. There was no error in the primary judge's conclusion:

> "I have no hesitation in agreeing with the Magistrate that the evidence established a breach of the family violence order. Having listening to the recording on numerous occasions, I am satisfied that his conduct was, and was intended to be, harassing and intimidating. I agree with the Magistrate that he was yelling at [the complainant], and that his tone was aggressive. His suggestion that he was talking to the dog is improbable, but in any event I am satisfied that his conduct was really directed towards [the complainant], and intimidating her."
>
> "In finding the appellant guilty of assault, the Magistrate was entitled to take into account the clear aggression demonstrated by the appellant at the time that [the complainant] says she was kicked. She was also entitled to find that the appellant had threatened to "snot" [the complainant], and that this was a threat to hit her. The Magistrate was also entitled to find that the accused had kicked the rubbish bin just before he kicked the complainant, although his intention may have been to scare the dog. These were all circumstances supportive of the evidence of [the complainant]. Finally, the Magistrate had the benefit of seeing and hearing [the complainant] cross examined and the appellant giving his evidence. Her finding that [the complainant] was a credible witness, and the appellant was not, should not lightly be interfered with. I am satisfied that there was ample evidence upon which the Magistrate was entitled to convict the appellant."

***TS v DT* [2020] ACTCA 43 (27 August 2020) – Australian Capital Territory Court of Appeal**

'Accommodation' – 'Appeal of family violence order' – 'Exclusion from home' – 'Ongoing risk' – 'Past domestic and family violence' – 'People from culturally and linguistically diverse backgrounds' – 'Protection orders' – 'Self-represented litigant'

Proceedings: Appeal of Family Violence Order.

Facts: The matter was an appeal to the Court of Appeal following a final Family Violence Order (FVO) made against the appellant by the Chief Magistrate, and upheld on appeal by the Primary Judge: *TS v DT* [2019] ACTSC 295 (25 October 2019). The appellant sought that the FVO made by the Chief Magistrate be quashed, and no further orders made excluding the appellant from the premises of the family home (where the respondent was living).

Issues: The male appellant applied to adduce additional evidence in the appeal. The appellant also raised 12

grounds of appeal: the decisions of the Chief Magistrate (Ground 1) and Primary Judge (Ground 2) were unreasonable and not supported by evidence; the Chief Magistrate erred in running a final hearing on the FVO application (Grounds 3 and 10), making an FVO that was too long (2 years from final hearing) (Ground 4) and applying the *Browne v Dunn* principle (Ground 5); the Primary Judge attempted to cover up the Chief Magistrate's alleged misconduct (Ground 6); the Chief Magistrate erred in law by relying on 2018 convictions (Ground 7) and the 2007/8 incident to support the making of the FVO (Ground 8); there was judicial misconduct by the Chief Justice in the conduct of the final hearing (Ground 9); and there was failure to have regard to evidence including relating to "property law issues" and the accommodation difficulties of the appellant (Grounds 11 and 12).

Decision and reasoning: The application to adduce additional evidence was refused ([52]-[64]), and the grounds of appeal were dismissed ([65]-[162]).

On Grounds 1 and 2, the decisions of the Chief Magistrate and Primary Judge were not unreasonable and were supported by evidence (including specific instances of violence against the respondent and her son, further supported by criminal convictions of the appellant) ([66]-[87]).

On Grounds 3 and 10, there was no error in making a final order excluding the appellant from access to the family home as the proceedings were run as a final hearing ([88]-[100], [142]-[143]). On Ground 4, the FVO's duration was grounded in statute. Further, the Chief Magistrate weighed the competing interests of the appellant and the respondent (including the appellant's accommodation difficulties) but found these could only be remedied by excluding the appellant from the family home ([101]-[112]). On Ground 5, there was no error in application of the *Browne v Dunn* principle ([113-[122]) and on Ground 6, there was no evidence of judicial bias ([123]-[125]).

On Ground 7, there was no miscarriage of justice relating to the 2018 convictions (which confirmed findings of instances of violence and substantiated the respondent's fear) ([126]-[131]) and on Ground 8, appropriate regard was had to an incident in 2007/8 ([132]-[137]). On Ground 9, the Chief Magistrate's conduct during the hearing was unremarkable ([138]-[141]).

On Grounds 11 and 12, the Chief Magistrate and Primary Judge had due regard to the evidence presented by the appellant, including evidence relating to "property law issues" and the accommodation circumstances of the appellant ([142]-[161]). On the property law issues, at [153]-[154], the Court noted:

> "The appellant contends that the respondent had an additional purpose in seeking as a condition of the

final FVO that the appellant be excluded from the family house – namely, an objective on the respondent's part to obtain sole ownership of the family home. As I noted earlier, irrespective whether this was the case, there was clear evidence before the Chief Magistrate that the respondent would have difficulty relocating her place of residence and, further, that there was a history of violent conduct on the part of the appellant towards the respondent which supported the final FVO being made.

Further, and notwithstanding the submissions of the appellant to the contrary, the ultimate proper disposition of assets is a matter for the family law proceedings. That the respondent may seek sole ownership of the matrimonial home in those proceedings does not mean that her claims under the *FV Act* had no basis."

***Laipato v The Queen* [2020] ACTCA 35 (7 July 2020) – Australian Capital Territory Court of Appeal**

'Appeal against conviction and sentence' – 'Evidence' – 'Inconsistent verdicts' – 'People affected by trauma' – 'Strangulation' – 'Threats to kill' – 'Unreasonable, unsafe and unsatisfactory verdicts'

Charges: Burglary x 1 (guilty); Unlawful confinement x 1 (guilty); Choking x 1 (guilty); Indecent assault x 1 (not guilty); Choking x 1 (not guilty); Intentionally causing property damage x 3 (not guilty); Stealing CCTV hard drive x 1 (not guilty).

Proceedings: Application for leave to amend notice of appeal and for leave to appeal (grounds 3, 4, 6 and 7) and appeal against conviction and sentence.

Facts: The trial court found that the appellant man broke into his former partner's (the complainant's) house before dragging her from bed and strangling her. The complainant's evidence was that the appellant 'made her stay' in the room by threatening to strangle her if she tried to leave, strangling her multiple times and threatening to kill her. The appellant allegedly committed property damage. There was some delay before the complainant alleged that the appellant had indecently assaulted her. The appellant allegedly ripped out the CCTV hard drive before leaving. The appellant also allegedly slashed the tyres of the complainant's car.

Grounds of appeal: (1) Verdicts were inconsistent; (2) Verdicts were unreasonable, unsafe and unsatisfactory; … (6) Trial judge erred in making factual findings; (7) Sentences were manifestly excessive.

Decision and reasoning:

Grounds (1)-(2) *Dismissed.*

There were rational explanations why the jury may have acquitted the appellant of some charges while finding the appellant guilty on others. One factor identified was that the complainant was upset and frightened; she 'may have misremembered matters or failed to appreciate details', although the complainant did make some errors in her evidence and did not directly witness some of the alleged charges/events. Where there were inconsistencies in the complainant's evidence, the jury may have accepted that this was because she had just 'survived a gruelling series of events' [101].

Ground (6) *Allowed.*

Two of the trial judge's factual errors did not reduce the objective seriousness of the offence to something less than 'midrange':

> [155] The offence was committed in the complainant's home, during the night. It was motivated by a desire to vent anger and assert physical control over the complainant in response to her termination of the relationship. The offence was of not insignificant duration. It was associated with violence and a threat to kill; whether the violence was properly described as "extreme violence" poses a semantic question that is unnecessary to answer.
>
> A third factual error of substance required the Court of Appeal to resentence on Counts 1, 2 and 3.

Ground (7) *Allowed*. *Total sentence reduced from 5 years and 5 months to 3 years and 6 months.*

***R v UG* [2020] ACTCA 8 (27 February 2020) – Australian Capital Territory Court of Appeal**

'Alcohol abuse' – 'Children' – 'Damaging property' – 'People with mental health issues' – 'Physical violence - threat to kill child - suicide threat- weapon'

Offences: Common assault x2; possessing offensive weapon with intent x1; d amaging property x 2; make demand with threat to kill x1; aggravated dangerous driving x1

Proceedings: Appeal against sentence

Issues: The Crown submitted that the sentences were manifestly inadequate:

- The length of sentence for the offence of making a demand with threat to kill failed to reflect the objective seriousness of the offence;

- The very limited degree to which the offences were cumulative meant that the total sentence was manifestly inadequate; and
- The actual imprisonment period of four months was manifestly inadequate having regard to relevant sentencing purposes.

Facts: R (the appellant man) and C (the complainant woman) were in a relationship at the time of offending. An argument had broken out after R told C he wanted to commit suicide. R grabbed C as she tried to leave their shared bedroom and pushed her onto the bed (first common assault). He then retrieved a large axe from their wardrobe. R pushed C to the ground while they struggled over the axe (second common assault) and swung the axe at her head, narrowly missing. R used the axe to damage items within the house before forcing the couple's four children into his car. He left and returned several times to demand C get in the car. He eventually threatened to kill their eldest daughter with the axe if C did not get in but drove away once more as police approached his vehicle. This led to a large-scale search. The R was located and arrested later that evening. While all four children were physically unharmed, the eldest daughter was later assessed by a paediatrician who thought it was likely that the offences significantly impacted her emotional and behavioural wellbeing.

On the day of offending, the respondent had failed to take his prescribed antidepressant medication and had consumed a significant quantity of alcohol.

Initially R pleaded not guilty to all charges. Following discussions between the parties the respondent pleaded guilty to six charges and was committed to the Supreme Court for sentence.

The sentencing judge imposed a total sentence of 16 months' imprisonment.

Judgment: In addressing the first aspect, the Court noted that while the offender's mental health condition somewhat reduced his moral culpability, it was still necessary to consider the sentencing purposes of general deterrence and denunciation. By failing to reflect these purposes, along with the high objective seriousness of the offence, the sentence starting point of 18 months' imprisonment for the offence of making a demand with threat to kill was "plainly unreasonable" [69-71]. For the second aspect, the Court believed the degree of cumulation failed to achieve a total sentence that was just and appropriate to reflect the overall criminality [73]. The Court did not make a decision as to the third aspect as they had found they had already found the sentences to be manifestly inadequate for other reasons. Despite finding the sentences manifestly inadequate, the Court refused to resentence the offender on the basis that the appeal raised no point of

principle, had limited precedent value and would disrupt the offender's rehabilitation [97].

The Court also discussed the preliminary issue of the correct approach to sentencing for family violence offences and the correct manner of dealing with the effect of a sentence of imprisonment on the offender's family [44]. The Court rejected the Crown's contention that family violence offences constitute a special category of offence in relation to which different sentencing principles apply, and instead provided that absent a statutory provision to the contrary, the same sentencing standards should apply to all offenders (Bugmy v The Queen) [48]-[51].

***R v Wyper* [2017] ACTCA 59 (11 December 2017) – Australian Capital Territory Court of Appeal**

'Appeal against conviction' – 'Complainant's credibility' – 'Crown appeal against sentence' – 'Intensive correction order' – 'People from culturally and linguistically diverse backgrounds' – 'Post-separation violence' – 'Sentencing' – 'Sexual and reproductive abuse'

Charges: Engaging in sexual intercourse without consent and being reckless as to whether the person was consenting x 1.

Appeal type: Defendant's appeal against conviction and Crown appeal against sentence.

Facts: The complainant and defendant were in a relationship ([11]). The defendant asked the complainant to leave the house; she did not want to leave. The complainant alleged that the defendant held her down and digitally penetrated her ([13]). The defendant denied that he digitally penetrated the complainant, and alleged that she damaged a number of his belongings ([14]). The defendant called the police about the property damage, and the complainant called the police about the sexual assault 2 hours later ([20]-[21]). A medical examination of the complainant revealed abrasions consistent with assault ([23]).

The defendant was convicted at trial. He was sentenced to 2 years and 6 months' imprisonment, served by way of intensive correction order ('ICO'), and 100 hours' community service ([2]).

Issues: The defendant appealed against conviction on 3 grounds: (a) the verdict was unsafe and unsatisfactory; (b) the trial judge caused a miscarriage of justice by failing to fairly put the defence case to the jury; and (c) the trial judge caused a miscarriage of justice by failing to direct the jury that the complainant had a motive to lie.

The Crown appealed on the ground that the sentence was manifestly inadequate.

Decision and Reasoning: Both the defendant's appeal against conviction and Crown appeal against sentenced were dismissed ([8]).

Appeal against conviction

On ground (a), the defendant argued that the verdict was unsafe and unsatisfactory having regard to the unreliability of the complainant's evidence. The Court (Murrell CJ, Bromwich J and Robinson AJ) held that while it was 'somewhat implausible' that the complainant did not cause the property damage, it was open to the jury to convict the defendant ([53]).

On grounds (b) and (c), the defendant argued that the judge should have directed the jury on the complainant's possible motive to lie to avoid the consequences of her causing the property damage. However, the Court stated that the summing up was fair, given that the motive to lie was not a large issue in the trial ([66]-[68]).

Crown appeal against sentence

The Crown argued that by ordering an ICO, the trial judge failed to give adequate weight 'to the principle that, for family violence offences, the sentencing purposes of general deterrence and denunciation are particularly important' ([96]). The Court reiterated the importance of general and specific deterrence in sentencing family violence offenders ([97]), however, the Court emphasised the exceptional nature of the offending at [99]:

> This was not a typical offence of family violence. There was no evidence of a history of domestic violence, controlling behaviour or psychological abuse. There were none of the typical indicia of power imbalance. Rather, the offence occurred in the context of a relationship ending, without those features apparently being present.

Imposing an ICO, while lenient, was justified by the defendant's subjective circumstances, such as his lack of criminal history, and the fact that there was no history of domestic violence in the relationship ([129]-[130]).

O'Brien v R [2015] ACTCA 47 (15 May 2015) – Australian Capital Territory Court of Appeal

'Assault occasioning bodily harm' – 'Double jeopardy- sentencing' – 'Exposing a child' – 'Perverting the course of justice' – 'Physical violence and harm' – 'Risk factor- strangulation' – 'Sentence cumulation' – 'Sentencing' –

'Systems abuse' – 'Trafficking in cocaine'

Charge/s: Trafficking in cocaine, assault occasioning actual bodily harm (two counts), forcible confinement, perverting the course of justice. Grievous bodily harm.

Appeal Type: Appeal against sentence.

Facts: The sentence imposed at first instance related to three distinct instances of criminality: the drug offence, the domestic violence offences and the perverting the course of justice offence. The domestic violence offences involved the appellant severely beating his then domestic partner which caused horrific injuries. He also choked her in the presence of his young son, restrained her from leaving their premises and forced her to take prescription sedatives so as to prevent her from seeking medical treatment which would reveal the assaults. He detained her for 24 hours. The perverting the course of justice offence involved the appellant encouraging his (by then former) partner not to attend court in relation to the domestic violence charges and encouraging her to produce false evidence about her psychological frame of mind. The aggregate sentence imposed was 12 years and 11 months' imprisonment with a non-parole period of 8 years and 4 months.

Issue/s: Whether the aggregate sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The appellant submitted that the domestic violence sentences should not have been made cumulative on the sentences for the drug offences. He also submitted that the sentencing judge did not apply the totality principle. The Court held that while the aggregate sentence could be considered by some to be somewhat harsh, it was not unreasonable and was appropriate having regard to all the circumstances. There was no overlap in the three instances of criminality, nor could it be said that the three incidents arose from a single episode or course of conduct, 'such that the criminality involved in one of the incidents was subsumed or comprehended in the others' (see at [29]). The sentencing judge did take accumulation, concurrency and totality into account and did impose a degree of concurrency.

***Kien v R* [2012] ACTCA 25 (24 May 2012) – Australian Capital Territory Court of Appeal**

'Choking so as to render unconscious' – 'Exposing a child' – 'Intentionally inflicting actual bodily harm' – 'Physical violence and harm' – 'Provocation' – 'Risk factor- strangulation' – 'Sentencing'

Charge/s: Intentionally inflicting actual bodily harm, choking so as to render unconscious.

Appeal Type: Appeal against sentence.

Facts: The appellant's marriage with his wife ended and she obtained a domestic violence protection order against him (though this was not in place at the time of the offence). The appellant went to the family home and an argument ensued, which developed into a physical fight. The appellant then took a chair from his wife (which she was threatening to throw at him) and struck her with it so forcefully that it broke into pieces. He then choked her until she became unconscious. He then wrapped a towel around her neck and used both hands to pull the material down toward the floor. A domestic violence protection order was previously in place in favour of the victim. He was subject to a good behaviour order at the time of the offences imposed for a prior breach of the protection order. He was sentenced to a total of four years and seven months' imprisonment with a non-parole period of three years and one month.

Issue/s:

1. Whether the sentencing judge erred in finding that the offences were unprovoked.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that the fact the offences were not unprovoked should have mitigated the severity of the sentence. This argument was rejected — the actions of the victim were all in response to the appellant coming to the matrimonial home where he was not welcome. He was asked to leave but did not do so. His response to his wife's actions were so disproportionate that they could not have been seen as provocative.
2. Counsel for the appellant submitted that two comparable cases showed the sentence was manifestly excessive. This argument was rejected, with the Court holding that the offences were serious and resulted in severe facial injuries committed in a context where the appellant was not welcome in the house. While they were heavy sentences, they were proportionate to the criminality involved.

***Stevens v McCallum* [2006] ACTCA 13 (30 June 2006) – Australian Capital Territory Court of Appeal**

'Assault' – 'Contravention of a protection order' – 'Evidence issues' – 'Hearsay' – 'Hostile witness' – 'Incompetence of counsel' – 'Physical violence and harm' – 'Protection orders' – 'Unco-operative witness'

Charge/s: Assault, contravention of a protection order.

Appeal type: Appeal against conviction and appeal against sentence.

Facts: The appellant was charged with assaulting his female partner ('the complainant') and contravening a protection order in her favour. He pleaded guilty to assault but not guilty to contravening a protection order. The offending came to light after a police officer ('the informant') attended the complainant's premises. The informant observed that the complainant was very distressed and had bruises on her body. A conversation between the complainant and the informant was recorded. In this conversation, the complainant made some allegations that the appellant had hit her but she was largely unresponsive to questions and was affected to a considerable degree by alcohol (See [41]-[43]). At trial, the prosecution sought to prove the tape and transcript of this conversation only for its possible use in refreshing the complainant's memory. However, counsel for the appellant, Mr Elmaraazey, tendered this document as evidence ('exhibit 3').

The complainant was called to give evidence after the informant. When asked about whether there was an incident between her and the appellant, she stated 'I can't remember the exact details' and proceeded to give an account of the evening that made no reference to any physical violence. She agreed that she had a conversation with the informant but could not recall its contents. The prosecution then proceeded to cross-examine the complainant about the various bruises that had been observed on her that evening. The complainant said she could not remember how the bruises happened. The prosecution applied to the magistrate for leave to cross-examine the complainant on the basis that the witness had made a prior inconsistent statement with reference to exhibit 3. Mr Elmaraazey did not object. The complainant's response was to accept that exhibit 3 accurately reflected what she had told the informant but she could neither confirm nor deny that it represented what actually happened (See [26]-[40]). Accordingly, absent the tender of exhibit 3 as evidence, there would have been insufficient evidence to convict the appellant (See [47]).

The magistrate found the appellant had assaulted the complainant and sentenced him to 12 months imprisonment for the assault and 3 months imprisonment for the breach of protection order. He was sentenced to an additional 6 months imprisonment for breach of an earlier imposed recognisance.

Issue/s:

1. The incompetence of counsel for the appellant, Mr Elmaraazey, led to a miscarriage of justice.
2. The sentencing magistrate erred in assuming that the injuries sustained by the complainant were the result of a 'violent and prolonged' assault.

Decision and reasoning: The appeal was allowed. First, in the absence of the tender of exhibit 3 by Mr Elmaraazey, it was, at the very least, unlikely that the statement would have been admitted as evidence that the appellant assaulted the complainant. It was open to the prosecutor to seek leave to give the statement to the complainant to refresh her memory, if s 32 of the Evidence Act were satisfied. However, the failure of this process to refresh the complainant's memory meant the prosecutor could not tender the prior statement as evidence of the truth of its contents (See [145]-[180]). There was a resulting miscarriage of justice (See [181]-[191]).

Second, the sentencing judge erred in assuming that all the injuries resulted from the charged assault. Even if the terms of exhibit 3 had been properly proved, they included an allegation of assault that had occurred the previous evening. The only unequivocal allegation of recent violence was that the appellant hit her in the face on their return from the shops. It was an error not to attempt to distinguish between the violence inflicted the previous night and those in the hours preceding the interview with the informant (See [196]-[207]).

Supreme Court

Groves (a pseudonym) v Everette (a pseudonym) **[2023] ACTSC 27 (22 February 2023) – Australian Capital Territory Supreme Court**

'Appeal from decision of registrar not to list a matter on an urgent basis for the hearing of an application to temporarily extend a protection order' – 'Matter remains listed in magistrates court' – 'No decision to refuse to amend protection order' – 'Protection order' – 'Supreme court jurisdiction not enlivened' – 'Whether court has jurisdiction to hear appeal'

Proceedings: Appeal from Registrar of Magistrate Courts' refusal to list application for a temporary extension of a final protection order for urgent hearing.

Facts: The female applicant sought an extension of a final family violence order (and temporary extension pending the hearing) due to expire the same day. She sought an urgent hearing of the application and that it be heard in the absence of the respondent.

The Registrar of the Magistrates Court refused to list the matter that day and the temporary application was listed a week later. The applicant was informed that the application in the proceeding must be served on the respondent. The applicant then appealed from the decision not to list the matter on an urgent basis and the requirement to serve documents on the respondent. The appeal was listed on an expedited basis.

Reasoning and decision: The matter was adjourned without making a decision on the application or appeal, as the judge found that the court did not have jurisdiction over the Registrar's decision.

Loukas-Karlsson J considered the jurisdiction of the Supreme Court to deal with the matter under s 92 of the *Family Violence Act,* determining that the court would have power over a registrar's refusal to make an amendment to the final order. However, Her Honour found the registrar's decision in this case did not constitute a refusal and was effectively related to internal listing matters. The fact that the Registrar had listed the application for a week's time was clear evidence that they had not refused the application.

The applicant had raised r 3803(c) (*Court Procedures Rules 2006* (ACT)), excluding family violence proceedings from appeals (r 6256), to argue that there was no avenue for an appeal in the Magistrates Court. However, Her Honour determined that the order could be varied at the Magistrate's discretion as finding otherwise would leave the appellant with no avenue to challenge an order.

Her Honour considered that the appellant had taken reasonable steps to attempt to serve the application and affirmed that the Magistrate had the power to vary or amend the Registrar's order requiring personal service.

In the addendum, Her Honour noted that the decision not to hear the application for a temporary extension on the day it was made was 'remarkable' and left the applicant with no protection.

***DPP v McGary* [2023] ACTSC 14 (2 February 2023) – Australian Capital Territory Supreme Court**

'Evidence' – 'Ground rules hearing' – 'Pre-trial application' – 'Sexual assault' – 'Special witness provisions' – 'Support person' – 'Victim fear' – 'Young people'

Proceedings: DPP pre-trial application for:

1. An intermediary to be appointed for the complainant witness and a ground rules hearing be held
2. The witness (complainant's father) give evidence by audio-visual link
3. The complainant's father give evidence with a support person present

Facts: The respondent had been charged with two counts of sexual intercourse without consent and plead not guilty to each.

The respondent and complainant had been in a relationship for a few months. The charges related to an incident during the relationship where the respondent digitally penetrated the complainant's anus and had anal intercourse with her despite her objections and resistance. She claimed that she continued in the relationship for a short time following the assaults as a matter of self-preservation, feeling it would be dangerous for her to end the relationship. She sought medical assistance and subsequently disclosed the sexual assault before ultimately making a police complaint.

The complainant's father, whose evidence included the changes he noted in the complainant's demeanour after the alleged incident, suffered from a significant cardiac condition.

Reasoning and decision:

- The Director's application under s 4AJ of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) for the appointment of a witness intermediary for [the complainant] is dismissed.
- The witness, [redacted], give their evidence at the trial by audio-visual link from a place in the Australian Capital Territory (ACT) that is outside the courtroom, namely the Court's remote witness room, pursuant

to s 32(1)(a) of the *Evidence (Miscellaneous Provisions) Act 1991*(ACT)

- The witness, [redacted], give their evidence at the trial with a support present, pursuant to s 49(1) of the *Evidence (Miscellaneous Provisions) Act 1991*(ACT)

1. Baker J was satisfied that the complainant suffered anxiety, stress, PTSD and elements of depression. While there was no evidence of these conditions continuing, her Honour emphasised that the stress of giving evidence in court could lead to an exacerbation of the issues.

   While the conditions were recognised as potentially affecting someone's ability to communicate, HH found that there was no evidence from the police interview or medical records indicating that the complainant's conditions had affected her ability to communicate. Her Honour highlighted that the purpose of a witness intermediary is not to reduce stress or be a support person but to facilitate communication and refused the application.

2. Baker J found that it was in the interests of the administration of justice that the complainant's father testify via audio-visual link on account of his cardiac condition, as giving evidence would exacerbate stress and impact his health. No unfair prejudice was found as the evidence was not likely to be contentious and the jury could be given appropriate directions.

3. Her Honour was satisfied that it was in the interests of justice that a support person be provided as the father's cardiac condition met the threshold of 'disability' and the impact of stress on his health would affect his ability to give evidence.

***Alvin (a pseudonym) v Director of Public Prosecutions* [2022] ACTSC 358 (20 December 2022) – Australian Capital Territory Supreme Court**

'Bail application' – 'Bail review' – 'Change in circumstances' – 'Domestic violence offences' – 'Drug rehabilitation' – 'Offending whilst on bail or facing charges for other offences' – 'People who are affected by drug and alcohol misuse' – 'Plea of guilty' – 'Review of decision of magistrates court'

Proceedings: Bail application.

Facts: The applicant had been refused bail by a Magistrate. He subsequently pleaded guilty to multiple charges, including domestic violence offences against his former partner. The applicant gave evidence that

he had remained drug free while in custody, despite drugs being readily available. He was unable to enter a rehabilitation program unless he was released and had the powerful motivating factor that he has been advised by Child Youth and Protection Services he would not have care of his two children until he completed a course of residential rehabilitation.

Reasoning and decision: Bail granted.

The applicant's recent plea of guilty to a number offences constituted a change in circumstances, removing the risk to the applicant's partner that she would be prevailed upon by him to withdraw complaints.

Special and exceptional circumstances were also found in the new incentives for the applicant to undertake residential rehabilitation. McCallum CJ reasoned that the fixing of the sentencing date would motivate rehabilitation and, more significantly, Child Youth and Protection Services has notified him that he had to undergo rehabilitation before they would restore care of his two children. This included the infant child he had with his current partner who was victim to some of the domestic violence offences.

While there was evidence of a history of conflict with his current partner, this occurred while he was addicted to ice and the Court accepted that he appears to have remained drug free since being in custody. While some risk of him returning to drugs was identified, McCallum CJ found that it was warranted to allow the applicant the opportunity to rehabilitate.

***DPP v Dunn* [2022] ACTSC 355 (16 December 2022) – Australian Capital Territory Supreme Court**

'Breach of protection order' – 'Coercive control' – 'Past domestic and family violence' – 'Physical violence' – 'Protection order' – 'Rape' – 'Sentencing' – 'Separation' – 'Sexual abuse' – 'Strangulation'

Proceedings: Sentencing following a plea of guilty to:

1. Common assault (s26 *Crimes Act 1900* (ACT))
2. Choking, strangling or suffocating (s28(2)(a))
3. Sexual intercourse without consent (s54)
4. Contravening a family violence order (s43(2))

Facts: The offender and victim were in a relationship. A protection order had been granted on application of the victim but was 'consensually not complied with' and the relationship between the offender and victim

continued [4].

Common assault: After an argument, the defendant took the victim's phone from her and she went into the bathroom to take a bath. Further argument ensued in the bathroom, during which the offender put his hands around the victim's throat without squeezing, before pushing her back against the vanity unit.

Choke, suffocate or strangle: After a verbal argument, the victim tried to make the offender leave. He forced his way into the house and carried the victim over his shoulder into the bedroom while she screamed for help. The defendant shoved her and pushed her down onto the bed, telling her to be quiet and placing his hand over her mouth. The victim had difficulty breathing and sustained a minor lip injury.

Sexual intercourse without consent: The offender visited the victim's residence after she had been drinking all day and was substantially intoxicated. The victim fell asleep and woke to find the defendant rubbing her vagina. She initially responded consensually to avoid a fight but then feigned being asleep in the hope that by letting it continue, the seriousness of the offence would allow her to leave the relationship. While she pretended to sleep, the defendant had sexual intercourse with her.

Contravene family violence order: Following the sexual assault, the victim blocked the offender's contact and social media but he continued to contact her. One evening he visited her residence and the victim activated security sirens, making him leave. She later told him to return to take away food he had left outside the house. He attended the premises several times that evening and during one visit the victim's sister told him to leave. He also spoke briefly with the victim.

Reasoning and decision: An aggregate sentence of 24 months' imprisonment with a non-parole period of 14 months was imposed.

Mossop J considered the objective seriousness of the four offences and the offender's subjective circumstances.

The common assault was found to be in the mid-range of seriousness, attributable to the act's demonstration of dominance and control within an intimate relationship. The strangulation was determined to be in the low-mid range, given the apparently short duration and fact that the victim did not appear to have approached passing out or sustained significant injury. The unusual circumstances of the sexual intercourse without consent charge – being the victim's deliberate behaviour to first indicate consent and then pretend to be asleep in the hope that the offender would commit an offence – in the context of a relationship which included

sexual intercourse led to a finding of low range objective seriousness.

The offender was found to have some relevant difficulties in his background, having been brought up with an alcoholic and abusive father. This moderated the significance of general deterrence slightly subject to the countervailing necessity for specific deterrence given his significant history of past domestic and family violence. This included assaults of the victim and a past partner and her child, and multiple contraventions of protection orders. Mossop J highlighted that while the present offending was not objectively high on a spectrum of seriousness, his criminal history revealed a disturbing pattern of offending directed towards intimate partners, making denunciation, deterrence and recognition of harm significant sentencing purposes.

While the offender had expressed some empathy about the victim and indicated a willingness to engage in family violence intervention programs, the evidence of his 'patchy' prior engagement in similar programs weakened his prospects of rehabilitation [41].

***Fall v Vuolo* [2022] ACTSC 249 (15 September 2022) – Australian Capital Territory Supreme Court**

'Appeal against sentence' – 'Conviction not recorded' – 'Extra curial punishment' – 'Manifestly inadequate' – 'Sentencing' – 'Stalking'

Charge: Stalking.

Case type: Appeal against sentence.

Facts: The offender was found guilty of stalking his ex-wife (the victim) under s 35 of the *Crimes Act (1900)* (ACT). A conviction was not recorded on the basis that the offending was at the lowest end of the spectrum and the offender was already being punished extra-curially by not being allowed to see his children. On six occasions over a period of around four months, the offender had followed the victim's car after handover of the children, when the children, aged four, seven and ten, were either in his car or in the victim's car.

Issue: The DPP appealed against the sentence on the basis that:

- the Magistrate erred in holding that the offending was 'very much towards the lowest level of objective seriousness';
- the Magistrate erred in finding there was extra-curial punishment; and
- the sentence imposed was manifestly inadequate.

Held: appeal upheld on the basis that the sentence was manifestly inadequate. Kennett J ordered the previous sentence be set aside, that a conviction be recorded and that the offender be placed on a good behavior bond for 12 months.

In relation to the second ground of appeal, the offender believed that he had lost his job and lost access to his children as a result of the charges. His Honour noted that 'some degree of career turbulence will often be a very predictable, if not inevitable, consequence of offending' [21]. His Honour contrasted this with the position regarding loss of contact with children:

> Loss of contact with his children was, for the respondent, a far from surprising consequence of committing a stalking offence against his former wife in circumstances where the children were present. However, it arises from his family circumstances; it is not something every stalker should expect. There was material before the Magistrate indicating it left the respondent distraught. As a discretionary factor it could legitimately be given little weight; however, I do not think that the Magistrate erred in principle by taking it into account. [23]

***TS v DT* [2022] ACTSC 137 (10 June 2022) – Australian Capital Territory Supreme Court**

'Application to extend protection order' – 'Domestic and family violence' – 'History of extended litigation' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Protection order appeal' – 'Systems abuse' – 'Whether protection order no longer necessary'

Matter: Appeal of decision of a Magistrate to extend the term of a protection order granted to the respondent woman DT, which among other terms prevented the appellant man, TS from residing in the matrimonial home (which protection order was the subject of *TS v DT* [2020] ACTCA 43 (27 August 2020) and an earlier appeal) for a period of 12 months (it having been extended a number of times previously on an interim basis).

Facts: The protection order, among other terms, prevented TS from residing in the former family home (that protection order was the subject of *TS v DT* [2020] ACTCA 43 (27 August 2020) and an earlier appeal) for a period of 12 months (it had been extended a number of times previously on an interim basis). TS argued DT had the means to obtain alternative accommodation and TS could not afford alternative accommodation, hence should be allowed to reside in the former family home, envisioning either the parties living separately under one roof (as they had between 2008 and 2017) or DT vacating the former family home so that TS could reside there. TS claimed the protection order application was a tactic to force TS to accept an outcome in

property proceedings contrary to his best interests. DT gave (largely unchallenged) evidence that TS continued to subject her to daily abuse, and that she remained fearful of TS, particularly if they were to reside under one roof. TS had not filed a response to DT's then Federal Circuit Court application for property orders in relation to the former matrimonial home and orders had been made in that court that if he did not respond orders would be made unopposed in terms of DT's application (granting DT sole ownership of the former matrimonial home or proceeds of sale thereof). DT submitted evidence of his psychiatric disorder.

Grounds: (Taken from TS's application)

1. The decision is unreasonable and not supported by evidence.
2. cross jurisdictional issues. The magistrate was totally focused on issues with property settlement under the jurisdiction of the federal circuit court, than what was before him in his own magistrate court, kicking the can into another jurisdiction. It clearly shows that this is a property matter and not a safety issue. corruption of the Family Violence Act in order to get property.
3. Evidence presented that was beneficial to me was totally ignored.
4. my lack of accommodation and resulting hardships was not considered.
5. my human rights and ownership rights have been abused by keeping me out of my house for the last 4 years and now with the order given becomes 5.
6. sex discrimination by allowing my wife to stay in the house without moving out while i because i am male have to be out for 5 years because of my gender. If men and women are treated equally then she should have been in the house for 2.5 years and then move out because she is permanent APS employee earning higher income than me.
7. disability discrimination as ample evidence was given about my depression while my wife does not have any disability.
8. There was much more time spent in the court for property matters than on other matters.as such the court was corrupted by matters not in its jurisdiction and as such its decision is heavily flawed.

Issues:

Whether the only consideration in an application to extend a protection order is whether the protection order is no longer necessary to protect the applicant from family violence (s86 *Family Violence Act 2016*) or whether the requirement to consider "hardship" to a respondent in s14 of that Act is a relevant consideration

on an extension application.

Decision and reasoning: Appeal dismissed, decision appealed from affirmed.

While the Magistrate erred in considering s 14 of the *Family Violence Act 2016*, TS failed to demonstrate that there was any change in the circumstances (including his attitude or the circumstances of the parties reducing or eliminating the risk posed by TS to DT) justifying the grant of the protection order which had been twice affirmed on appeal. Kennett J held that in fact TS's conduct of the proceedings and focus on his "right" to reside in the home demonstrated a continued need for the protection order, as did his continued minimisation of the 2017 events which resulted in his conviction for common assault and the original grant of the protection order. The parties' continued conflict in relation to property matters in Australia and in Sri Lanka also indicated a continued need for the protection order.

***Morrison v Maher (No 2)* [2022] ACTSC 63 (1 April 2022) – Australian Capital Territory Supreme Court**

'Character evidence' – 'Children' – 'Choking' – 'Coercive control' – 'Following, harassing monitoring' – 'Image abuse' – 'No prior convictions' – 'People with mental illness' – 'Property damage' – 'Protection order' – 'Re-sentence following appeal' – 'Sentencing' – 'Stalking' – 'Systems abuse' – 'Technology-facilitated abuse' – 'Totality' – 'Weapon'

Charges: Assault occasioning actual bodily harm x 5; Property damage; Possess offensive weapon with intent; choking (common assault x 2; Non-consensual sharing of explicit images; Trespass x 2; Property damage; Contravention of a Family Violence Order x 7; Aggravated stalking; Attempt to pervert the course of justice x 2; Stalking x 3; Attempt to contravene a Family Violence Order; Use of a carriage service to harass.

Proceedings: Re-sentence following appeal.

Facts: The male offender was 43 years old with no prior criminal history. The offending against his wife spanned nearly 10 years and included multiple offences on numerous occasions. The complaints came to light when the victim separated from the offender and sought a Family Violence Protection Order. The offender subsequently repeatedly breached the Family Violence Order, including whilst in custody.

The offender had a traumatic childhood and was diagnosed with Bipolar Disorder, Attachment Disorder and Complex Post-Traumatic Stress Disorder. He and his former wife married in 2000 and had two children. He successfully appealed his original sentence of a total period of imprisonment of nine years and eight months,

with a non-parole period of five years and eight months in *Morrison v Maher* [2021] ACTSC 312 (8 December 2021) on the basis of conceded errors of reasoning in the original sentencing decision (*Maher v Morrison* [2020] ACTMC 26 (17 December 2020)).

Decision and reasoning:

1. Appeal allowed.
2. Charge CC2019/6240 is amended by deleting "between 24 March 2019 and 26 April 2019" and inserting "on or about 20 May 2019".
3. An aggregate sentence of imprisonment is nine years, four months and 26 days imposed, with a non-parole period to equivalent of 60 per cent of the total effective sentence. As the appellant did not wish the matter to be remitted to the Magistrates' Court for resentence Mossop J was unable to consider new evidence the appellant sought to adduce, noting that the appellant's statement and evidence before the first instance court sought to shift a degree of responsibility for his offending to the victim and the controlling nature of the offending meant such behaviours indicated likely entrenched attitudes, making it difficult to assess his prospects of rehabilitation [117].

Mossop J observed at [105]:

> The offending involves serious domestic violence offending. It is offending directed to the maintenance of control over the victim. It occurred in the context of a relationship where physical and emotional tools were used to maintain that control. It occurred in the victim's home. Some of the offences directly involved the children. Others indirectly involved the children through the creation of a climate of fear. The assessment of the objective seriousness of the offending must be made with due regard to that context.

***R v Teel (a pseudonym)* [2021] ACTSC 183 (17 August 2021) – Australian Capital Territory Supreme Court**

'Intimate images' – 'Intimate video footage' – 'Sentencing' – 'Stepchild' – 'Technology facilitate abuse'

Charges: Sexual intercourse without consent x 4; committing an act of indecency without consent x 8; committing an act of indecency in presence of a young person x 3; non-consensual distribution of intimate images x 7.

Proceedings: Sentence.

Facts: Between1 January 2011 and 22 April 2012 the male accused committed the first series of offences against his then partner, KD. Between 12 December 2017 and 28 September 2018 the accused committed the second series of offences against his then wife, NM. Following her separation from the accused NM discovered evidence the accused had taken photographs of her naked while she was asleep, which she later reported to police. Coincidentally KD's mother discovered an SD card containing images and videos of the accused committing sexual offences against KD while she was unconscious. The execution of a search warrant on the accused's premises revealed further images and videos of sexual offences committed against NM, including some committed in the presence of NM and the accused's son. A number of the images and videos were uploaded to pornographic websites without the consent of either victim, and a number were distributed to another person via email.

The accused was a victim of childhood sexual abuse and multiple psychological report suggested he had symptoms consistent with PTSD, major depressive disorder, ADHD and alcohol misuse disorder, although it was apparent he did not disclose the full extent of his offending to all of the report-writers. He entered pleas of guilty at an early stage.

Decision and Reasoning: Aggregate sentence of 9 years and 10 months' imprisonment, with a non-parole period of 5 years and 10 months' imprisonment.

Only sentences of full-time imprisonment were appropriate and Burns J noted at [115]:

> It is also important that the sentences I impose mark the community's abhorrence of sexual offending, particularly against intimate partners. All women have the right to feel safe in their domestic relationships. Like all members of the community, they have the right to have their physical integrity respected.

R v Smith [2021] ACTSC 114 (3 June 2021) – Australian Capital Territory Supreme Court

'Assault' – 'Breach of protection order' – 'Coercive control' – 'Extensive criminal history' – 'History of domestic and family violence' – 'People affected by trauma' – 'Plea of guilty during trial' – 'Sentence' – 'Separation' – 'Sexual intercourse without consent' – 'Strangulation' – 'Suicide threat'

Charge: Sexual intercourse without consent; contravention of family violence order (FVO); the pleas in full

satisfaction of the indictment on the basis that the facts relating to a charge of choking, suffocating or strangling, and three transfer charges of common assault, would be taken into account in relation to the contravention of the FVO.

Facts: The offences were committed by the male offender against his female partner over 2 days in March 2020. Their relationship involved domestic violence, including controlling and abusive behaviour by the offender towards the victim. An incident of assault by the offender against the victim in February 2019 led to criminal charges and an FVO was made by the ACT Magistrates Court on 7 May 2019 for 12 months. On the offender's release from custody after serving a sentence of imprisonment for the assault the parties resumed cohabitation. The victim sought to leave on 24 March, booking herself into a hotel. In a series of text messages the offender threatened suicide and urged the victim to return, which she did. The offender repeatedly applied force to the victim's throat over a period of 10 minutes causing her to become short of breath, then removed her underpants and digitally penetrated her vagina without her consent and wiped his hands on her face. The offender forced the victim to drive him to McDonalds, and when they returned questioned her, and not accepting her answers, slapped her face. The victim was too frightened to leave. When the offender woke in the morning he elbowed her as he got out of bed, then they went to the hotel to retrieve the victim's belongings. On the way out the victim was able to seek help from the receptionist who hid her from the offender, and police were called. The victim's victim impact statement described a range of trauma-related impacts of the offending.

Sentence: 40 months and 12 days (three years, four months and 12 days), with a non-parole period of 28 months, approximately 70 per cent of the head sentence.

Mossop J observed:

[44] The circumstances of this case involve a disturbing example of domestic violence. The offender has a criminal history, including previous offences directed to the current victim, that means he is not entitled to leniency. I do not place any significant weight upon the remorse communicated to the author of the pre-sentence report. I accept that statements unsupported by evidence that is able to be tested should be treated with great caution: see Barbaro v R [2012] VSCA 288; 226 A Crim R 354 at [38] and Imbornone v R [2017] NSWCCA 144 at [57].

***R v Heijm* [2021] ACTSC 17 (5 February 2021) – Australian Capital Territory Supreme Court**

'Grievous bodily harm' – 'Misuse of drugs and alcohol' – 'Past domestic and family violence' – 'Pregnancy of victim' – 'Sentencing'

Charges: Grievous bodily harm x 1.

Proceedings: Sentencing.

Facts: The male offender applied force to the face of his pregnant female partner during an argument. The following day the victim's face was observed to be swollen and red, she had a cut lip and blood coming from her mouth and nose. She attended the hospital and underwent a CT scan which revealed a fractured right eye socket and a blood clot around her right eye. The Forensic Medical Officer opined that her injuries were the result of blunt force trauma. The victim was reluctant to report the incident to police.

Issues: Sentence to be imposed.

Decision and reasoning: An aggregate sentence of 21 months, suspended after 13 months, and a good behaviour order were imposed. This reflected the guilty plea and earlier breaches of good behaviour orders/suspended sentence.

The offending was at the low end of the mid-range of objective seriousness for grievous bodily harm. It was an example of domestic violence, occurred at the victim's home and while she was heavily pregnant. The offender was on conditional liberty at the time ([11]). Other relevant circumstances included that the offender had a disrupted childhood and an early introduction to illicit drugs. However, notwithstanding the likely lifelong effects of this, the offender was not a young man and there was little evidence of strong motivation to address his drug and alcohol problems. He had a long criminal history, including previous domestic violence offending directed against the same victim. There was a high risk of re-offending ([30]-[34]).

The victim faced difficulty in reporting the offending:

> "She disclosed to the hospital staff that she had been injured at home. She also spoke to police but did not want to disclose who had injured her or how it had happened. That evening the offender attended the hospital to see her but was refused entry. The victim told police that she was scared and wanted to speak to the offender in the presence of the police. She did so, before the offender left and she returned inside the hospital.

> "DVCS members later contacted police on the victim's behalf to report that she had been assaulted by the offender. The victim decided that she was prepared to make a statement to police and she participated in a family violence evidence-in-chief interview on 8 February 2020.

***R v DQ* [2020] ACTSC 352 (18 December 2020) – Australian Capital Territory Supreme Court**

'Attempted murder' – 'Family law proceedings' – 'Female perpetrator' – 'Initial charge of damaging property by fire with intent to endanger life' – 'People with mental illness' – 'Sentencing' – 'Separation'

Charges: Attempted murder x 2.

Proceedings: Sentencing.

Facts: The case concerned the sentencing for the offender's attempted murder-suicide of herself and her 2 children by setting the house on fire.

Issues: Sentence to be imposed.

Decision and reasoning: A total head sentence of 9 years and 5 months was imposed, with a non-parole period of 6 years and 4 months. This reflected the guilty plea and a degree of cumulation for 2 separate victims with a single set of acts.

The offending was above the mid-range of objective seriousness for attempted murder. It involved the offender's children in "the most extreme breach of her parental obligations," and exploitation of her parental authority to achieve the children's compliance. There was a degree of premeditation. It was a persistent and serious attempt that, but for a neighbour and the fire brigade's actions, would have been successful ([23]-[28]).

Further, the offending occurred in the context of a long and acrimonious breakdown of the offender's relationship with her ex-husband and associated Family Court proceedings relating to division of property and custody of the children, which affected her mental health. The offender was diagnosed with a major depressive disorder which was given some weight as it was long-standing and had the potential to distort her thinking to an extent. It was not accepted that the evidence established a diagnosis of post-traumatic stress disorder or chronic adjustment disorder. She had no criminal history, and was at low risk of re-offending. However, the sentence also needed to reflect accountability, denunciation, and just punishment ([29]-[56]).

***R v Tonna (No 1)* [2020] ACTSC 360 (2 October 2020) – Australian Capital Territory Supreme Court**

'Aggravated burglary' – 'Assault occasioning actual bodily harm' – 'Breach of protection order' – 'Damaging property' – 'Driving whilst disqualified, repeat offender' – 'Plea of guilty' – 'Separation' – 'Weapons and threats to kill'

Charges: Aggravated burglary; Assault occasioning actual bodily harm; Possessing a drug of dependence; Driving whilst disqualified from obtaining or holding a driver licence as a repeat offender; Contravening a Family Violence Order committed on three occasions x 2.

Proceedings: Sentencing.

Facts: Mr Tonna was in an intimate relationship with the female victim of the assault for about four years, before it ended in mid-2019. Mr Tonna breached Family Violence Order (FVO) made for the protection of the victim by attending her residence twice while she was sleeping, accusing her of having a man in the room and damaging property. Mr Tonna subsequently hit the victim with his car, causing injuries. Separately, Mr Tonna also broke into a block of units and was in possession of methylamphetamine. He pleaded guilty.

Decision and reasoning: A total sentence of 2 years and 4 months imprisonment was imposed.

The breaches of the Family Violence Order were serious. Refshauge J said at [26]-[27]:

> "The reported comment made by Mr Tonna when attacking the victim's window on 23 July 2019, namely accusing her of having a man in her room, apart from being none of his business, does show he had not accepted the end of the relationship. Difficult though that may be, it is something that he has to confront and acknowledge.
>
> "It should be noted that the actions on that morning also constituted at least three separate approaches to the victim though relatively close together in time, at 6 am, 7:10 am and 7:30 am. Each could have constituted a separate offence. While not formally described in these proceedings as a rolled-up plea, it is appropriate to treat them in this way. I have described that approach in *R v John* [2017] ACTSC 144 at [106]- [107] and will follow what I there said."

The assault, a violence offence, was also serious. Refshauge J said at [28]-[29]:

> "It was, in the circumstances, in the nature of a family violence offence. It is the duty of courts to denounce such offences. It also shows an exercise by Mr Tonna of power which is, in reality, an abuse

of power, an abuse that is often exacerbated by the vulnerability of women. The assault is an example of escalation and the use of the car, which can properly be described in this situation as a weapon, a potentially lethal weapon. Thus, such offending can escalate and lead, as family violence offences often do, to the death of the victim.

"Further, a victim who, as in this case, is on the ground is in a vulnerable situation (*R v Hodge* [2015] ACTSC 214 at [15]). The victim must have been terrified as her Victim Impact Statement shows. These are serious offences as explained in decisions such as:

Roberts v Smorhun at [120]-[127] and *Goundar v Goddard* [2010] ACTSC 56 at [32]- [36]. In relation to the assaults in the context of family violence, see *R v Stanley* [2015] ACTSC 322 at [65]-[66]."

***Kibblewhite v Buik* [2020] ACTSC 132 (11 June 2020) – Australian Capital Territory Supreme Court**

'Autism spectrum disorder' – 'Breach of protection order' – 'People with disability and impairment' – 'People with mental illness' – 'Self-represented litigants' – 'Specific error' – 'Step-children'

Charges: Contravening a family violence order x 1

Case type: Appeal against conviction and sentence

Facts: The appellant man was convicted of contravening a family violence order protecting his female former partner (the victim) and her two children. A conviction was recorded and he was ordered to enter into a good behaviour bond for 12 months.

The family violence order prevented the appellant from being at the premises where the protected persons lived, being within 100 metres of them or engaging in behaviour that constituted family violence. He had attended her home at her invitation after mediation, they had rekindled the relationship and the police were called when the victim sent a text message to a friend asking her to call police. The victim said she sent the text message because the appellant "had begun playing psychological mind games on her and abusing her in relation to a number of morning after pills he had located" ([12]). The appellant claimed that because the victim initiated the contact, he thought that he did not breach the family violence order. The appellant was self-represented at the sentencing hearing. Further evidence of a forensic psychiatrist's report was also admitted on appeal.

Grounds:

1. The (self-represented) appellant was denied procedural fairness in being denied an adjournment by the learned Magistrate;
2. Her Honour failed to consider whether a non-conviction order was appropriate;
3. Her Honour placed undue weight on the need for general and specific deterrence and denunciation; and
4. the sentence was manifestly excessive ([2]).

Held: The appeal was allowed, the Magistrate's orders set aside and the appellant was ordered to enter into a good behaviour order for 9 months without conviction ([75]).

The appellant had faced prior charges of assaulting and resisting an officer and contravening a domestic violence order which were dismissed under the "Mental Health Act" ([18]). He suffered from autistic spectrum disorder which affected his thinking, increased his anxiety and interfered with his ability to maintain relationships. The offending was at the low end of the spectrum for this kind of offence. Extenuating circumstances included (1) the victim's invitation to recommence contact; (2) the re-establishment of a physical relationship between the parties over a period of weeks before the conduct in question; (3) the victim's consent to the appellant being at her home; and (4) the absence of any request for him to leave the house or cease contact prior to the police being called ([68]). Mossop J noted that the power in s17 Crimes (Sentencing) Act to not record a conviction will not often be deployed in family violence cases due to the need for general and specific deterrence, but the extenuating circumstances of the present case and the appellant's personal matters meant a conviction should not have been recorded ([70]). The Magistrate made a specific error in failing to give consideration to the application of s 17 ([51]).

***R v Palmer* [2020] ACTSC 13 (3 February 2020) – Australian Capital Territory Supreme Court**

'Choking' – 'Guilty plea' – 'History of abuse' – 'Non-fatal strangulation' – 'Physical violence and harm' – 'Victim history of trauma and abuse'

Charges: Burglary x1; Assault occasioning bodily harm x1; Choking a person and rendering them insensible x1;

Proceedings: Sentencing

Issue: Appropriate sentence

Facts: The male offender was convicted on his pleas of guilty. The female victim was his former partner. He entered her house while she was asleep and remained in the property despite the victim asking him to leave. The offender assaulted the victim after a verbal argument and choked her so as to render the victim unconscious. The offender had a significant criminal history and had been dealt with in the Magistrate's Court for other offending against the same victim. He attributed his violent and abusive behaviour towards the victim to his struggles to cope with the victim's psychosocial difficulties due to her long history of trauma and abuse [13].

Held: Justice Elkaim sentenced the accused to 10 months imprisonment for the burglary, 5 months' imprisonment for the assault, and 20 months imprisonment for the choking offence. The sentences were to be served concurrently.

Elkaim J found the offence of burglary to have "just below medium objective seriousness" [6]. His Honour noted that "Although s 10 of the Crimes (Sentencing) Act 2005 (ACT) says full-time imprisonment should be a last resort, I can see no alternative here. Domestic violence is abhorrent. Choking a person is a serious crime. The offender should not have been anywhere near his victim. He was already on bail for family violence offences against the same victim. When she told him to leave he should have done so. He should not have assaulted her and he certainly should not have choked her." [15]. The seriousness of the offence and the domestic violence were aggravating factors and a 15% discount for the guilty plea was allowed.

***R v Laipato* [2019] ACTSC 386 (20 December 2019) – Australian Capital Territory Supreme Court**

'Burglary' – 'Children' – 'Controlling behaviour' – 'Extensive criminal history' – 'Lack of remorse' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'Persons with mental illness' – 'Poor prospects of rehabilitation' – 'Sentence' – 'Separation' – 'Threat to kill' – 'Unlawful confinement'

Charges: Burglary x 1; Unlawful confinement x 1; Unlawfully choking, suffocating or strangling a person x 1

Case type: Sentence

Facts: The male offender was found guilty by a jury of burglary, unlawful confinement and unlawfully choking, suffocating or strangling a person. He was acquitted of 6 other charges. The offender and female victim (his former partner) were engaged in SMS text conversation about their relationship in the hours leading to the

offending conduct. The victim made it clear that the relationship was over, and the offender was angry as a result of this conversation ([4]). The offender attended the victim's home after midnight, dragged her from her bed into the neighbouring room and choked her ([5]). The offence was accompanied by a death threat, calculated to increase the victim's fear. The offender and victim had been in an intermittent relationship since 2012, and have a 4-year old son. In her Victim Impact Statement, the victim explained the impact of the domestic violence. She suffers severe anxiety, PTSD and depression, and sometimes "feels very angry that her former partner hurt her so much, both physically and emotionally". At the time of the offending conduct, she felt helpless, fearful and thought that she might die ([6]-[7]).

Held: The offender was sentenced to 5 years' and 5 months' imprisonment, with a non-parole period of 3 years and 6 months. The offender has a very lengthy criminal history, including multiple convictions for burglary, assault occasioning actual bodily harm, aggravated burglary, recklessly inflicting grievous bodily harm, assault and drug and traffic offences ([8]). A significant aggravating feature of the offences was that they occurred in a family violence context ([9]). The unlawful confinement lasted for a minimum of 1.5 hours, and this was "impulsive and without any significant planning". The purpose of the confinement was to manifest his anger towards the victim for ending the relationship and to exercise control over her. During the course of the confinement, the offender inflicted extreme violence on, and instilled fear in, the victim, who now suffers continuing psychological consequences ([10]). The choking conduct was deliberate and sustained, and the victim's ability to breathe was sometimes completely impaired ([11]).

Although the offender's childhood was marred by instability, he now enjoys a supportive family relationship ([13]). In a pre-sentence report, the offender indicated that he had no intention to reunite with the victim and claimed to have been subjected to violence in the relationship ([14]). He also has a long history of alcohol and drug use, as well as Major Depressive Disorder, which was described as in full remission in 2017. He was also assaulted while in custody that same year. He plans to reunite with his son, with whom he is believed to have a "healthy, loving relationship" ([17]-[20]).

The offender has also shown no remorse for his current and previous offending. This gave rise to a concern regarding his ability and commitment to avoid criminal offending and to achieve a stable, co-parenting relationship with the victim. During his present period in custody, he did not take any steps to address his drug and alcohol abuse issues or his attitude to domestic violence. Therefore, his prospects of rehabilitation could not be described as good ([21]-[23]).

***R v MZ* [2019] ACTSC 341 (6 December 2019) – Australian Capital Territory Supreme Court**

'Exposing children' – 'Monitoring' – 'People with mental illness' – 'Sexual violence'

Charges: Sexual intercourse without consent x1; Administration of certain declared substances x1.

Proceedings: Sentencing

Issue: Appropriate sentence

Facts: The complainant woman and male offender were married and lived together. The offender engaged in sexual intercourse with the complainant while she was asleep. An audio recording taken during the time reveals that the complainant did not consent to the offender's conduct and that when she woke up she immediately asked the offender to stop. The offender then left the bedroom, only to return ten minutes later and force a bitter substance into the complainant's mouth. The substances administered were temazepam and zopiclone.

Judgment: In determining the objective seriousness of the offence, Mossop J noted that "while the offending did occur in a domestic context, the evidence did not establish that it was part of any pattern of oppression of the victim through violence or sexual violence. Nor does it establish that there was any marked inequality of power between husband and wife." [9]. The judge found the offending to also lack other aggravating factors as the offender did not use a weapon or violence, threaten the victim, or have a significant degree of premeditation and the victim was not injured, humiliated or degraded in a way more explicit than the conduct itself [7]. Justice Mossop also did not consider the presence of the sleeping child to be an aggravating factor as the child had no awareness of what was going on. The Court accepted that the offender's depression and general anxiety disorder meant that "he is likely to find a sentence of full-time imprisonment more onerous than a person without those conditions" [40]. The sexual intercourse offending was held to be in the lower range of objective seriousness for this offence [10]. It was not possible to find on the evidence that the administration of a declared substance offence "was an intention to cause harm to the victim other than through interference with her recollection of events".

The offender was sentenced to 22 months' imprisonment for the first charge, with the sentence to be suspended after four months upon the offender entering into an undertaking to comply with good behaviour obligations for 19 months. For the charge of administering a declared substance, the offender was convicted and sentenced to a suspended sentence of two months' imprisonment.

***R v Teer* [2019] ACTSC 334 (29 November 2019) – Australian Capital Territory Supreme Court**

'Good behaviour bond' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Strangulation'

Charges: Act of indecency x 1; Assault occasioning bodily harm x 1

Case type: Sentencing

Facts: The offender attempted to strangle the victim when she refused to engage in sexual activity, pushing the victim face-down against a pillow. After releasing the victim and letting her partially roll-over, the offender grabbed the victim's throat and restricted her breathing for 5 to 10 seconds while threatening if she continued making noise. There was medical evidence of petechial bruising.

Issue: Sentence to be imposed.

Decision and reasoning: Loukas-Karlsson J discounted the penalty for each charge by 5% as the offender entered guilty pleas one week before a re-trial for the offences. His Honour only reduced the sentences by 5% rather than the usual 10% because the offender demonstrated a lack of remorse and tried to justify his actions. It was also noted at [60] that 'it must be recognised by the Court that the offences committed against the victim had a serious and significant impact upon her. Both the short and the long-term consequences of being the victim of these offences must be acknowledged'.

'In respect to the offence of an act of indecency…the offender [was] sentenced to a good behaviour order with the core conditions requiring him to sign an undertaking to comply with good behaviour obligations' for a period of 20 months reduced to 19 months on account of the guilty plea. 'In respect of the offence of assault occasioning actual bodily harm…the offender [was] sentenced to a good behaviour bond' with the same core conditions for a period of 32 months reduced to 30 months on account of the 5% reduction for entering guilty pleas. [64]

***NS v Hotchkis* [2019] ACTSC 309 (8 November 2019) – Australian Capital Territory Supreme Court**

'Audio recording' – 'Domestic violence offences' – 'Evidence issues' – 'Protection order'

Charges: 1 x common assault; 1 x contravention of a Family Violence Order

Case type: Appeal against convictions

Facts: The appellant allegedly kicked the complainant's leg during an argument (assault charge). At that time, the appellant and complainant were married and living together. The complainant had obtained a Family Violence Order against the appellant, which the appellant allegedly breached during the argument by causing or threatening to cause injury to the complainant or by harassing, threatening or intimidating her ([3]). A central issue was whether an audio recording made by the complainant was admissible.

Issue: The appellant appealed the findings of guilt on the basis that 1) the learned Magistrate erred in ruling that the audio recording made by the complainant was admissible pursuant to s 5(2)(d)-(e) of the Listening Devices Act 1992 (ACT) (LDA), and 2) the convictions were unreasonable and could not be supported by the available evidence.

Held: The prosecution sought to adduce a recording of the alleged events said to have been made by the complainant on her mobile. The appellant objected on the ground that the recording was made in contravention of the provisions of the LDA ([10]). Burns J did not challenge the Magistrate's finding that a 'private conversation', for the purposes of the LDA, existed ([13]), and turned his mind to whether any of the exception provisions applied such that the complainant's use of the listening device was not proscribed by the LDA ([15]). In his Honour's opinion, the Magistrate was correct in finding that the exception in s 4(3)(b)(i) was satisfied. The complainant feared that the appellant might seriously injure or kill her, and gave evidence that she had regularly been abused by him. Therefore, there were reasonable grounds for her to consider that the recording was necessary to protect her lawful interests ([21]). His Honour also found that the exceptions in s 5(2)(d) and (e) were established ([22]).

His Honour concluded that even if the recording had been obtained in contravention of the LDA, the proper exercise of the discretion found in s 138 of the Evidence Act would have resulted in its admission ([31]). The evidence was important, both in its own right and as support for the complainant's evidence, and its probative value was significant. The gravity of the contravention was low, and there was no suggestion to the complainant that she knew that she was violating the LDA. Further, the offences charged against the appellant were serious domestic violence offences ([26]-[27]). At [30], Burns J noted that '[a] criminal has no right to keep their offending private, or to claim that the gathering of evidence of their crime is a breach of their privacy'.

As to the second ground of appeal, his Honour agreed with the Magistrate that the evidence established a breach of the Family Violence Order, as the conduct was harassing and intimidating. The Magistrate was entitled to consider the aggression by the appellant towards the complainant at the time she said she was

kicked. As there was sufficient evidence on which the Magistrate was entitled to convict the appellant, the appeal was dismissed ([40]-[41]).

***Davis v Stephens* [2019] ACTSC 271 (1 October 2019) – Australian Capital Territory Supreme Court**

'Appeal against conviction and sentence' – 'Female perpetrator' – 'Jealous behaviours' – 'Physical violence and harm' – 'Separation' – 'Victims who are (alleged) perpetrators'

Offences: Common assault x 2; Assault occasioning actual bodily harm x 1

Proceedings: Appeal against conviction and sentence

Facts: The female appellant and male victim had been in a relationship for about two years (which was 'volatile' and 'they tended to be jealous' of each other and had numerous 'fights') but they had broken up the day before the offending and the appellant had moved out. Early in the morning of the offending, the appellant entered the front door and started punching the victim in the head. The appellant saw another woman on the couch and started moving towards her, so the victim grabbed the appellant's arm. The appellant bit the victim's arm hard and grabbed his testicles. She then chased after the other woman before taking the victim's phone, leaving the house and knocking over the victim's motorcycle. The appellant was convicted and sentenced to a 12-month Good Behaviour Order. She appealed her conviction on the following grounds:

1. The Magistrate erred by not properly directing herself to the law of self-defence in terms of both personal self-defence and self-defence of property, and/or
2. The Magistrate erred by returning inconsistent verdicts by dismissing charges of Damage to property but returning verdicts of guilty on the other charges in circumstances where the evidence was substantially the same between the counts. That error was compounded because the verdict of not guilty should have caused reasonable doubt in relation to the other counts.

Judgment: The judge dismissed the appeal. His Honour found that the Magistrate accepted the evidence of the victim (the victim grabbed the appellant's arm to stop the appellant coming further into the house, not to prevent her from retreating out of the house) and, as such, the basis for self-defence fell away [76]. Regarding Ground 2, his Honour held that "the bare fact of there being a guilty verdict in relation to some charges arising from a course of events and an acquittal in relation to one or more charges arising from the same course of events is not enough to establish that the guilty verdicts must be unreasonable. It is

necessary for the appellant to demonstrate that the different outcomes cannot stand together as a matter of logic and common sense" [79]. His Honour found that the Magistrate was correct in distinguishing the verdicts in relation to events that occurred inside the house from those which occurred outside the house [82].

His Honour further held that the sentence imposed fell within the range of appropriate outcomes and was not excessive, let alone "manifestly excessive" [84].

***Kumar v Love* [2019] ACTSC 238 (30 August 2019) – Australian Capital Territory Supreme Court**

'Children' – 'Evidence issues' – 'Family violence' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm'

Charges: Common assault

Case type: Appeal against convicions

Facts: The appellant was found guilty of two charges of common assault arising out of an altercation with the victim (his wife). The acts of assault included slapping the victim across the face, pushing her forehead backwards striking the wall behind, grabbing her hair, twisting her head and hitting her face on the wall, and striking his daughter's shoulder. The charges fell into the category of family violence. The appellant pleaded not guilty to each charge and did not testify. The defence argued that the victim fabricated the assaults with the intention of terminating the marriage ([17]).

Issue: The appellant appealed on the ground that the Magistrate's findings of guilt were unsafe and unsatisfactory on the basis that:

- It was not open to the Magistrate to wholly reject the appellant's evidence; and
- There were a number of significant parts of the evidence relied upon by the prosecution which should have given rise to a reasonable doubt as to the appellant's guilt.

Held: Crowe AJ dismissed the appeal. His Honour rejected the first ground of appeal and saw no basis upon which to doubt the Magistrate's rejection of the appellant's version of events. His version of events changed as the interview progressed. For example, after he said that he had not touched the victim at all, he then said that he had tickled her ([35]). In relation to the second ground, the Magistrate was entitled to accept the complainant as a witness of truth, and reject the proposition that the victim fabricated the entire story in order

to terminate her unhappy marriage with the appellant. The discrepancy between the victim's evidence and that of her female friend did not provide a sufficient basis to reasonably doubt the victim's evidence as to the appellant's violence towards her. The discrepancy was explained by reference to the extent of the victim's distress, and the physical and language communication difficulties at that time ([40]-[47]).Crowe AJ dismissed the appeal. His Honour rejected the first ground of appeal and saw no basis upon which to doubt the Magistrate's rejection of the appellant's version of events. His version of events changed as the interview progressed. For example, after he said that he had not touched the victim at all, he then said that he had tickled her ([35]). In relation to the second ground, the Magistrate was entitled to accept the complainant as a witness of truth, and reject the proposition that the victim fabricated the entire story in order to terminate her unhappy marriage with the appellant. The discrepancy between the victim's evidence and that of her female friend did not provide a sufficient basis to reasonably doubt the victim's evidence as to the appellant's violence towards her. The discrepancy was explained by reference to the extent of the victim's distress, and the physical and language communication difficulties at that time ([40]-[47]).

***R v EP (No 3)* [2019] ACTSC 242 (28 August 2019) – Australian Capital Territory Supreme Court**

'People with mental illness' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Social abuse'

Charges: 1 x threaten to capture or distribute intimate images; 1 x use of a carriage service to menace, harass or cause offence; 2 x indecency; 1 x sexual assault; 1 x common assault; 1 x stalking

Case type: Sentencing

Facts: The offender and victim were in a de facto relationship for approximately 6 years and have a daughter. Despite the breakdown of their relationship, they remained on amicable terms ([7]). The offender was charged with a combination of Federal and Territory offences. The offender pleaded guilty to threatening to distribute an intimate image (Count 5) and using a carriage service to menace, harass or cause offence (Count 6). He was found guilty of 2 charges of committing an act of indecency (Counts 2 and 4) and a charge of sexual assault in the third degree (Count 3). A charge of common assault and stalking were transferred to the Court, which required consideration of the provisions on back-up and related offences in the Supreme Court Act 1933 (ACT) ([13]).

Issue: The issue for the Court was to determine the appropriate sentence for the offences.

Held: The Court sentenced the offender to 3 years' imprisonment with a non-parole period of 18 months for

the Territory offences, and declined to make a recognizance release order with respect to the Federal offence as the offender would still be serving a period of imprisonment for the Territory offences after the expiration of that offence. The charge of common assault was dismissed.

The offender's subjective circumstances were observed at [32]-[40]. He had 2 daughters from a previous marriage and worked as a self-employed technician prior to custody. However, he had not been working for the past 6 months due to mental health issues, and suffered financial distress as a result ([35]). The offender reported infrequent social use of cannabis and his self-reported alcohol use was deemed 'risky' ([36]). The offender showed some insight into the impact of his offending, but attempted to minimise and justify some of his actions ([39]). The offender was also being treated for symptoms of depression ([40]).

The Court did not attribute significant weight to the offender's expression of remorse ([41]-[44]). He had no relevant criminal history and was of prior good character ([45]-[46]). He pleaded guilty to 2 charges before the trial commenced, and the 2 further transfer charges in the course of the sentencing hearing. Accordingly, the Court allowed a discount of approximately 10% in each case ([47]-[54]). The Court also considered the time spent in custody ([55]-[56]), and analysed relevant cases and statistics ([57]-[69]). At [89], the Court found that all the offences committed against the victim significantly impacted her. The Court also took into account the principles of totality, concurrency and accumulation ([70]-[78]), and relevant statutory considerations ([79]-[88]). Significantly, it was noted at [88] that the 'Courts have made it clear that women must not be treated by men as property'.

***Barron v Laverty* [2019] ACTSC 198 (31 July 2019) – Australian Capital Territory Supreme Court**

'History of abuse' – 'People affected by substance misuse' – 'Protection order' – 'Sentence'

Charges: 5 x contravention of a Family Violence Order; 1 x use carriage service to harass/menace

Case type: Appeal against sentence

Facts: In early 2019, the appellant was sentenced to a total of 2 years' and 8 months' imprisonment, with a non-parole period of 18 months, following guilty pleas to 6 charges, namely, contravening family violence orders obtained by his parents and his ex-partner against him and using carriage service to harass/menace.

Issue: The appellant appealed against the sentence on various grounds, including that the total sentence was manifestly excessive and that her Honour erred in her approach to s 110(2)(a) Crimes (Sentence

Administration) Act 2005 (ACT) by ordering that the suspended sentences imposed for the breach offences be served cumulatively.

Held: Murrell CJ noted that the appellant had a very significant domestic violence history ([52]). Her Honour considered the appellant's prior convictions of matters of dishonesty, and contravening protection orders ([25]), for which he had been sentenced to 5 months' imprisonment suspended for 12 months. Offences 1 and 2 were committed while he was subject to these suspended sentences, and Offence 3 was committed 3 days after his release from prison (for contravening a protection order) ([26]). Further, the appellant's illicit substance abuse rendered him unsuitable for an Intensive Corrections Order (ICO) ([29]).

Murrell CJ held that the appellant's continued contraventions of court orders required a significant total sentence to be imposed. Her Honour was not satisfied that, when considering the appropriateness of the total sentencing, the sentencing judge erred in exercising her sentencing discretion ([41]).

The appellant argued that, as the original suspended sentences were concurrent, the sentencing judge fell into specific error when she made them cumulative ([56]). After analysing the interpretation of s 110(2) in some detail, her Honour concluded that the sentencing judge fell into error ([95]). The appeal was therefore allowed and the appellant was re-sentenced to a total sentence of 2 years' imprisonment with a non-parole period of 13 months ([100]).

***R v NX (No 2)* [2019] ACTSC 131 (24 May 2019) – Australian Capital Territory Supreme Court**

'Coercive control' – 'Damaging property' – 'Extensive criminal history' – 'History of domestic violence offences' – 'Offender on conditional liberty at the time of offending' – 'Presence of child' – 'Sentencing' – 'Social abuse and isolation'

Charges: Sexual assault in the third degree x 1, sexual intercourse without consent x 1; assault occasioning actual bodily harm x 3; common assault x 2; capturing visual data in circumstances where the capture is an invasion of privacy and indecent x 1; damage to property x 3.

Proceedings: Sentence.

Facts: The male offender and female victim had been in a relationship since 2017. The offences took place over three days.

While the victim was driving her car with the offender in the passenger seat the offender took the victim's

mobile phone, snapped it in half and threw the pieces out of the car window. That afternoon he headbutted her in the middle of the forehead causing her pain and told her to “get the fuck out” of the house. The victim left the residence on foot with her son as the offender had taken her car keys. [5]

While she was gone the offender slashed two of the car’s tyres with a knife.[6] When the victim returned the offender told her that he had lost her keys and that somebody had popped the tyres of her car. He told her to go inside the house otherwise he would “start shit” with the victim’s flatmate. [7]

Later that night the offender held a Stanley knife with the blade out to the victim’s throat and near her face and directed her to “suck [his] dick”. The victim felt forced to do so and the offender filmed the incident. [8]

Two days later the offender attempted to cuddle the victim but she did not wish to cuddle and did not reciprocate. The offender became angry and began yelling. He punched the victim in the back of the head a number of times. The victim tried to put on a dress and the offender ripped it off her then grabbed her left breast and twisted and squeezed it causing pain and bruising. The victim’s son was present. [10]

Decision and Reasoning: Four years and eight months imprisonment with a non-parole period of three years.

In considering the objective seriousness of the offence, Mossop J observed:

> The offending had some of the typical features of domestic violence in that it involved attempts to control the victim’s behaviour and sought to place responsibility for the offender’s unlawful conduct upon the victim. It occurred in circumstances where the victim was particularly vulnerable by reason of the need to care for and protect her small child. [14]

R v Cowling **[2019] ACTSC 138 (23 May 2019) – Australian Capital Territory Supreme Court**

‘Intensive corrections order’ – ‘Options’ – ‘Perpetrator interventions’ – ‘Physical violence and harm’ – ‘Rehabilitation’ – ‘Sentencing’

Charges: Unlawful confinement x 1; choking, suffocating or strangling x 1; common assault x 1.

Case type: Conviction and sentence.

Facts: The offender engaged in controlling and violent behaviour towards the victim during their relationship and had threatened to kill her and her family if she ended the relationship. On 1 November 2016, the offender drove himself and the victim home. He did not allow her to exit the vehicle, pulled her hair and punched her in

the face several times. On 21 March 2017, the victim visited the offender's residence and an argument ensued. The offender grabbed the victim, pushed her down and squeezed her neck. Later that night, the offender choked the victim for 'about 20 minutes' and threatened to kill her, he intermittently released his hands [7]. On 22 March 2017, the victim fled and called her brother to get her. The offender later attended the brother's residence, and made threats and attempted to drive his vehicle towards the brother. The brother was the victim of the common assault charge.

Issue: The Court determined the appropriate sentence for the offences in the circumstances.

Held: The Court considered the objective circumstances of the offending. The unlawful confinement charge was serious as it involved gratuitous violence against the victim, including punching her in the face. The choking charge was also serious as the victim felt that she could pass out and the conduct was accompanied by threats ([27]-[28]). The offender reported that he attended psychological counselling sessions in the past ([34]). His personal circumstances were also taken into account. His parents separated when he was young, he reported a supportive family environment, he has a four year son with an ex-partner with whom he maintains contact, and he is currently employed. He denied any past or current drug use. Although there was an almost decade-old matter for possession of prohibited drugs, no conviction was recorded ([33]). Further, his criminal history was limited. The Court refused to take into account a current family violence charge against him, as he had not yet been convicted and was entitled to a presumption of innocence ([44]-[45]). The offender's remorse, references provided to the court, time already spent in custody, and sentencing principles, particularly rehabilitation, were also taken into account in determining the appropriate sentence ([38]-[43], [51], [80-[88]). The Court noted that the offender entered pleas of guilty 11 days prior to when the trial was listed to commence for a second time, and allowed a discount of approximately 15% ([46]-[50]). The offences were found to significantly impact the victim. 'This sort of violence against women must be deterred and must be punished' ([100]).

The Court recorded the convictions for the 3 offences. The sentence imposed was ordered to be served by way of an Intensive Corrections Order (ICO), which highlights the importance of rehabilitation. The ICO was made on the condition that the offender perform 400 hours of community service, continue to engage with psychological services to manage his mental health, and be assessed for and complete offence specific intervention ([114]).

***R v Hudson* [2019] ACTSC 110 (2 May 2019) – Australian Capital Territory Supreme Court**

'Blackmail' – 'Following, harassing and monitoring' – 'Intimidation' – 'Women'

Charges: Using carriage service to harass x 2; Demand accompanied by threat to endanger x 1; Threaten to inflict grievous bodily harm x 1; Blackmail x 1; Arson x 1; Recklessly inflicting actual bodily harm x 1; Possession of a prohibited item (as a detainee) x 2; Obstructing a public official x 1; Possessing an offensive weapon with intent x 1.

Proceeding type: Sentencing and application for reparation order.

Facts: The accused had been in a relationship with the female victim for three years, with their relationship ending three months before the offence was committed. After the relationship ended, the accused became a member of a motorcycle gang and the female victim commenced a relationship with her current partner. Upon learning of the victims' relationship, the offender harassed and threatened his ex-partner (via text message and Facebook). He also threatened and blackmailed her new partner, demanding $5000 for 'whoring out [his] missus' [26].

The appellant was arrested for these offences. While in custody, the offender started a fire in his cell and possessed dangerous items out of fear he was at risk from members of rival motorcycle gangs. The offender then injured an officer while being restrained.

Issues: What are the appropriate sentences given the circumstances?

Decision and reasoning: Murrell CJ provided that 'sentences must deliver appropriate punishment, and speak to the purposes of accountability, denunciation, and recognition of harm' [81]. In reaching his decision, Murrell CJ consequently considered the high objective seriousness of the accused's harassment of his ex-partner; the accused's extensive criminal history; good behaviour during previous periods of imprisonment; his dysfunctional upbringing; and the fact that the accused had allegedly not been receiving proper treatment for his post-traumatic stress disorder.

The accused was sentenced to four years and two months imprisonment with a non-parole period of 33 months.

In sentencing the offender, Murrell J noted:

43. The family violence offences and associated offences bear the hallmarks of many serious family violence

matters. At the time of the offences, the offender remained angry and distraught over the breakup of his relationship with Ms Lees. He was jealous, felt a sense of entitlement in relation to Ms Lees, and wanted to control her new relationship. He behaved in a volatile and irrational manner, elevating the danger and threat of danger perceived by the victims. In addition, the offender called his Nomads associates in aid, which would have considerably enhanced the fear felt by the victims.

R v Green **(no. 3) [2019] ACTSC 96 (11 April 2019) – Australian Capital Territory Supreme Court**

'Directed acquittal application' – 'Evidence' – 'Physical violence and harm' – 'Statutory interpretation' – 'Strangulation' – 'Women'

Charges: Choking, suffocating or strangling a person x 2.

Proceeding type: No-case submission/Directed acquittal application.

Facts: The accused was charged with two counts of choking, suffocating or strangling his mother while in an argument. While the mother claimed that the accused strangled her in her initial accounts of the incident, she eventually recanted her allegations claiming she had fictionalised them while angry with the accused.

Issues: The proceedings focused on the questions of whether the words 'chokes' 'suffocates' and 'strangles' in s 28(2) of the *Crimes Act* 1900 should be interpreted with respect to their effects on the victim's breathing and consequently whether the correct interpretations of these words warrant upholding the accused's no-case submission.

Decision and reasoning: Although choking, suffocating or strangling is an offence under s 28(2), the terms are not defined within the legislation and prior to these proceedings were yet to receive judicial consideration in the ACT. Loukas-Karlsson J provided, in comparing s 28(2) of the *Crimes Act* to the corresponding offences in other jurisdictions, that the intention behind the provision may have been to build on the ACT's existing offences which contain the elements of 'choke, strangle or suffocate' in an attempt to 'lower the threshold of conduct to capture a broader range of conduct, particularly in the domestic violence setting' [34]. Upon considering this intention along with the elements' statutory context, 'authoritative' definitions from the *Macquarie Dictionary* and extrinsic material (such as the Explanatory Statement) Loukas-Karlsson J concluded that 'the relevant element is constituted by the stopping of the breath' [46].

In considering the accused's directed acquittal application, Loukas-Karlsson J provided that "a verdict of not

guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty" (*Doney v The Queen* [1990] HCA 51) [84]. Since the accused did not stop the victim's breath on either attempt, his conduct failed to satisfy the necessary element. His Honour therefore concluded that there was a defect in the evidence such that a verdict of not guilty must be directed.

***Lewis v Storey* [2019] ACTSC 74 (22 March 2019) – Australian Capital Territory Supreme Court**

'Physical violence and harm' – 'Sentencing' – 'Strangulation'

Charges: Five offences including two counts of common assault, one count of assault occasioning actual bodily harm, one count of choking to render insensible, and one count of possession of an offensive weapon with intent.

Case type: Appeal of sentence.

Facts: The victim and the appellant had been in a relationship for approximately two months. The two counts of common assault were constituted by the appellant putting his hands around the victim's neck and pushing her into a wall, as well as saying intimidating and threatening words. The appellant also armed himself with two knives (count of possession of an offensive weapon with intent), and had wrapped his arm around the victim's neck cutting off her circulation and causing her to lose consciousness (count of choking to render insensible). The count of assault occasioning bodily harm was established by the appellant kicking the victim numerous times, grabbing her hair and repeatedly hitting her head on the ground, and slapping the victim's face. The victim suffered significant injuries ([18]). Notably, a total head sentence of three years and six months imprisonment was imposed, with a non-parole period of 18 months.

Issues: The appellant sought leave to appeal on the grounds that that the sentence with the respect to the charge of choke render insensible and the non-parole period were manifestly excessive. He sought leave to add two grounds of appeal: 1) that the Magistrate offended the *R v De Simoni* principle by punishing him for attempted murder; and 2) that the Magistrate erred by not applying the full discount of 20% to the sentence imposed for the offence to choke to render insensible. He sought orders setting aside the Magistrate's order, and that he be re-sentenced in respect of that charge.

Decision and reasoning: The Court allowed the appeal and re-sentenced the appellant, in relation to the offence of choking to render insensible, to three years' imprisonment, with a non-parole period of 17 months. At [43], the Court held that a head sentence of three years and two months was not manifestly excessive.

With respect to the non-parole period of 18 months, the Court found that 'as expressed as a percentage of a head sentence of 3 years and 2 months of imprisonment, the relevant percentage is approximately 47%'. This is outside the usual range of non-parole periods in the ACT. The proper approach to fixing a non-parole period is to have regard to all the sentencing purposes, the objective seriousness of the offence, and the appellant's subjective circumstances and prospects of rehabilitation. The proportion of the sentence served by way of non-parole period is a matter of judicial discretion, and ordinarily, the non-parole period is a significant part of the total sentence ([52]). The appellant's youth was important to his prospect of rehabilitation. It was necessary to fix a non-parole period that is relatively low, but also reflected the total sentence and was consistent with sentencing purposes ([53]).

***R v KD* [2019] ACTSC 62 (15 March 2019) – Australian Capital Territory Supreme Court**

'Children' – 'Factors affecting risk' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Suffocation'

Charges: Attempted sexual intercourse without consent x 1.

Case type: Sentence.

Facts: The accused pleaded guilty to an offence of attempted sexual intercourse without consent. The accused and the victim lived together for two years prior to the accused entering custody, and had a child together ([21]-[22]). The victim was lying on her back when the accused pinned her down and repeatedly placed a pillow over her face. He then attempted to have non-consensual sexual intercourse with her ([4]).

Issues: The Court determined the appropriate sentence for the offence in the circumstances.

Decision and reasoning: Loukas-Karlsson J found that the offence approached mid-range seriousness. The objective seriousness of the offence was informed by the fact that the accused pinned down the victim and repeatedly placed a pillow over her face ([15]-[17]). His Honour considered the accused's personal circumstances at [18]-[28]. He was young (24 years old), had been diagnosed with PTSD at the age of five as a result of witnessing domestic violence between his parents, reported to have been sexually abused by a family member, left high school early, worked in hospitality and as a removalist, and used drugs from an early age. The accused accepted responsibility for the offence and acknowledged the negative impacts of his actions. He indicated that he was willing to participate in programs and interventions. In considering the objective seriousness of the offence and subjective matters, his Honour held that the appropriate sentence for

the offence of attempted sexual intercourse without consent is two years and nine months imprisonment. However, his Honour reduced the sentence to two years and four months due to the guilty plea.

***R v Kennewell* [2019] ACTSC 125 (25 January 2019) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Bail' – 'Bystander intervention' – 'Imprisonment' – 'Physical violence and harm'

Charges: Recklessly inflicting grievous bodily harm x 1.

Case type: Conviction and sentence.

Facts: The offender pleaded guilty to the offence of recklessly inflicting grievous bodily harm after the matter was committed for trial, but before the trial date was set.

The offender attended a friend's party in the ACT, but started arguing with his girlfriend and left the party. Later that night, the victim heard the argument and, specifically, a female screaming. Concerned for her safety, the victim approached them. The offender stabbed the victim 3 times, and then ran away, followed by his girlfriend. The offender was arrested and granted bail the following day. He was subsequently imprisoned for offences (involving stabbing another person with a knife) committed in NSW while on bail.

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: Burns J held that the recent offending demonstrated that the offence in question was not an isolated incident. He was also found in possession of an instrument capable of being used to stab after he was extradited from NSW. These matters strongly suggest the need for specific deterrence. His Honour found the offending was unprovoked. The offender's personal circumstances were also considered. He is a 20 year old Indigenous man, his parents separated when he was young, and he has anger management, drug and alcohol issues. However, he maintains a good relationship with his family, with whom he had remained in contact since he was incarcerated. It was noted that the offender is in good health, has a positive attitude, has employment available to him, and had completed an anger management course. His Honour was satisfied that the offender had reasonable prospects of rehabilitation, provided that he ceases carrying weapons, and addresses his anger management, drug and alcohol issues and employment. Even though the offender said that he carries a knife for self-protection, Burns J held that 'no law-abiding citizen in this country, not associating with criminals or engaging in criminal conduct, needs to carry a knife for self-protection' ([30]).

Notwithstanding his young age and rehabilitation prospects, Burns J held that the sentence needed to reinforce the fact that using knives to seriously harm others will be met with harsh punishment. Nothing less than full-time imprisonment would sufficiently address the sentencing requirements ([31]). The offender was convicted and sentenced to 3 years and 1 month imprisonment, with a non-parole period of 18 months.

***KIC v Tennant* [2019] ACTSC 145 (23 January 2019) – Australian Capital Territory Supreme Court**

'Breach of protection order' – 'Child contact' – 'Physical violence and harm' – 'Women'

Appeal type: Appeal against conviction and sentence.

Facts: The appellant had previously been served with an Interim Family Violence Order (the Order). Among other things, the Order prohibited the appellant from being within 100 metres of the protected person, his wife, except when handing over their child. The wife alleged that shortly after being served, the appellant breached the Order by walking in front of her house at a time she was home. She claimed that when the appellant was walking past her property, he stopped and looked into the residence. She also claimed that the appellant returned twice after leaving and began to follow her when he saw her outside.

The appellant pleaded guilty to the breach in the Magistrate Court. This plea was later withdrawn, but then reinstated during these proceedings.

Issue: Whether the sentence imposed by the magistrate was manifestly excessive.

Decision and reasoning: During the proceedings in the Magistrate Court, the appellant attempted to tender a document detailing the events of the day the offence allegedly occurred. The magistrate rejected this document on the grounds that it sought to 'traverse' the plea of guilty [9]. While Burns J disagrees with the grounds on which the magistrate refused the document, His Honour believed it should have been rejected because it was self-serving. The contents and rejection of the appellant's document formed the main focus of Burns J's judgment.

Burns J had great difficulty accepting most of the appellant's evidence both in the document and that which the appellant gave before Burns J. The appellant claimed that he visited the area near to his wife's residence to find a spot for his daughter to wait for him to pick her up the next day. The appellant also claimed that he had recently undergone a procedure to his eyes which resulted in him being unable to see more than one metre in front of him. Burns J provided that given the condition of the appellant's eyes and the fact that he

visited the residence at 10 pm, 'it does not make any sense whatsoever that in his circumstances' he visited the residence for the reason he claimed [13].

Burns J also found it difficult to accept the appellant's submissions as he had made no challenge to the Statement of Facts that were read before the magistrate. The Statement of Facts did not include any of the above claims and instead provided that the appellant walked passed the protected person's house while he was out walking to take care of his health (as the appellant claimed to be diabetic). His Honour concluded that he was "not now prepared to find that the events occurred in the way in which the appellant now suggests that they did. On that basis, [Burns J] propose[d] to proceed on the basis that the circumstances of the offence went as put before the magistrate' [17].

Burns J dismissed the appeal, commenting 'it has not been demonstrated that the sentence [was] manifestly excessive, nor [was Burns J] satisfied that there was any relevant error which would have affected the outcome of the proceedings before the magistrate' [21].

***R v Vincent* [2018] ACTSC 347 (12 December 2018) – Australian Capital Territory Supreme Court**

'Children' – 'Damaging property' – 'Domestic violence' – 'Factors affecting risk' – 'People with children' – 'Physical violence and harm' – 'Vulnerable people'

Charges: Assault occasioning actual bodily harm x 1; Minor property damage x 2

Facts: The offender was in a relationship with the complainant for 12 years. They had a child, aged seven at trial. The relationship ended late 2017. The offender visited the complainant's home to visit children. He entered the house, damaged property, and assaulted the complainant with a baton by hitting her on the arms and on the back of the head.

Issues: Sentencing

Decision and Reasoning: The offender pleaded guilty and was sentenced to 12 months' imprisonment for assault occasioning actual bodily harm, one month's imprisonment for the first count of damaging property, and one month's imprisonment for the second count of damaging property. The sentences were to be served concurrently. The term of imprisonment for the offence of assault was suspended on the condition that the offender enter a Good Behaviour Order for 18 months.

The offender had a significant criminal record, which included a contravention of a protection order against the complainant for which he already served a period of time in custody. He grew up in difficult circumstances – his mother had a drug addiction and did not adequately support him. The offender also had a long-standing history with drugs and alcohol which was exacerbated by his separation with the complainant. Whilst in custody, he completed a drug and alcohol awareness program and commenced an anger management course. His Honour noted that domestic violence is an 'appalling crime' and 'offends the most basic norms of society' ([11]). There were positive signs of rehabilitation, such as the fact that the offender was in a stable relationship, had ongoing accommodation and employment, and was a valuable member at his workplace. The complainant had sent an email to the offender saying she had 'moved on' and wanted the offender to attend their child's graduation. His Honour stated: 'Expressions of reconciliation by victims of domestic violence are often a regrettable reflection of the dominance of the abuser. However, in this case, primarily because the offender is in a new relationship, I am prepared to accept the sincerity of the victim's request.'

Fallon v Baker **[2018] ACTSC 319 (9 November 2018) – Australian Capital Territory Supreme Court**

'History of abuse' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Women'

Charge: Common assault.

Appeal type: Appeal against conviction.

Facts: The appellant had a history of heavy drinking. Despite having been prescribed medication to assist with his alcohol dependence, the appellant was heavily intoxicated on the night the offence occurred. His intoxicated state led him to punch his wife in the back on at least four occasions while she was pretending to sleep and to later threaten to strangle their youngest child to stop him crying. This threat prompted the mother to call the police.

In the magistrate's judgment, he noted that the wife declined to participate in the Family Violence Evidence-in-Chief interview as she did not want the appellant to know she was the one who had contacted the police. The wife declined out of fear of losing the children due to the husband's past behaviour and conduct in the relationship. The magistrate attributed the appellant's behaviour to his dependence on alcohol.

Along with appealing the magistrate's sentence, the appellant also sought to admit further evidence and to have the sentencing proceedings reopened.

Issues: (1) Was the sentence imposed manifestly excessive; and (2) did the magistrate fail to consider or give proper weight to the subjective circumstances of the appellant; (3) should further evidence be admitted and the sentencing proceedings reopened.

Decision and reasoning: Mossop J dismissed the appeal and confirmed the sentence imposed by the magistrate. His Honour was satisfied that the magistrate considered all possible consequences of a conviction for the appellant's employment and other subjective circumstances and that the appellant's submissions failed to demonstrate otherwise. As such, the appellant's first ground for appeal was unsuccessful.

When considering the second ground, Mossop J used the wife's fear of making a complaint and of losing her children, and the history of similar events during the relationship as evidence 'that the offending conduct in the present case occurred in a context of typical domestic violence cases …[This] history of conduct within the relationship indicates that the offending conduct had a more objectively serious character than it would have had if that history was not present' [21]. Mossop J used these facts to reject the appellant's claim that the magistrate's sentence was manifestly excessive.

In relation to the third issue, the appellant sought to admit evidence detailing the consequences of the conviction on his employment and job prospects given that the conviction caused his employer to consider terminating the appellant's employment and the appellant to consequently resign. Mossop J, however, did not consider the admission of further evidence to be in the interests of justice as the evidence was of limited scope and addressed a matter already considered by the magistrate.

R v Williams [2018] ACTSC 354 (18 October 2018) – Australian Capital Territory Supreme Court

'Breach of protective bail conditions' – 'Control' – 'Intensive correction order' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful confinement' – 'Women'

Charges: Unlawful confinement x 1; Threat to kill x 1; Inflicting actual bodily harm x 1; Common assault x 2; Aggravated dangerous driving x 1.

Proceeding type: Sentencing and application for an intensive corrections order.

Facts: At the time the offences were committed, the accused was on bail in relation to family violence charges against his partner. The accused's bail conditions prohibited him from assaulting or intimidating his partner,

being near her, having contact with her and from attending her home. While on bail, the accused assaulted his partner, unlawfully confined her and threatened to kill her. When attempting to flee the home, the accused also struck his partner's current boyfriend with a car, recklessly inflicting actual bodily harm.

Issues: (1) What are the appropriate sentences given the accused's offences; and (2) is an intensive correction order appropriate for the accused?

Decision and reasoning: Burns J rejected the submission for an intensive corrections order on the grounds that the accused's imminent deportation from Australia (due to his visa being revoked) made it unlikely that the accused would comply with the order. The accused was instead sentenced to two years and four months' imprisonment. Burns J reached this decision by considering the relatively low seriousness of the harm inflicted upon the victim; the victim's vulnerability; and the fact that the accused was on conditional liberty at the time of committing the offences.

Burns J notes at [5] [The offence of unlawful confinement] 'involved an attempt by you to control the victim by means of intimidation. Some factors which are relevant to determining the objective seriousness of this offence, but also relevant to all of the offences, were that the offences occurred in the victim's own home and, in fact, in her bedroom. With respect to the particular offence, there was force and intimidation used to stop the victim leaving the room. It occurred in the context of threats being made to the victim. The victim was five and a half months pregnant at the time with your child. There was also another child in the house at the time of the commission of these offences. The offences which occurred with regard to KS, in the first tranche of offending, involved a breach of trust because you were only able to gain access to the premises because you had been in a relationship with the victim.'

***R v Simonds* [2018] ACTSC 265 (21 September 2018) – Australian Capital Territory Supreme Court**

'Evidence' – 'Physical violence and harm' – 'Threats to kill' – 'Unlawful confinement'

Charges: Assault occasioning actual bodily harm x 1; Choke, suffocate or strangle x 1; Assault occasioning actual bodily harm x 1; Unlawful confinement x 1; Threat to kill another person x 1.

Proceeding type: Trial by judge alone.

Facts: The accused and the complainant went out to dinner. At about midnight the accused, apparently intoxicated, went out alone. Some hours later, he returned and although not obviously intoxicated, soon

became violent. He dragged the complainant, hit her in the face, held a knife to her throat, and detained her in the flat for about four hours. During this time, he threatened to kill her, and demanded information from her about her mobile phone.

Issues: Whether or not the events as described by the complainant occurred; Whether or not the Court could be satisfied beyond reasonable doubt.

Decision and reasoning: A verdict of not guilty was entered as to each of the six counts in the indictment. The Court was satisfied that the complainant 'was probably telling the truth', but noted that the required standard was beyond reasonable doubt. Therefore, his Honour could not accept the complainant's evidence. The emails, particularly, appeared to seriously contradict her version of events, such that they had a significant effect on her evidence being accepted beyond reasonable doubt.

***R v Rose* [2018] ACTSC 237 (23 May 2018) – Australian Capital Territory Supreme Court**

'Arson' – 'Damaging property' – 'Factors affecting risk' – 'Sentencing'

Charges: Aiding and abetting the commission of an offence - caused damage to two vehicles by fire and intended to cause, or was reckless about causing damage to the vehicles.

Proceeding type: Sentencing.

Facts: The offender aided and abetted the co-offender to set fire to his former partner's car using accelerant, which caused the destruction of the vehicle. As a result, an adjacent vehicle also caught fire and suffered damage.

Issues: Burns J determined the appropriate sentence for the offender.

Decision and reasoning: In determining the sentence, the Court took into account the age of the offender (19 years old), the fact that he had no previous convictions, his attempt to contact the owners of the vehicle to apologise for his actions, the contents of the Pre-Sentence Report (which revealed that he had continued family support and a positive peer network), the fact that he was in stable employment and that he was considered to be at low risk of re-offending. His Honour also took into account the offender's plea of guilty, albeit that it was not entered at the earliest opportunity. These matters were relevant to a finding that he had good prospects for rehabilitation ([10]). A sentence of imprisonment should only be imposed as a last resort, and accordingly, the Court ordered a Good Behaviour Order for a period of 12 months and recorded a

conviction. He was also required to complete 150 hours of community service and accept supervision of ACT Corrective Services for that period.

***SA v Badenhorst* [2018] ACTSC 216 (21 May 2018) – Australian Capital Territory Supreme Court**

'Evidence' – 'Good behaviour bond' – 'Intermediate sanctions' – 'Sentencing' – 'Sentencing options'

Charges: Assault x 1

Appeal type: Appeal against decision to refuse adjournment; appeal against sentence.

Facts: In the course of sentencing submissions, the Magistrate was not willing to accept a submission relating to the likely impact of a conviction upon the appellant's employment. The appellant sought an adjournment to obtain evidence to put before the Magistrate. The Magistrate refused the request.

Issues: Whether the Magistrate fell into error in refusing the application for an adjournment.

Decision and Reasoning: Burns J upheld the appeal.

The Magistrate's refusal of an adjournment was unreasonable so as to bespeak error ([5]). Having received fresh evidence (a letter from the principal of the school where the appellant was employed), Burns J held that, if a conviction was recorded, she would lose her 'working with children' approval and, consequently, her job as a teacher. Such an outcome would be disproportionate compared to the nature of the offence ([11]).

His Honour took into account the appellant's character, antecedents, age, health and mental condition, as well as the seriousness of the offence and extenuating circumstances in which the offence was committed.

His Honour noted that there is no rule of law that a domestic violence offence cannot be the subject of non-conviction order ([15]). Consequently, the conviction was set aside and a non-conviction order made. The Court also imposed a good behaviour order.

***Purcell v O'Reilly* [2018] ACTSC 60 (9 March 2018) – Australian Capital Territory Supreme Court**

'Children' – 'Coercive control' – 'Damaging property' – 'Separation'

Proceeding: Appeal from Magistrate's sentence order following conviction for damage property causing damage of no more than $5000.

Grounds:

1. The sentence was manifestly excessive;
2. The Magistrate misapplied s 17 of the *Crimes (Sentencing) Act* (2005) (ACT) in failing to make a non-conviction order.
3. The Magistrate erred in refusing to consider a non-conviction order on the basis that as a family violence offence the matter was too serious a matter to be dealt with by a non-conviction order. He also submitted the sentence was manifestly excessive as the appellant was entitled to a sentencing discount as without the appellant's confessions the offence would have been difficult to prove.

Facts: The offence occurred when the appellant man was a guest in his former wife's home so that he could take his son to football training in the morning. The appellant demanded to see his former wife's phone and refusing, she retreated to her bedroom and locked the door. The appellant threatened to break the door down if she did not unlock it. The appellant's daughter blocked his access to her mother's bedroom door. The appellant went to the lounge room, picked up a flat screen TV and threw it to the ground, picked up the glass table it had been sitting on then threw the table onto the TV screen, causing it to shatter. His former wife declined to make a statement to police and police proceeded with the matter based upon the appellant's admissions at the scene.

Decision and Reasoning: The appeal was dismissed. The Magistrate was simply identifying this particular offence as involving family violence, and taking place in the complainant's home where a child was present. On that basis, she concluded that the particular offence is too serious to be dealt with under s 17. This is not a case in which, but for Mr Purcell's admissions, either the offence would never have come to light or it would have been difficult to prove in a defended hearing. The judge noted that in *R v Hamid* [2006] NSWCCA 302, Johnson J (with whom Hunt AJA and Latham J agreed) said at [77]:

> An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control.

Penfold J observed:

> [48] … the incident giving rise to Mr Purcell's conviction, and its source in Mr Purcell's determination to examine the victim's mobile phone, seem to reflect both an attempt to exercise power or control over his former wife and a belief that this was justified. For this reason, the incident as a whole may legitimately be treated as more serious than it would have been if the TV had been destroyed in anger or frustration generated by some event unrelated to conflict between Mr Purcell and his former wife.

***R v KN* [2018] ACTSC 111 (26 February 2018) – Australian Capital Territory Supreme Court**

'Perpetrator interventions' – 'Physical violence and harm' – 'Sentence' – 'Strangulation'

Charges: Assault occasioning actual bodily harm x 1; Intentionally and unlawfully choking a person so as to render that person insensible or unconscious x 1.

Case type: Sentence.

Facts: The defendant headbutted his wife, causing her to become unconscious. He tightly wrapped a piece of rope around her neck, causing her to again become unconscious. She had lost control of her bodily functions and urinated ([1]). The incident occurred in 2013. The complainant was unwilling to provide a statement previously, because she wanted to continue in her relationship with the defendant ([4]).

The defendant pleaded guilty to the charges ([5]).

Issues: Sentence to be imposed.

Decision and Reasoning: The defendant was sentenced to 2 years and 9 months' imprisonment, wholly suspended ([17]). Mitigating factors included the defendant's: pleas of guilty; limited criminal history; childhood trauma; mental health issues; and engagement in psychological services ([11]). Burns J considered that the defendant had very good prospects for rehabilitation ([16]).

***R v Kulczycki* [2018] ACTSC 9 (30 January 2018) – Australian Capital Territory Supreme Court**

'Blackmail' – 'Emotional and psychological abuse' – 'History of breaches of protection orders' – 'Revenge porn'

Charges: Blackmail x 1; Stalking x 1.

Case type: Sentence.

Facts: The defendant and complainant were in a relationship for 2 years. They sometimes filmed consensual sex ([6]-[7]). After the relationship broke down, the defendant sent the complainant emails and text messages threatening to release the video unless the complainant paid him $20,000 ([8]-[9]). The complainant obtained a protection order, and the defendant breached the order three times ([11]).

Issues: Sentence to be imposed.

Decision and Reasoning: Elkaim J remarked on the seriousness of the blackmail in the context of a domestic relationship at [16]: 'blackmail of the type involved in this case must be regarded as serious. This is not so much because of the amount of money demanded but because it involved a threat to breach the privacy of a relationship and to cause severe embarrassment to the complainant'. While the defendant had promising prospects of rehabilitation and had taken steps to reduce his consumption of illicit drugs, Elkiam J considered that a period of imprisonment was necessary ([21-[22]). The defendant was sentenced to a head sentence of 9 months' imprisonment, to be served concurrently with 6 months' imprisonment for stalking [22].

Justice Elkaim remarked on the seriousness of the blackmail in the context of a domestic relationship at [16]: 'blackmail of the type involved in this case must be regarded as serious. This is not so much because of the amount of money demanded but because it involved a threat to breach the privacy of a relationship and to cause severe embarrassment to the complainant'.

Parkinson v Alexander **[2017] ACTSC 201 (4 August 2017) – Australian Capital Territory Supreme Court**

'Administration offence' – 'False accusation' – 'Interpretation of evidence' – 'Procedural fairness' – 'Tendency evidence'

Charges: Making a false accusation x 3; Public mischief x 6.

Appeal type: Appeal against conviction.

Facts: The defendant and 'EK' had been in a relationship. After the relationship had ended, the defendant made allegations to the police that EK had sexually assaulted her, had followed her in his car, and had broken into her house ([5]-[12]). The police made investigations, but eventually determined that the accusations were false ([14]).

At trial, the prosecution relied upon the following evidence to show the defendant's tendency to make false complaints: the fact that there were many allegations supported the inference that each one was false; a complaint of sexual assault made by the defendant against a neighbour when she was 17; and three other allegations made by the defendant against EK's family ([26], [29]). The defendant was convicted of two counts of making a false accusation and three counts of public mischief (for wasting police officers' time). She had not yet been sentenced.

Issues: One issues was whether the Magistrate correctly applied tendency evidence.

Decision and Reasoning: The appeal was partially upheld. Justice Refshauge found that the Magistrate applied the tendency evidence incorrectly for two reasons.

- First, the sequence in which the Magistrate addressed the incidents was not logical. The Magistrate first found that the defendant made two false allegations in 2014. The Magistrate then used the evidence of the 2014 allegations to support reasoning that earlier accusations, in 2013, were also false ([52]).
- Second, the Magistrate reformulated the tendency evidence to conclude that it showed a 'vendetta against the family' ([32], [45]). This was not how the prosecution framed the evidence in the notice of tendency evidence, and the defendant was not given an opportunity to respond to this argument ([45]). Therefore, the evidence was inadmissible ([68]).

Note: this case was subsequently remitted to the Magistrates Court for retrial before a different Magistrate, see *Parkinson v Alexander (No 2)* [2017] ACTSC 290 (9 October 2017).

***R v Rappel* [2017] ACTSC 38 (24 February 2017) – Australian Capital Territory Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Contravention of a protection order' – 'Exposing children to domestic and family violence' – 'Murder' – 'People affected by substance misuse' – 'Sentencing' – 'Women as a vulnerable group'

Charges: Murder x 1; Recklessly inflicting grievous bodily harm x 1; Assault occasioning actual bodily harm x 1; Contravene protection order.

Case type: Sentence.

Facts: The defendant and the deceased had formerly been in a domestic relationship and had a child together ([9]). The deceased had taken out a domestic violence order (DVO) against the defendant the day before the defendant killed her ([17]-[19]). When the defendant received the order, he bought an axe, drove to the deceased house and cut her neck with the axe, severing her spine. She was holding his newborn child at the time, and her two sons were in the same room ([33]-[36]). The axe severed her sister's finger, which formed the basis of the grievous bodily harm charge. He then assaulted her brother, which formed the basis of the assault occasioning bodily harm charge ([37]-[39]).

Issues: Sentence to be imposed. The defendant raised the mitigating factor of diminished responsibility.

Decision and Reasoning: Burns J described the objective circumstances of the murder 'within the worst category of cases of murder, and would warrant a term of life imprisonment' [133].

Burns J said at [131] 'For many years now, the courts of this country have spoken of the need to protect members of the community, and particularly women, from domestic violence, and the need for courts to take seriously offences of domestic violence. If these statements are to have meaning, if the protection offered by the [Domestic Violence and Protection Orders Act 2008 (ACT)] is to have significance, it is incumbent on courts to recognise the heinousness of offences of violence committed in retribution for a member of the community invoking the protection provided by the Act.'

His Honour took into account as mitigating factors the defendant's plea of guilty, his experience of abuse as a child, and his long history of mental health issues ([103]). Other contributing factors included his use of anabolic steroids, methylamphetamines and a personality disorder, but his Honour did not place significant weight on these circumstances ([120]). His Honour also had regard to victim impact statements tendered by the deceased's family ([124]-[128]). His Honour concluded (at [151]):

'The present offence of murder was vicious and cowardly. Those who witnessed your violence will have to live with their memories for the rest of their lives. Your actions deprived three children of their mother, including your own infant daughter Ayla. You have effectively deprived Ayla of both of her parents. The effects of your actions will be felt for decades to come. There is a very substantial community interest in retribution, deterrence and punishment. This can only be achieved by a very substantial period of imprisonment.'

His Honour imposed a sentence of 32 years and 2 months' imprisonment.

Note: the Domestic Violence and Protection Orders Act 2008 (ACT) referenced in this decision has been repealed and replaced by the Family Violence Act 2016 (ACT).

R v Ennis [2016] ACTSC 72 (4 April 2016) – Australian Capital Territory Supreme Court

'Assault occasioning bodily harm' – 'Good behaviour order' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rehabilitation'

Hearing: Breach of good behaviour order.

Facts: In 2012, Mr Ennis was involved in an altercation with his female partner of 27 years. He was convicted of assault occasioning actual bodily harm and was subject to a good behaviour order for 2 years with a condition to perform 100 hours of unpaid community service work. In 2014, Mr Ennis breached this order by failing to perform the community service work ('the first breach'). The good behaviour order was extended by 12 months and Mr Ennis ordered to perform 108 hours of community service work (See *R v Ennis* [2014] ACTSC 369 (4 November 2014)).

However, before the end of the good behaviour order in 2015, Mr Ennis breached the order again ('the second breach'). Mr Ennis and his partner, who had been drinking alcohol, argued outside their house. Mr Ennis pulled her by her hair and dragged her inside. He let her go and slammed the door in her face (common assault). In March 2016, a magistrate sentenced Mr Ennis to 5 months imprisonment, suspended immediately, and made a good behaviour order for 18 months with various conditions. His Honour then referred the matter to Refshauge J for breach of the good behaviour order that had been extended upon Mr Ennis' first instance of breach.

Issue/s: Whether further action is warranted in light of Mr Ennis' breach of a good behaviour order.

Decision and Reasoning: While Mr Ennis complied with nearly 2 years of the original good behaviour order without breach constituted by further offence and nearly 9 months of the additional period ordered by Refshauge J, Mr Ennis had failed at his attempts at rehabilitation. This offending was also facilitated by the consumption of alcohol. Further, the nature of offending was serious. Per Refshauge J, *'It is, as his Honour Magistrate Morrison said, a family violence offence, and it is serious in that it was the commission of the offence against the same victim, although many years apart. It is a similar offence also, in that it is an assault and another family violence assault. Nevertheless, it is a much less serious version of the offence, although in this case, because of the earlier history, it attracted a sentence of imprisonment, although suspended'.* It was

relevant that Mr Ennis' partner had moved away and it was unlikely that the relationship would resume in the near future (See [15]-[22]). Accordingly, the duration of the good behaviour order was extended to 2 years to run from the date of this decision.

***R v BNS* [2016] ACTSC 51 (24 March 2016) – Australian Capital Territory Supreme Court**

'Accused has conviction for intimidating witness' – 'Evidence via audio visual link from remote location' – 'History of family violence by accused against witness' – 'Physical violence and harm' – 'Questioning witnesses' – 'Safety and protection of victim and witnesses'

Hearing: Application for evidence to be given by audio visual link from a location outside the courtroom.

Facts: The accused, BNS, pleaded not guilty to 2 counts of incest and 5 counts of committing an act of indecency on TN. At the time of offence, BNS was in a relationship with SN, the mother of TN, and was the step father to TN. SN was called to give evidence at trial. She was expected to give evidence of complaint made by TN and relationship evidence (of her and the child's relationship with BNS).

Here, an application was made for SN to give evidence by audio visual link from a remote location. BNS was physically abusive to SN during the relationship. SN said she had ongoing anxiety and depression which would inhibit her ability to give her best evidence if she was required to give evidence in the courtroom. In light of the history of family violence, she felt intimidated in front of BNS. Finally, BNS also had a conviction for intimidating a witness.

SN did not have the right to give evidence by audio visual link from a remote location under Part 4 of the *Evidence (Miscellaneous Provisions) Act* because she was not a child, complainant, or a similar fact witness. In the absence of statutory provision, it was noted that there is no power at common law for a court to allow evidence to be heard by video link: *R v Hampson* [2009] EWCA Crim 1569. However, s 32 of the *Evidence (Miscellaneous Provisions) Act* empowered the court to direct a person to give evidence by audio visual link from a remote location.

Issue/s: Whether the application to give evidence outside the courtroom via audio visual link should be allowed under s 32 of the *Evidence (Miscellaneous Provisions) Act*.

Decision and Reasoning: The application was allowed as the pre-conditions set out in s 32 were met. First, the necessary facilities were available (See [10]). Second, the evidence could be more conveniently given

from a remote location by video link. SN's aversion to the accused would make it more convenient for her to give evidence remotely. It was also more convenient for the court to have the evidence given free of the inhibitions troubling SN (See [12]-[13]). Finally, BNS did not object to SN giving evidence remotely and, accordingly, it could not be said that it would be unfair to the accused for SN to give evidence remotely. Although the general rule is that prosecution witnesses should give evidence in the presence of the accused, it was noted that there have been numerous past occasions where the giving of evidence by video link has not been unfair (See [14]-[22]). Further, there were no discretionary matters requiring the application to be refused (See [23]-[30]).

***R v Curtis (No 2)* [2016] ACTSC 34 (26 February 2016) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Breach of a good behaviour order' – 'Deterrence' – 'Physical violence and harm' – 'Young people'

Hearing: Breach of a good behaviour order.

Facts: Mr Curtis assaulted his female partner by punching her a number of times, causing her bruising. He was charged with assault occasioning bodily harm. In October 2013, Refshauge J sentenced Mr Curtis to 12 months imprisonment, wholly suspended, and imposed a good behaviour order with a probation condition for 2 years (See *R v Curtis* [2013] ACTSC 291 (16 December 2013)). In April 2015, within the period of the good behaviour order, Mr Curtis was found in possession of a number of electronic and other items reasonably suspected of being stolen. In December 2015, he pleaded guilty in the Magistrates Court and was sentenced to a further good behaviour order for 18 months with a community service condition. The magistrate referred the breach of the earlier imposed good behaviour obligations to the Supreme Court.

Issue/s: Whether further action is warranted in light of Mr Curtis' breach of a good behaviour order.

Decision and Reasoning: The offence subject of the breach was of a different character and less serious to the offence that Mr Curtis was originally sentenced for. This offending was not part of a life of serious criminal offending but a stupid criminal offence prompted by his perceived necessity. Mr Curtis had otherwise complied with the good behaviour order. His Honour was satisfied that this justified re-sentencing Mr Curtis rather than imposing the suspended sentence (See [45]-[49]).

In re-sentencing Mr Curtis, Refshauge J noted the need for general deterrence because the original offence was of family violence. He further noted that *'Vindication of the victim is always important in family violence*

offences and, again, the expression of the court's displeasure with the offending by the imposition of imprisonment will meet that objective' (See [52]). His Honour further noted Mr Curtis' youth, his employment, and the birth of his child into a stable relationship (absent any family violence) (See [50]-[55]). Mr Curtis was re-sentenced to 12 months imprisonment to commence from 15 August 2015 (to take into account pre-sentence custody), wholly suspended. His Honour further imposed a good behaviour order for 18 months with probation conditions and a community service condition.

Note: the defendant subsequently breached his good behaviour order (although the breach was not related to further domestic and family violence) and was re-sentenced to 12 months' imprisonment, wholly suspended (see *R v Curtis (No 3)* [2017] ACTSC 101 (27 April 2017).

***R v Williams* [2015] ACTSC 406 (18 December 2015) – Australian Capital Territory Supreme Court**

'Anger management programs' – 'Assault occasioning bodily harm' – 'Brother' – 'Deterrence' – 'Drug and alcohol programs' – 'Family members' – 'Physical violence and harm'

Charge/s: Recklessly inflicting grievous bodily harm.

Hearing: Sentencing hearing.

Facts: After arguing with his brother, Mr Williams chased his brother down the street. He caught up with his brother and hit him with a guitar, rendering him unconscious. Mr Williams' brother was found to have a depressed skull fracture and a haematoma on his brain. He underwent surgery and spent three weeks in hospital before being moved to a rehabilitation facility.

Decision and Reasoning: This was a serious offence, especially because it involved family violence. The offence was not premeditated but was aggravated because it took place at a time when Mr Williams was already subject to a NSW good behaviour order made in connection with an earlier family violence offence (against Mr Williams' former partner). Further, Mr Williams tried to minimise his actions. The injuries sustained by his brother were quite serious (See [11]-[22]). Penfold J also had regard to Mr Williams' subjective circumstances including his extensive criminal history (See [23]-[26]). He noted that Mr Williams had attended some anger management and drug and alcohol programs but these had not had an effective rehabilitative impact (See [27]-[31]).

In terms of general deterrence, His Honour noted, '*This is an offence of a kind that requires general*

deterrence, and in some cases at least, general deterrence may be effective. I note defence counsel's comment that general deterrence in relation to the grievous bodily harm offence is particularly relevant in relation to "glassing" offences, but I consider that deterring violence within the family is at least as important as deterring alcohol-fuelled violence between strangers or acquaintances' (See [33]). Personal deterrence was also relevant on the facts (See [34]). Penfold J sentenced Mr Williams to three years imprisonment with a non-parole period of 18 months.

***R v Pikula* [2015] ACTSC 380 (12 November 2015) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Assault occasioning actual bodily harm' – 'Brother' – 'Causing grievous bodily harm' – 'Drug and alcohol programs' – 'Family members' – 'People affected by substance misuse' – 'Physical violence and harm'

Charge/s: Assault occasioning actual bodily harm, causing grievous bodily harm.

Hearing: Sentencing hearing.

Facts: After consuming a significant quantity of alcohol, Mr Pikula, a man with Aboriginal and Tongan ancestry, began arguing with his step-brother (Mr Mapa). Another step-brother, Mr King, tried to intervene but was stabbed with a knife in the back of his thigh by Mr Pikula (assault occasioning actual bodily harm). The following evening, Mr Pikula again became highly intoxicated and argued with Mr Mapa. He stabbed Mr Mapa twice in the back. The knife wounds punctured his lung (grievous bodily harm).

Decision and Reasoning: Refshauge J sentenced Mr Pikula to 22 months imprisonment for assault occasioning actual bodily harm and 27 months imprisonment for causing grievous bodily harm (cumulative). His Honour also recommended that a condition of Mr Pikula's parole would include a requirement that he undergo treatment and counselling for alcohol abuse. In imposing this sentence, Refshauge J noted the importance of both general deterrence and specific deterrence (in light of his violent criminal record). The offending was serious here and warranted denunciation. While it had some association with alcohol, which may provide some opportunity for rehabilitation, this could not be said to overwhelm the other purposes of sentencing. His Honour also had regard to Mr Pikula's troubled childhood and his long history of alcohol abuse.

At [1], *'There can be no doubt that one of the marks of a civilised society is that its members can be protected from violence in their lives. While there can, of course, be no guarantee of such protection, nevertheless, the*

community expects that appropriate steps will be taken to maximise such protection. This is especially true of the need for safety within the family'.

***R v NQ* [2015] ACTSC 308 (14 October 2015) – Australian Capital Territory Supreme Court**

'Act of indecency without consent' – 'Assault with intent to engage in sexual intercourse' – 'Deterrence' – 'Drug and alcohol programs' – 'Emotional and psychological abuse' – 'Exposing children' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Act of indecency without consent, assault with intent to engage in sexual intercourse.

Hearing: Sentencing hearing.

Facts: The male offender and the female complainant were married. They had been in a relationship for 17 years and had 3 children. The offender and the complainant had been drinking alcohol together when the offender requested oral sex. The complainant declined and went to bed. Five minutes later the offender walked into the bedroom and demanded the complainant perform oral sex on him. She refused repeatedly and started crying. The offender said, 'Do you think your crying is going to get you what you want? It's your job to do it'. He then took all his clothes off and positioned himself on top of the complainant. She pushed the offender off but he continued to talk angrily. The offender then dragged the complainant across the bed and pushed her head close to his penis. He tried to slap her twice but was blocked by the complainant. She fell off the bed, hurting her head. The offender continued to demand oral sex. He pinned her down on the bed and yelled, 'You need to suck me off, it's not about love or intimacy'. The complainant, crying, pleaded for him to let her go and the offender replied 'What can you do about it?' The offender then became upset and the complainant called the police.

Decision and Reasoning: These offences were objectively serious. The assault lasted almost an hour and included physical and mental abuse. Robinson AJ noted, *'I take into account the fact that prior sexual relationship is relevant in assessing the seriousness of sexual assault. Here it is not a sexual assault by an unknown stranger which would give rise to extreme terror in the mind of the complainant'* (See [8]). His Honour also took into account a number of subjective circumstances. There had been some measure of reconciliation between the offender and the complainant. While these events were not an isolated incident of abuse and this mitigated the leniency that could otherwise have been shown in this case, the offender had taken opportunities to assist himself and took responsibility for his offending (See [9]-[14]).

In sum, His Honour noted: *'I have come to the view that only a sentence of imprisonment is appropriate to the level of offending in this case. There is a need to punish this offending and to send a clear message by way of general deterrence to others that participation in sexual behaviour is a matter of choice not subjugation. I have also determined to deal with the offending as if it were only one transaction and impose concurrent sentences'* at [15]. The offender was sentenced to one year and nine months on the charge of unlawful assault and seven months imprisonment for an act of indecency. These sentences were wholly suspended upon the offender entering a good behaviour order for three years.

***R v Stanley* [2015] ACTSC 322 (12 October 2015) – Australian Capital Territory Supreme Court**

'Assault' – 'Damaging property' – 'Deterrence' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rape' – 'Risk factor- strangulation' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Totality' – 'Victim impact statement'

Charges: Assault occasioning actual bodily harm (two counts), damaging property, engaging in sexual intercourse without consent (two counts)

Proceeding: Sentencing

Facts: The offender and the victim were in a relationship. After drinking three bottles of wine one night, the offender smashed a bottle and jar because 'he was angry'. The victim decided to stay at her mother's house and that it was best to take the offender's car keys. When she went to get them, the offender grabbed her by her hair, threw her to the ground, stood over her, stomped on her face and chest and punched her a number of times. During the attack, the offender told the victim 'This is what you get for lying to me' and threatened to kill her. He then put his hands around her neck and tried to strangle her (count 1). When the victim tried to phone someone for help, the offender snapped her mobile in half (count 2). About 15 minutes after the initial attack had ended, the offender grabbed the victim by the back of her neck, smashed a mug over her head and hit her multiple times with the smashed mug. After the mug broke, he went to get another mug and again hit her, causing a large laceration to the victim's head (count 3). After the victim had a shower, the offender told her 'Now that I have done that to you, we are going to do everything my way from now on. It is not your way, it is going to be my way, okay.' He then put his penis into the victim's mouth despite her resisting and turning her head away (count 4) and forced her legs apart and had sexual intercourse with her (count 5).

The next morning the offender asked the victim what had happened. When she told him and asked to be

taken to the hospital, he refused until later that day. The offender later apologised to the victim and told her, 'If you tell the police then we will not see each other again'.

In relation to this conduct the offender was charged and pleaded guilty to two counts of assault occasioning actual bodily harm (counts 1 and 3), one count of damaging property (count 2) and two counts of engaging in sexual intercourse without consent (counts 4 and 5).

Issue: What sentence the offender should receive.

Decision and reasoning: Refshauge ACJ began his judgement by emphasising the seriousness of domestic violence and the considerations relevant to sentencing offenders: '*Domestic violence is a scourge in the Australian community. It has become so problematic that significant efforts are being made at the Federal, State and Territory levels to address it. Clearly, the courts have a part to play in denouncing such conduct and making it clear that in a civilised society it is completely unacceptable. In sentencing offenders who commit domestic violence against their partners, the courts must use the objectives to be achieved in sentencing: general deterrence, specific deterrence, accountability of the offender and vindication of the victim, as well as denouncing the conduct. Nevertheless, at all times a sentence for any criminal offence must be appropriate to the circumstances of the offence and proportionate to the criminality of the offence and the culpability of the offender'* ([1]-[4]).

The offender had a long history of alcohol abuse and alcohol related violence. He had previously been convicted of a violent assault on his previous partner, two offences of drink driving and driving while disqualified. While in custody, the offender completed the SMART Recovery Program and First Steps to Anger Management Program to address his alcohol abuse and violence. He also accepted that he had an alcohol problem and expressed remorse about the offending and its impact on the victim.

References about the offender were provided by his employer (he was employed as a wards person in a hospital), his brother-in-law and his pastor. All three references described him as a respectful and caring person of good character. His brother-in-law and pastor also commented on the positive changes the offender made while in custody. He developed his faith in God, was obedient and respectful of authority, enjoyed the education and rehabilitation programs available and was very remorseful about his conduct in harming the victim. The victim also prepared a victim impact statement in which she expressed her continued serious emotional trauma and its impact on all areas of her life including friends, family, work and finances.

The offending was very serious with the whole of the events constituting a 'brutal, extended attack on a victim

which not only left her with physical scars but with social and mental scars that will last for some considerable time' ([70]). The facts the assaults occurred in the context of a domestic relationship and the victim suffered injuries were aggravating factors. The circumstances in which the property was damaged also made the offence more serious: 'To deny a victim of a brutal assault the opportunity to gain assistance would have increased the terror she must have experienced and has aggravated the offence' ([67]). The sexual assaults violated the victim's integrity and were a serious intrusion into her personal life despite occurring in the context of a domestic relationship.

In sentencing, Refshauge ACJ emphasised the need for special and general deterrence to denounce the offences committed by the offender. While the offender had taken positive steps in rehabilitation, this could not overbear the other purposes of sentencing. Rather, it was taken into account in setting the non-parole period. The seriousness of the offending meant that imprisonment was the only appropriate sentence. After considering the principle of totality and ensuring the offender was not punished twice, Refshauge ACJ sentenced him to a total sentence of six years' imprisonment, backdated for the time already spent in custody. A non-parole period of three years and three months was also ordered. The total sentence comprised of:

- Count 1: one year and eight months' imprisonment;
- Count 2: one year imprisonment, cumulative as to four months on the sentence for count 1;
- Count 3: two years imprisonment, cumulative as to one year on the sentence for count 2;
- Count 4: three years imprisonment, cumulative as to one year and three months on the sentence for count 3;
- Count 5: three years and six months imprisonment, cumulative as to one year and nine months on the sentence for count 4.

***Alchin v McInerney* [2015] ACTSC 300 (25 September 2015) – Australian Capital Territory Supreme Court**

*Note: this case referenced now superseded legislation, however the statements of principle are unaffected by the legislation change.

'Breach of domestic violence order' – 'Deterrence' – 'Following harassing, monitoring' – 'Protection order' – 'Sentencing'

Charge/s: Breach of a domestic violence order.

Appeal type: Appeal against sentence.

Facts: The appellant had been in an 'off and on relationship' with the female victim for 10 years. A Domestic Violence Order was made in favour of the victim against the appellant. Subsequently, one evening between 9.13pm and 10.04pm, the appellant made 10 telephone calls to the victim. He left one message saying: '*You wait cunt. Your house is smashed and that fucking cunt you're rooting. I am going to kill that cunt'.* The appellant pleaded guilty at the first reasonable opportunity to the breach and was sentenced to a period of imprisonment of 22 months with a non-parole period of 15 months.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The offence was very serious but the objective circumstances did not warrant a term of imprisonment of 22 months. As per Robinson AJ: *'Significantly, there was no face to face confrontation, no infringement of the prohibition to be on the property of or within 100 metres of Ms BC and no weapon was involved. Ms BC did not answer the telephone calls'.* His Honour referred to *R v Loulanting* [2015] ACTSC 172 as being a factually similar case. His Honour acknowledged that compliance with any type of protection order is essential to protect members of the community from violence and anti-social behaviour. It is therefore open to the Court to impose a stern penalty to achieve this end. However, the punishment must still be proportionate to the offending and here this could not be said to be the case (See [25]-[26], [32]-[35]).

The appellant was re-sentenced to 14 months imprisonment. Robinson AJ stated: *'In my view substantial weight should be accorded, in the circumstances of this case, to deterring the offender and others from committing the same offence. His conduct was a defiance of the orders of the Court. This was by no means the first such defiance. There is value in our society upholding all orders of Courts. There could be said to be even more value in upholding protection orders in the context of the role that protection orders now play in our society in all jurisdictions'* at [54].

***McClung v Vince* [2015] ACTSC 255 (27 August 2015) – Australian Capital Territory Supreme Court**

'Common assault' – 'Damage to property' – 'Damaging property' – 'Exposing children' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing'

Charge/s: Common assault, damage to property.

Appeal type: Appeal against sentence.

Facts: The appellant and his former female partner had four children together. They separated two months prior to the offending but the appellant had been staying at the family home for a week prior to the offences. On 6 November 2014 at about 11pm, the appellant banged on his former partner's window demanding she wake up. She let him in and went back to bed (where her 5 year old daughter was sleeping). The appellant went to the bedroom and punched a hole in the door. He started yelling and abusing his former partner. Despite the cries of the 5 year old daughter to stop, the appellant restrained his former partner and started hitting her. He woke up the couple's 3 year old son. The appellant then hit the bedroom door several more times and started yelling again. The couple's 13 year old daughter called the police. The appellant was sentenced to 12 months imprisonment for common assault and 6 months imprisonment for damage to property, suspended after 8 months. The appellant had previously been convicted for offences of assault against his former partner in 2006 and 2012. These offences were also committed under the influence of alcohol.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. First, the sentencing magistrate did not fail to consider the possibility of part of the sentence being served by way of periodic detention. Second, although counsel submitted that the appellant had been compliant with bail conditions imposed in 2014 (namely, sobriety), the magistrate was entitled not to place any great weight on this consideration. This was particularly so given that the appellant had assaulted his former partner before under the influence of alcohol. Finally, counsel for the appellant submitted that previous assaults had been dealt with by a non-custodial sentence and to impose a sentence of full-time imprisonment for at least 8 months was an oversized incremental step. Robinson AJ stated: *'The argument regarding the oversized incremental step is answered by the proposition that the courts dealing with the earlier assaults allowed leniency (perhaps too much) in a desire to rehabilitate the appellant. Further there is no sentencing principle that requires courts to impose sentences incrementally according to some upward scale'* (See [18]).

***R v Guy* [2015] ACTSC 237 (5 August 2015) – Australian Capital Territory Supreme Court**

'Assault' – 'Assault occasioning actual bodily harm' – 'Breach of good behaviour order' – 'Childhood disadvantage' –

‘Damaging property’ – ‘People affected by substance misuse’ – ‘People with mental illness’ – ‘Rehabilitation’ – ‘Risk factor- strangulation’ – ‘Sentencing’

Charges: Damaging property, assault, assault occasioning actual bodily harm

Proceeding: Resentencing

Facts: The offender was charged and pleaded guilty to damaging property for breaking a window in his partner’s house. He was convicted and sentenced to one month’s imprisonment. This conviction breached a good behaviour order that was made after he was convicted for assaulting his partner. He was sentenced to six months’ imprisonment, wholly suspended upon complying with a good behaviour order for two years. The good behaviour order was cancelled as a result of the breach and the six months’ suspended sentence was imposed, but was ordered to be served concurrently with another term of imprisonment. The offender successfully appealed this sentence. A sentence of six months’ imprisonment wholly suspended on the condition of a 12-month good behaviour order was imposed on appeal. A good behaviour order for the offence of damaging property was also made.

The offender was subsequently convicted of traffic offences, constituting a breach of both good behaviour orders. As a result, the good behaviour bond imposed for the offence of damaging property was extended for a further 12 months. He was also resentenced to six months’ imprisonment on the assault charge, suspended for a period of 12 months on the conditions of a further good behaviour order for 12 months and 80 hours of community service. This effectively increased the length of the good behaviour orders as well as requiring the offender to perform community service work.

The offender again breached these good behaviour bonds when he was convicted of assault occasioning bodily harm. This conviction arose when the offender choked his partner and threw a chest of drawers that hit her in the head. In relation to this offence, he was sentenced to 18 months’ imprisonment, suspended after nine months with a good behaviour order for two years thereafter.

Issue: How should the offender be resentenced for the final breach of the two good behaviour orders?

Decision and reasoning:

The offender suffered a difficult childhood in which he was sexually abused and had great difficulties in school as a result of having ADHD and dyslexia. After leaving school at 14, he was homeless for many years. He also had a long history of drug and alcohol abuse. The offender also suffered from various mental illnesses,

including major depressive disorder, borderline personality disorder and antisocial personality traits, for which he was receiving treatment. He had a long criminal history with 122 offences on his criminal record. This reduced towards the time of offending in question and suggested his criminality was abating.

The final breach of the good behaviour orders was serious when considering 'the offence was a family violence offence committed on a complainant who had been the victim of earlier offences of a similar type committed by [the offender], for which the current Good Behaviour Orders owe their genesis' ([37]). However, there was a need to take into account the offender's mental health. Refshauge J considered that 'the option for rehabilitation can be given greater prominence without minimising the need for some level of special and general deterrence' ([38]).

Refshauge J cancelled the good behaviour orders in accordance with s 110 of the *Crimes (Sentence Administration) Act 2005* (ACT). The conviction of assault occasioning actual bodily harm was confirmed. The offender was convicted to six months' imprisonment, wholly suspended for a period of two years. A good behaviour order was made for two years with the conditions that the offender would be supervised, must complete 180 hours of community service, and must participate in the Detention Exit Community Mental Health Outreach Program for three months. The conviction for damaging property was also confirmed and the offender was sentenced to one month's imprisonment, taking into account the time already spent in custody.

Refshauge J concluded by telling the offender, 'If you are genuine in your efforts, the Court will support you in this, as I hope I have shown you, but if you are not, then you can expect further custodial sentences and a revolving door' ([57]).

For Refshauge J's previous decision on appeal, see *Guy v Anderson (No 2)* [2013] ACTSC 245.

***R v McLaughlin* [2015] ACTSC 201 (16 July 2015) – Australian Capital Territory Supreme Court**

'Animal abuse' – 'Assault' – 'Contravening a protection order' – 'Exposing children' – 'Moral culpability' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing' – 'Victim impact statement'

Charges: Common assault, assault occasioning actual bodily harm, contravening a protection order, resisting a public official

Proceeding: Sentencing

Facts: When the offender returned home he tripped after his dogs walked in front of him. In front of his wife (the victim) and children, the offender became angry and started kicking the dogs. After the victim asked him to calm and stop hurting the animals, the offender punched her in the stomach (count 1). Approximately 10 minutes later when they were discussing the punch, the victim said 'You grew up watching your dad hit your mum and now you think it's okay to hit me too'. In response, the offender punched her again to the back of her head, causing her to fall to the ground. He then punched her twice more, kicked her in the head five times and stomped on her head. As a result, the victim suffered a large cut to her forehead requiring seven stitches and a bloody nose (count 2). Both children were present during this assault. When the offender was arrested by police he became aggressive, spat at one of the officers (count 3) and resisted the arrest (count 4). Approximately 3 months later a domestic violence order was made against the offender restraining him from engaging in conduct that constitutes domestic violence to the victim, including offensive, harassing or threatening conduct. The offender subsequently had an argument with the victim where he was abusive and threatening towards her (count 5). When someone attempted to intervene, the offender threatened to kick him. At the time this offence took place the offender was on bail for the previous 4 offences.

In relation to this conduct, the offender was charged and pleaded guilty to two counts of common assault (counts 1 and 3), one count of assault occasioning actual bodily harm (count 2), one count of resisting a public official (count 4) and one count of contravening a protection order (count 5).

Issue: What sentence should be imposed.

Decision and reasoning:

In assessing the objective seriousness of the offences, Burns J took into account that the offender was significantly larger than the victim, that the offences occurred in the context of a domestic relationship and that the children were present during the attack. Burns J considered the offender's conduct to be 'cowardly, shameful and rightly characterised as criminal' ([7]). A victim impact statement was also prepared by the victim, explaining the trauma and anxiety the offences caused her and the children. Burns J noted that 'As is so often the case in domestic violence offences, the long term burden of your violence will not only be felt by your wife, but also by your children'.

The offender's childhood was marred by exposure to domestic violence and he 'was disappointed in [his] actions and how [he] exposed [his] children to that type of domestic violence, which [he] despised as a child' ([22]). He had secure employment to return to after being released from custody. The offender had a history

of drug and alcohol abuse and mental health issues including suffering from posttraumatic stress disorder. Due to these concerns, he was assessed as being at moderate risk of reoffending. However, Burns J noted that the offender had been attending numerous rehabilitation programs for his alcohol and drug abuse and was receiving treatment for his mental health issues. Expert psychologist reports noted that the offender's behaviour was 'strongly influenced by [his] background of mental health issues arising out of [his] traumatic childhood, particularly [his] ongoing complex post traumatic stress disorder' and that he was unable to make calm or rational choices at the time of offending ([32]).

The offender demonstrated a degree of remorse in his statements to psychologists and his guilty pleas. Therefore, the sentence was reduced by 25 per cent as a result of these early pleas. The offender's mental illness was causally connected to his offending and to his abuse of alcohol. It also impaired his mental functioning at the time of the offences and reduced his moral culpability by impairing his ability to exercise appropriate judgement and make calm and rational choices. Full time imprisonment would have a deleterious effect on his mental health and prospects of rehabilitation. Burns J concluded that the need for general and specific deterrence should be moderate in light of the offender's reduced culpability as a result of his mental illness.

Burns J convicted and sentenced the offender to:

- Count 2: Nine months' imprisonment to be served by way of periodic detention;
- Count 5: Three months' imprisonment concurrent with the sentence for count 2, suspended after 13 days on the condition of complying with a good behaviour order for 18 months;
- Count 1: Good behaviour order for a period of nine months;
- Count 3: Fine of $600.00; and
- Count 4: Good behaviour order for three months.

***R v Ross* [2015] ACTSC 22 (1 July 2015) – Australian Capital Territory Supreme Court**

'Assault' – 'Bail' – 'Burglary' – 'Choking' – 'Exceptional circumstances' – 'Physical violence and harm' – 'Risk factor-strangulation'

Charges: Assault occasioning actual bodily harm, burglary and choking a person so as to render them insensible or unconscious

Proceeding: Bail

Facts: While on bail for previous offending, the accused allegedly entered his ex-partner's (the victim) home and attacked her, placing his hand around her neck and squeezing until she felt light headed. At the time these offences were committed, the accused was subject to a protection order in favour of the victim. The breach of this order was a serious offence for the purposes of the *Bail Act 1992* (ACT) (the Act) and therefore the presumption against bail did not apply to the accused. In order for bail to be granted, the court must have been satisfied that there were special and exceptional circumstances favouring the grant of bail under s 9D(2) of the Act.

Issue: Whether bail should be granted.

Decision and reasoning: Bail was not granted. The charge of contravening a protection order was ultimately withdrawn because of procedural issues relating to service. However, s 9D of the Act still applies where a person is on bail for a serious offence of which offence that person is acquitted. Therefore, the fact that the charge was withdrawn did not amount to special and exceptional circumstances in favour of granting bail. The accused allegedly committed very serious offences of family violence. He had a history of offending, having previously been convicted of two offences of assault occasioning actual bodily harm, four offences of assault, two offences of contravention of a protection order, numerous traffic offences including drink-driving offences and fives offences of failing to appear in accordance with a bail undertaking. He had also shown an unwillingness to obey and disrespect of court orders. Given the accused's history and the real risk that he would not attend trial and reoffend, bail should not have been granted even if there were special and exceptional circumstances in favour of granting bail.

***R v Loulanting* [2015] ACTSC 172 (23 June 2015) – Australian Capital Territory Supreme Court**

'Breach of a protection order' – 'Drug and alcohol programs' – 'Following harassing, monitoring' – 'People affected by substance misuse' – 'Sentencing' – 'Threat to kill'

Charge/s: Threat to kill, breach of a protection order x 2.

Hearing: Sentencing hearing.

Facts: The offender was charged with and pleaded guilty to 2 counts of breaching a protection order (where the protected person was his former female partner) and making threats to kill. On 18 January 2015, the

offender contacted the protected person, asking to see his son. She refused because he had been using ice and was acting aggressive and demanding. The offender then sent her a number of text messages that were indecent, offensive and aggressive. The protected person ignored these messages as he had sent similar messages in the past. However, the next day, the offender called again and left a voice mail and text messages threatening to kill her.

Decision and Reasoning: The offender was sentenced to a total sentence of 4 years imprisonment, including 12 months imprisonment for the breaches of the protection order and 2 years and 6 months imprisonment for the threat to kill. This sentence was appropriate in light of a number of factors. The offences required punishment and denunciation, and considerations of general and specific deterrence were also significant. Refshauge J accepted that the offender genuinely sought rehabilitation but noted that agencies the offender had been referred to in the past had had no significant impact on his behaviour. His Honour took into account the plea of guilty, the offender's mental health and accepted that the offender felt remorseful (See [44]-[48]).

His Honour further took into account the seriousness of the offences, which were particularly concerning as they were committed in the context of family violence. First, the threat to kill was serious. The use of ice, earlier harassment and changed tone from the earlier conversation all showed the serious intent of the offender and the fear that this threat was likely to have had engendered in the victim. The fact that this offence was brought on by the use of ice was not a mitigating factor but Refshauge J took into the offender's desire for rehabilitation and the, so far unsuccessful, attempts he had made at rehabilitation. The denial of access to his son also provided explanation for the offence but was not a mitigating factor in any way (See [37]-[40]). Second, the breaches of the protection order were also serious, albeit less serious than the threat to kill. The breaches were deliberate and intentional. While they were not the most serious versions of the offence, they were not made by personal approach, they were still serious as the contact was made over two days and was abusive and indecent (See [41]-[42]).

Refshauge J stated:

There is no doubt that the addiction to drugs creates significant problems for the community, as well as for the user and his or her family. When the drug is methylamphetamine, or ice, the violence that it also generates can create further problems, particularly if there are stressed family situations leading to family violence. When mental health issues are added to the situation, it creates great complexity in trying to deal with the multiple issues that arise (See [1]).

R v Peadon [2015] ACTSC 132 (14 May 2015) – Australian Capital Territory Supreme Court

'Aggravating factor' – 'Burglary' – 'Common assault' – 'Community views' – 'Drug and alcohol programs' – 'Mitigating factors' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Recklessly inflicting grievous bodily harm' – 'Rehabilitation'

Charge/s: Recklessly inflicting grievous bodily harm, burglary x 2, common assault x 2.

Hearing: Sentencing hearing.

Facts: On two occasions on one evening, the offender attended the residence of his former partner. On the first occasion, the offender entered through a window and engaged in a physical confrontation with his former partner's boyfriend. The offender then left the premises. He returned later in the evening and picked up a knife from the kitchen. The offender started a physical confrontation with his former partner's boyfriend. To protect himself, the victim placed his hand on the blade of the knife and sustained a serious injury to his hand.

Decision and Reasoning: On the burglary charges, the offender was sentenced to 12 months imprisonment and 16 months imprisonment, with the balance suspended and a good behaviour order imposed. On the charge of recklessly inflicting grievous bodily harm, the offender was sentenced to 15 months imprisonment, wholly suspended upon entering into a good behaviour order. In imposing this sentence, Burns J took into a number of considerations that warranted greater punishment. His Honour noted that, *'these offences [were] family violence offences and as such must be treated very seriously by [the] Court. [The] community views with great abhorrence the infliction of violence by people in family relationships'.* It was also significant that the offences occurred in the victim's own home. In mitigation, Burns J took into account the offender's plea of guilty, the steps taken by the offender to address his alcohol abuse (which was a significant factor in all his offending), his remorse and general prospects for rehabilitation.

LE v SX [2015] ACTSC 79 (11 May 2015) – Australian Capital Territory Supreme Court

'Application for a domestic violence order' – 'Domestic and family abuse in the context of family law proceedings' – 'Exposing children' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Protection order' – 'Systems abuse'

Order sought: Application for a domestic violence order (DVO).

Appeal type: Application for extension of time in which to bring an appeal from the decision of the Magistrates

Court dismissing an application for a domestic violence order.

Facts: On 25 February 2014, the applicant applied for a DVO against her former male partner. Both parties were represented. The transcript of the proceedings extended over some 86 pages. The applicant gave evidence in chief of a number of incidents involving the applicant and her daughter being followed and stared at by the respondent, being grabbed and punched by the respondent, and the respondent sending threatening messages. Of particular relevance to the appeal, the applicant gave evidence of an incident that occurred on 1 December 2010 at the time of the couple's separation. The applicant thought the respondent was overseas but he appeared in her house and dragged her into the hallway, sat on top of her, and smashed her head onto the floor ('the December 2010 incident'). The next day the applicant made an application for housing assistance to the Commissioner for Social Housing stating that she was homeless and escaping violence from her partner.

On 27 May 2014, the magistrate found that the principal incidents of which the applicant gave evidence did not occur or did not constitute domestic violence. In particular, the magistrate was satisfied that the respondent was not in Australia on or about 1 December 2010 and he did not return until after the applicant had gone to the Commissioner for Social Housing. Although the applicant had been injured by someone at the time she went to the Commissioner for Social Housing, Her Honour was not satisfied on the balance of probabilities that the respondent caused that injury.

The application for leave to appeal was not filed until 2 January 2015 (a period of 7 months delay). The applicant was prompted to lodge this appeal because of an adverse decision of a judge of the Federal Circuit Court on 18 December 2014. The decision of the Federal Circuit Court related to parental responsibility and living arrangements for the child of the applicant and the respondent. One of the reasons the applicant sought to overturn the decision of the Magistrates Court was that this decision had an impact on the findings and outcome in the Federal Circuit Court decision.

Issue/s: Whether the grounds of appeal have any reasonable prospect of success and whether the extension of time within which to appeal should be granted.

Decision and Reasoning: Mossop Ass J dismissed the application for an extension of time within which to appeal. His Honour accepted that, at least in relation to the December 2010 incident, there was a reasonably arguable ground of appeal based on documentary evidence presented to the Supreme Court on appeal. Essentially, this paperwork demonstrated that there was at least a possibility that the dates originally provided

were incorrect and the respondent could have been in the country at the time of the incident (see [82]-[92]).

However, there were other factors telling against the grant of an extension of time: the length of time since the decision; the limited prospects of ultimately obtaining an order even if domestic violence was ultimately established; the interests of SX in not having a long finalised decision reopened; and the availability of protection under the Act if circumstances warrant it. The way in which the Federal Circuit Court relied on the findings and decision reached in the Magistrates Court was a matter of significant concern to the applicant but the correctness of the Federal Circuit Court's approach and conclusions was a matter to be resolved in that appellate hierarchy (See [112]-[113]).

Note: this case was affirmed on appeal (see *LE v SX* [2017] ACTCA 34)

***McElholum v Hughes* [2015] ACTSC 78 (24 April 2015) – Australian Capital Territory Supreme Court**

'Assault' – 'Family law proceedings' – 'Legal representation' – 'Physical violence and harm' – 'Safety and protection of victim and witnesses' – 'Systems abuse'

Charge/s: Assault.

Appeal type: Appeal against conviction and sentence.

Facts: The appellant and his former partner had commenced family law proceedings relating to parenting orders for their son. The appellant, a solicitor, was self-represented while his former partner (the complainant) was represented by a firm of solicitors and a barrister. While at the Federal Magistrates Court, the appellant knocked on the interview door where his former partner and her counsel (the solicitor, barrister and a law clerk) were conferring. He asked if they had considered his proposal. When he was told they would be another 10-15 minutes, the appellant replied 'that's not good enough'. The barrister attempted to close the door with her left wrist but the appellant forced it open and said, 'who are you?' in a raised voice. The barrister called security. 30 minutes later she complained of pain in her wrist. The appellant was charged with assault and pleaded not guilty. The magistrate found the charge proved and fined the appellant $100 and ordered the appellant to pay costs of $69, a criminal levy of $50 and a victim's service levy of $10.

Issue/s: The appellant appealed against his conviction and sentence. The notice of appeal was nearly 70 pages long and contained many convoluted and repetitive grounds of appeal. Two relevant grounds were:

- The evidence of the witnesses called by the prosecution was tainted by interest or was perjured (appeal

against conviction).

- The magistrate erred in placing significance on the location of the assault namely, the court building (appeal against sentence).

Decision and Reasoning: The appeal against conviction and the appeal against sentence were dismissed. First, one of the grounds in relation to the appeal against conviction was that the evidence given by the barrister, the solicitor, the law clerk and his former partner was tainted because they all had an ulterior motive i.e. to gain advantage in the family law proceedings. Refshauge J held that there was no evidence to support this allegation and stated, 'the incident was reported to a security officer of the Commonwealth Law Courts promptly, the evidence of the various parties was not identical, usually a matter indicative of truth, because identical recollections of different witnesses, especially as to inessential facts, is often an indication of concoction and it is not explained what benefit [his former partner] would obtain from such a device'. Further, the allegation that the witnesses perjured themselves was unsustainable. The evidence given was corroborated by the CCTV footage and by the evidence of the other parties(See [301]-[323]).

Second, in relation to the appeal against sentence, the magistrate did not err in placing significance on the fact that the assault took place in a court building. Refshauge J stated, 'while [the appellant] certainly possessed the right to be within the bounds of the court precinct, this is not an unlimited right and does not give him the right to assault other people. A court precinct is a place where people should be able to expect the law to be observed at all times'. Further, His Honour quoted from *Grimshaw and Mann* [2013] ACTSC 189, 'intermediate Courts of Appeal have regularly referred to the fact that violent offences committed in public are more serious'. However, this was not to state that assaults occurring in a private home are not serious (See [372]-[377]).

Note: this case was affirmed on appeal (see *McElholum v Hughes* [2016] ACTCA 37 (29 September 2016)).

***R v Seears* [2015] ACTSC 109 (23 April 2015) – Australian Capital Territory Supreme Court**

'Aggravated burglary' – 'Assault occasioning actual bodily harm' – 'Damaging property' – 'Emotional and psychological abuse' – 'Intentionally cause damage to property' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Aggravated burglary (armed and intent to cause harm).

Hearing: Sentencing hearing.

Facts: S left her male partner, the offender, to be in a relationship with another man (the victim). Thereafter, the offender sent many abusive and threatening text messages to S. On the morning of 26 May 2013, the intoxicated appellant drove to the victim's house, where S was now living. He was carrying a 1.2 metre spirit level and a bag with an angle grinder, cable ties, electrical tape, a kitchen knife and a timber-handled holding knife. The offender used the spirit level to smash the window of the victim's bedroom, where the victim and S were asleep. The victim asked the offender what he was there for to which the offender replied, 'You know what I'm here for; I'm going to kill you' and 'You're sleeping with my wife'. He continued to scream at the victim as the victim walked away. The offender then struck the victim with the spirit level on the left arm and left side of his head, causing significant lacerations. S tried to intervene as the offender punched the victim in the face, threatening to kill him. The police were called and the offender removed.

Decision and Reasoning: The offender was sentenced to 3 years and 1 month imprisonment with a non-parole period of 18 months. In imposing this sentence, Murrell CJ took into account a number of considerations. First, the offender had a history of taking the law into his own hands. He was on bail for common assault at the time of the offences and had previously committed offences of common assault. Second, Her Honour took into the offender's subjective circumstances namely, the offender's intention to 'settle down' by continuing his employment in the building industry and removing himself from his involvement in the Rebels Motorcycle Gang. However, she noted that it was surprising that someone at age 63 had not 'learnt his lesson from a series of prior similar incidents'. Third, the objective circumstances were of at least moderate seriousness (See [26]-[33]). Finally, Her Honour took into account general sentencing considerations (See [35]-[40]).

***R v Elphick (No 2)* [2015] ACTSC 23 (1 April 2015) – Australian Capital Territory Supreme Court**

'Breach of personal protection orders' – 'Children' – 'Damaging property' – 'Following, harassing, monitoring' – 'People affected by substance misuse' – 'Protection order' – 'Stalking' – 'Threatening to commit arson' – 'Victim impact statements'

Charge/s: Threatening to commit arson, stalking, breach of a personal protection order x 2.

Hearing: Sentencing hearing.

Facts: The offences arose out of the breakdown of a relationship between the offender and his former female partner. The relationship ended acrimoniously, particularly in relation to the care and access arrangements

relating to the care of the couple's child. The offender's former partner obtained Domestic Violence Order against the offender and her parents obtained Personal Violence Protection Orders. Subsequently, the offender and his former partner had an argument over the telephone over the care and access arrangements for their daughter. The offender went over to the house of his former partner's parents and began shouting and swearing at his former partner. He produced a cigarette lighter and threatened to burn her parent's car. Further, the offender pleaded guilty to a count of stalking on the basis of 25 phone calls made to his former partner. Most were for relatively short periods and were made at varying hours of the day. Finally, the offender breached the Personal Protection Orders by calling his former partner's parents on multiple occasions.

Decision and Reasoning: Refshauge J imposed a total sentence of 2 years and 4 months imprisonment, suspended for a period of two years. In imposing this sentence, Refshauge J took into account the purposes of sentencing and in particular, specific deterrence and vindication of the victims (in light of the Victim Impact Statements delivered in court — See [67]-[70]). He also took into account the offender's plea of guilty and his subjective circumstances (including the offender's drug problem).

These offences were serious and warranted a term of imprisonment. The offence of arson was serious because the offender produced a cigarette lighter, there was a threat with intent to achieve an objective to which he may otherwise not have been entitled, and it was committed at the home of the victim. The stalking offence was also a serious offence particularly because it was committed with a circumstance of aggravation, namely in the presence of a Domestic Violence Order. Finally, the breaches of Personal Protection Orders were serious because they involved a disregard of a court order designed to protect the subjects of the orders.

R v Saedam [2015] ACTSC 85 (1 April 2015) – Australian Capital Territory Supreme Court

'Assault' – 'Bail' – 'Emotional and psychological abuse' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Pregnant women' – 'Rape' – 'Risk of reoffending' – 'Sexual and reproductive abuse' – 'Theft' – 'Views of victims'

Charges: Engaging in sexual intercourse without consent (3 counts), assault, assault with the intent of engaging in sexual intercourse, theft

Proceeding: Bail

Facts: The applicant and his wife (the victim) lived together for some time after migrating to Perth from Syria. While living in Perth, the victim left the applicant and moved into a refuge as a result of domestic violence in the relationship. After the applicant and victim reconciled, they moved to Canberra where their relationship remained volatile. One day the applicant went into the bedroom and had sexual intercourse with the victim, despite her asking him not to, attempting to push him away and crying throughout. Later in the day, the applicant verbally abused the victim and threatened to withdraw his immigration sponsorship of the victim's family to come to Australia. He then again had intercourse with the victim, who continued to cry but otherwise did not move. The next day, the applicant slapped the victim and dragged her by her hair, rolled her on her back and again had intercourse with her. The victim continued to struggle, hitting the applicant's chest and pushing him away. The applicant was charged with three counts of engaging in sexual intercourse without consent, one count of assault, one count of assault with the intent of engaging in sexual intercourse and one count of theft. He pleaded not guilty to each charge.

While in custody, the victim visited the applicant every two or three days. She subsequently made a statutory declaration that she was 'a little tired and confused' at the time of making her complaint to the police. She sought to change her statement that all sexual intercourse was consented to and that she had been drinking before the assault. The victim wrote a letter to the Court in respect of the bail application, in which she said she did not object to the applicant being granted bail. She also stated that she was not pressured into writing the letter, that the applicant was not harmful to the community, and that as a pregnant woman she did not want her child to grow up knowing their father was in gaol.

Issue: Whether bail should be granted.

Decision and reasoning: Bail was granted on conditions including that his family pay a surety of $5000, he surrender travel documents, he not contact the victim, and that he reside in Perth.

The offences that the applicant was charged with were serious. However, Refshauge J determined he could not assess the strength of the Crown case given the absence of much evidence and the victim's damaged reputation as evidence because of her apparent retraction of the complaint. The applicant also had a substantial cash surety available to him and proposed to live with his parents. He had no criminal record. His departure from Canberra to Perth immediately after the offences were alleged was an indication of his intention to flee. However, this risk could be mitigated by imposing conditions on bail such as the surrender of travel documents, that he report to police and be prohibited from being at a place of international departure. Refshauge J accepted that the applicant was likely to commit further violent offences against the victim if he

had contact with her. However, this could also be mitigated by the applicant living in Perth and on the condition that he not contact the victim. The Crown's submission that the applicant could intimidate and interfere with witnesses if bail was granted was rejected. The fact the applicant could withdraw his sponsorship of the victim's family was unlikely to be affected by his bail status. Further, the victim had already retracted her initial complaint, with no evidence from the prosecution that this was a result of intimidation from the application.

***R v Thompson* [2015] ACTSC 69 (20 March 2015) – Australian Capital Territory Supreme Court**

'Aggravated burglary' – 'Emotional and psychological abuse' – 'People with mental illness' – 'Physical violence and harm' – 'Rehabilitation' – 'Unlawful confinement' – 'Young people'

Charge/s: Aggravated burglary, unlawful confinement, common assault, carry/use a firearm with disregard for own safety or safety of other persons.

Hearing: Sentencing hearing.

Facts: The 26 year old male offender and the 21 year old female complainant commenced a relationship after meeting on an online dating website. Five weeks after their first meeting, the complainant told the offender that she wanted to end the relationship but wished to remain friends. The complainant then went overseas for 2 months. Upon her return, the offender tried to re-commence their relationship but the complainant did not want to. At a meeting between the pair, the offender said the complainant was 'cruel', 'yelled at him' and 'humiliated him'. A month later, the complainant was home alone in her apartment. The offender sprung out from behind a door, covered her mouth with a gloved hand and told her not to scream. In his other hand, he was holding a gun. There was a struggle in which the offender tackled the complainant onto the bed and held a gun against her chest. The complainant was confined to the apartment for 3 hours.

Decision and Reasoning: Imprisonment was the only penalty appropriate in the circumstances. These were very serious offences — the complainant was in her own apartment which the offender broke into, he carried a gun, he wore medical gloves, held the gun against the complainant's chest, and confined the complainant in terrifying circumstances for 3 hours. However, on the balance of probabilities, Robinson AJ found that the offender was suffering from a depressive mental illness on the day of the offence. The moral culpability of the offender was reduced, although not eliminated, by this depressive illness. There was a moderate risk of reoffending but His Honour concluded the offender had very good prospects for rehabilitation in light of the

treatment of his mental illness and his new relationship. In the circumstances, it was desirable to give weight to the promotion of the rehabilitation of the offender. Accordingly, the offender, was sentenced to a total effective sentence of 2 years imprisonment, suspended from 9 December 2015.

Note: the convictions in relation to this case were set aside and a retrial was ordered because the trial judge failed to provide a warning about having a support person (see *Thompson v The Queen; The Queen v Thompson* [2016] ACTCA 12 (6 May 2016).

***Hutcheon v West* [2015] ACTSC 55 (13 March 2015) – Australian Capital Territory Supreme Court**

'Assault occasioning actual bodily harm' – 'Choking' – 'Common assault' – 'Denunciation' – 'Deterrence' – 'Exposing children' – 'Manifestly inadequate' – 'Non-parole period' – 'Physical violence and harm' – 'Risk factor- strangulation' – 'Sentencing'

Charges: Choking a person so as to render them unconscious, assault occasioning actual bodily harm, common assault

Appeal type: Crown appeal against sentence

Facts: The respondent and victim were in a domestic relationship for three and a half years and lived together with the complaint's son. One afternoon the respondent and victim got into a fight that resulted in the respondent striking the victim across her face and placing her in a chokehold. The respondent then placed his knee on the victim's shoulder. After the victim asked him to stop, he asked 'You want to die?'. The respondent then placed his hand around the victim's throat and started squeezing before placing his other hand over her mouth and nose. As a result the victim briefly lost consciousness. Later the same day the respondent grabbed the victim by her hair and began shaking her. Attempting to free herself from the respondent's grip, she ended up on the ground when the respondent kicked her face, and jumped and stomped on her arm and head. When the respondent realised the victim's son witnessed the attack he told him 'I didn't do anything wrong. Mum's flipping out'.

In relation to this conduct the respondent was charged and made late guilty pleas to choking a person so as to render that person unconscious, for which he was sentenced to 15 months' imprisonment; assault occasioning actual bodily harm, for which he was sentenced to 10 months' imprisonment, with three months to be served cumulatively on the sentence imposed for the offence of choking; and common assault, for which he was sentenced to five months' imprisonment concurrent with the sentence imposed on the charge of

choking. A non-parole period of 12 months was ordered. While the offending occurred, the respondent was on parole for burglary, theft and unauthorised possession of a firearm. The respondent's parole was subsequently revoked and he was liable to serve the remainder of his sentence. The sentence imposed for the offence of choking was ordered to commence at the expiration of the sentence the respondent was serving as a result of the cancellation of the parole order.

The respondent had an extensive criminal history, having been convicted for approximately 80 criminal offences in the past 20 years. He also had a long history of substance abuse and mental health issues including being previously diagnosed with antisocial and paranoid personality traits. A pre-sentence report noted that the respondent made derogatory comments about the victim and demonstrated minimal victim empathy. The report also considered the respondent was at high risk of reoffending.

Issue: Whether the sentence was manifestly inadequate.

Decision and reasoning: The appeal was allowed on the sentences imposed for the offences of choking and assault occasioning bodily harm. These sentences were set aside and the respondent was resentenced to a term of three years and one month's imprisonment for the offence of choking and 20 months' imprisonment for the offence of assault occasioning actual bodily harm.

The starting point of 18 months' imprisonment adopted by the magistrate before a reduction for the guilty pleas was manifestly inadequate in relation to the choking offence when considering the maximum penalty of 10 years' imprisonment, the objective circumstances of the offence and the subjective circumstances of the offender. Burns J held that an appropriate starting point was three years and nine months' imprisonment with a reduction of eight months for the plea of guilty. Likewise, the starting point of 14 months' imprisonment for the offence of assault occasioning actual bodily harm was also manifestly inadequate. An appropriate starting point when considering the seriousness of the offending was two years' imprisonment, reduced to 20 months' imprisonment to reflect the plea of guilty.

In coming to this conclusion, Burns J considered that the seriousness of offences of violence within intimate relationships requires sentences that strongly denounce and deter such offending. Citing Wood CJ in *R v Edigarov* [2001] NSWCCA 436, 'such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence'.

***R v Eimerl* [2015] ACTSC 72 (12 March 2015) – Australian Capital Territory Supreme Court**

'Damaging property' – 'Drug and alcohol programs' – 'Emotional and psychological abuse' – 'Family members' – 'Forcible confinement' – 'Parent/s' – 'People affected by substance misuse' – 'Theft'

Charge/s: Forcible confinement, damaging property, theft.

Hearing: Sentencing hearing.

Facts: The offender, who was on parole at the time, confined his mother in her home for 2 hours. During the course of confinement, the offender verbally abused his mother, threatened violence and damage to property, and damaged a heater and a wooden cedar door. The offender's anger was based on his belief that his parents were communicating with Corrective Services, putting in jeopardy his parole order. His parents were in fact communicating with Corrective Services because they were concerned he had resumed his methamphetamine use. The offender completed a substance misuse program before being paroled in 2013. His initial response to parole supervision was satisfactory — his urinalysis results were negative and he obtained employment. However, at the time of the confinement, he had resumed his methamphetamine use.

Decision and Reasoning: A sentence of 2 years and 1 month imprisonment was imposed. Burns J took into account the circumstances of the offence (it was committed out of anger and a sense of betrayal, it caused a significant degree of fear but no injuries were inflicted). His Honour also noted the guilty plea, the youth of the offender and that rehabilitation was an important consideration (however, this had to be 'considered guarded' (see[16])). There was a need for both general and specific deterrence.

His Honour further took into account that this was a family violence matter and stated, 'that is relevant because the only reason that you were able to commit this offence was because of the relationship of trust that existed between you and the victim. If you had not been a family member who was loved and trusted by your victim you would not have had the opportunity to commit this offence. I also note that the offence occurred in the victim's own home, where she should have been entitled to feel safe' (See [17]).

***R v Brown* [2015] ACTSC 65 (5 March 2015) – Australian Capital Territory Supreme Court**

'Coercive control' – 'Emotional abuse' – 'Mitigating factors' – 'People with mental illness' – 'Perjury' – 'Physical violence and harm' – 'Sentencing' – 'Victims as alleged perpetrators'

Charge/s: Perjury.

Proceeding: Sentence.

Facts: The defendant gave false evidence in a bail application involving an allegation of assault that had been made against her ex-partner. It was alleged that her ex-partner assaulted his mother. The defendant's ex-partner also assaulted her prior to the alleged assault on his mother. A psychologist's report indicated that the defendant was suffering from 'a major depressive disorder of moderate severity' (see at [4]) when she was in a relationship with her partner. The report described the relationship as physically and emotionally abusive which resulted in a gradual deterioration of the defendant's mental health and reported low self-worth and feeling overwhelmed. Notwithstanding this, she felt that her partner was the only person who she could rely on. The defendant had no prior convictions. She was 18 years old when the offence occurred.

Issue/s: The appropriate sentence to be imposed.

Decision and Reasoning: The defendant was ordered to enter into a good behaviour order for 15 months with conditions that she accept the supervision of ACT Corrective Service and not to associate with her former partner. No conviction was recorded. Burns J noted that this offence, while serious, was at the lower end of the spectrum for offences of this nature. His Honour accepted that her mental illness affected her judgment and also noted the fact she was in a controlling relationship with her ex-partner. The defendant had good prospects of rehabilitation. The offence of perjury is serious and normally results in the recording of a conviction and imprisonment. However, in this case, the mitigating factors including her youth and mental illness meant that rehabilitation, rather than general deterrence were the primary sentencing considerations. His Honour warned the defendant that relationships like those with her ex-partner are characterised by a significant degree of manipulation and that the defendant ought to be aware of the likelihood of her ex-partner to attempt to recommence the relationship using protestations that he has changed and is going to behave in a different way. He urged the defendant to be mature enough to understand that such change is not going to happen.

R v East [2015] ACTSC 54 (16 February 2015) – Australian Capital Territory Supreme Court

'Common assault' – 'Criminal history' – 'Forcible confinement' – 'Offender's traumatic childhood' – 'People affected by substance misuse' – 'People with disability and impairment' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Forcible confinement, common assault.

Hearing: Sentencing hearing.

Facts: The offender was the complainant's carer and partner. They had been in an 'on again off again' sexual relationship for 3 years and the offender had recently moved back into the complainant's flat. On 14 October 2013, during an argument, the complainant told the offender to get his belongings and leave the flat. She then attempted to leave herself but the offender grabbed her arms and forced her back into the flat. The complainant made a number of unsuccessful attempts to escape and the offender took her mobile phone. The offender refused to leave. At one stage, he agreed to pack his belongings and asked the complainant for some money. When she refused, he forced her onto the couch. She tried to yell but the offender grabbed her throat, restricting her ability to breathe. After 5 hours, the offender gave the complainant her mobile and left the flat. These offences put the offender in breach of a good behaviour order imposed in respect of an earlier offence of a reckless threat to kill made against the same complainant. That offence involved the heavily intoxicated and distressed offender threatening his partner with a knife, a hammer and a piece of concrete.

Decision and Reasoning: The offender was sentenced to 22 months imprisonment, with a non-parole period of 10 months. Penfold J took into account a number of factors in imposing this sentence. In determining the charged offences to be of mid-range seriousness, His Honour noted that in some cases being confined in one's own home by a partner might be less frightening than being confined in a strange place by a stranger (depending on past experiences with the partner); during confinement, the offender was physically violent to the complainant; the offender was on conditional liberty at the time of the offence; the domestic relationship put the parties into a position of trust and, to an extent, the offender abused this trust (however, the offender's role as a carer did not mean that the offence involved any extra abuse of a position of trust because the complainant was 14 years older and the offender had a very disturbed upbringing); the offences had a distressing and more than short-term effect on the complainant; and the offender accepted responsibility for his actions (See [13]-[14]).

Penfold J also took into account the subjective circumstances of the offender. He did not seem to have any tendency towards criminal behaviour except in the context of this relationship. However, His Honour noted that 'much of violent crime committed within domestic relationships is committed by men who otherwise live entirely within the law'. Further, the offender had a very disturbed upbringing. His mother suffered with severe mental illness and schizophrenia and would alternate between being a loving mother to being emotionally and physically abusive towards her children. He witnessed his mother kill herself when he was 8 when she set herself alight. The offender was then raised by his adoptive father, who would drink heavily to cope and belt

the children (See [15]-[17]). The relationship between the offender and the complainant was 'toxic' and characterised by substance abuse and conflict (See [18]-[22]). Penfold J also took into account general and specific deterrence, the offender's guilty plea and the offender's acceptance of counselling.

R v BJ [2015] ACTSC 47 (4 February 2015) – Australian Capital Territory Supreme Court

'Breach of a good behaviour order' – 'Emotional and psychological abuse' – 'Perpetrator programs' – 'Young people'

Hearing: Breach of 12 month good behaviour order.

Facts: In February 2014, BJ was sentenced for burglary, minor theft and common assault. These charges arose out of the breakdown of a relationship between BJ, then aged 17, and the female complainant. He was sentenced to a 12 month good behaviour order, including a condition that he undertake the Cognitive Self-Change Program. Nearly 5 months after BJ was sentenced, he began another serious of offences against another ex-partner. These offences involved: taking his ex-partner's car keys, damaging her car and stealing the car; using a false Facebook identity to taunt her with pictures of the car hidden in a forest; attempting to get her (alone) to meet him in the forest; further damaging the car; and making a series of harassing phone calls to his ex-partner. He was sentenced to a term of imprisonment for these offences, 3 months served in full time custody and 6 months suspended subject to a 24 month good behaviour order. The matter was referred to Penfold J here to deal with the breach of the earlier imposed good behaviour order.

Issue/s: Whether further action is warranted in light of BJ's breach of a good behaviour order.

Decision and Reasoning: Penfold J noted that he was incorrect in his 2014 sentencing remarks and BJ did in fact have a tendency to behave inappropriately in the context of failed intimate relationships. He noted that this behaviour needed to be addressed as early as possible. Penfold J imposed a new good behaviour order for 2 years subject to the following conditions: accept the supervision of ACT Corrective Services and obey all reasonable directions, under take counselling courses, programs or treatments, and undertake either one or both of a Men's Cognitive Self-Change Program and a Family Violence Cognitive Self-Change Program.

R v Mazaydeh [2014] ACTSC 325 (13 November 2014) – Australian Capital Territory Supreme Court

'Animal abuse' – 'Assault occasioning actual bodily harm' – 'Common assault' – 'Denunciation' – 'Deterrence' – 'Emotional and psychological abuse' – 'Perpetrator programs' – 'Physical violence and harm' – 'Threatening to cause damage to the complainant's property' – 'Victim impact'

Charge/s: Assault occasioning actual bodily harm, common assault x 3, threatening to cause damage to the complainant's property.

Hearing: Sentencing hearing.

Facts: The offender was a friend and former partner of the female complainant. The offender became jealous when the complainant received a phone call because he suspected it was from another man. The complainant asked the offender to leave her apartment. He refused. He pushed and attempted to choke the complainant and held a knife to the throat of her cat. The assaults were accompanied by verbal abuse and abusive text messaging. The offender also rifled through the victim's belongings and demanded her phone. The incident lasted about 15 minutes.

Decision and Reasoning: The offender was sentenced to a good behaviour order for 3 years and fined $1750. In terms of the objective seriousness of the offending, Murrell CJ noted that the conduct constituting the assault occasioning bodily harm was extremely serious. It was a very forceful and frightening assault that involved the offender taking hold of the victim's throat. The actual bodily harm that resulted was at the lower end of the spectrum but the incident had a considerable psychological impact. The other offences were less serious. The incident, while not fleeting, was relatively short. It was not only frightening but designed to humiliate. It occurred within the victim's home, in circumstances where she had asked him to leave.

Further, this was an incident of domestic violence. Her Honour noted:

'These offences occurred in the context of a previous relationship between the offender and the victim and involved violence within the victim's home, an apparent sense of entitlement on the part of the offender, and humiliation through verbal and text abuse of the victim.

The sentencing purposes of punishment, general deterrence and denunciation are very important, as well as the recognition of harm to the victim personally and the community generally through offences of this nature. The victim provided a victim impact statement in which she referred to impacts upon her of the type that frequently result from offences of domestic violence, including feelings of anxiety, difficulty sleeping, difficulty concentrating at work and elsewhere, and an adverse effect on her ability to form relationships. Since the incident, the victim has moved house because she felt unsafe in the apartment where the offence occurred' (See [15]-[16]).

Her Honour also took into account the subjective circumstances of the offender including that the offender

had been assessed as being at low risk of re-offending, he was employed, is a member of a close and supportive family and has no problems with drug dependence or mental health. However, Murrell CJ further noted that the offender lacked insight into the seriousness of his conduct and the impact on the victim. Although this was probably a one-off incident, Her Honour considered that it would be of assistance to the offender to undertake courses that may guide him towards greater insight and maturity in relation to interpersonal relationships.

***R v Ennis* [2014] ACTSC 369 (4 November 2014) – Australian Capital Territory Supreme Court**

'Anger management programs' – 'Assault occasioning actual bodily harm' – 'Drug and alcohol programs' – 'Good behaviour order' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rehabilitation'

Hearing: Breach of community service condition to a good behaviour order.

Facts: In 2012, Mr Ennis was convicted for assault occasioning actual bodily harm. Mr Ennis and his female partner, who had been together for 27 years, were both drunk and fought 'over money'. During this argument, Mr Ennis caused his partner to suffer a fracture to the left forearm and a laceration to the outside of her lower leg. Mr Ennis had a long history of cannabis and alcohol abuse. He claimed that this alcohol abuse led to his criminality. The sentencing judge made a good behaviour order for 2 years, with a condition that Mr Ennis perform 100 hours of community service within 12 months. Mr Ennis breached this order by failing to complete the community service work conditions. He submitted that the breach was the result of his alcohol abuse.

Issue/s: Whether further action is warranted in light of Mr Ennis' breach of a good behaviour order.

Decision and Reasoning: The order was amended by extending the good behaviour period to a further 12 months, extending the number of hours of community service work to 108 hours to be completed in 12 months, and requiring Mr Ennis to be subject supervision by the Director-General. In imposing this sentence, Refshauge J noted that while Mr Ennis' breach was unsurprising in light of his alcohol abuse, this did not provide an excuse for his behaviour (See [16]). In favour of Mr Ennis, it was significant that he had not committed any offences in the two years since the order was made. His Honour noted, *'This is a very important matter, for that is the fundamental objective of the criminal law, namely, as Brennan J described it in Channon v The Queen (1978) 33 FLR 433 at 437, the protection of society which is achieved by the prevention of crime and the eradication of recidivism'* (See [21]).

Further, Mr Ennis had taken steps towards rehabilitation namely, enrolling in a number of programs including drug and alcohol counselling, a Men and Anger Program and an Employment Pathway Plan (See [23]-[27]). Mr Ennis' partner was also addressing her alcohol abuse and they were both accessing counselling at relationships Australia (See [28]). However, Refshauge J remained sceptical in his assessment of this reform and nevertheless extended the good behaviour order (See [30]-[33]).

His Honour noted: *Despite the considerable contribution that illicit drug use makes to criminality in the community, alcohol remains a problem for those addicted to it. Alcohol abuse remains a very significant source of crime and leads the addict to unhealthy and anti-social behaviour and situations* (See [1]).

See also *R v Ennis* [2016] ACTSC 72 (4 April 2016).

***Pasa v Bell* [2014] ACTSC 303 (30 October 2014) – Australian Capital Territory Supreme Court**

'Assault' – 'At the complainant's home' – 'Exposing children' – 'General and personal deterrence' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Assault.

Appeal type: Appeal against conviction and sentence.

Facts: The appellant pleaded guilty to an offence that he assaulted his former fiance and de facto partner of 2 years (the complainant). The offence occurred about 1 month after the appellant and the complainant had separated in the presence of the complainant, a friend, and the appellant's young son. The appellant and the complainant argued and the complainant asked him to leave. The garage door hit the appellant on the head as he left and he turned around the pushed the complainant. She fell backwards into the car. The appellant spoke in a threatening manner to the complainant. He pushed her again, kicked her car twice, and left.

Issue/s: One of the grounds of appeal was that the primary judge erred in his assessment of what constituted an aggravating feature of the offence.

Decision and Reasoning: The appeal against conviction and appeal against sentence was dismissed. In relation to the appeal against conviction, the appellant submitted that the mere fact the offence was committed at the home of the victim is not enough to aggravate the offence; there must be some level of intrusion. Murrell CJ noted that a sentencing court must consider all relevant objective and subjective matters.

She stated,

'When considering the sentencing purposes set out in s 7 of the Sentencing Act, including general and personal deterrence, a sentencing court is entitled to consider the fact that an offence involved domestic violence, and that the violence has occurred at the victim's home. An offence involving domestic violence is one that involves abuse of a partner, former partner or other family member (using the term "family" in the broadest sense). Frequently, such offences occur in the home, where the inhibitions of an offender may be lowered, the impact on the victim may be heightened (as she or he is made to feel that a formerly safe place has been violated) and the occurrence of the offence is more readily concealed. Further, where a domestic violence offence occurs in the victim's home, it is often associated with secondary abuse to other family members' (See [16]; See also *R v Bell* [2005] ACTSC 123 [30]-[31]).

Here, the primary judge did not approach the matter on the basis that the 'mere fact' that the incident took place at the complainant's home was an aggravating feature. He considered the location of the offence in the context of other relevant circumstances namely that it occurred at a place where the complainant was entitled to feel safe, it occurred in the presence of the appellant's son, and the appellant refused to leave.

***Reid v Smith* [2014] ACTSC 349 (21 October 2014) – Australian Capital Territory Supreme Court**

'Assault' – 'Breach of domestic violence order' – 'Damaging property' – 'Aboriginal and Torres Strait Islander peoples' – 'People affected by substance misuse' – 'Rehabilitation' – 'Sentencing'

Charges: Damaging property, breach of domestic violence order, assault

Appeal type: Appeal against sentence

Facts: The appellant, an Aboriginal man, and the victim were in a relationship and had a son together. The appellant and victim also both had a daughter each from previous relationships. He was charged and convicted of damaging property, assault and breaching a domestic violence order made to protect the victim. No further information about the offending or factual matrix was provided. Since his arrest and while on bail, the appellant attended Oolong House several times where he received rehabilitative treatment. The magistrate sentenced the appellant to 12 months' imprisonment each for the assault and damaging property offences, to be served concurrently, and two years' imprisonment for the breach of the domestic violence order. In sentencing, the magistrate stated 'The current offences continue a pattern of behaviour that appears entrenched in the context of the relationship with the victim. Despite legal sanctions and protection orders,

[the appellant] has yet to demonstrate the responsibility to abide by conditions to uphold the safety of vulnerable people in his life. Under the influence of substances his behaviour poses unacceptable risks for such people' ([5]).

The appellant had a somewhat difficult childhood with his parents divorcing after his father suffered a stroke and his mother abusing alcohol. He finished school at year 10 and had very limited and sporadic employment since then. He had a long history of alcohol and drug abuse and engaged in residential rehabilitation several times. The appellant also suffered depression, stress and anxiety and was housed in the AMC Crisis Support Unit since his remand due to his risk of suicide and/or self-harm. He had an extensive history of criminal offending, including convictions for common assault, assault occasioning actual bodily harm and contravening protection orders against the victim.

Issues: Some grounds of appeal were:

1. Whether the magistrate failed to take into account the time spent at a rehabilitation centre.
2. Whether the magistrate failed to give adequate weight to the decision in *Bugmy v The Queen* [2013] HCA 37 ('*Bugmy*').

Decision and reasoning: The appeal was dismissed.

1. There is no requirement in sentencing to give credit and discount the sentence for time spent in residential rehabilitation between the commission of an offence and the sentencing for that offence. The magistrate therefore did not err in failing to explicitly take into account the appellant's successful completion of the Oolong House rehabilitation program.
2. In *Bugmy*, the High Court of Australia considered, '*An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offence may mitigate that offender's sentence… Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices but to recognise this is to say nothing about a particular Aboriginal offender… An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender* '. While Penfold ACJ

acknowledged that the appellant had a 'somewhat troubled background', she did not consider that a failure to give adequate weight to a particular consideration was a sufficient ground to evoke the court's appellant jurisdiction, relying on *R v Ang* [2014] ACTCA 17, [22]-[24].

***Hossen v Hughes* [2014] ACTSC 101 (21 May 2014) – Australian Capital Territory Supreme Court**

'Aggravating and mitigating factors' – 'Assault' – 'Exposing children' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Sentencing'

Charge: Assault

Appeal type: Appeal against sentence

Facts: The appellant, his wife (the complainant) and their children moved to Canberra in order for him to complete a PhD. After their daughter complained that she did not like the lunch the complainant was preparing, the complainant struck the daughter's hip with a plastic doll to 'chastise her for her behaviour'. The appellant became angry at the complainant's actions and slapped her. When questioned by police, the appellant said 'I do not think I did anything wrong. In my culture, I did not do anything wrong'. He pleaded guilty to assault at the earliest opportunity and expressed remorse in a letter to the court.

At trial, the appellant was unrepresented but had a Bangladeshi interpreter. A conviction was recorded and the appellant was ordered to sign a good behaviour undertaking for two years. The magistrate noted that 'cultural differences may be in play here, but I don't accept them on the basis that you've been here for two years, you've acknowledged in your own statement to me today that you understand what you did was wrong'.

Issues: Some grounds of appeal were:

1. The magistrate erred in treating the presence of their daughter as an aggravating factor when the assault of the complainant would not have occurred but for her hitting their daughter;
2. The magistrate erred in not giving sufficient reasons for refusing a non-conviction order pursuant to s 17 of the *Crimes (Sentencing) Act 2005* (ACT) (the Act).

Decision and reasoning: The appeal was dismissed and the sentence imposed by the magistrate was confirmed.

1. In sentencing, the magistrate referred to Refshauge J's comments in *Elson v Ayton* [2010] ACTSC 70 to conclude that the presence of their daughter was an aggravating factor and that 'the courts have no tolerance, or very little tolerance, for people who engage in domestic violence, and certainly in the presence of children'. Counsel for the appellant submitted that the presence of their daughter should not have been an aggravating factor because the complainant's action in hitting her provoked the appellant's assault and that this provocation was a mitigating factor. However, Penfold J held that there was nothing in the nature of the assault that meant their daughter's presence was an inherent part of the objective circumstances of the offence. Further, while the complainant's conduct in hitting her daughter with a doll may reduce the culpability of the appellant's assault, it is not properly described as a mitigating factor. Therefore, there was no error in the magistrate's approach to the presence of their daughter.

2. The magistrate was obliged to provide an explanation to the appellant for declining to make a non-conviction order. He was unrepresented, inexperienced in the procedures of Australian courts and English was not his first language. The magistrate performed this obligation in explaining that a non-conviction order could not be made due to the nature and circumstances of the offence. However, the magistrate did not allow the appellant to put forward evidence or a proper explanation when he attempted to explain the detriment to his future should a conviction be recorded. Therefore, the magistrate erred in dealing with the appellant's application for a non-conviction order by failing to give proper consideration to the application, having regard to the particular difficulties faced by the appellant.

   Despite this error, the appeal was dismissed because re-sentencing was not appropriate. Having regard to the factors in s 17 of the Act, Penfold J held there were no grounds sufficient to make a non-conviction order. In particular, the appellant's character, antecedents, age, health and mental condition; the seriousness of the offence; his extenuating circumstances; and the absence of any properly explained or substantiated claim that a conviction would have negative impacts on his future prospects, would not have excluded the making of a non-conviction order.

***R v Rogers* [2014] ACTSC 124 (1 April 2014) – Australian Capital Territory Supreme Court**

'Assault occasioning actual bodily harm' – 'Denunciation' – 'Deterrence' – 'Emotional and psychological abuse' – 'Exposing children' – 'History of abuse' – 'Late plea' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Risk factor-strangulation' – 'Systems abuse' – 'Unlawful confinement'

Charges: Unlawful confinement, assault occasioning actual bodily harm (two counts)

Proceeding: Sentencing

Facts: The offender and victim were in a domestic relationship. The victim had a son from a previous relationship. Six months after moving in together, the offender sat on the victim's stomach, held both arms above her head and tied her wrists to the bed. The offender told the victim, "*you've hurt my feelings. Now you have to pay. I'm going to take you for a drive to the forest and I'm going to kill you*". He then slapped her across the face several times and stuck a piece of clothing in her mouth. The victim was gagging and choking and believed that she would suffocate. The offender then hit the victim's thigh with a car aerial and held a lit match to her face, threatening "*have you ever played 'light the match' game?*". The next day the offender brought the victim flowers and apologised. Several days later the victim woke up to the offender slapping her face. Her son then walked into the room but returned to his bedroom after the offender screamed at him. The victim packed herself and her son into the car to escape after the offender had left. However, the offender returned and parked his car behind the victim's car. He grabbed the victim's shoulders, pushed her backwards causing her to hit to head and dragged her into the house. When inside, he grabbed her throat, kicked her, forced her face under a running tap, slapped her and threatened her.

The offender was charged with unlawful confinement and two counts of assault occasioning actual bodily harm. He maintained a plea of not guilty for nearly two years until changing his plea to guilty on the date the trial was to begin.

The offender had a long history of offending including convictions of nine common assaults, assault occasioning actual bodily harm, stalking and two breaches of domestic violence orders. He also had a history of dysfunctional relationships, with many of these convictions resulting from domestic violence. He abused prescription drugs and suffers from Attention Deficit Disorder, depression and bipolar. During one period of excessive drug use, the offender was diagnosed with amphetamine-induced paranoid psychosis. The offender engaged in the methadone program and drug and alcohol counselling to address his substance abuse. He reported that since the offending, he had ceased using drugs or drinking heavily and that he was no longer short-tempered and jumpy.

Issue: What sentence should the offender receive?

Decision and reasoning: Penfold J emphasised the need for general deterrence and denunciation for

domestic violence offences. Having regard to the offender's criminal history and his repeated failures to take advantage of rehabilitative opportunities, rehabilitation was not the highest priority in sentencing. His Honour accepted some concession was needed for the offender's improved behaviour in the two years since the offending and his continued engagement with mental health services. However, no sentence other than imprisonment was appropriate when considering the gravity of the offending and the effect on the victim and her son.

The offences were all serious examples of the relevant offences. The presence of the victim's son during the second assault occasioning actual bodily harm aggravated the offence. All the offences were further aggravated by the breach of trust that is 'inherent is most if not all domestic violence offences, especially those that occur in the privacy of a home shared by the victim and the perpetrator, a circumstance which of itself — that is the sharing of the home — seems to me to establish a mutual relationship of trust' ([7]).

Penfold J sentenced the offender to a total sentence of 38 months' imprisonment, suspended after 24 months. This total sentence comprised of 25 months' imprisonment for the offence of unlawful confinement, 18 months' imprisonment for the first offence of assault occasioning bodily harm, and 20 months' imprisonment for the second offence of assault occasioning bodily harm. The first assault occasioning bodily harm sentence was ordered to be accumulated so as to add three months to the unlawful confinement offence and the second assault occasioning bodily harm sentence was ordered to be accumulated so as to add 10 months to the total sentence.

Beniamini v Storman **[2014] ACTSC 2 (22 January 2014) – Australian Capital Territory Supreme Court**

'Assault' – 'Damaging property' – 'Exposing children' – 'Intentionally causing damage to property' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing'

Charge/s: Intentionally causing damage to property x 2, trespassing without reasonable excuse, assault, minor theft.

Appeal type: Appeal against sentence.

Facts: The appellant was in a relationship with a young woman, the complainant, and they had two children together. The relationship was characterised by ongoing conflict, caused largely by the appellant's ongoing abuse of alcohol, and subsequently the relationship broke down. Later, the appellant went to the complainant's house to see the children but she refused to let him in. The appellant damaged the front

security door and shouted threats. He was arrested and granted bail for this offence. However, before the proceedings could be resolved, the appellant again went to the complainant's property, and broke open the front door. The appellant began to strangle the complainant (assault). The complainant's daughter rang the complainant's mother who arrived and manage to calm the appellant down. The police arrived and the appellant ran off. On another subsequent occasion, the appellant was charged with minor theft for leaving a petrol station without paying.

The appellant pleaded guilty and was sentenced in the Magistrates Court to: intentionally causing damage to property — fine of $1,500; intentionally causing damage to property — 3 months imprisonment to commence on 1 August 2013; trespassing without reasonable excuse — fine of $500; assault — 17 months imprisonment to commence on 1 September 2013; minor theft — fine of $250. A non-parole period of 12 months was set on the total period of 18 months imprisonment.

Issue/s: One of the grounds of appeal was that the terms of imprisonment imposed, including the non-parole period, were manifestly excessive.

Decision and Reasoning: The sentence for the assault was manifestly excessive, the appeal allowed and the appellant re-sentenced (see *R v Beniamini; Beniamini v Storman* [2014] ACTSC 40 (22 January 2014)). The offence of assault was serious: it was committed late at night in the complainant's home; it was an offence in the context of family violence; and the offence was protracted. It was more serious by the fact that the appellant was on conditional liberty at the time, the offence was committed in the presence of children, and the appellant had prior convictions for personal violence (but not family violence).

However, despite the seriousness of the assault, the sentence was manifestly excessive because the magistrate started her calculation of sentence on the basis that this was almost the worst category of the offence (See [119]). Since the time of offences, the appellant had made no further inappropriate contact with the complainant, had managed to resolve issues of access to the children, and had stopped drinking. This was also his first offence of violence in the family context. It was also relevant that the denial of access to his children at the time was arbitrary and not under any court order. He was remorseful and showed insight into his actions (See [94]-[104]).

***R v Curtis* [2013] ACTSC 291 (16 December 2013) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Assault occasioning bodily harm' – 'Drug and alcohol programs' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Rehabilitation' – 'Young people'

Charge/s: Assault occasioning bodily harm.

Hearing: Sentencing hearing.

Facts: Mr Curtis, an 18 year old Aboriginal man, and the female victim were in a relationship. On 1 June 2013, Mr Curtis became agitated and aggressive towards the victim. He started punching her legs, arms, torso and stomach, causing bruising. When interviewed by police, he said that the victim had wanted him to teach her how to 'stick up' for herself and that they were just 'mucking around' but he stopped when he thought that what was happening did not 'feel right'.

Decision and Reasoning: Mr Curtis was sentenced to 12 months imprisonment, suspended for 2 years, and ordered to comply with good behaviour obligations (a probation condition making Mr Curtis subject to the supervision of the Director-General and required to obey all reasonable directions as to counselling or treatment for his mental health and his abuse of alcohol and other drugs). In imposing this sentence, Refshauge J took into account Mr Curtis' plea of guilty. He also took into account the subjective circumstances of Mr Curtis including his troubled childhood, his relationship with his 20 month old child, his current committed relationship, his use of alcohol and illicit substances, and his history of mental health issues (See [6]-[19]).

Refshauge J also took into account that the offence was serious especially because it was committed in the context of a relationship. His Honour quoted Higgins CJ in *R v Bell* [2005] ACTSC 123 at [30]: '*I appreciate that personality disorders may often underlie the criminal behaviour of men who beat women. Alcohol or other substance abuse may sometimes be a triggering factor. Nevertheless, they must take responsibility for their actions and be seen to have done so. The offence is often hidden, so general deterrence is a factor that is quite prominent. So also is specific deterrence. No offender engaging in this kind of behaviour, nor their victims, should feel that it is to be treated lightly. Rather, it must be made the subject of condign punishment. That is not to say, of course, that any mitigatory factors or prospects for rehabilitation will be disregarded*' (See [28]-[32]).

Refshauge J further accepted that the youth of Mr Curtis and his prospects for rehabilitation were very relevant to the sentencing exercise. Per His Honour, *'for youthful offenders rehabilitation is usually more important than general deterrence, especially when retributive punishment may in fact lead to further offending. A youthful offender should not be sent to an adult prison if it can be avoided'* (See [20]). A lengthy good behaviour order was warranted in light of the need for rehabilitation. In this context, His Honour noted the influence of excessive alcohol on the offending which, although not mitigating the offending, was very relevant to rehabilitation (See 36].

See also *R v Curtis (No 2)* [2016] ACTSC 34 (26 February 2016).

***Roberts v Smorhun* [2013] ACTSC 218 (1 November 2013) – Australian Capital Territory Supreme Court**

*Note: this case referenced now superseded legislation, however the statements of principle are unaffected by the legislation change.

'Appeal against sentence' – 'Breach of protection order' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Protection order'

Charge/s: Contravention of a domestic violence order.

Appeal type: Appeal against sentence.

Facts: The female complainant and the male appellant had been in a relationship for 6-12 months and had lived together until mid-December 2012. After the complainant was granted an interim domestic violence order against the appellant, the appellant telephoned the complainant to meet him at a friend's place so he could give her the keys back to her place. At this meeting, an argument developed and the appellant started chasing the complainant, yelling abuse. When he caught up to the complainant, he raised his arm as if to punch her, but instead he grabbed the complainant's sunglasses, snapped them in half and threw them in her face. This caused the complainant injury. The appellant was sentenced to 32 months imprisonment for the charge of contravening a protection order, with no further penalty for the charge of assault occasioning actual bodily harm..

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld and the appellant re-sentenced to 23 months imprisonment.

Refshauge J noted that there was no doubt that the offending was serious. The fact that the appellant had been convicted of 9 prior offences of the same character against another woman meant that he could be afforded little leniency. However, the sentence was nonetheless disproportionate to the offending conduct.

The prosecution submissions on sentence at first instance referred to the fact this was a family violence offence, referring to dicta of the Alberta Court of Appeal in *R v Brown* (1992) 73 CCC (3d) that:

> When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.[81]

The court noted that this statement had been cited with approval by the Court of Criminal Appeal of the Supreme Court of Tasmania in *Parker v R* [1994] TASSC 94 (21 July 1994) and in the NSW Court of Criminal Appeal in *R v Hamid* [2006] NSWCCA 302. [82]

Three features listed by the sentencing judge as aggravating the offence, were not in fact aggravating features. First, while domestic violence orders play a special place in the criminal law's efforts to prevent domestic violence, His Honour erred in finding that a domestic violence was a feature of aggravation for the offence of contravening a domestic violence order. Second, His Honour also incorrectly found that the fact the offence occurred in public was a circumstance of aggravation in this particular case as there were no people present at the time of offence. His Honour also previously referred to this issue in the case of *Grimshaw v Mann* [2013] ACTSC 189 at [49]-[51], where he expressed some difficulty with characterising the public nature of an assault as an aggravating feature, as it implies that a private assault is less serious. Finally, the sentencing judge inferred that the broken part of the complainant's glasses was sharp and this aggravated the offending. However, this conclusion was not supported by the evidence (See [132]-[138]). Further, the sentencing judge did not take into adequately discount the sentence to account for the appellant's plea of guilty (See [143]).

In dicta, His Honour considered the principles in Pearce v The Queen. The sentencing judge pointed out that the appellant's assault covered most, if not all, of the conduct prohibited by the protection order, and decided to impose no penalty, other than the conviction, for the assault offence. His justification was that there was no element in the assault offence that had not been encompassed in the offence of contravening the protection

order. Refshauge J stated that '[i]f that were strictly correct, then the conviction for the offence of contravening the protection order would have resulted in a requirement that there be a verdict of autrefois convict in respect of the offence of assault occasioning actual bodily harm. That would have been the appropriate response if the elements [were] such that the whole of the criminality of offence of assault occasioning actual bodily harm was contained in the offence of contravening the protection order.' However, as the parties did not argue on this issue, it was unnecessary for His Honour to resolve it on the appeal. The appellant brought the appeal against the sentence on the charge of contravening the protection order. There was no cross-appeal that the sentence for the assault offence was manifestly inadequate, 'which would be likely if it was thought that there was criminality in that offence separate from the other such that, for example, the plea of autrefois convict would not apply' ([150]).In any event, Refshauge J concluded that the offence of contravening the protection order did not include any of the fault element of the offence of assault ([151]).

Refshauge J quoted from *R v BG* (an unreported judgment from December 2010):

Compliance with any sort of protection order is essential for the court in protecting members of the community from violence and other unwanted behaviour. Breaches of protection orders risk the success of the regime from achieving that purpose, especially if they encourage people to think that they can breach with impunity. A severe approach is necessary, consistent with fairness to the accused. Thus, the Court cannot punish beyond what is appropriate to the offence (See [4]).

***Khan v Evans* [2013] ACTSC 211 (4 October 2013) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Breach of domestic violence order' – 'People affected by substance misuse' – 'Temporary protection order'

Charge/s: Breaches of an interim protection order x 4, breach of a personal protection order, failure to comply with a bail undertaking to appear in court, common assault x 2.

Appeal type: Appeal against sentence.

Facts: The appellant, an Aboriginal man, had been in a relationship with the female complainant and they had 3 children together. The complainant was granted a personal protection order against the appellant. The appellant breached these orders on 5 occasions by being at the premises of the complainant. The common assault offences occurred when the appellant assaulted his father. The appellant pleaded guilty to 4 breaches of an interim protection order made on 23 July 2012 and breach then of the personal protection order

subsequently made on 23 August 2012, a failure to comply with a bail undertaking to appear in court, and 2 offences of common assault. In the Magistrates Court, a total period of imprisonment of 16 months was imposed from 21 March 2013, with a non-parole period of 12 months.

Issue/s: The grounds of appeal were –

- The sentence was manifestly excessive.
- The magistrate erred in failing to take into account a period of pre-sentence custody.
- The good behaviour order for which the appellant was sentenced had been cancelled and could not have been breached by the offences.

Decision and Reasoning: The appeal was upheld on grounds 2 and 3 but not ground 1. The magistrate failed to take into account a period by pre-sentence custody by starting the sentences on 21 March 2013 rather than 23 February 2013. Further, the good behaviour order for which the appellant had been sentenced had previously been cancelled (See [42]-[49]). However, the sentence could not be said to be manifestly excessive. Refshauge J stated,

'While the offence against Mr Khan's father could also be described as domestic violence, the fact is that the interim personal protection order and the personal protection orders are there to protect the complainant from what might be described as domestic violence in its widest sense. Therefore, such orders are an important component of the criminal justice system's response to domestic violence. Breaches of personal protection orders are serious matters which the courts must treat seriously to ensure the integrity of the system which the protection orders are intended to put in to effect' (See [52]).

***Grimshaw v Mann* [2013] ACTSC 189 (29 August 2013) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Anger management programs' – 'Applications and orders for child residence, contact and parenting orders' – 'Common assault' – 'Drug and alcohol programs' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Protection order' – 'Public/private space' – 'Victim impact statements'

Charge/s: Common assault.

Appeal type: Appeal against sentence.

Facts: The Aboriginal male appellant was involved in an altercation with his former female partner (the

complainant) of 7 years. The relationship ended in 2010 due to the appellant's use of drug and alcohol, and he had not seen the children since. In May 2012, the appellant moved to Canberra to be closer to his children and commenced proceedings in the Family Court for access rights. On 2 June 2012, outside a late night convenience store, the appellant started arguing with the complainant and struck her three times with a closed fist. She fell to the ground and hit her head. She was helped up by her two friends and threw a glass soft drink bottle at the appellant. She missed but smashed another glass bottle over his head. The appellant needed four stiches. The appellant voluntarily handed himself into the police two days later. The complainant had previously obtained two protection orders against the appellant. Both had expired at the time of offence.

At the sentencing hearing, a lengthy Victim Impact Statement was tendered. However, it contained a good deal of irrelevant and inadmissible material. Refshauge J on appeal stated:

'Allegations of further serious offending cannot come within the definition of "harm suffered by the victim [as a result of, or in the course of, the commission] of the offence": s 47 of the Crimes (Sentencing) Act 2005 (ACT). While defence counsel may be wary of exercising their rights to cross-examine a victim on a Victim Impact Statement, discussions with prosecutors should result in an appropriate response from responsible prosecutors about inadmissible material and such statements. Without that proper approach, it is likely that such statements will lose their value and that the courts will have to intervene to ensure that the legislation is respected to ensure inadmissible, and often inflammatory, material is not included in such statements' (See [41]).

The appellant pleaded guilty to common assault and was sentenced to 10 months imprisonment, three months to be served by full-time custody, three months by periodic detention and the balance suspended and a two year good behaviour order made. The appellant sought assistance for his alcohol and drug issues, made contact with the Aboriginal Justice Centre, and enrolled in a men's anger program.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed and the appellant re-sentenced to 10 months imprisonment to commence on 28 May 2013, suspended for two years from 27 August 2013. The sentence was manifestly excessive in all the circumstances. First, the sentencing magistrate did not take into account the appellant's injuries caused by the complainant which occurred when the appellant was no longer a threat to the complainant. Second, the injuries sustained by the complainant, as apparent from photographic evidence, were not as serious as what was described in the Victim Impact Statement. Finally, the appellant's criminal

history, although containing prior convictions for violent offences, did not demonstrate a propensity to violence. He had not been charged with any domestic violence offences and he had not breached two personal protection orders (See [77]-[82]).

His Honour further stated:

'The prosecution referred to the aggravating factor that the assault "took place in a public place." I have some difficulty with that factor as an aggravating one. It implies that an assault in private is less serious. I am not sure that this follows.

Most family violence occurs in private yet is regarded as very serious. Indeed, privacy can emphasise the vulnerability and helplessness of the victim.

However that may be, intermediate Courts of Appeal have regularly referred to the fact that violent offences committed in public are more serious. See, for example, R v Freestone [2009] QCA 290 at [30], Ludeman v The Queen (2010) 208 A Crim R 298 at 321; [132], Smith v Tasmania [2012] TASCCA 3 at [32], R v Edwards [2012] QCA 117 at [23], Shoard v Van Der Zanden [2013] WASC 163 at [41]. This is the not the place to consider the rationale for such an approach; that will have to wait for another day. It is enough that the reliance by the learned Magistrate on the fact that the assault occurred in public as an aggravating factor was not an error' (See [49]-[51]).

***Cranfield v Watson* [2013] ACTSC 160 (1 August 2013) – Australian Capital Territory Supreme Court**

'Manifestly excessive' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing'

Charges: Assault occasioning actual bodily harm (two counts)

Appeal type: Appeal against sentence

Facts: The appellant and complainant were in a relationship and resided together with their son. While arguing one day, the appellant grabbed the complainant's arm and punched her in the face a number of times. In response, the complainant struck the appellant in the torso. The pair continued to exchange blows throughout the day with the appellant striking the complainant to the face and punching her thigh, and the complainant hitting the appellant in the torso and face and bitting his arm. A week later, the appellant became angry after having computer difficulties and started swearing at the complainant. When she told him to stop being pathetic and throwing tantrums, the appellant slapped the complainant and caused her eardrum to

rupture.

In relation to this conduct the appellant was charged and convicted of two counts of assault occasioning actual bodily harm. He was sentenced to 11 months' imprisonment for the first offence and five months' imprisonment, of which two months' was to be served concurrently with the sentence imposed for the first offence, for the second offence. The total sentence was therefore 14 months' imprisonment. Five months of that sentence was to be served in full custody, with the following five months to be served by way of periodic detention, and the remaining four months suspended upon the appellant entering into a good behaviour order for two years.

The magistrate considered that it was an aggravating feature of the first offence that the assault was comprised of several violent, physical contacts that extended over a period of time. He also considered it was an aggravating feature of both offences that they included blows to the head and face of a female. Finally, his Honour considered the ruptured eardrum of the complainant was an aggravating factor of the second offence.

Issue: Whether the sentence imposed was manifestly excessive.

Decision and reasoning: The appeal was upheld and the appellant was re-sentenced.

The magistrate erred in considering that the nature and duration of the violence in relation to the first offence was an aggravating feature. Rather, it was a circumstance that was relevant to the sentencing of the appellant. Further, the fact the complainant suffered a ruptured eardrum was not an aggravating feature of the second offence. It was merely an element of that offence — namely, that the assault resulted in actual bodily harm. The magistrate also failed to properly consider a psychiatrist report put before him. That report noted that the appellant's domestic violence was likely related to his on-going mental health difficulties including suffering from post-traumatic stress disorder.

Burns J considered the term of imprisonment with respect to the offences was excessive where there was evidence that the appellant's conduct was either caused by or contributed to by mental health conditions. These conditions were capable of being treated. Further, the appellant did not have a significant history of violent offending, having only been convicted of two offences of common assault 11 years prior to the offending.

In resentencing the appellant, Burns J accepted that the offences warranted terms of imprisonment. The appellant was sentenced to six months' imprisonment for the first offence and two months' imprisonment for

the second offence. The total sentence of seven months' imprisonment was backdated to recognise the two months the appellant had already spent in custody, and suspended thereafter. Burns J imposed a good behaviour order for two years with the conditions the appellant accept supervision and obey reasonable directions; undertake programs or counselling as directed, including the Family Violence Cognitive Self Change Program if appropriate; and undertake counselling or treatment with respect to mental health issues.

***Guy v Anderson* [2013] ACTSC 5 (14 January 2013) – Australian Capital Territory Supreme Court**

'Assault occasioning actual bodily harm' – 'Damaging property' – 'Forgiveness' – 'People affected by substance misuse' – 'People with mental illness' – 'Perpetrator programs' – 'Physical violence and harm' – 'Reconciliation' – 'Rehabilitation' – 'Risk factor- strangulation' – 'Victim contribution'

Charge/s: Damaging property, assault occasioning actual bodily harm.

Appeal type: Appeal against sentence.

Facts: The male appellant was in an intermittent relationship with the female complainant. During the course of an argument, the intoxicated appellant shouted in the complainant's face and hit her. The appellant then sat on top of the complainant and attempted to choke her. He stood up and kicked her in the ribs when she screamed for help. The appellant sat on top of her again and choked her until her vision went blurry. She started retching and the appellant dragged her to the toilet by her hair. When she finished retching, he poured half a bottle of wine over her head and again placed his hands around her throat. The appellant then pulled the complainant into the lounge room and the complainant tried to calm him down. She went to the police the next day. He was sentenced to 3 months imprisonment for common assault and 6 months imprisonment, wholly suspended and conditional on a good behaviour order, for assault occasioning bodily harm.

On a subsequent occasion, the complainant and the appellant again started arguing. The appellant went outside the house to have a cigarette and the complainant locked him out. She packed his bag and left it at the rear door. The appellant, who had not seen the bag, began knocking on the rear door and the window. As the complainant was on the phone to police, she heard the sound of the appellant breaking the window. The complainant told the appellant his belongings were at the front door and he left. He pleaded guilty to damaging property and sentenced to 1 month imprisonment. The conviction constituted a breach of the earlier imposed good behaviour order and the magistrate imposed the full 6 months of this sentence.

Issue/s: The sentence for damaging property and the action taken in respect of the breach of the good

behaviour order was manifestly excessive.

Decision and Reasoning: The appeal was allowed. First, the sentence for the offence of damaging property was manifestly excessive in the circumstances. Although this was a domestic violence offence, this did not mandate a particular response and the circumstances as a whole needed to be considered. Refshauge J accepted the fact that complainant and the appellant had reconciled needed to be treated cautiously. He stated that, *'Forgiveness by victims of domestic violence offences is highly problematic and must be treated with considerable caution for the reasons outlined by Simpson J in R v Glen* [1994] NSWCCA 1 (19 December 1994) *at 8. As her Honour said, "the victim's attitude to sentencing … was not a matter which should have influenced the sentencing decision".'* However, reconciliation of the complainant and the offender (as opposed to her forgiveness) can be relevant as to prospects of rehabilitation.

Second, the magistrate's decision to impose the full 6 months suspended sentence was manifestly excessive. While the breaching offence was not trivial, it was at the low end of seriousness for the offence and was also of a different character from the original offence. Significantly, the appellant had also complied with the probation condition, sought mental health assistance of his own volition and participated in the Family Violence Cognitive Self-Change Program. See re-sentencing [1]-[5].

***Saddler v Pavicic* [2011] ACTSC 199 (9 December 2011) – Australian Capital Territory Supreme Court**

'Assault' – 'Assault occasioning actual bodily harm' – 'Deterrence' – 'Family members' – 'Manifestly inadequate' – 'Older people' – 'Parent/s' – 'Physical violence and harm'

Charge/s: Assault occasioning actual bodily harm, assault.

Appeal type: Crown appeal against sentence.

Facts: During the course of an argument, the 31 year old respondent and his 60 year old mother (the first complainant) began pushing and shoving each other. This culminated in the respondent grabbing the complainant by the neck and pushing her, causing her to fall and fracture her wrist (assault occasioning actual bodily harm). Later that afternoon, the first complainant was visited by the male second complainant and his 4 children. The second complainant heard a revving noise and saw the respondent holding a chainsaw outside the window. The respondent said, 'You fucking Australian cunt, come out here, I am going to cut you, like this', and then tried to enter the backdoor. When he failed, the respondent picked up a fish gaff and swung it above his head (assault). The magistrate recorded a conviction and fined the respondent $1,000

for assault occasioning bodily harm and $1,500 for assault.

Issue/s: One of the grounds of appeal was that the sentences imposed were manifestly inadequate.

Decision and Reasoning: The appeal was allowed. The sentence for the assault occasioning actual bodily harm was manifestly inadequate. The respondent was not entitled to leniency in sentencing on the basis of his prior criminal history or on the basis of his plea. The sentence imposed gave little, if any, weight to the requirements of specific and general deterrence, nor did it reflect the objective seriousness of the offence, even taking into account the provocation from the complainant. The appellant was re-sentenced to a suspended sentence of 7 months imprisonment.

In reaching this conclusion, Burns J noted that this was clearly a domestic violence offence. He noted that, 'It is now well settled that offences of domestic violence must be treated seriously, and frequently display aggravating features not present in offences occurring outside a domestic relationship. The only reason the respondent was in a position to commit the offence on his mother was because of that relationship. As such, the offence involved a serious breach of the trust reposed in the respondent as a son by his mother. Additionally, the age of the complainant was an aggravating circumstance attending the commission of the offence'at [12].

The sentence imposed by the magistrate in relation to the assault was also manifestly inadequate.

***Donoso v Koster* [2011] ACTSC 192 (24 November 2011) – Australian Capital Territory Supreme Court**

'Common assault' – 'Hardship' – 'Non-conviction order' – 'Offender character references' – 'Physical violence and harm' – 'Recording a conviction'

Charge/s: Common assault.

Appeal type: Appeal against sentence.

Facts: The appellant forcibly pulled sheets from on top of the complainant when she was in bed. The sheets caught on the complainant's necklace and this caused pain and a red welt on her lower neck. The magistrate recorded a conviction.

Issue/s: A conviction should not have been recorded.

Decision and Reasoning: The appeal was allowed. The prosecution submitted that, as this was a family violence offence, it had a certain degree of seriousness and a conviction ought to be recorded. Burns J accepted that 'there are circumstances and principles relating to family violence offences which that they must be taken particularly seriously'. However, the objective seriousness of the offence and the subjective circumstances of the offender are always relevant. Objectively, this offence came very close to the bottom of the range of seriousness of offences of this nature. Further, the appellant was otherwise a man of good character. He had no prior convictions and was spoken of highly in provided testimonials. Further, he was employed in an area in which the recording of a conviction would result in particular hardship (i.e. termination of employment). The conviction was set aside and a good behaviour order for a period of 12 months was imposed.

***Connelly v Allan* [2011] ACTSC 170 (13 October 2011) – Australian Capital Territory Supreme Court**

'Evidence' – 'People with mental illness' – 'Sentencing' – 'Voice recognition evidence'

Charges: Contravening a domestic violence order (two counts)

Appeal type: Appeal against conviction and sentence

Facts: The appellant was subject to a domestic violence order that prohibited him from contacting his former partner (the applicant), behaving in a harassing manner towards her or threatening her. The appellant breached this order by making a number of phone calls to the applicant. He was charged with two counts of breaching the domestic violence order and was convicted of both charges. Those convictions amounted to a breach of two good behaviour orders previously made when the appellant was convicted of stalking and two additional counts of contravening a protection order in December 2007 and common assault in June 2007. He was sentenced to six months' imprisonment on each of the counts of breaching the domestic violence order, to be served concurrently. On the breach of the first good behaviour order he was sentenced to four months' imprisonment, one month of which was to be cumulative on the other sentences. All the imprisonment to be served by periodic detention.

In convicting the appellant, the magistrate accepted evidence from the applicant and a friend that they recognised the appellant's voice. The phone calls were allegedly made using a public phone, so this voice recognition was the only evidence to support that the appellant was guilty of the offences.

The appellant had a long history of criminal offending comprising of 52 charges. A pre-sentence report stated

that the appellant had suffered a dysfunctional, violent and unstable family background. His father was an alcoholic and was violence towards his mother. The appellant also abused alcohol, drinking about six stubbies every night. Since the offending, the appellant reported that he was still drinking but not at a problematic level. However, there was no evidence to support these assertions. The appellant suffered from depression and anxiety that 'result in markedly diminished capacity in judgement', according to a psychologist's report. Another psychologist concluded that the appellant's offending history was alcohol induced and based.

Issues:

1. The ground of appeal against the conviction was that the magistrate failed to direct and warn herself adequately in relation to the voice identification evidence.
2. The grounds of appeal against the sentence were:
   (a) The sentence was manifestly excessive;
   (b) The magistrate failed to have proper regard to the significance of the appellant's alcoholism in structuring an appropriate sentence; and
   (c) The magistrate erred in not finding that community service was appropriate in all the circumstances.

Decision and reasoning: The appeal against the conviction was dismissed. In considering whether the appellant was guilty, the magistrate scrutinised the applicant's evidence as to voice recognition carefully. Both witnesses knew the appellant well and recognised his voice on the phone. While the magistrate should have given a warning, it would have been confined to the fact that the conversations were limited and that people can be mistaken about the voices of those they know well. Despite the lack of warning, Refshauge ACJ held there was no miscarriage of justice, as even if a warning was given, it would not have affected the magistrate's conclusion.

However, the appeal against the sentence was allowed and the appellant was ordered to be re-sentenced. The appellant's offending was at the lower end of the spectrum of contravening a domestic violence order. However, the magistrate did not err in concluding that imprisonment was the appropriate punishment when considering his offending history and breaches of good behaviour orders. Rather, the magistrate erred in dismissing the option of suspending a term of imprisonment with a good behaviour order to include a community service condition. The offences were not so serious that a suspended sentence was too lenient.

In the matter of an application for bail by Hutchings **[2011] ACTSC 83 (20 April 2011) – Australian Capital Territory Supreme Court**

'Bail' – 'Breach of a domestic violence order' – 'Breach of conditions' – 'Conditions of orders' – 'Physical violence and harm' – 'Special or exceptional circumstances favouring the grant of bail' – 'Temporary protection order' – 'Uncharged allegations'

Charge/s: Breach of a domestic violence order.

Appeal type: Appeal against refusal to grant bail.

Facts: Mr Hutchings breached an interim Domestic Violence Order by sending the female complainant a letter summarising his feelings towards her and the end of their relationship. This was also in breach of bail conditions imposed for a dangerous driving offence. He was granted bail with a condition included that he not contact the complainant in any way. The complainant later received a telephone call and message, alleged to be from Mr Hutchings. He was arrested and charged with breaches of the Domestic Violence Order. This activated s 9D of the *Bail Act* which provided that bail could not be granted unless there were special or exceptional circumstances favouring the grant of bail. The magistrate refused bail in those circumstances.

Issue/s: Whether there were special or exceptional circumstances favouring the grant of bail.

Decision and reasoning: The appeal was rejected. The Police were concerned that Mr Hutchings would commit further breaches of the Domestic Violence Order if allowed on bail. They noted that the complainant had made further complaints against Mr Hutchings but there was insufficient evidence to justify the commencement of proceedings. Burns J noted that the courts must be very cautious about relying on uncharged allegations but concluded that it was a concern to be taken into account [10]. While Mr Hutchings' daughter was pregnant and needed Mr Hutchings to drive her around, Burns J noted that she could make other arrangements [12]. Accordingly, there were no special and exceptional circumstances justifying the grant of bail.

Ross v Mothersole **[2010] ACTSC 125 (19 October 2010) – Australian Capital Territory Supreme Court**

'Assault occasioning actual bodily harm' – 'Drug and alcohol programs' – 'Glassing' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Plea of guilty' – 'Victim contribution' – 'Victim's views'

Charge/s: Assault occasioning actual bodily harm, assault, threatening to harm a public official, obstructing a public official.

Appeal type: Appeal against sentence.

Facts: The male appellant and the female victim of the two assaults were in a relationship. The first offence occurred when the intoxicated appellant swore at the victim and smashed a beer glass in her face. She required five stiches (assault occasioning actual bodily harm). At the watch house, the appellant threatened violence against police officers and resisted search attempts. On a subsequent occasion, the appellant and the victim were out drinking together and, during the course of argument, the appellant yelled, 'I could kill you right now and no-one would ever know'. He then put the victim into a headlock, and head-butted and punched the complainant in the face (assault). A total head sentence of 36 months imprisonment was imposed with a non-parole period of 18 months.

Issue/s: The sentence for the assault occasioning actual bodily harm was manifestly excessive.

Decision and Reasoning: The appeal was allowed. The sentencing magistrate failed to take proper account of the appellant's plea of guilty in sentencing (See [78]). Refshauge J noted that it is very desirable that a sentencing magistrate or judge makes express reference to the issue of a plea of guilty to show that it has been taken into account. Further, the sentencing magistrate did not address the relevant mental state of the appellant (intention or recklessness). Refshauge J stated, 'there is no doubt that "glassing" is a serious offence, whether intentionally (significantly more serious) or recklessly. It is a cruel and vicious offence, especially where the damage done is to the victim's face, the scars from which will be long obvious and distressingly disfiguring. It is a serious offence which ordinarily will need to be visited by a sentence of imprisonment, mostly served by full-time custody' (See [88]). However, notwithstanding this, on the facts, it was more likely than not that the appellant did not intend to use the glass as a weapon (See [90]).

In re-sentencing the appellant, Refshauge J had regard to a letter from the victim. It showed that she was still devoted to the appellant and wanted to maintain their relationship. She stated, *' I know he is truly sorry for hurting me and the time he has spent in jail he has not wasted one day doing everything possible to completely turn his life around, every course available in the prison Egan has not only completed but done so with proud achievement'.* This showed that the insight and rehabilitative opportunities noted in the original sentencing hearing had been fulfilled and the appellant had addressed his offending behaviour (See [92]-[94]). The appellant was re-sentenced to 2 years imprisonment for the assault occasioning bodily harm. The

other sentences were confirmed leaving a head sentence of 30 months, with a non-parole period of 10 months.

***Tuckey v Ede* [2010] ACTSC 95 (8 September 2010) – Australian Capital Territory Supreme Court**

'Assault' – 'Non-conviction order' – 'Physical violence and harm' – 'Victim contribution'

Charge/s: Summary offence of assault.

Appeal type: Appeal against conviction.

Facts: The intoxicated male appellant started arguing with his partner (the female complainant) in their house. The appellant kicked a chair at the complainant and broke it. She threw the broken chair at him and he slapped her in the face. The complainant called the police. After discussion, the appellant agreed to plead guilty to a summary charge of assault and the prosecution agreed to make submissions not opposing the making of a non-conviction order. Her Honour refused to make a non-conviction order, convicted the appellant and imposed a 12 month good behaviour order.

Issue/s: One of the issues was that the sentencing process was flawed.

Decision and Reasoning: The appeal was upheld because the sentencing process in the Magistrates Court was flawed in light of further evidence provided about the agreement between the prosecution and the defence before the hearing. Although the appellant was not entitled to assume that the magistrate would make the orders that had been agreed upon, he was entitled to expect that the prosecution's attitude to a non-conviction order would have been articulated during the hearing (See [26]-[42]).

Another sentence was appropriate in this case. The appellant had no criminal record nor any identified problem with alcohol or anger management. The offence was an isolated incident in which the complainant also took part. The couple had reconciled and were again living with their child. The appellant had a sound employment record, had already been punished by spending the night in police custody and was unable to return home for 3 weeks because of his bail conditions. Finally, the conviction would make it difficult for him to see his partner's family in Vietnam (See [43]-[45]).

The appellant's conviction was set aside and a good behaviour order imposed for 12 months. In re-sentencing the appellant, Penfold J stated:

'However, the appellant should not interpret this conclusion as in any sense condoning of his use of physical violence on his partner (or anyone else for that matter). Rather, it is a recognition that while it is vital for domestic violence to be taken seriously by the police and the prosecuting authorities and the courts, it is also important for a victim of domestic violence to be able to call for help when she needs it in the belief that after her immediate needs have been addressed, the longer-term consequences of the call for help will be decided in a calmer environment in which her longer-term interests and wishes will also receive recognition. The appellant should be aware however, that if there were any repetition of this kind of behaviour by him, I expect that a sentencing court would take it very seriously' (See [47]).

***Elson v Ayton* [2010] ACTSC 70 (15 July 2010) – Australian Capital Territory Supreme Court**

'Assault' – 'Assault occasioning actual bodily harm' – 'Damaging property' – 'Emotional abuse' – 'Exposing children' – 'Manifestly excessive' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentence accumulation' – 'Sentencing' – 'Totality'

Charge/s: Assault occasioning actual bodily harm, assault x 3, damaging property x 2.

Appeal type: Appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship. The appellant became very angry with the complainant and she got in her car with her daughter to leave. The appellant punched the driver's side window of the car causing the window to shatter. He then punched the complainant in the nose and eye, causing her nose to bleed. On a subsequent occasion, in breach of his bail conditions, the intoxicated appellant went to the complainant's house. He abused her saying, 'he would kill her and hurt her,' and put his right arm around her throat. He threw a jar and punched his fist through the microwave door. On a third occasion, again in breach of bail conditions, the appellant went to the complainant's home with his teenage son. He grabbed her by the throat, punched her in the face, and kicked her. The appellant only stopped when the complainant's 10 year old son called the police.

While the sentencing magistrate stated that she intended to impose a total sentence of 48 months, with a 24 months non-parole period, the accumulation of sentences the magistrate articulated in court was only a total of 30 months. However, amendments were subsequently made to the bench sheets to reflect what Her Honour intended.

Issue/s:

1. The sentencing magistrate erred in amending the sentences.
2. The sentencing magistrate erred in imposing the maximum penalty for the damaging property offences.
3. The sentence was manifestly excessive and the sentencing magistrate misapplied the totality principle.

Decision and Reasoning: The appeal was upheld. First, the parties should have been given an opportunity to be heard before the sentences were amended. This failure amounted to an error requiring the sentence to be set aside (See [81]-[93]). Second, the offences of damaging property were not in the worst category of offences — the damage was not considerable and there were no matters of aggravation of either offence such as planning or premeditation. The magistrate erred in imposing the imposition of the maximum penalty on these offences (See [94]-[103]).

Third, the sentence of 15 months imprisonment imposed for the second assault was excessive in light of the sentence of 18 months imprisonment for the first assault. The first assault was more serious. It involved the smashing of a window, the appellant caused the complainant's nose to bleed, it was committed in the presence of a child, and the appellant pleaded not guilty to this offence (See [105]-[109]). Further, by merely accumulating the sentences for the three episodes, the sentencing magistrate could not be said to have applied the principle of totality (See [109]-[116]).

The appellant was re-sentenced by Refshauge J to a total sentence of 34 months imprisonment, with a non-parole period of 15 months based on evidence that the appellant had taken steps to address his drug and alcohol use (See [121]-[130]). His Honour noted, *'these offences are serious, particularly because they are offences of family violence, some committed in the presence of children, some committed whilst on bail and in breach of conditions of that bail. The repetition of assaults on the victim also makes the offences serious'* [122].

***Goundar v Goddard* [2010] ACTSC 56 (29 June 2010) – Australian Capital Territory Supreme Court**

'Anger management programs' – 'Appeal against sentence' – 'Assault' – 'Physical violence and harm' – 'Probation' – 'Purpose of sentencing' – 'Rehabilitation'

Charge/s: Assault.

Appeal type: Appeal against sentence.

Facts: The male appellant and his wife, the complainant, were involved in a lengthy argument regarding the conduct of the complainant's daughter. The appellant swore at the complainant and said, 'I'm going to kill you'. He then pushed the complainant on her forehead, causing her to fall backwards into her chair. The complainant went to her daughter's bedroom and was followed by the appellant. The argument continued and at one point the appellant came so close he caused the complainant to stumble backwards onto the bed. The appellant pleaded guilty to assault. Counsel for the appellant sought a non-conviction sentence and the prosecution made no opposing submissions. The magistrate imposed a good behaviour order which required the appellant to subject to probation for 18 months and required the appellant to attend counselling on anger management and inter-personal relationships.

Issue/s: The condition of the good behaviour order requiring the appellant to be subject to probation for 18 months was manifestly excessive.

Decision and Reasoning: The appeal was allowed and the period of supervision set aside. This was an offence at the lower end of the scale of seriousness for such offences, notwithstanding that this was a family violence offence. It was committed by a person with no criminal history. Further, a substantial number of very positive references were submitted attesting to the appellant's good character (See [44]-[47]).

The respondent submitted that weight had to be given to general and specific deterrence because this was a family violence offence. Refshauge J accepted this but noted that 'supervision on probation is not ordinarily seen as part of the deterrent component of sentencing'. It is generally a rehabilitative part of sentencing. Here, unless actual supervision was required for a rehabilitative purpose, i.e. to ensure the appellant attended counselling, it was not appropriate to make a probation condition. There was no suggestion on the facts that the appellant would benefit from such guidance (See [48]-[59]).

***Twerd v Holmes* [2010] ACTSC 55 (25 June 2010) – Australian Capital Territory Supreme Court**

'Emotional and psychological abuse' – 'Manifestly excessive' – 'Unlawful confinement'

Charge/s: Unlawful confinement.

Appeal type: Appeal against sentence.

Facts: The appellant unlawfully confined his former partner by forcing her into a taxi and compelling her to travel with him, against her will. He then took her to another person's house where she was prevented from

answering her phone. She was held captive for approximately 2 hours. The magistrate imposed a sentence of 20 months imprisonment, with a non-parole period of 15 months.

Issue/s: One of the issues was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The sentence could not be said to be manifestly excessive. This was a very serious offence. Its seriousness was not diminished by the fact that it occurred within the context of a relationship breakdown, that it was not carried out for financial gain, and that it was committed in the presence of third parties. Further, the appellant had a long criminal history (See [3]-[4]).

In the matter of an application for Bail by Breen **[2009] ACTSC 172 (31 December 2009) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Bail' – 'Emotional and psychological abuse' – 'People with mental illness' – 'Presumption against the grant of bail' – 'Threatening to kill'

Charge/s: Threatening to kill, failing to surrender firearms x 3, possessing a quantity of cannabis.

Appeal type: Appeal against refusal to grant bail.

Facts: Mr Breen, an Aboriginal man, was in a relationship with a woman and they had three children. Mr Breen rang the mother of his partner, asking if she knew where his partner was. He was extremely agitated and said, 'If we were married, we would now be divorced' and 'I've got big problems with my head'. Mr Breen then said, 'and if [his partner] gets boyfriends out of this, I will get my gun and blow all their heads off. I will kill us all. Better that than have them molested as I was'. Mr Breen stayed on the phone to his partner's mother for an hour and on two occasions he threatened to kill the whole family. When police later arrived, Mr Breen said he was depressed and 'wanted to end it all'. A search of the property uncovered three unregistered rifles and cannabis. He was arrested and was refused bail by a magistrate for 'mental health issues' and his access to 'illicit' firearms.

Issue/s: Whether Mr Breen should be granted bail.

Decision and reasoning: Section 9B of the Bail Act meant that the presumption in favour of bail did not apply. Refshauge J noted that, in determining whether to grant or refuse bail, the court had to engage in an assessment of 'future risk'. Given that refusal of bail is tantamount to preventative detention, the court should not make a decision on the basis of suspicion or speculation (See [57]-[61]). His Honour stated, 'the

appropriate initial view was that this was a serious offence which was engendered in emotional circumstances where very serious violence, at least to Mr Breen himself if not to his partner and children, was threatened and where there were apparent means to carry out such a threat. This was exacerbated by the fact that Mr Breen clearly [had] some mental health issues which [made] the likelihood of unpredictable outcomes greater' at [61].

However, on the basis of tendered evidence, Refshauge J was satisfied that the imposition of strict bail conditions could manage these concerns (See [91]). Mr Breen's behaviour was caused by a mental impairment that was treatable (and treatment were already occurring). While Mr Breen had a worrying fascination with guns and weapons, he was not in a realistic position or had the immediate capacity to carry out his threat. There was no evidence to satisfy Refshauge J that Mr Breen's partner would be in danger with the provision of suitable bail conditions. Mr Breen had work available and his parents were prepared to offer a cash surety.

***Talukder v Dunbar* [2009] ACTSC 42 (16 April 2009) – Australian Capital Territory Supreme Court**

'Anger management programs' – 'Common assault' – 'Exposing children' – 'Physical violence and harm' – 'Recording a conviction' – 'Victim contribution' – 'Victim impact statements'

Charge/s: Common assault.

Appeal type: Appeal against sentence.

Facts: The appellant and the complainant had been married for eight years and had two children. An argument arose between the appellant and the complainant. Their 12 year old son stepped between them but was pushed away by the appellant. The appellant grabbed the complainant by the hair, pulled her into the bedroom and threw her on the bed. The complainant called the appellant's mother a prostitute and he twisted her arm behind her back and slapped her face several times. The police were called. The appellant made full admissions. In sentencing submissions, counsel for the appellant informed the magistrate that a conviction would prevent the family from migrating to Canada and asked for a short adjournment to procure such evidence from his office. The magistrate refused. The appellant was convicted and made subject to a good behaviour order for 12 months.

Issue/s: One of the grounds of appeal was that the magistrate failed to provide procedural fairness by not permitting an adjournment.

Decision and reasoning: The magistrate erred in refusing to allow an adjournment for the material relating to the potential barriers of a conviction to migrating to Canada to be procured. The adjournment would only have been brief and the issue of migration status was of major concern to the family. It was not appropriate to deny the appellant the opportunity of putting his case before the court just because his legal representation had failed to have the requisite documents on hand. The appeal was allowed and it fell to Refshauge J to re-sentence the appellant (See [34]-[51]).

In re-sentencing the appellant, His Honour had particular regard to the issues of the migration process to Canada and the views expressed by the complainant in a letter to the court. First, Refshauge J accepted that there was a real likelihood that in a case of domestic violence the appellant would be refused admission to Canada. This would adversely affect the family (See [73]-[78]). Second, in relation to the letter from the complainant, His Honour stated that:

'In my view, there is a great danger in putting a victim of domestic violence in the position where they are seen to have some power to influence a sentence. This is often likely to be an intolerable choice between the bonds of affection which often persist despite the violence and their need for protection against recurrence and for the offender to be held accountable' at [82].

His Honour accepted the letter for the following: the appellant had previously good character, the incident was a one-off occurrence, he voluntarily participated in an anger management course, and it confirmed the effect on the family if they were unable to migrate to Canada. But, in light of the issues mentioned above, accepting the letter as evidence of reconciliation needed to be treated with caution (See [79]-[84]).

The appellant had no prior convictions and previous good character. The offence was serious but at the lower end of the criminal calendar and, as a matter of marginal extenuation, the victim was equally as abusive. A non-conviction order was warranted because of the appellant's immediate engagement in a rehabilitation program, his plea of guilty and early confession, and the risk to the family if their immigration plans were thwarted (See [92]-[97]).

R v Taylor (No 2) **[2008] ACTSC 97 (12 September 2008) – Australian Capital Territory Supreme Court**

'Contravention of a protection order' – 'Following, harassing, monitoring' – 'Good behaviour orders' – 'People affected by substance misuse' – 'Perpetrator programs' – 'Protection order' – 'Purpose of sentencing' – 'Rehabilitation' –

'Subjective circumstances' – 'Suspended sentence'

Charge/s: Contravention of a protection order.

Hearing type: Sentencing hearing.

Facts: On 16 January 2007, the offender was found guilty for breaching a Domestic Violence Protection Order, protecting Ms Perrin (with whom he had two children). He drove past Ms Perrin's residence, yelled at her, and summonsed another man at the premises to fight him. The offence was committed in breach of two earlier imposed and unrelated good behaviour orders for aggravated robbery and assault occasioning bodily harm ('the 2004 offences'). Accordingly, it fell to Rares J to sentence the offender for the breach of the protection order and re-sentence the offender for the 2004 offences. At the time of sentencing, the offender and Ms Perrin had reconciled.

Decision and Reasoning: The offender was sentenced to 12 months imprisonment, wholly suspended with conditions [2]. In sentencing the offender, Rares J was satisfied that the offender had made a serious and concerted effort to turn his life around — the offender had stopped taking cannabis and alcohol, had obtained employment, paid for his own attendance with Ms Perrin at a Relationships Australia course, and had the support of his family and Ms Perrin's family to make a good life for their children. His Honour also took into account the fact that he had pleaded not guilty to the offence of breaching the domestic violence order and that he had a prior criminal history.

Rares J noted that while he did not want to undermine the offender's 'terrific' improvement, a penalty had to be crafted that appropriately reflected the offender's criminality, the seriousness of the conduct and general deterrence. His Honour noted:

'In many, many cases before the courts, the subjective impact of a punishment on an offender once brought to justice can be seen to be great. But to do justice according to law, must be to uphold the laws themselves and their purpose to ensure that we all obey the law. The community must know that offenders, whatever their personal circumstances are, receive a punishment that is appropriate and recognises the seriousness of the offending and the breaches of the community's standards embodied in its criminal laws' at [17].

***Redden v Slavin-Molloy* [2008] ACTSC 37 (29 April 2008) – Australian Capital Territory Supreme Court**

'Breach of a protection order' – 'Damaging property' – 'Following, harassing, monitoring' – 'Protection orders' –

'Repeated breaches' – 'Specific deterrence'

Charge/s: Contravention of a protection order x 2.

Appeal type: Appeal against sentence.

Facts: The female complainant obtained a protection order against the male appellant, her former partner. In breach of this order, the appellant attended her home. When she refused to let him inside, he began yelling and attempted to break down the door. She called for help and the appellant fled. The next day, the appellant again tried to obtain entry to the complainant's home. He struck and damaged the front door when he was refused entry and again ran off when he was told the police had been called. In December 2007, the offender was sentenced to 10 and 15 months imprisonment respectively for these breaches. Earlier, in May 2007, the offender had been sentenced for a number of other offences, including four charges of contravening a protection order. For the most serious of these breaches, he was sentenced to six months imprisonment to be served as periodic detention.

Issue/s: One of the grounds of appeal was that the sentence of 10 months imprisonment and 15 months imprisonment was manifestly excessive.

Decision and reasoning: The appeal was allowed. Penfold J noted that:

'To the extent that punishing an offender ever more severely because of repeat offending, rather than because the individual offences have become more serious, is justifiable, such an approach must relate to the need for specific deterrence of an offender who appears unwilling to learn from previous penalties. Even in that case, the penalty must still remain referable in some way to the actual offence committed' at [38].

Here, the sentence was manifestly excessive (See [42]). In particular, the two sentences imposed were at least twice as severe as the most severe penalty previously imposed for breach of a protection order in May 2007. However, if the May 2007 breaches were so much less severe than the conduct here, it was hard to see how they would have justified imprisonment at all (See [37]). Further, at the time of the August breaches, the offender had not served any full-time custody or even any periodic detention. It could not be assumed that his actions in August were informed by any understanding of the reality of a custodial sentence (See [39]). Other relevant mitigating factors were taken into account (See [30]).

The appellant was re-sentenced to 6 months imprisonment for each breach.

Miller v MacDonald **[2006] ACTSC 76 (30 June 2006) – Australian Capital Territory Supreme Court**

'Conditions of orders' – 'Conflict between orders' – 'Contravention of a protection order' – 'Explaining the orders' – 'Family court orders' – 'Mistake of law' – 'Protection order' – 'Recklessness' – 'Repeated breaches'

Charge/s: Contravention of a domestic violence order x 2.

Appeal type: Appeal against conviction and appeal against sentence.

Facts: The appellant's former wife, with whom he had a daughter, obtained a domestic violence protection order against him, prohibiting contact. Shortly before the appellant left for an extended visit to the United States, the Family Court made an order which vacated this contact order. It stated that while the appellant was out of the country, he could send gifts and correspondence or postcards to his daughter provided that the contact was directed to the child and that he could send a photograph from time to time. When he was back in Australia, the appellant sent his daughter a package containing photographs, gifts and a letter. Additionally, the appellant mistakenly sent his former wife an email when he sent a group message to his siblings. He had previously been interviewed by police for a similar mistake. The appellant had spent 42 days in custody on remand. The magistrate imposed a six month term of imprisonment from the date he was taken into custody and directed he be released after serving 42 days, effectively that he be released the day following the hearing. He also imposed an 18 month good behaviour bond, subject to some conditions (see[22]).

Issue/s:

1. The appellant made an honest and reasonable mistake of law by sending his daughter a package.
2. The email to his wife was sent in error.
3. The sentence was manifestly excessive.

Decision and reasoning: The appeal was dismissed. First, His Honour held that: '[I]t is certainly fair to say that if a person seeks to rely on a Family Court order that varies what is otherwise a clear domestic violence order, it is incumbent upon that person to take steps to understand what the Family Court order says. And it seems to me that the Magistrate was perfectly entitled to find that Mr Miller was at least reckless in assuming that that order, which on its face only covers the time that he was out of the country, continued to apply after he had returned to Australia' at [5].

Second, on its own, the email sent in error to his former wife would have been unlikely to meet the requisite

standard of intent or recklessness. However, given that the appellant had made the same mistake before and had been interviewed by police for this, there was at least recklessness in relation to the sending of that message.

Third, the sentence could not be said to be manifestly excessive. His Honour noted that these were low level breaches of a domestic violence order, they involved recklessness rather than intent, and the nature of the correspondence in both the letter and the email was non-violent and non-threatening. However, the appellant had three prior appearances relating to seven convictions for breaches of a protection order. Connolly J stated:

'It seems to me that even though these were lower level, indeed very low level breaches in the sense that there was no actual or apprehended or threatened violence, repeated breaches however low level, do inevitably meet with an increase in sentence on the basic premise that when low level sentences do not stop the offending behaviour a court has little option but to continue a pattern of steadily ramping up the sentence' at [20].

***R v Bell* [2005] ACTSC 123 (1 December 2005) – Australian Capital Territory Supreme Court**

'Impact of domestic violence on women and children' – 'Persons affected by substance misuse' – 'Physical violence and harm' – 'Rehabilitation' – 'Risk factor- strangulation' – 'Sentencing'

Charge: Assault occasioning actual bodily harm

Proceeding: Sentencing

Facts: The offender and victim had previously been in a relationship and had two children together. The offender and victim's version of events differed. The victim alleged that after consuming alcohol with the offender one night, the offender dragged her out of bed, hit her three time in the face and put his hands around her neck and pushed his thumbs into her throat. While doing so, the offender said something to the effect of "Slut, I'll kill you, I'll kill you". When she woke up the next morning the offender continued to follow and abuse her. The offender said that the offending occurred after he blacked out after drinking substantial amounts of alcohol. He said that the assault occurred after the victim, who was drunk, was following him between pubs and abused him verbally and physically by kicking him. After she got in an altercation with a patron, she was removed from the pub and was spoken to by police officers. The offender agreed to take the victim home, where they sat outside smoking marijuana and drinking bourbon. They then got in an argument

over their children and the victim struck the offender. According to the offender, this is when he grabbed her throat and beat the victim.

Higgins CJ, after hearing corroborating witnesses, accepted that the assault occurred in the way described by the offender. However, he did not suggest that the victim was fabricating her account: ‘She was savagely beaten, she had a lot to drink and it is unsurprising that some of the details became confused in her mind’ ([26]).

In relation to this conduct the offender was charged and pleaded guilty to one count of assault occasioning actual bodily harm.

For three months prior to the assault, the offender had undergone rehabilitation at Oolong House. He had a long history of offending, including 28 prior assaults. Most of the previous offending occurred after the offender had consumed alcohol. While he acknowledged his alcohol abuse, the offender did not consider he needed drug and alcohol intervention. He also admitted to feeling ‘horrified by what he had done’ and said ‘violence towards women is not in his makeup and he has no excuses for what he has done’.

Issue: What sentence should the offender receive?

Decision and reasoning: The offender was sentenced to two and a half years’ imprisonment with a non-parole period of 18 months. While the preceding conduct on the night of the offending and the alcohol abuse engaged in by both the parties may explain the offending, it did not excuse it. There were some prospects of rehabilitation for the offender. However, having regard to the severity of the attack and the offender’s criminal history and alcohol abuse, a sentence of imprisonment was appropriate: ‘No other sentence will say to men who abuse women that such conduct is abhorrent and will result in severe punishment whatever the status or record of the offender’ ([32]).

In considering the purposes of sentencing domestic violence offending, Higgins CJ noted that while alcohol may have been a triggering factor, offenders must take responsibility for their actions and be seen to do so. As domestic violence offences are often hidden, general deterrence is also an important consideration in sentencing. So too is specific deterrence. Higgins CJ emphasised that domestic violence ‘*is a pernicious and evil phenomenon not only because of the immediate trauma to the victim. Its evil influence spreads to children as well. It is no coincidence that, in my experience, young offenders, more often than not, present with a family history of domestic violence. It used to be regarded as a family matter, to be kept private. Victims would be made to feel humiliated, and ashamed to complain; in truth it is entirely the criminal conduct of the*

perpetrator which is at fault. It is entirely in the public interest that such conduct be exposed and deterred' ([30]).

***Gray v Burt* [2005] ACTSC 93 (23 September 2005) – Australian Capital Territory Supreme Court**

'Application to revoke domestic violence order' – 'People with disability and impairment' – 'Protection orders' – 'Sexual and reproductive abuse' – 'Victim contribution'

Appeal type: Appeal against refusal of a magistrate to revoke a Domestic Violence Order.

Facts: On 22 October 2003, a Domestic Violence Order was made by the Deputy Registrar of the Magistrates Court for the protection of the female respondent against the appellant, with whom she was in a sexual relationship. Both parties had disabilities. During their 'physical relationship', the respondent suffered three separate fractures of her legs. She had no history of such injuries prior to the physical relationship and no history of such injuries subsequent to the physical relationship. On 24 May 2004, the Order was varied by consent and in particular the Order restrained and prohibited the male appellant from taking certain actions in relation to the respondent. The appellant applied to have the order revoked but a magistrate declined to revoke the Order. His Honour concluded that the physical nature of the relationship represented a genuine risk to the well-being of the respondent.

Issue/s: The magistrate erred in failing to revoke the order. His Honour made three errors in reaching his decision to not revoke the order –

1. The magistrate failed to take into account the fact that the injuries occurred while the respondent was living in an apartment with the appellant and was not receiving the same degree of care as she did now.
2. The magistrate failed to take into account evidence about counselling that the parties had commenced and intended to continue.
3. The magistrate failed to take into account the likelihood of future sexual contact between the parties in circumstances where the appellant was now under full-time supervision at Hartley Court (a disability support facility).

Decision and reasoning: The appeal was dismissed. First, the location of where the injuries occurred was not relevant because it was the physical relationship that caused the injuries. Second, there was no evidence that the counselling had been concluded nor that it would reduce the likelihood of injury if the physical relationship

was to continue. Accordingly, this was not a relevant consideration. Finally, the magistrate did consider the fact that such a relationship was likely to continue on the basis of evidence before him.

Further, the magistrate did not fail to take into account the fact that persons with disabilities had the same basic rights as other members of Australian society. The magistrate specifically referred to the wishes of the respondent to continue the relationship with the appellant. However, His Honour concluded that the risk to the respondent resulting from such a relationship as such that he was unable to be satisfied that the order preventing such a relationship was no longer necessary for her protection.

***R v In* [2001] ACTSC 102 (2 November 2001) – Australian Capital Territory Supreme Court**

'Assault occasioning bodily harm' – 'Emotional and psychological abuse' – 'Exposing children' – 'General deterrence' – 'People with mental illness' – 'Physical violence and harm' – 'Risk factor-suicide threats' – 'Sentencing' – 'Unlawful confinement'

Charge/s: Unlawful confinement, assault occasioning bodily harm.

Hearing type: Sentencing hearing.

Facts: The offences occurred after the male offender and his wife, the complainant, had separated and the offender had moved out of the family home. He occasionally stayed overnight to see the children. After seeing his wife kiss another man, the offender arrived at the family home late at night, when the children were present in the house. The complainant let him in and went back to bed. The offender followed her and sat on top of her. He placed a sharp object against her throat and said, 'This is a knife. If you move I will fucking kill you'. He then placed pre-cut strips of duct tape over the complainant's mouth and eyes. He bound her wrists and ankles and tied her hands and feet together. He said, 'You'll have your wish — you'll see me die tonight, you'll see me die'.

The complainant had difficulty breathing and the offender removed the duct tape. He interrogated her about her relationship with the other man, hitting her several times around the head and shoulders. He left the room saying, 'If you fucking move I'll kill you' and returned with a telephone book. The offender asked for the other man's phone number before leaving the room again. The complainant heard him enter the nearby bedroom, occupied by two of their daughters and heard him say, 'Now take this darling. I know it tastes awful, doesn't it'.

He returned to the complainant and resumed interrogating her, striking her. He said multiple times that he was going to kill himself and take the children with him. The offender eventually became tearful and untied the complainant. She rang the emergency number and asked for an ambulance, thinking her children had been poisoned. The police and ambulance arrived. The children were unharmed. The offender left the premises and went to the police station the next morning.

Decision and Reasoning: The offender was sentenced to 6 years imprisonment for unlawful confinement and 3 years imprisonment for assault, concurrent and a non-parole period of 18 months. Crispin J took into account a number of subjective factors in imposing this sentence. The offender pleaded guilty. At the time the offender entered the house, while there was some measure of pre-meditation in the appellant's actions (the decision to confine and interrogate the complainant), the offender did not intend to threaten the complainant with a knife or to kill his children. The offender stopped the violence and threats of his own volition.

At the time of offending, the offender was suffering from serious psychological illnesses including acute depression and adjustment order. It was submitted on the offender's behalf that, because of this illness, this made the offender an inappropriate vehicle for general deterrence. Crispin J disagreed and stated,

'The extent of his psychological condition is relevant to the issue of general deterrence but, in my view, the need to protect former spouses or partners from conduct of this nature cannot be so easily dismissed. Many people no doubt experience great stress upon the breakup of their marriages or other close relationships and in some cases they may suffer from symptoms of an underlying psychological illness or even become psychologically ill for the first time. One may and should respond with sympathy. However, when a person commits serious criminal acts against a former spouse or partner the court must take into account the need to deter other people from similar conduct. The risk of serious injury and, as in this case, grave emotional trauma may be at least as serious when the offender is psychologically ill. Accordingly, the need for deterrence should be given due recognition, though the weight which should be given to that factor will vary according to the circumstances of the case, and the actual sentences must be determined by reference to all relevant factors' (See [19]).

Other relevant factors included that the offender was remorseful, he had no prior convictions and was previously a committed father and a person of impeccable character. He had taken steps to obtain counselling and achieved a significant measure of rehabilitation. He had already been imprisoned for 8 months and this caused significant distress in light of his inability to see his children and his potential to be a suicide risk.

However, Crispin J was unable to accept counsel submissions that the offender should be released on parole immediately. The offences were too serious to be dealt with in that manner — the complainant was confined for an extended period and intended to cause significant fear in the complainant.

***R v Lorenz* [1998] ACTSC 275 (14 August 1998) – Australian Capital Territory Supreme Court**

'Assault occasioning bodily harm' – 'Battered woman syndrome' – 'Emotional and psychological abuse' – 'Exposing children' – 'General deterrence' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful confinement' – 'Where the offender is also a victim'

Charge/s: Robbery with an offensive weapon.

Trial: Judge only trial.

Facts: On 20 November 1996, Ms Lorenz ('the accused') entered a supermarket and attempted to purchase some cigarettes with her EFTPOS card from the complainant. The transaction could not be completed because there were insufficient funds in the account. The accused maintained she was sure there were funds in the account and re-tried the card but it was again declined. She then left the store. Ten minutes later, the accused returned to the store with a pen knife. She approached the complainant, held the knife out in front of her and said, 'give me all your fucking money or I'll slit your throat'. The complainant gave the accused $360 in cash and the accused left the store. While initially denying any involvement, the accused made admissions to the police.

Counsel for the accused argued that the accused was acting out of duress on the basis of a threat made by Ms Lorenz's partner on the night before the robbery and repeated the following morning to the effect that if she did not obtain enough money to enable him to re-register his car he would kill her. This threat followed a pattern of violent and threatening behaviour towards the accused over a number of years (See [11]). On the morning of the robbery, the accused, who was pregnant with the couple's third child, found out that she was unable to get the immediate payment of an advance payment from the Department of Social Security to pay the re-registration.

Decision and Reasoning: There was some discussion in this case of 'battered woman syndrome' (See [26]-[31]). Crispin J accepted that upon failing to receive advance payment from the Department of Social Security, the accused became frightened and confused and the robbery was an impulsive act due to her fear

that her partner would kill her. His Honour stated: ‘In my view her failure to attempt to extricate herself from the situation whether by leaving him or otherwise is largely explicable by her fear and confusion. Furthermore, she may have thought that any escape would have been only temporary and that sooner or later [her partner] would have been bound to have caught up with her and carried out his threat’ at [30].

However, ‘a diagnosis of battered woman syndrome does not of itself give rise to any defence. The law does not recognise any general principle that people should be absolved from criminal conduct because they had been beaten or abused or because a psychological condition caused by such treatment may have led them to commit the offences with which they are charged. Nonetheless, evidence that such a person may have had a psychological condition of this kind may be relevant to several defences known to the law’ at [31].

Here, counsel for the appellant unsuccessfully attempted to rely on the defence of duress. In the accused’s favour, His Honour found that the threat was effective at the time of the offence, the accused did not fail to take advantage of a reasonable opportunity to render the threat ineffective, and, in light of the extremity of the actual and threatened violence displayed by the accused’s partner, a person of ordinary firmness of mind may have acted in the way the accused did (See [35]-[37]). However, the accused’s partner did not direct the accused to commit the offence and accordingly the defence of duress failed (See [38]-[41]). In the alternative, counsel for the accused attempted to rely on the defence of necessity. However, His Honour held that the imminence of danger fell well short of the required standard for the successful proof of the defence (See [42]-[45]). She was accordingly found guilty.

The accused left her partner shortly after the robbery and had formed a relationship with another man. She had just turned 23, had three children and was pregnant to her new partner. The new relationship was apparently a happy one. In these circumstances, and to give her the opportunity to start a new life for herself and her children, Crispin J found it appropriate to defer passing sentence on the condition that she enter into recognisance to be of good behaviour for a period of three years.

Magistrates' Court

TS v PU [2019] ACTMC 22 (12 July 2019) – Australian Capital Territory Magistrates' Court

'Employment' – 'Exposing children to domestic and family violence' – 'Final protection order application' – 'Firearm' – 'Hardship' – 'History of domestic and family violence' – 'Police domestic and family violence' – 'Suicide threat' – 'Weapon'

Proceedings: Application for final family violence order (FVO).

Facts: The male respondent and the female applicant both worked for the Australian Federal Police. An interim FVO prevented the respondent from working as an active officer as he was not allowed use of firearms. The circumstances of the offending included exposing the couple's child to domestic and family violence, and text messages from the respondent threatening suicide including images of the respondent with a firearm in his mouth.

Decision and reasoning: A 24-month FVO was granted. In particular, the Magistrate considered the hardship to the respondent in making a FVO but noted at [34]-[35]:

> "Those who have the professional privilege of using and carrying firearms in the workplace know full well that this grant of privilege for firearms can be revoked if their behaviour is inconsistent with a continued grant. The consequential effect of any order made in favour of the applicant relating to depriving the respondent's ability to access firearms has weighed heavily in this decision. Ultimately, the respondent must take responsibility for his conduct in terms of the professional repercussions he has brought upon himself and the personal (and legal) repercussions caused by involving the applicant in his behaviour. Encouragement of him to so do is expressed in s 6 as an object of the FV Act.
>
> Bearing all of the issues in mind, I find that in the circumstances of this matter, the level of hardship to the respondent caused by granting a final order does not outweigh the need to grant an order. That is, any s 14 hardship upon the respondent has not outweighed the s 6 and other competing s 14 considerations. I have decided to impose a final order and I turn my mind to the conditions of that order."

Love v Kumar [2018] ACTMC 23 (31 October 2018) – Australian Capital Territory Magistrates' Court

'Assault' – 'Coercive control' – 'History of family violence' – 'Isolation' – 'People from culturally and linguistically diverse background' – 'Visa threats'

Charges: Common assault x 5.

Matter: Judgement.

Facts: The events relating to the charges took place between 2014 and 2017. The defendant male and complainant female were married and had one child. The 5 assault charges relate to the following alleged incidents:

1. slapped complainant wife across face
2. slapped complainant wife across face
3. struck his child on the her back of shoulder because she was crying;
4. pushed complainant wife's forehead backwards striking the wall behind
5. grabbed complainant wife's hair and twisted her head and hit her face on wall

Decision and Reasoning: In relation to charges 1-3, the Magistrate was not satisfied that the case had been sufficiently made out to justify a finding of the accused's guilt.

In relation to charges 4 and 5, the Magistrate found the accused guilty.

Special Magistrate Hunter OAM observed:

> Taken together the evidence if accepted of giving information to officials at Immigration, the refusal to recant that information, the bruise to the head which is consistent with the allegation on 18th and the general information such as not allowing Ms Devi to have a phone, not allow her to contact her brother and the like which could lead to a conclusion that the defendant was controlling her life, (which is not unknown in domestic violence situations). It also leads to a conclusion that Ms Devi is speaking the truth and should be believed. [207]

And:

> I am also satisfied that she had been controlled at least to some extent. That is supported by uncontroverted evidence that she had to secret a SIM card so that she could contact her family and brother by phone. This is consistent with the evidence from her brother that she had no access to contact him except by public phone until he gave her the SIM card. I am also satisfied she had limited access to

> friends and family. That evidence was corroborated by her brother and by the fact she used the SIM card he gave her to make the various phone calls she made to family and friends. I also note the Defendant had alluded to that control in some of his answers in the ROI such as those referred to by Prosecution counsel in her submissions. [209]

[Note: This decision was unsuccessfully appealed: *Kumar v Love* [2019] ACTSC 238 (30 August 2019) – Australian Capital Territory Supreme Court]

New South Wales

Court of Appeal

Rock v Henderson **[2021] NSWCA 155 (29 July 2021) – New South Wales Court of Appeal**

'Abuse of process' – 'Appeal' – 'Breach of protection order' – 'Children' – 'Family court proceedings' – 'Female perpetrator' – 'Improper purpose' – 'Malicious prosecution' – 'Protection order' – 'Separation' – 'Systems abuse' – 'Trespass'

Proceeding: Application for leave to appeal against striking out Statement of Claim in full.

Facts: The male applicant and female respondent were formerly husband and wife with financial and child proceedings pending in the Family Court. In 2018 there was an incident at Sydney Airport between them where it was alleged the applicant approached the respondent and her current partner and caused her humiliation and embarrassment [58]. The respondent made a written statement which led to the police obtaining a provisional protection order against the applicant [54]. It was dismissed in June 2019 [4].

The applicant sued the respondent for damages for malicious prosecution and for trespass to land. The malicious prosecution submission related to the protection order application [4]. The trespass to land submission related to the respondent entering the applicant's property in July 2019 where the children, whom she was prohibited from approaching by a separate protection order, resided with him [4]. The respondent filed a Notice of Motion to the District Court seeking the claim be struck out, in full or in part pursuant to Uniform Civil Procedural Rules 2005 (NSW), rule 14.28 [5]. The primary judge ordered the applicants' claim be struck out in full as the applicant commenced the proceedings for an improper purpose, namely to circumvent or derive some advantage in the family law proceedings. The applicant applied for leave to appeal.

Grounds of Appeal:

The Primary judge erred in finding the appellant's actions for malicious prosecution and trespass were an abuse of process in that they were commenced for an improper or collateral purpose in that:

1. there was an absence of evidence capable of supporting that finding; and
2. as a matter of law, the purpose ascribed to the applicant was not an improper or collateral purpose as a matter of law.

Decision and Reasoning: Leave granted, appeal upheld.

Wright J considered the evidence that the claimed amount was the same as the proceeds from the sale of the Lilydale house provided no basis for a claim of circumventing the family law proceeding or obtaining an advantage [87],[91]. Naming the children in the claim for damages for trespass was not an improper purpose [92]. The evidence was insufficient to cross the high threshold to prove the proceedings were instituted for an improper or collateral purpose and therefore the primary judge erred in his judgement.

Wright J found that the elements of malicious prosecution were sufficiently clear and the minor defects in the applicant's statement did not justify the claim being struck out [117]. Further, the distress caused to the applicant by the children's distress was relevant to his claims for damages and therefore was not liable to be struck out as tending to cause prejudice, delay or embarrassment [117].

Brereton JA and Belle P agreed with the orders proposed by Wright J [50].

Makita (Australia) Pty Ltd v Sprowles **[2001] NSWCA 305 (14 September 2001) – New South Wales Court of Appeal**

'Expert evidence' – 'General principles' – 'Negligence' – 'Opinion'

Appeal Type: General civil appeal.

Facts: This decision was not concerned with domestic and family violence but is relevant in relation to the admission of expert evidence in cases involving domestic and family violence. The plaintiff was injured after falling down the stairs at work and sued her employer for negligence. At trial, her employer was found to have breached their duty of care because the stairs were slippery and this was the reason the plaintiff fell. This finding of fact made at trial was largely based on expert evidence adduced by the plaintiff. The expert attested to the slipperiness of the stairs. The plaintiff was awarded damages. But for the expert's report, 'a conclusion that the stairs were not slippery would have been inevitable' (see at [56]). The defendant appealed on the basis that, *inter alia,* the trial judge erred in accepting the expert evidence.

Issues: Whether the trial judge erred in accepting the opinion of the expert regarding the slipperiness of the stairs.

Decision and Reasoning: The appeal was upheld. All members of the Court of Appeal agreed that the trial judge ought not to have accepted the evidence. Importantly, this appeal was concerned with whether the evidence ought to have been accepted by the trial judge, not with its admissibility. Heydon JA firstly considered whether the expert's testimony '(complied) with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions' ([59]). It was in this context that his Honour engaged in general discussion about the admissibility of expert evidence. Expert evidence cannot usurp the role of the trial judge (or jury if present) in making findings of fact. The task of the tribunal of fact is to make an independent assessment of expert evidence in forming its own conclusion. It cannot do this, 'if the expert does not fully expose the reasoning relied on' (see at [67]). The Court is not obliged to accept the opinion of an expert, even if no other evidence is called to contradict it (see at [87]). This is important especially where the evidence goes to the ultimate issue in the case. Evidence which goes to the ultimate issue is not inadmissible for that reason (see s 80 of the *Evidence Act 1995* (NSW)). Essentially, an expert gives opinion based on facts, and as such must prove 'by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based' (see at [64]).

See at [85] where his Honour summarises the general principles of the admissibility of expert evidence –

'In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the

court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in HG v R [1999] HCA 2; (1999) 197 CLR 414, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise" (at [41]).'

Court of Criminal Appeal

Giacometti v R [2023] NSWCCA 150 (23 June 2023) – New South Wales Court of Criminal Appeal

'Application for leave to appeal against sentence' – 'Assault occasioning actual bodily harm' – 'Inconsistent evidence' – 'Intentional choking without consent' – 'Manifestly excessive' – 'Moral culpability' – 'Paraphilic disorder' – 'People with mental illness' – 'Physical violence and harm' – 'Psychiatric evidence' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Sexual assault' – 'Strangulation' – 'Subjective circumstances' – 'Wounding'

Charges: Sexual intercourse without consent x 1; Attempted sexual intercourse without consent x 1; Intentional choking so as to render unconscious x 2; Assault occasioning actual bodily harm x 2; Reckless wounding x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant was sentenced to 14 years imprisonment with a non-parole period of 9 years and 9 months, after entering a late plea of guilty to seven offences against his then female partner.

The sentencing judge found that the applicant's personal history and mental health diagnoses cited in psychiatric reports were inconsistent. The sentencing judge was not satisfied of the accuracy or reliability of the history provided by the applicant and disregarded most of the applicant's subjective circumstances [51].

Grounds:

1. The sentencing judge erred in declining to consider evidence of his subjective circumstances; and
2. The sentence was manifestly excessive.

Reasoning and decision: Hamil J (Mitchelmore JA and Davies agreeing) found error in ground 1 but dismissed the appeal.

Ground 1: The court held that the sentencing judge erred in declining to consider evidence of the applicant's subjective circumstances. The sentencing judge was correct to find the applicant's alcohol abuse did not explain his conduct [97] and the judge was entitled to be suspect in accepting the accuracy of his history [102].

However, the sentencing judge was not justified in rejecting almost all of the applicant's subjective circumstances. The applicant was entitled to have his relative youth, lack of prior convictions, sexual abuse,

neglect, and diagnosis of a paraphilic disorder considered. These factors were largely consistent and should not have been rejected [107].

Ground 2: This ground was rejected. The court held the applicant's course of conduct represented sexual and violent offending of an extreme and depraved kind [111]. The applicant's childhood experiences, and mental health conditions only had a modest impact on his moral culpability [119]. The Court found that the aggregate sentence and non-parole period would have been of at least the same magnitude as the sentence imposed in the District Court [139].

***R v Sharrouf* [2023] NSWCCA 137 (16 June 2023) – New South Wales Court of Criminal Appeal**

'Allegations of infidelity' – 'Assault' – 'Coercive control' – 'Financial abuse' – 'Jealousy' – 'Lack of planning and mitigation' – 'People from culturally and linguistically diverse backgrounds' – 'Rape' – 'Spiritual abuse' – 'Strangulation'

Charges: Sexual assault without consent x 8; aggravated sexual intercourse without consent x 1; indecent assault x 1; attempted choke with intent to commit an indictable offence (intimidation) x 1; use offensive weapon with intent to commit an indictable offence x 2; assault occasioning actual bodily harm x 5; common assault x 6.

Proceedings: Crown appeal against sentence.

Facts: The respondent was sentenced to an aggregate term of imprisonment of 10 years with a non-parole period of 5 years after a judge alone trial after pleading not guilty to 40 offences and was found guilty of 24 charges. All offences were committed against his then-wife (they were "married" in an Islamic ceremony which was not officially recorded) between 2007-2008 shortly after their marriage. The victim made a statement to police in 2009 but did not proceed to make a formal statement until July 2019. Expert evidence was led of the respondent's schizophrenia and melancholic depression. The respondent had been exposed to family violence as a child. The offending included multiple counts of penile-vaginal and penile-anal rape. The respondent demanded that the complainant behave in a manner contrary to her religious beliefs, he assaulted the complainant as punishment for "hiding" things from him or seeking advice in relation to his financially controlling behaviour, he punched the complainant to the face breaking her nose and rendering her unconscious and deliberately caused injuries to the complainant's legs and feet such that she had difficulty walking as punishment for perceived misdeeds on her part.

The respondent conceded grounds 2 and 3 but argued that the court should exercise its residual discretion to decline to intervene.

Grounds:

1. The sentencing judge erred in his assessment of the objective seriousness of counts 9, 16 and 26;
2. The sentencing judge erred in imposing convictions with no further penalty pursuant to s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSP Act') in relation to counts 2, 10, 36 and 38; and
3. The aggregate sentence is manifestly inadequate.

Decision: Sentence quashed (Price, Wilson and Dhanji JJ), resentenced to an aggregate term of 14 years imprisonment with a non-parole period of 9 years (Price and Wilson JJ).

Ground 1: The sentencing judge understated the objective seriousness of 9, 16 and 26 [171]. Re counts 16 and 26 (sexual assault without consent), the sentencing judge emphasised the spontaneity and lack of planning of these offences in assessing their objective seriousness. Price J (Wilson J agreeing) observed:

> [167] How in these circumstances could the lack of planning reduce the objective gravity of the offending? As Adamson J (as her Honour then was) observed in *Kennedy v R* [2022] NSWCCA 215 at [51]:
>
> "... it is typical of offences of domestic violence committed by persons such as the applicant that they are not "premeditated". Thus, the lack of planning in this context is of negligible, if any significance."
>
> [168] This Court has observed that the short duration of a sexual assault would not ordinarily be considered as a factor which mitigates the objective seriousness of the offence: *R v Daley* [2010] NSWCCA 233 at [48]; *Cowling v R* [2015] NSWCCA 213 at [16]. In the present case, where the respondent's sexual offending was a repetitive feature in a violent domestic relationship, the short duration of an offence could not amount to a mitigating factor.
>
> [169] In the passage quoted at [151] above, the judge said that the offending in count 16 "was not associated with particular additional violence of the kind that characterised some of the offending." It is unclear to which offences his Honour was referring, however, the infliction of actual bodily harm at the time of, or immediately before or after the sexual assault would have amounted to an offence of aggravated sexual assault contrary to s 61J(1) of the *Crimes Act 1900* (NSW).

Re count 9, neither the spontaneity or its short duration could reduce the objective seriousness of the offence, which involved chasing the victim, punching her to the face with a closed fist, causing her to fall to the ground, unconscious with a broken nose [170].

Ground 2: In finding that the sentencing judge erred in applying s10A CSP Act to impose no conviction for counts 2, 10, 36 and 38 Price J (Wilson and Dhanji JJ agreeing) observed:

> [188] I recognise that the recording of a conviction may have serious consequences for an offender. However, general sentencing principles apply to the operation of the section. Where an offence is objectively serious and general deterrence, denunciation, and the protection of the community are of importance, the scope for the use of the section must necessarily be substantially diminished. I acknowledge that current sentencing legislation does not prohibit the application of s 10A to a domestic violence offence. Nevertheless, the appropriate use of s 10A in a domestic violence offence must be rare.

In addition no reasons were given for departing from a sentence of full-time detention or a supervised order as required by s4A(2) CSP Act.

Ground 3: Price J (Wilson and Dhanji JJ agreeing) held the aggregate sentence of 10 years imprisonment and non-parole period of 5 years is "so manifestly inadequate that it does not reflect the totality of the criminality involved in the respondent's offending."

Residual discretion to decline to intervene:

In agreeing with Price J's refusal to exercise the residual discretion, Wilson J noted:

> [269] This is not a matter in which the residual discretion should be exercised. The courts must ensure that those who seek to brutally dominate a domestic partner, and violently impose a claimed gender superiority on another, are held to account. The aggregate sentence proposed by Price J is one that achieves that aim, whilst giving proper ameliorative weight to the respondent's subjective case.

***Waldron v R* [2023] NSWCCA 128 (9 June 2023) – New South Wales Court of Criminal Appeal**

'Accused case not glaringly improbable' – 'Application for leave to appeal against conviction' – 'Circumstantial evidence directions' – 'Directions apt to reverse onus of proof' – 'Error in jury direction' – 'Female alleged perpetrator'

– ‘Intent to cause grievous bodily harm’ – ‘Jury direction’ – ‘Male complainant’ – ‘Miscarriage of justice’ – ‘Misdirection’ – ‘No rational inference direction’ – ‘No substantial miscarriage of justice’ – ‘Onus of proof’ – ‘Perpetrator misidentification’ – ‘Proper directions’ – ‘Proviso’ – ‘Re-trial’ – ‘Rebutting self-defence’ – ‘Self defence’ – ‘Tendency evidence’ – ‘Uniform evidence law’ – ‘Use of tendency evidence’ – ‘Victim as (alleged) perpetrator’ – ‘Wounding’

Charges: Wounding with intent to cause grievous bodily harm x 1.

Proceedings: Application for leave to appeal against conviction.

Facts: The female accused was charged with wounding her male former domestic partner. At trial she claimed she acted in self-defence in wounding the complainant when he arrived at her home angry and in the company of a companion and initiated a physical altercation between them. The female accused is physically much smaller than the male complainant. Her case included evidence of the complainant’s past offending against a former female domestic partner:

> [29] A tendency notice served pursuant to s 97(1)(a) of the *Evidence Act 1995* (NSW) identified the tendencies of the complainant the applicant sought to establish:
>
> (a) To make threats to kill to ex-partners;
>
> (b) To threaten or to bash them in front of friends/family;
>
> (c) To call ex-partners ‘slut’ or ‘dog’ ‘cunt’; and
>
> (d) To threaten to or actually visit ex-partner’s homes with the intention to commit violence.
>
> [30] The notice identified a variety of evidentiary sources that were said to be capable of establishing these tendencies. The Prosecutor objected to the evidence, but Judge English accepted that the evidence had significant probative value and was admissible.

In relation to the adduced tendency evidence, which included a statement of agreed facts (s 191 *Evidence Act 1995* (NSW)) that the complainant had admitted and been convicted of the offences of Use carriage service to menace/harass/offend and stalk/intimidate intend fear physical or mental harm against [the victim] in relation to a former partner. The statement included text messages and telephone calls heard by police containing threats to kill and bash the victim and calling the victim a “slut” and “cunt”, and that the accused was apprehended while actually causing damage to the victim’s home.

In directing the jury, the trial judge identified the nature of the evidence and tendency the applicant sought to establish:

> Part of the defence case is that the complainant has a tendency to have a particular state of mind, namely, to become angry to an extreme towards ex-partners. It is also part of the defence case that the complainant has a tendency to act on that state of mind by making threats to kill ex-partners, threatening to bash them in front of family and/or friends, calling ex-partners words such as a 'slut', or a 'dog', or a 'cunt', or threaten to – or actually – visit ex-partner's homes with the intention to commit violence. [34]

The applicant submitted and the respondent conceded that parts of the following direction were erroneous:

> Whether you reason in the way argued by the defence, or the Crown is entirely a matter for you. You will need to be very careful about drawing the inference asked of you by the defence, and I will direct you to consider whether there be any alternative explanations for that evidence, and I direct you that you should not draw any inference from the direct evidence unless it is a rational inference in the circumstances. Very shortly I will give you a general direction about drawing inferences when you are considering this part of the defence case. But if you find the complainant did have the tendency alleged by the defence, then you can use that fact in considering whether it is more likely *than not* that he acted in the way alleged by the accused on 19 July 2020. That is, that he was the aggressor on this occasion. [Emphasis added.] [36]

Grounds:

1. Her Honour erred in directing the jury that it should not draw the inference that the complainant had a tendency to act in a particular way unless it was the only rational inference in the circumstances.
2. Her Honour erred in directing the jury that it could take into account a tendency of the complainant to act in a particular way in considering whether it is more likely than not that he acted in the way alleged by the applicant.

Reasoning and decision:

1. Leave to appeal granted.
2. Appeal upheld.
3. Quash the applicant's conviction.

4. Order that there be a new trial.

5. List the matter for call-over on 8 June 2023 at the District Court sitting at Newcastle.

6. The Court directs that, pursuant to s 59(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), that the commencement date of the aggregate sentence for H82562810 (court file 2021/00297170) imposed on the applicant at Toronto Local Court on 28 March 2022 be varied from 14 March 2024 to 14 March 2022.

Hamill J (Button and Sweeney JJ agreeing) observed:

> [38] The applicant was correct to submit, and the respondent was correct to concede, that parts of that direction were erroneous. There were at least three flaws in the direction.
>
> [39] First, the jury should not have been directed that it should be "very careful about drawing the inference asked of you by the defence". There was nothing wrong with directing the jury that the process of drawing an inference should be a rational one, but it will rarely be appropriate for a jury to be warned that it needs to be "very careful" about drawing an inference favourable to an accused in a criminal trial. That is because the accused, except in unusual cases, bears no onus.
>
> [40] Secondly, the direction introduced a standard of proof – "whether it is more likely than not" – that the alleged victim acted in accordance with the tendency on the day of the offence. This cast an onus on the applicant to establish that the complainant acted "in the way alleged by the accused on 19 July 2020". The direction had the capacity to, and perhaps did, reverse the onus of proof. Other directions made it clear that the prosecution bore the onus and emphasised the high standard it was required to meet. Even considered in that context, the direction represented a significant legal error in the summing up.

And:

> [43] Her Honour drew no distinction between drawing an inference of guilt against an accused person – where all other reasonable inferences must be excluded – and drawing an inference favourable to the applicant as part of her circumstantial case based on the tendency evidence.
>
> [44] It is, by now, well established that tendency evidence is a species of circumstantial evidence and there is no requirement that it be proved to any particular standard, let alone (as these directions were want to suggest) that it must be proved beyond reasonable doubt

In rejecting the respondent's arguments that the despite the misdirection no substantial miscarriage of justice occurred, and that the applicant's account was "glaringly improbable", Hamill J (Button and Sweeney JJ agreeing) was not persuaded that self-defence was eliminated beyond reasonable doubt.

***Lawrence v R* [2023] NSWCCA 110(24 May 2023) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Criminal history' – 'Driving' – 'Manifestly excessive' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical harm and violence' – 'Protection order' – 'Sentencing' – 'Threats to kill' – 'Weapon'

Charges: Intimidation x 1; Aggravated kidnapping x 1; Contravention of a protection order x 6.

Proceedings: Application for leave to appeal against sentence.

Facts: The male offender accosted and detained his former de facto wife, contravening a protection order which protected her. For 9 hours, the offender drove the victim at a high speed and in an erratic manner, while abusing, threatening, and assaulting her. The period of detention ended when the victim ran from the car, despite the offender's threats that he would kill her if she escaped.

The offender was sentenced by the District Court to 6 years and 6 months imprisonment with a non-parole period of 4 years, affording a 10% discount for late pleas.

Grounds:

1. The sentencing judge erred by aggravating the offending by reason of the applicant's criminal history;
2. the sentencing judge erred in her assessment of the objective seriousness of the offending without reference to the applicant's reduced moral culpability and mental health conditions;
3. the sentencing judge erred in finding that the applicant's drug use from an early age did not amount to a mitigating factor;
4. the sentencing judge erred in double counting the presence of the knife in Count 1, both in determining where on the scale of seriousness the offending sat and also by counting it as an aggravating factor; and
5. the sentencing judge erred in imposing a sentence that was manifestly excessive.

Reasoning and decision: Wilson J (Gleeson JA and Davies J agreeing) dismissed the appeal.

Ground 1: It was held there was no error in the conclusion that the offender's criminal history was an aggravating factor. It was a feature relevant to the overall determination, but not used to elevate the objective gravity of the offences [58].

Ground 2: The sentencing judge was correct to treat the offender's moral culpability distinct from the objective gravity of the offences. The offender's deprived background or mental health impairment are features that affect the weight to be given to considerations of moral blameworthiness and general deterrence [79].

Ground 3: The sentencing judge appropriately gave weight to the offender's drug addiction as a manifestation of his deprived background. There was no need to have further regard to it [85]; Wilson J stated 'it will be a rare case in which a drug addiction, of itself and standing alone, can be treated as a mitigating factor, no matter what age an offender was when the addiction commenced' [85].

Ground 4: The sentencing judge did not err by double counting. Double counting is not established by the number of times a feature is mentioned, but the use of the feature [90].

Ground 5: The sentence was not excessive, if anything, it was lenient [101].

***Liu v R* [2023] NSWCCA 30 (24 February 2023) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'Causing grievous bodily harm with intent to murder' – 'Failure to properly consider the offender's advanced age in sentencing' – 'Jealous behaviour' – 'Older people' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence' – 'Principles in gulyas v western australia' – 'S27 crimes act 1900 (nsw)' – 'Severity' – 'Weapon'

Charge: Causing grievous bodily harm with intent to murder.

Proceeding: Application for leave to appeal against sentence.

Ground: The sentencing judge had failed to apply the principle regarding advance aged in determining the sentence.

Facts: The appellant and victim were married in 2014 and living with the widower of a woman the victim had cared for. The appellant had become jealous of the attention the victim gave to the widower.

The applicant attacked his wife with a meat tenderising mallet and stabbed her before cutting his own wrists and hers, leaving her with very serious injuries. At the time of the attack the appellant was 81 years and 6 months old and was 82 years and 8 months old at the time of sentencing.

The appellant pleaded guilty to causing grievous bodily harm with intent to murder (s 27 *Crimes Act 1900* (NSW)) and was sentenced to 12 years imprisonment with a non-parole period of 7 years and 3 months.

Reasoning and decision: Leave to appeal, appeal dismissed.

Campbell J (Adamson JA [1]and McNaughton J [50] agreeing) emphasised that the general principles regarding advanced aged and sentencing expressed by Steytler P in *Gulyas v Western Australia* {[2007] WASCA 263 are nuanced and not to be mechanically applied or seen as automatically leading to a lesser sentence than the objective circumstances require [40].

The appellant had no age-related mental impairment. Similarly, imprisonment would not necessarily be more arduous for him as he was found to enjoy generally good health and was not struggling with age-related frailty. The impact of advanced age on sentencing is subject to proportionality: the punishment must fit the crime.

The sentencing judge's regard to age as a special circumstance had a real and direct effect in reducing the minimum time that the appellant was to serve. No error in the previous judgement was found, as the appellant's advanced age had not been treated as peripheral.

***Thorp v R* [2022] NSWCCA 180 (31 August 2022) – New South Wales Court of Criminal Appeal**

'Applicant pleaded guilty to aggravated detain and breach of apprehended domestic violence order (advo)' – 'Application for leave to appeal against sentence' – 'Criminal law' – 'Double punishment' – 'Manifestly excessive' – 'Sentence' – 'Whether both charges arose from same incident' – 'Whether sentencing judge erred in imposing wholly consecutive sentences'

Matter: application for leave to appeal against sentence.

Facts: The applicant was convicted of:

1. Aggravated detain for advantage contrary to s 86(2)(b) *Crimes Act 1900* (NSW); and
2. Breach of an ADVO contrary to 14(1) *Crimes (Domestic and Personal Violence) Act 2007* (NSW)

The applicant was sentenced to 3 years and 3 months imprisonment on the first charge; and 2 months on the second charge, to be served wholly concurrently.

The applicant had prior convictions for domestic violence and other offences.

The applicant and the victim had been in an on-off relationship for three years. At the time of the offences, the applicant was subject to an ADVO which included a requirement not to come within 200 m of the victim. The Victim and applicant were in the applicant's car and both knew there was an electric stock prod in the car. The victim was driving while the applicant read through her phone messages. He became angry that she had texted a friend, yelled at her and threatened to break her legs so she couldn't run away. The victim drove to the carpark of a restaurant, got out of the car, and started running away from the applicant, screaming for help. The applicant caught up to the victim and started dragging her back to the car, injuring her knees, arms and hands. An employee appeared from the restaurant, saw what was happening, and returned shortly with three other men. They yelled at the applicant who dropped the victim. One of the men helped the victim and the applicant drove out of the carpark, nearly hitting the other two men.

Grounds:

1. [The sentencing judge] erred by doubly punishing the applicant for his breach of the [ADVO], such double punishment manifesting in:
   (a) the assessment of the objective seriousness of the detain offence including the fact that it constituted a contravention of the ADVO; and
   (b) an entirely consecutive sentence being imposed for the contravene ADVO offence.
2. The sentence imposed for the detain offence was manifestly excessive.

Held: Leave granted; appeal against sentence dismissed.

Ierace J, with whom Bell CJ and Bellew J agreed, dismissed the appeal on the first ground, holding at [71]:

> the sentencing judge clearly explained that the contravention of the ADVO contributed to the seriousness of the detain offence but also warranted discrete punishment for contravening the court order by an act of violence. The relatively short sentence of 2 months fixed term imprisonment is consistent with it reflecting primarily the criminality of the breach of a court order.

His Honour also dismissed the appeal on the ground of manifestly excessive sentence. While the second case cited by the applicant in support of his manifest excess argument was similar, the difference in sentence imposed (three months more in the case at hand) was 'not so much as to reflect a misapplication of principle' [89]. Moreover, the 'protection of society and the safety of the victim were of particular importance' so a 'significant total sentence and a ratio of the overall non-parole period to the balance of term of 56 per cent was the means of achieving that result' [90].

***GS v R; DPP v GS* [2022] NSWCCA 65 (1 April 2022) – New South Wales Court of Criminal Appeal**

'Choking, suffocation or strangulation' – 'Crime' – 'Intentionally chokes' – 'Meaning of 'intentionally chokes'' – 'People with mental illness' – 'Residual discretion not to remit for trial' – 'Threat to kill' – 'Weapon'

Charges: intentional choking x 1; assault occasionally actual bodily harm x 1.

Proceedings: Appeal against directed acquittal; appeal against conviction; appeal against sentence.

Facts: The DPP appealed against a directed acquittal on the charge of intentionally choking contrary to s 37(1A) *Crime Act 1900* (NSW).

The defendant GS appealed against a conviction on a charge of occasioning actual bodily harm contrary to s 59(1) of the Crimes Act.

GS also appealed against his sentence for the above conviction. He was sentenced to 20 months' imprisonment with a non-parole period of 15 months. However, he had served 29 months' imprisonment by the time the sentence was imposed.

GS and the victim JC were in a relationship. The charges arose from GS' conduct over 24 hours. According to JC, GS returned home at 5am, work up JC and began punching her. The punching continued in different parts of her body throughout the day. JC also threw three objects at her, causing bruising. At around 8 or 9am he armed himself with a knife which he kept with him throughout the day in case she tried to run away and threatened to cut her throat if she didn't stop lying to him. JC said that GS jumped on her while she was on the bed, kept his hands around her neck for about one minute, after which she managed to slide her head out of his hands. This caused bruising to her neck, which was 'really sore' for a couple of days, but she did not specifically mention that her breathing or blood flow was affected. The next day, GS forced JC to accompany him to the fruit shop and then home again. After GS said he was going to have a shower, JC ran to the train

station. GS followed her and put her in a headlock. A witness called police. GS said he did not commit any of the offences alleged and was trying to restrain JC from jumping in front of a train. JC had a mental illness. GS was found not guilty of three related charges and two 'backup' charges.

Decision and Reasoning:

DPP v GS:

1. Set aside the order for the acquittal of GS on the charge of intentionally choking contrary to s 37(1A) of the *Crimes Act 1900 (NSW)*;
2. Declare that "intentionally chokes" within the meaning of s 37(1A) of the *Crimes Act 1900 (NSW)* means "intentionally apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head";
3. In the exercise of the residual discretion, decline to remit GS to the District Court for a re-trial.

GS v R:

1. Dismiss the appeal against conviction and sentence.

Payne JA, with whom Rothman and Harrison JJ agreed, declared that 'intentionally chokes' means 'intentionally apply pressure to the neck so as to be capable of affecting the breath or the flow of blood to and from the head.'

His Honour reached this conclusion by undertaking statutory interpretation of s 37(1A) *Crimes Act 1900 (NSW)*. He referred to the context and structure of s 37 as a whole [49]. He said at [50]:

> Section 37(1A) was designed to facilitate the prosecution of choking, suffocation and strangulation offences in the context of a "zero tolerance" approach to domestic violence. The section was expressly intended to fill a gap in the legislation for the choking, suffocation or strangulation of a victim of domestic violence where the victim was not rendered unconscious, insensible or incapable of resistance. The purpose of including s37(1A) was to create an offence which responded to issues raised in the NSW Domestic Violence Death Review Team report to Parliament for the period 2015-2017.

***DS v R* [2022] NSWCCA 55 (21 March 2022) – New South Wales Court of Criminal Appeal**

'Agreement to punishment' – 'Application to extend time to appeal' – 'Consent' – 'Culturally and linguistically diverse

people' – 'Delay in reporting' – 'Evidence' – 'Rape' – 'Relationship evidence' – 'Sexual abuse' – 'Sexual assault'

Charges: Sexual intercourse without consent x 21.

Proceedings: Application to extend time to appeal.

Facts: The appellant and victim were married for 17 years and had two children. The appellant was convicted of 21 charges of sexual intercourse without consent, which the appellant used to 'punish' the victim whom he falsely believed was having an affair [4]. The offending included 'fellatio, fellatio with urination in the complainant's mouth, digital/vaginal penetration, vaginal penetration with a "sex toy", and attempted anal penetration with that toy' [4].

The defendant sought leave to appeal on the following grounds:

1. Unreasonable, or cannot be supported by the evidence.
2. His Honour misdirected himself on the elements of the offences (negation of consent).
3. Relationship evidence had no probative force on the question of consent.

Decision and Reasoning: The application was dismissed.

The trial judge found that 'the complainant's agreement to sexual intercourse was not freely and voluntarily given in circumstances where she was "subjecting herself to the punishment he had imposed"'. Furthermore, 'consent was negated under s 61HA(4)(c) where the complainant had been "assaulted multiple times and was scared that this would occur again"' [58]. In response to these findings and in support of his second ground of appeal, the appellant submitted that 'the complainant agreed to participate in the various sexual acts to "manipulate" him so that he would stay in the relationship against his wishes' and 'that she participated because she was prepared to do whatever was necessary to remain in the relationship with him' [60]. The Court affirmed the trial judge's finding that the victim did not give free and voluntary consent and rejected the appellant's submission on the probative value of the relationship evidence. The Court explained that 'the complainant did not regard herself as having any choice, because of her situation and her need to protect her children, but to accept and "agree" to' the appellant's 'punishments'. Furthermore, 'the complainant's evidence… describes her as being "scared" and the sexual activity variously as "dangerous", "aggressive", "unbearable", "brutal", "painful", "rough", "hurting" and "bruising". The evidence suggests no sensible explanation for why the complainant would have freely and voluntarily subjected herself to that conduct.

Finally, the sequence of events leading to the complainant jumping off the carport roof… is consistent with the sexual activity which preceded it not being consensual' [88]-[92]. The trial judge's findings 'demonstrate the probative value of the evidence in relation to the issues of consent and delay in making any complaint' and 'do not involve or include any tendency reasoning' [67]. Finally, the Court found that evidence of the victim's fear, both generally and in response to threats made by the appellant, provided a 'reasonable justification for her' delay in reporting the offending [90].

***Nguyen v R* [2021] NSWCCA 118 (18 June 2021) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Children' – 'Damaging property' – 'Financial abuse' – 'Following, harassing and monitoring' – 'Kidnapping threat' – 'Physical violence and harm' – 'Pregnant people' – 'Separation' – 'Sexual and reproductive abuse' – 'Suicide threat' – 'Technology facilitated abuse' – 'Threats to kill'

Charges: Aggravated entry with intent to steal; Steal property in dwelling house; Intimidation; Form 1 offences attached to sequence 6 (Damage property, contravene Apprehended Violence Order); Section 166 Certificate (Dishonestly obtaining financial advantage by deception).

Proceedings: Application for leave to appeal against aggregate sentence.

Facts: The male applicant and the female complainant had been in a relationship, which had ended prior to the offending. While the complainant was at the hospital giving birth to their child, the applicant entered her home, damaged her car, ransacked her room, and stole her laptop. He sent her many threatening messages via text, WhatsApp and email (threats to kill, violent sexual assault, stalking, removal of child, suicide etc), including breach of a provisional Apprehended Violence Order (AVO). He also used the complainant's laptop to access her personal MyGov account and make two fraudulent tax returns in the complainant's name causing payments to be made to the applicant's own bank account. The applicant was sentenced to an aggregate sentence of 7 years' imprisonment with a non-parole period of 4 years 11 months.

Grounds of appeal:

1. The sentencing judge erred by failing to give proper practical effect to the finding of special circumstances.
2. The sentencing judge erred by taking into account the incorrect offence when dealing with the second

offence on Form 1.

3. The aggregate sentence was manifestly excessive.

Held: Application for leave to appeal granted, appeal dismissed.

Ground 1: It was evident from the sentencing judge's remarks that he gave proper effect to his finding of the basis for special circumstances by varying the statutory ratio downwards to 70%.

Ground 2: It was clear that the sentencing judge nominated the incorrect offence at a point in his reasons. However, while the Crown's submissions focused on whether the error vitiated the sentencing discretion, the true question in the circumstances here was whether the error was an inadvertent misstatement that did not affect the sentence imposed. The slip that occurred could not properly be characterised as a material error capable of vitiating the sentence imposed.

Ground 3: The aggregate sentence was not manifestly excessive in light of the fact that the applicant's criminality encompassed offences of a different nature and varying degrees of seriousness with multiple complainants. Relevant matters in relation to the sequence 6 offence (aggravated entry with intent to steal and the Form 1 offence) included at [107]:

- The offences were committed in the context of a relationship marred by domestic violence. The applicant twice threatened to kill the applicant and had also threatened her with violent sexual assault and removal of her newborn baby.
- It was significant that the applicant purposefully chose the complainant's home and attended at a time he thought she would be asleep and near to her giving birth.
- The offence was not less serious because the duration of the entry was short.
- The objective seriousness of the sequence 6 offence was at the middle of the range, noting the persons present were inherently vulnerable and the offence was not impulsive.
- The offences involved an abuse of trust.
- The applicant was a young man who had a prior record including offences of domestic violence perpetrated against the same complainant, which disentitled him to leniency, pointed to an increased need for specific deterrence and contributed to a finding that his prospects of rehabilitation were poor or guarded.
- The need for general deterrence and the protection of the community.

- The statistics did not point to the indicative sentence for sequence 6 being manifestly excessive.

The aggregate sentence was also appropriate in light of the circumstances of the other offending including at [108]:

- The stealing offence was assessed as "falling slightly below the middle range of objective seriousness but not by much", due to the non-monetary value of the laptop which could be expected to contain personal information.
- The intimidation offence was assessed as at the middle end of the range of objective gravity noting the conduct was premeditated and designed to instil further mental harm on the complainant, when the applicant was aware she had just given birth.
- The sentencing judge found the dishonesty offences fell slightly below the middle range of offending given the multiple victims (the ATO and the complainant), and the applicant having exploited his possession of the complainant's laptop (subject of the stealing offence) to perpetrate the fraud.
- No challenge was made with respect to accumulation.
- The two offences on the Form 1, particularly contravene AVO, required an increase to the penalty for the principal offence (sequence 6), to ensure personal deterrence and extract retribution.
- The applicant showed little or no insight into the complainant's perspective and was not genuinely remorseful.
- The applicant represented a medium risk of re-offending.
- The challenge to a limited adjustment to the sentencing ratio for special circumstances was rejected.
- There was no double counting.

***McFarland v R* [2021] NSWCCA 79 (23 April 2021) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'Factors relevant to sentencing' – 'Manifest excess' – 'Misuse of alcohol or drugs by perpetrator' – 'Past domestic and family violence' – 'Physical violence and harm' – 'Strangulation'

Charges: Aggravated take and detain a person with intent to obtain advantage (aggravation being actual bodily harm, advantage being psychological gratification) plus a Form 1 for common assault x 1; Assault occasioning actual bodily harm x 1; Driving with a high range content of alcohol in blood x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant and female victim were in a de facto relationship. The intoxicated applicant assaulted the victim, punching and strangling her. He forced her partially into the car and drove 2.9 km, leaving her legs dragging along the gravel. The victim's injuries were described by sentencing judge as "horrific" and representing the most serious form of actual bodily harm. The applicant pleaded guilty and was sentenced to an aggregate term of 7 years imprisonment, with a non-parole period of 4 years and 4 months.

Grounds of appeal: The sentence was manifestly excessive.

Held: Application for leave to appeal against sentence was granted. Appeal dismissed. The sentence was not manifestly excessive in light of the following factors:

- Aggravated take and detain offence was assessed at above the mid-range of objective seriousness. The maximum penalty of 20 years imprisonment is an important legislative guidepost.
- Assault occasioning actual bodily harm offence was assessed at the mid-range of objective seriousness. It carried a maximum penalty of 5 years imprisonment.
- Applicant's subjective case was not powerful, even taking account of his genuine remorse.
- No evidence to support a finding that the applicant's moral culpability was anything but high or that he was not an appropriate vehicle for general or specific deterrence.
- Self-induced intoxication is not a mitigating factor.
- Applicant's prior conviction for domestic violence offending against his previous female domestic partner disentitled him to leniency.
- Although the offending was unplanned, it was not fleeting. The totality of the offending involved relatively sustained violence.
- Harm suffered by the victim was described by the sentencing judge as "horrific".
- It was necessary the sentence reflected specific deterrence, general deterrence, recognition of the human dignity of the victim and the community's legitimate interest in the denunciation of alcohol fuelled domestic violence.

***Cooper v R* [2021] NSWCCA 65 (14 April 2021) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – 'History of abuse' – 'Mercy killing' – 'Murder' – 'Substance misuse'

Charges: Murder x 1; Form 1 offences (stalking/intimidating with intent and contravening an apprehended domestic violence order, ADVO).

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant injected the deceased, his partner, with a lethal dose of heroin intending to cause her death. The sentencing judge accepted that this was a “mercy killing” at the deceased’s request. After a 25% reduction for his guilty plea, the applicant was sentenced to a term of imprisonment of 13 years and 6 months with a non-parole period of 10 years. There was a history of domestic violence (including an ADVO in place) and substance abuse.

Grounds of appeal:

1. The Court did not take into account the applicant’s deprived background and early introduction to substance abuse in determining his moral culpability for the offending.
2. The sentence was manifestly excessive.

Held: Appeal dismissed.

Ground 1: There was no dispute that the applicant’s deprived background and early introduction to alcohol and substance abuse was a highly relevant factor in considering the applicant’s moral culpability: *Bugmy v The Queen*; *R v Millwood*. However, the sentencing judge did take these principles into account, setting out in detail the applicant’s troubled background and early association with drugs and alcohol and referring with approval to the forensic psychiatrist’s assessment of the applicant’s mental condition. These conclusions formed part of the context for a finding of the applicant’s low moral culpability ([68]-[72]).

Ground 2: Notwithstanding the tragic circumstances surrounding the killing and the applicant’s low moral culpability, it could not be said the sentence was unreasonable or plainly unjust. It had to be remembered that: (1) This was a deliberate killing of another human being by the injection of an illegal drug; (2) It took place whilst the applicant was on conditional liberty and in direct breach of his bail conditions and the ADVO; (3) Although not a significant issue in sentencing, offences on a Form 1 needed to be taken into account; and (4) Despite the applicant’s mental illness reducing the need for the sentence to reflect denunciation and general deterrence, specific deterrence remained of importance ([82]-[86]).

***Rogers v R* [2021] NSWCCA 61 (9 April 2021) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against conviction' – 'Defence relied upon at trial' – 'Extreme provocation' – 'Murder'

Charges: Murder x 1.

Proceedings: Appeal against conviction.

Facts: The male appellant suffocated his wife during a physical altercation and attempted to commit suicide. The appellant had discovered his wife had formed a relationship with another man. There was evidence that the deceased kicked the appellant during the struggle. At trials in 2018 and 2019, the appellant relied upon the partial defence of substantial impairment by abnormality of mind under s 23A *Crimes Act 1900* (NSW). The jury rejected the partial defence and convicted the appellant of murder. No application was made at trial for the partial defence of extreme provocation to be left to the jury.

Grounds of appeal/Issues: Application for leave to rely upon the ground of appeal pursuant to Rule 4 Criminal Appeal Rules (NSW).

> Ground: A miscarriage of justice resulted from the failure to leave the partial defence of extreme provocation under s 23 *Crimes Act 1900* (NSW) to the jury.

Held: Leave to rely on the ground of appeal refused; leave to appeal against conviction refused.

Issue 1: As Bathurst CJ observed in *ARS v R*, the *Criminal Appeal Act 1912* (NSW) does not exist to enable an accused who has been convicted on one set of issues to have a new trial under a new set of issues which could or should have been raised at the first trial. In any event, the appellant had not lost a real chance of a verdict of not guilty of murder, but guilty of manslaughter, because extreme provocation was not left to the jury: ([166]-[167]).

Issue 2: Properly constructed, s 23 provides that the conduct of the deceased to which the accused person responded (s 23(2)(a)), and which caused the accused person to lose self-control (s 23(2)(c)), and which was capable of causing an ordinary person to lose self-control (s 23(2)(d)) must be conduct which constituted a serious indictable offence (s 23(2)(b)). Omitting the words "in the position of the accused" in the 2014 amendment means s 23(2)(d) now significantly departs from the common law. "[T]he ordinary person test now contained in s 23(2)(d) assumes a calm ordinary person and that it is not relevant that the accused person was particularly sensitive to the situation or was experiencing a depressive disorder" (see [92]-[104]).

The critical and determining aspect of the appeal concerned the objective element in s 23(2)(d). It was accepted that the notional ordinary person may act in unreasonable ways but "the reaction must still be within the range of possible reactions of an ordinary person as assessed by the Court when considering the threshold question of law involved." In the context and factual circumstances of the case, the reaction of the appellant was "not within the range of possible reactions of an ordinary person. The partial defence of extreme provocation ought not to have been left to the jury" ([141]-[163]).

***Taylor v R* [2020] NSWCCA 355 (20 December 2020) – New South Wales Court of Criminal Appeal**

'Animal abuse' – 'Application for leave to appeal against conviction' – 'Past domestic and family violence' – 'Significant probative value' – 'Tendency evidence'

Charges: Breaking and entering into dwelling and committing serious indictable offence, namely, intimidation with intent of causing fear of physical or mental harm, knowing that persons were inside x 1 (Count 4); Intimidation with intent of causing fear of physical or mental harm x 1 (Count 6); Possession of an implement of housebreaking without lawful excuse x 1 (Count 8); Entering dwelling with intent to commit serious indictable offence, namely, intimidation with intent of causing fear of physical or mental harm, knowing that persons were inside x 1 (Count 9).

Proceedings: Application for leave to appeal against conviction.

Facts: The applicant man and the complainant woman were in an on-off relationship for about two years prior to the alleged offences. Following a trial by jury in the District Court of New South Wales, the applicant was found not guilty on Counts 1-3, but guilty on Counts 4, 6, 8, 9, 11 and 12.

In relation to Count 9, the Crown's case required the applicant to have gained external access to the complainant's fourth floor apartment of a five storey building, despite there being no means for the applicant to access the balcony externally.

In relation to Counts 1-10, the Crown relied on tendency evidence, namely, a signed statement of agreed facts from 2010 used in sentencing the applicant for a charge of recklessly occasioning grievous bodily harm to his former wife on 25 October 2008. The facts concerned acts of violence and threats towards his former wife of 30 years, and their pet, during the breakdown of the relationship. The signed statement of agreed facts also included a statement that there was a history of domestic violence in the relationship.

Grounds of appeal:

1. The verdict on Count 9 was unreasonable as there was no direct evidence, or no proper inference from direct evidence, that there were persons in the premises at the time of entry, and that element of the offence was not capable of proof; and
2. Evidence in relation to conduct committed in 2008 ought not to have been admitted as tendency evidence.

Held: Ground 1 upheld, ground 2 dismissed; applicant re-sentenced to an aggregate term of imprisonment for 14 months, with a non-parole period of 10 months.

Ground 1: It was not reasonably open to the jury to have been satisfied beyond reasonable doubt that the applicant had accessed the balcony externally. There was no evidence how the applicant could have gained external access.

Ground 2: The appeal on ground 2 was dismissed by majority (Beech-Jones J, with Walton J agreeing). First, the tendency evidence relied upon had "significant probative value". The evidence strongly supported proof that the applicant possessed the alleged tendency (to be violent/threatening towards women with whom he was in/had an intimate relationship) as at the time of the alleged charges (March 2018). There was no relevant difference in this context between the violent breakdown of the 30-year relationship and the 2-year relationship (Beech-Jones J at [140]-[155], Walton J agreeing at [136]).

Further, the probative value of the tendency evidence substantially outweighed its prejudicial effect. The submission that the admission of the tendency evidence would lead to the jury having an "adverse emotional response" was rejected. The trial judge's direction specifically warned the jury in that regard (Beech-Jones J at [156]-[157], Walton J agreeing at [136]).

***Droudis v R* [2020] NSWCCA 322 (10 December 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'Coercive control' – 'Family court matters' – 'Female perpetrator' – 'Immolation' – 'Murder' – 'Past domestic and family violence' – 'Step-children' – 'Victim as perpetrator' – 'Weapon'

Charges: Murder x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The female applicant was the partner of Man Haron Monis (who was the perpetrator of, and died during, the Lindt Café siege in December 2014) ([6]). Prior to meeting Monis, the applicant had not been involved in any criminal conduct ([5]). It was accepted that Monis exercised a significant degree of influence/psychological persuasion and a measure of control over the applicant, fortified by a level of physical abuse, and she was prepared to act at his behest ([9], [37], [38], [39]).

Man Haron Monis planned the murder of his former wife (the victim, with whom he had two children). But he was not prepared to carry out the killing himself, planning with the applicant that instead she would carry out the murder. Part of the applicant's motive included the desire to form a "single family unit" with Man Haron Monis and the children ([29(h)]; [69]).

The applicant stabbed the victim 18 times before dousing her with petrol and setting her alight. The applicant was convicted of the murder of the victim following a judge alone trial. She was sentenced to 44 years imprisonment, with a non-parole period of 33 years.

Grounds of appeal:

1. The sentencing judge erred in his assessment of the significance of the death of Man Haron Monis to the applicant's risk of re-offending and prospects of rehabilitation.
2. The sentencing judge erred in his application of s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which deals with the power of the court to reduce penalties for facilitating the administration of justice.
3. The sentence was manifestly excessive.

Held: Leave to appeal granted, ground 1 upheld. The applicant was re-sentenced to a term of imprisonment of 35 years with a non-parole period of 26 years and 3 months. Grounds 2 and 3 dismissed.

Ground 1: The sentencing judge failed to take into account the death of Monis, and the removal of his ongoing influence on the applicant, as relevant factors in determining future dangerousness, the need for personal deterrence, and the prospects of rehabilitation ([68]-[72]).

Ground 2: The sentencing judge gave proper consideration to the nature of the assistance given ([99]). Section 22A did not require a two-stage approach to sentencing (as opposed to taking the matter into account as part of the "instinctive synthesis approach"), nor impose a legal requirement to quantify the extent to which the sentence was reduced ([100]-[104]). While it would provide further transparency to the sentencing

process if the court specifies the penalty that would be imposed but for the assistance provided, a failure to quantify the discount does not by itself establish error ([105]).

Ground 3: The sentencing judge did not err in his conclusion that the psychological persuasion of Monis, and physical abuse, did not give rise to "a form of non-exculpatory duress such as to reduce the applicant's moral culpability". The sentencing judge was also correct in his finding of the objective gravity of the offence, and in concluding there was no evidence of contrition or remorse (but there was limited evidence of remorse/ rehabilitation on appeal) ([118]-[119]).

In re-sentencing, despite the relevance of the death of Monis to the applicant's prospects for rehabilitation and re-offending, the Court noted that the offence was serious and retribution/general deterrence were significant ([120]-[129]).

***Bussey v R* [2020] NSWCCA 280 (16 November 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against conviction' – 'Application for leave to appeal against sentence' – 'Rape where parties formerly in intimate relationship' – 'Separation' – 'Sexual abuse' – 'Strangulation'

Charges: Indecent assault x 1; Sexual intercourse without consent x 1; Aggravated sexual assault without consent (deprivation of liberty) x 2.

Proceedings: Application for leave to appeal against conviction and sentence.

Facts: The applicant man and female victim had remained in contact following the end of their relationship as they were in a music band together. The victim refused the applicant's request to revive the relationship. The applicant strangled her until she passed out. When he then asked whether she "was going to fight him", she said "no and reluctantly gave in to intercourse".

The victim reported the incident to her friends and the police. The victim identified prior sexual practices between the applicant and herself, including regular consensual choking, physical restraint, being thrown onto a bed, role playing and "rough sex". The defence case was that all sexual contact between the applicant and the victim was consensual. The applicant was found not guilty on Counts 1, 2 and 4, and guilty on one charge of aggravated sexual assault without consent (Count 3).

Grounds of appeal:

1. The verdict was unreasonable, as it was inconsistent with the not guilty verdicts on the other three counts.
2. The sentence was manifestly excessive.
3. The sentencing judge erred by not having sufficient regard, or giving weight, to the historical extent and nature of the prior sexual experience between the applicant and the victim.

Held: Appeal dismissed (per Harrison J, Hoeben CJ and Bellew J agreeing).

Ground 1: In a case where there are mixed verdicts of guilty and not guilty, and the complainant's evidence is the only evidence of an accused's guilt, a court may (but not must) conclude the verdicts are factually inconsistent: citing *MFA v The Queen*, *R v Markuleski*, and *Mackenzie v The Queen*. The court held that the verdicts of not guilty on Counts 1, 2 and 4 were explicable without leading to the conclusion that the jury formed an adverse impression about the victim's credibility. As such, the guilty verdict on Count 3, dependent on the jury's acceptance of the victim's credibility, was not inconsistent and unreasonable ([62]-[70]).

Grounds 2 and 3: The seriousness of the offending was not mitigated by the prior sexual relationship between the applicant and the victim. Harrison J (Hoeben CJ and Bellew J agreeing) held at [87]-[88]:

"Mr Bussey maintained that, but for his Honour's failure to have sufficient regard to the fact that he and RM had, until only a relatively short time before the commission of the offence, been in a close and enthusiastic personal relationship, he would have concluded that Mr Bussey's objective criminality was reduced and would have imposed a less severe sentence. In this sense, it is said that his Honour allegedly failed to have regard to a relevant consideration:

> In my opinion, that submission falls foul of the principle that just because it may be possible to contemplate more serious examples of the same offence does not mean that the particular offence being considered is for that reason less serious."

And at [95]-[97], with Hoeben CJ and Bellew J particularly noting their agreement with these remarks:

> "The cases reveal a consistent and commendable emphasis upon the need to consider each offence of sexual assault upon a woman by her partner or former partner with special and particular regard to the circumstances of the case. However, there has in my view been a regrettable tendency in some cases to refer to the fact that the assault occurred within, or following the breakdown of, a relationship as something that might "mitigate" the seriousness of the particular offence. This type of language has the

unfortunate potential erroneously to dilute the significance of the offence under consideration. Put simply, the objective seriousness of sexual intercourse without consent cannot be reduced because of factors such as a prior sexual history between an offender and his victim without making unjustified and impermissible assumptions about the effect upon the victim. It depreciates the notion that no means no, whatever other factors may be involved. To accept that a prior relationship can ever operate to mitigate the seriousness of the offending completely abandons that uncontroversial wisdom and reverts to the type of attitude that once saw domestic violence treated as less culpable than other assaults. It also proceeds upon the implicit and unsafe adoption of non-consensual sexual intercourse with a stranger as the default position.

I cannot accept that a statement such as “the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship” is now or could ever have been an acceptable, far less correct, summary of the law or that it should continue to influence this Court in the determination of cases such as the present. Violation and defilement of the victim are quintessential aspects of the offence and the victim’s familiarity with an assailant can have no bearing upon that fundamental circumstance. Indeed, such an assault, committed by a person with whom the victim may have had a formerly close and respectful relationship, is potentially more likely to exacerbate the seriousness of the offence than otherwise. I cannot accept the proposition that there can be varying degrees of violation and defilement. Such a concept appears to derive from the offensive notion that a man should in certain circumstances be entitled to raise his prior relationship with the victim as some kind of limited excuse for disregarding the absence of consent to an act of intercourse with him to which activity the victim had historically consented.”

As I have indicated, Mr Bussey’s submissions implicitly rely upon the proposition that the offence of which he was found guilty could have been more serious. The fact that one can imagine the commission of more serious offences of this type is not controversial. It does not, however, mean that the sentence imposed by his Honour for the offence committed by Mr Bussey should somehow be assessed by reference to that fact. It certainly does not mean that the objective seriousness of Count 3 is diminished or reduced because Mr Bussey and RM had previously been in a consensual sexual relationship. Once it is accepted that no means no, that should be the end of the matter.”

***Yaman v R* [2020] NSWCCA 239 (25 September 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Following, harassing and monitoring' – 'Physical violence and harm' – 'Protection order' – 'Separation' – 'Stalking' – 'Weapon'

Proceedings: Application for leave to appeal against sentence.

Charges: Aggravated break and enter, commit assault occasioning actual bodily harm, breach ADVO.

Facts: The male applicant was in a domestic relationship with the female victim which ended due to ongoing domestic violence. The offender breached a protection order by calling the victim 48 times and attending the victim's residence. As the victim unlocked her front door the applicant 'collided' with her, and they fell into her apartment. He put his foot on her head to hold her down screaming 'how dare you ignore me' and 'who are you to tell me it's over' [23]. The applicant took a knife from the kitchen, pushed the victim onto a couch. The victim told the applicant 'If you're gunna pull a knife on me do it' which caused him to back off and leave the premises. The victim had several small lacerations to the backs of her hands [27].

Grounds of Appeal:

1. The sentencing judge was in error in finding that the aggravated break and enter involved 'some significant planning';
2. (2A) The sentencing judge erred in finding the applicant's criminal history was 'aggravating on sentence'; (2B) The sentencing judge failed to give reasons as to how the applicant's history 'aggravated' the sentences imposed'
3. The sentencing judge erred in characterising the objective seriousness of the aggravated break and enter offence as 'mid-range offence'
4. The sentence imposed for the aggravated break and enter offence is manifestly excessive

Decision and Reasoning: Leave to appeal granted on grounds 1,2 and 4 and refused leave to appeal on ground 3. The appeals were dismissed.

Fullerton J held there was 'more than sufficient factual foundation' to support a finding that the offence involved significant planning. He found the phone calls indicated the applicant's determination to confront the victim [5].

Wilson J regarded the phone calls, the offender's presence in the stairwell and the speed he ran to the victim

as evidence that it was open to the court to find the only reasonable conclusion was that there was some planning [96].

Wilson J held that the applicant's characterisation of the offence "significantly minimised the gravity of his crime" [117]. He found that because of the telephone calls the victim had already received, she was already in a state of fear before the confrontation. His Honour found that just because applicant did not use the knife to inflict injury, did not make the incident less serious. That the applicant waited for the victim to be home before charging at her and propelling them both through the doorway heightened the gravity of the crime [119].

***Le v R* [2020] NSWCCA 238 (23 September 2020) – New South Wales Court of Criminal Appeal**

'Appeal' – 'Assault occasioning bodily harm' – 'Coercive control' – 'Credibility' – 'Emotional and psychological abuse' – 'Misuse of alcohol or drugs by perpetrator' – 'People affected by substance misuse' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Protection orders' – 'Unreasonableness' – 'Women' – 'Young people'

Charges: 2x counts of assault occasioning bodily harm, with a third alternative charge that was not pressed.

Proceedings: Appeal against conviction on 1 count of assault occasioning grievous bodily harm.

Facts: The female victim and male offender were in an intimate relationship for 15 months. On the relevant night, the offender and the victim had consumed cocaine. The offender hit the victim multiple times after the victim had continued talking after sex. Critically, the offender stomped or kicked the victim's hip, which fractured her femur and required a hip replacement. The victim did not go to the hospital or report the incident immediately. About two weeks after the injury, she called the police, following an argument where the offender did not hit her but she feared that he would hit her again. Over the next few weeks, she subsequently went to hospital, discovered the seriousness of her injury and gave a recorded statement to police.

Issue: Whether appeal against conviction should be allowed on the ground that the verdict of the jury was unreasonable.

Decision and reasoning: Leave to appeal against conviction was granted. However, the appeal was dismissed by a majority of 2:1.

Hoeben CJ would have allowed the appeal. He considered that there were objective deficiencies in the account of the victim: [30]. She was inconsistent in her account of how she sustained the injury: [53]. This

also extended to the circumstances of the injury and the nature of the fight: [45]–[47]. She told a series of lies, admittedly in relation to trivial factors like drug use or the injuries of the accused: [96]–[98]. Further, there was little evidence to support that there had been months of physical abuse prior: [102]. These inconsistencies were so significant that the jury ought to have had a reasonable doubt about the guilt of the offender: [24].

Adamson and Davies JJ, writing separately but agreeing with each other, did not consider that the verdict of the jury was unreasonable. Adamson J, providing primary reasons, accepted that the victim was at times inconsistent but noted that juries can accept parts of what witnesses say, while rejecting other parts: [202]. Recapping the evidence, Adamson J reiterated that the question is whether it was open to a reasonable jury to find that the Crown had established its case beyond reasonable doubt: [205]. In this case, the jury only needed to be satisfied that the offender had stomped or kicked the victim in the left hip and this caused her hip to fracture: [205]. Given the evidence, Adamson J did not have a doubt and, further, any such doubt would be the kind of doubt that was resolved by the jury's advantage in seeing and hearing the evidence: [226].

Davies J, providing additional reasons, added that, even though this was primarily a single-witness case, the fact the victim sustained a fractured femur was significant objective evidence: [112]. The expert evidence suggested that a fall was an unlikely cause of an isolated injury to the hip: [117], [121]. This was so despite aspects of the victim's evidence being unreliable: [124]. The defence case that the victim may have fabricated charges following the break up was inconsistent with the victim's reluctance to provide statements to the police: [128]–[130]. It was open to the jury to reject the applicant's case but it was also open to accept that the hip fracture occurred in the way that the victim said: [132]. Therefore, the appeal ground was not made out.

***Ebsworth v R* [2020] NSWCCA 229 (11 September 2020) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – '*De Simoni* issue' – 'Intent to kill' – 'Strangulation'

Charges: Breaking, entering and committing a serious indictable offence in circumstances of aggravation x 1; Using an offensive weapon with intent to assault x 2; Intimidation x 5; Recklessly damaging property x 1; Contravening a DFV protection order x 5.

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant man and female victim were in a domestic relationship. After an argument, the applicant

was told to leave the victim's premises and did so. Later, he returned when the victim was absent and cut up most of her clothes. As a consequence of that incident, an protection order was issued. Following this the applicant committed a number of offences including threatening to kill the victim, sending abusive and threatening messages, breaking into the victim's house and assaulting the victim, including strangling her and threatening to kill her while holding a knife. The victim was able to run from the house, but the applicant chased her with the knife, grabbed her hair and punched her repetitively in the face. In response to the victim's cousin intervening to protect the victim, the applicant threatened to stab both the victim and her cousin. Afterwards, the applicant continued to send abusive and threatening messages to the victim, including threatening to shoot her and her family. The applicant is of Aboriginal heritage.

Grounds: (2) Whether the sentencing judge erred by taking into consideration a more serious offence contrary to the principles in *De Simoni.*

Decision and reasoning: *Leave to appeal granted. Appeal dismissed.*

The applicant argued that the sentencing judge considered that the applicant had a state of mind to kill or inflict serious injury upon the victim at the time of committing charge 1. As such, the applicant submits that the sentencing judge was sentencing the applicant in relation to a more serious, uncharged offence (i.e., strangulation with intent of committing murder under s 29 of the *Crimes Act*). The difficulty with this submission is that the strangling of the victim would have to have been done *for the purpose of* killing the victim to fall under s 29 of the *Crimes Act*.

> [58] If a choking occurs, which choking does not kill the victim, the offender does not commit an offence under s 29, unless there was an intention to kill. The sentencing judge referred to threats to kill or inflict grievous bodily harm for which the choking was an act following through on those threats. But the sentencing judge did not conclude that the "following through" by choking was done with an intent to kill. It could have been done to inflict really serious injury. The requirement in s 29 of the Crimes Act to commit an act of strangling "with intent … to commit murder", requires the offender to have an intention to kill; not one that may be to inflict really serious injury. On the other hand, if a strangulation occurs which does, in fact, cause death, then an intention to cause really serious injury is sufficient to give rise to the crime of murder.
>
> …
>
> [63] The prohibition based upon the principles established by the High Court in *De Simoni* should not be

> overstated. The principles disentitle a sentencing court from inflicting punishment or aggravating an offence for which a sentence is to be imposed, because conduct has occurred which otherwise would be a more serious offence.

Nothing in the circumstances of this case give rise to the principles described in *De Simoni*.

***Romeo v R* [2020] NSWCCA 221 (31 August 2020) – New South Wales Court of Criminal Appeal**

'Administration of justice' – 'Application for leave to appeal against sentence' – 'Family law dispute' – 'Soliciting to murder'

Charges: Soliciting to murder x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant contravened a protection order protecting his former wife. The applicant arranged a third party to murder the victim before his next appearance in court, paying the third party $30,000. The third party planned to defraud the applicant and informed police of the applicant's intention to murder his former wife. An undercover police operative posing as the person who would carry out the murder met with the applicant and was instructed to get the victim to write a letter to her son to explain the victim's disappearance. The original sentence was 9 years and 9 months commencing on 18 November 2016 and expiring on 17 August 2026 with a non-parole period of 6 years expiring on 17 November 2022.

Grounds: (1) The sentencing judge erred in finding that the offending fell within the middle of the range of seriousness; (2) the sentence was manifestly excessive.

Decision and reasoning: *Leave to appeal granted. Appeal dismissed.*

(1) The assessment of the objective seriousness of the offence as falling within the middle range was open to the judge.

[88] In the present case, the offence was motivated at least partially by the applicant's wish to have his former wife murdered before he was due to attend court on 29 November 2016 for the AVO. As this Court has emphasised, an offence of solicit to murder is seriously aggravated where the motive is to interfere with the administration of justice.

Citing *Efthimiadis v R (No 2)* [2016] NSWCCA 9 (9 February 2016) at [85]-[86] of that decision:

> [85] Personal and general deterrence are important considerations in the sentencing exercise for the reasons previously given and as the offence of soliciting a person to murder another is a heinous crime …
>
> [86] In my mind, there is another reason that general deterrence has significance in the present case. All too often partners in a domestic relationship resort to violence. The community cannot tolerate violence in any domestic setting, but the community's abhorrence of a crime intended to secure the custody of a young child by the murder of the mother needs to be expressed in the sentence to deter persons who might be like-minded to commit such a crime.

(2) The sentence was not manifestly excessive.

***Samandi v R* [2020] NSWCCA 217 (27 August 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against conviction and sentence' – 'Application to withdraw guilty plea' – 'Guilty pleas after commencement of trial' – 'Manifestly excessive' – 'Systems abuse'

Charges: Assault occasioning actual bodily harm x 6; Assault x 3; Intentionally damaging property x 1; Making a false accusation knowing that persons are innocent of an alleged offence x 1; Contravention of a protection order x 1.

Proceedings: Application for leave to appeal against conviction and sentence.

Facts: When the applicant was originally committed for trial the Crown also alleged four counts of sexual intercourse without consent (also domestic violence offences). The Crown accepted a plea arrangement where the applicant pled guilty to all other counts and the Crown would not proceed further on the four counts of having sexual intercourse without consent. The applicant signed instructions agreeing to the plea deal. The trial judge set out the scale of the offending, namely that between December 2015 and February 2017, the male applicant repeatedly assaulted his female partner. The trial judge highlighted that 'A common feature of the assaults upon the victim was the quite unnecessary use of force in response to minor matters', as well as the applicant giving 'false explanation[s] to the police' to cover up his conduct [71]. The trial judge noted that domestic violence offences are 'serious matters … worthy of exemplary sentences in the context of giving proper weight to the purposes of sentencing that reflect the need to send a message to the wider community' [96]. The trial judge took into account mitigating factors such as the guilty plea.

Issues: (1) Whether a miscarriage of justice will occur if the applicant is not permitted to withdraw their guilty plea; … (4) Whether the sentence was manifestly excessive.

Decision and reasoning: *Application for leave to appeal against conviction refused. Application for leave to appeal against sentence granted. Appeal against sentence dismissed.*

(1) The applicant has not established that a miscarriage of justice will result from him being held to the pleas of guilty that he entered.

> The Applicant's pleas of guilty were entered freely and voluntarily, and were the subject of written instructions from the Applicant to his lawyers. There was no intimidation, improper inducement or fraud which led to the Applicant's pleas of guilty. This was an informed decision by the Applicant to plead guilty to the charges for which sentence was passed [123].

(4) The aggregate sentence was not manifestly excessive. The Court endorsed the judgment in *Cherry v R* [2017] NSWCCA 150 that:

> [155]: '[78] … current sentencing practices of 'offences involving domestic violence' [may] depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations'. It is undoubtedly the case that the criminal law, in the area of domestic violence, requires rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community. [79] In the context of domestic violence offences, the High Court has observed that it is a longstanding obligation of the State to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending and to afford such protection as can be afforded by the State to the vulnerable against repetition of violence'.
>
> [156]: The applicant's offences reflected his exercise of control and domination over the victim with these being common features of domestic violence offences [76]-[77]… Specific and general deterrence were important factors on sentence in this case together with the requirement for powerful denunciation by the community of such conduct and recognition of the harm done to the victim as a result of these offences: *Cherry v R* [76].
>
> [157]: It is important to keep in mind, as well, the serious public justice offence committed by the applicant contrary to s 314 Crimes Act 1900 … the applicant's s 314 offence involved the making of false allegations against police officers designed to protect the applicant himself from prosecution for domestic

violence offences against his partner. The applicant caused injuries to himself which he falsely attributed to police. As his Honour [the sentencing judge] observed, the applicant did not carry through with further reports. However, this was a serious public justice offence which warranted the indicative sentence of imprisonment for two years which was itself a significant component of the aggregate sentence imposed upon the applicant.

[158]: There is a continuing and deep-seated lack of insight on the part of the applicant concerning his domestic violence offences.

***AK v Regina* [2020] NSWCCA 194 (5 August 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'People affected by mental illness' – 'Sexual violence' – 'Step-child in the family' – 'Suicide threat' – 'Threat to kill child'

Charges: Detained wife with the intent to obtain an advantage (psychological gratification) x 1; Detained stepchild with the intent to obtain an advantage (psychological gratification) x 1; Doing an act intending to influence a witness to withhold evidence/procure an acquittal x 1; Sexual intercourse without consent x 1; Contravention of a protection order x 1; Common assault x 2; Intimidation/Stalking x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant entered his wife's home premises in contravention of a protection order, intending to intimidate her. The wife returned home with her child, PC, and was scared when she saw the appellant. She yelled to PC to open the door and the appellant told PC that if she opened the door of the room, he would kill PC. Over a number of hours, the applicant spoke with his wife about an impending court case and threatened to kill himself if she called the police. The wife told the applicant she would 'say whatever the offender wanted her to say in court'. The applicant detained his wife locked in a bedroom for approximately two hours during which time the applicant said, 'I'm sorry I hit you, I love you' and then had sexual intercourse with the victim without her consent. The applicant told the victim he had sent his brother $3000, so that if anything happened to the offender, his brother would kill her and he re-iterated his threat that if she called the police he would commit suicide.

Ground: (1) The sentencing judge erred by failing to properly consider the mental health of the applicant.

Decision and reasoning: *Application for leave to appeal granted. Appeal dismissed.*

No error has been demonstrated. Ground 1 dismissed.

The sentencing judge made specific reference to the context of domestic violence citing the High Court in *Munda v Western Australia* [2013] HCA 38 at [54]-[55]:

> 'the longstanding obligation of the of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence'.

Reference was also made to *The Queen v Kilic* [2016] HCA 48, recognising the:

> 'societal shift in relation to domestic violence and that current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category offence, because of changes in societal attitudes to domestic relations' [15].

Aggravating factors included the actual or threatened use of violence, the presence of children, the commission of offences in the home of the victim, 'a place where they are entitled to expect to be safe and free from this type of conduct', and the breach of bail and a protection order [16]. The sentencing judge took into account medical reports that indicated that the offender's mental condition may have 'contributed to the commission of the offending in a material way'. The sentencing judge weighed up the relevant factors on the evidence before him, including:

> [40] …a background of repeated, violent offending, where an AVO and bail conditions in place seem to have made no difference to this offender's willingness to attack, detain, humiliate, terrorise and rape his partner in the presence of her children.

***Samandi v DPP (NSW)* [2020] NSWCCA 102 (9 June 2020) – New South Wales Court of Criminal Appeal**

'Application for bail pending appeal' – 'Protection order' – 'Reasonable prospects of success'

Charges: Assault x 3; Assault occasioning actual bodily harm x 6; Intentionally damaging property x 1; Contravening a DFV protection order x 1.

Proceedings: Application for bail pending application for leave to appeal.

Facts: The male applicant plead guilty to offences committed against his wife and has now lodged an application for leave to appeal against convictions and sentences, contending his instructions to withdraw his pleas were not followed. The Crown case against the applicant was 'very strong'. The applicant also contends that his lawyers failed to inform the sentencing judge about issues related to his health.

Issues: Whether special exceptional circumstances justify the grant of bail.

Decision and reasoning: *Special or exceptional circumstances established. Application for bail granted subject to conditions.*

The applicant has not established that he has reasonable prospects of success on his conviction appeal. However, the applicant's contention that the consideration of additional medical evidence could result in him being resentenced is 'reasonably arguable or … at least [has] some reasonable prospects of success' on appeal [34]. Further, although the applicant's submission that being in custody prevents him from properly preparing for appeal as an unrepresented litigant does not 'qualify as special or exceptional circumstances standing alone' [33], it can be considered as part of a combination of factors.

***Vaughan v R* [2020] NSWCCA 3 (6 February 2020) – New South Wales Court of Criminal Appeal**

'Application for extension of time for leave to appeal' – 'Controlling and obsessive behaviour' – 'Following, harassing and monitoring' – 'Motor vehicle' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Physical violence and harm' – 'Separation' – 'Visa' – 'Weapon'

Charges: Causing grievous bodily harm with intent to murder; Wounding with intent to cause grievous bodily harm

Case type: Application for extension of time for leave to appeal against aggregate sentence

Ground of appeal: His honour erred in the notional accumulation of indicative sentences in determining the aggregate sentence

Facts: The applicant man and female first victim met shortly after she moved from Columbia in 2011 and they married in 201. They had separated having had 'relationship difficulties' at the time of the offences. After a series of arguments, the first victim moved out of the marital home at his demand. A few days later, the applicant began texting her and her friend, then when asked not to text her emailed the first victim's sister (copied to the victim) and accused the first victim of fraudulently obtaining a visa and of trying to steal money

from him and his family. He also stated that he "hope[d] [the victim] were to die in a car accident and that she has to fly home the body" [20]. The first victim subsequently made several statements to police leading up to the offending "in case something happened to [her]" and that she felt vulnerable and ‘unsafe to go outside’ and she was worried about what the applicant would do "because he is very controlling" [21-2]. The Applicant was also found to have searched for the first victim online, her place of work and the phrase ‘carotid artery neck’ [26]. This search history was relied upon by the Crown to contend that the offences were premediated and that the "Applicant armed himself with a knife intending to cut the victim’s carotid artery in her neck with an intention to kill" [26].

On the day of the offence, the Applicant had waited for the first victim to arrive at work. When she arrived, he approached her, produced a knife from his pocket and "lunged at the victim’s head and neck area, stabbing her in the forehead, the left-chest area and the left arm which she had raised to protect herself" [32]. One of her colleagues approached the Applicant and told him to stop. The Applicant then stabbed the colleague in the skull, causing immediate bleeding and a bone fracture. The Applicant then ran to his vehicle and accelerated quickly towards the first victim, who had collapsed on the ground, and crushed her between the bumper bar of his vehicle and another parked vehicle before driving away.

The first victim suffered abrasions and bruising, multiple fractured ribs, fractures to the left scapula, several vertebrae and pelvis. She had stab wounds to her chest and arm and a laceration to her left forehead. She was hospitalised for two weeks, a number of days in intensive care and required surgery for several injuries. The second victim required sutures for a laceration as a result of the stab wound to the top of her head and the injury caused a mildly displaced fracture of the skull.

The Applicant admitted that he brought the knife with him "intending to cut [his] throat in front of [the victim]" but instead "completely lost it" during a police interview. He had a major depressive illness but no evidence of psychosis or hallucinations and there was expert evidence he was capable of forming and intention to kill, wound and/or do grievous bodily harm.

The applicant had no prior criminal history. He pleaded guilty and was sentenced to an aggregate sentence of 21 years comprising a non-parole period of 14 years commencing on 19 August 2015 and expiring on 18 August 2029, with a balance of term of seven years commencing on 19 August 2029 and expiring on 18 August 2036 [4]. The sentencing Judge gave the following sentence indications:

(a) Count 1 - the offence under s.27 Crimes Act 1900 of causing grievous bodily harm with intent to murder -

imprisonment for 17 years and six months with a non-parole period of 12 years;

(b) Count 3 - the offence under s.33(1)(a) Crimes Act 1900 of wounding with intent to cause grievous bodily harm - imprisonment for 11 years and three months with a non-parole period of eight years.

The applicant lodged his Notice of Intention to Seek Leave to appeal in time on 1 May 2019 and it was extended until 1 February 2019. Notice of Application for leave to Appeal was not lodged until 30 August 2019. The Crown submitted that the extension of time should not be granted as there was not merit in the ground of appeal.

Held: The ground of appeal lacked sufficient merit to warrant and extension of time to bring an application for leave to appeal against sentence [114]. Johnson J (Macfarlan JA concurring) provided that "the Applicant's submission in support of [the] ground of appeal are based upon a misconception concerning the operation of the statutory provisions providing for aggregative sentencing in this State" [87]. "The principles of sentencing concerning accumulation and concurrency at general law, as explained in Pearce v The Queen, have no application where an aggregate sentence is used by the sentencing Court."[91] The sentencing judge was found to have correctly complied with the statutory provisions as well as to have taken a "detailed, careful and balanced approach in reaching sentence in this case" [113].

***Field v R* [2020] NSWCCA 105 (1 May 2020) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Appeal against sentence' – 'Jealous behaviours' – 'Manifestly excessive' – 'People with mental illness' – 'Physical violence and harm' – 'Substance abuse' – 'Weapon'

Offences: Causing grievous bodily harm with intent to cause grievous bodily harm

Proceedings: Appeal against sentence

Grounds:

1. The sentencing judge's assessment of the objective seriousness of the offence as "just below midrange" was not open to her.
2. The sentencing judge erred in her approach to general deterrence by failing to have regard to the individual circumstances of the offence and offender.
3. The sentencing judge erred by failing to give effect to his findings of special circumstances in relation to

the overall effective sentence.

4. The sentence is manifestly excessive.

Facts: The male victim was in a relationship with Ms Crowther ('C'), who was also in a relationship with the appellant, an Aboriginal man. After staying at C's house overnight, the victim sent C text messages (which were consistent with someone who was in an intimate relationship) but C did not reply so the victim waited for C at her house while consuming alcohol. The victim fell asleep on the front veranda and was awoken by the appellant opening the front door. The victim punched the appellant in the face, causing him to stagger backwards. The victim then went inside and remonstrated with C. He then felt a blow to his stomach and realised he had been stabbed, so he went to the kitchen to escape. He applied paper towel to his stomach and the appellant said, "Come out and I'll finish ya". C left to collect her daughter from school and the appellant also subsequently left. The victim was left by himself and called 000. He underwent a number of surgical procedures over the following months.

The appellant was convicted and sentenced to six years' imprisonment with a non-parole period of four years. In sentencing the appellant, the judge found that the appellant was raised in an extremely violent and dysfunctional environment [18]. Furthermore, he left school in year eight, was illiterate [19], had been using drugs since he was 16 [20] and suffered from longstanding mental illnesses [21].

Judgment: The court dismissed the appeal. Regarding Ground 1, the court held that the assessment of objective seriousness was open to the sentencing judge, taking into account the serious injuries and harm suffered by the victim, that the appellant used a knife capable of inflicting serious injury or worse, and that the offence was committed spontaneously as part of an excessive and disproportionate mode of self-defence [54].

The court also held that Ground 2 had not been made out. The court found that the comments made by the sentencing judge regarding general deterrence had direct application to the facts of the case and did not constitute some generalised "motherhood statement", from their context and content [74]. The sentencing judge did not downplay or ignore the appellant's mental illness [74] because the mental illness aspect of the appellant's claims "appear[ed] to be unrelated to his criminality generally and this offence in particular" [70].

In holding that Ground 3 had not been made out, the court stated that the "fact that the applicant was subject to conditional liberty at the time of the offences operates as an aggravating factor by virtue of its existence at

the operative time and not because of its capacity to rationally affect the criminality of the offence" [86].

The court held that Ground 4 had not been made out and therefore that the sentence was not manifestly excessive because:

1. The sentence has to be considered against a maximum penalty of 25 years imprisonment and a standard non-parole period of 7 years. These are significant guidelines.
2. The applicant received the benefit of a finding of special circumstances such that the non-parole period is 67 per cent of the total sentence.
3. Having been found guilty by a jury after trial, the applicant was not entitled to any utilitarian discount.
4. The offence properly fell just below the midrange of objective seriousness for the reasons advanced in relation to appeal ground 1. Although the applicant's offence was found to involve a spontaneous act of excessive self-defence, those actions also involved a significantly disproportionate response to the perceived threat. This response involved the use of a knife which caused severe ongoing physical and emotional harm to the victim.
5. The applicant's criminal history disentitled him to the leniency to which a person with no criminal history may have been entitled.
6. The applicant was subject to conditional liberty at the time of the commission of the offence.
7. The applicant's sentence was backdated in a manner favourable to the applicant to 18 April 2018. This backdating subsumed the entirety of his time in custody for six other unrelated offences for which he had received sentences of imprisonment ranging from 3 to 6 months.

***Goodbun v R* [2020] NSWCCA 77 (23 April 2020) – New South Wales Court of Criminal Appeal**

'Breach of advo' – 'Guilty plea - history of domestic violence - lack of remorse' – 'Manifestly excessive' – 'Murder' – 'Separation' – 'Whether aggregate sentence imposed was unreasonable or plainly unjust' – 'Whether unnecessary to make a finding of special circumstances'

Charges: Murder x 1; Contravening an apprehended domestic violence order x 1; Using an unregistered firearm x 1; Assault occasioning actual bodily harm x 1.

Case type: Appeal against sentence

Facts: The applicant man pleaded guilty to the murder of his wife (the victim), and to three related offences, namely, contravening an apprehended domestic violence order, using an unregistered firearm, and assault occasioning actually bodily harm. The victim was shot dead by the applicant. They had been married for 40 years and had 2 adult children. The applicant was sentenced to an aggregate sentence of 41 years 6 months imprisonment, with a non-parole period of 31 years and 1 month. He was born in 1956 and, if alive, would be 91 at the time of eligibility for parole.

The sentencing judge described the murder as a "chilling and deeply shocking crime which, without hyperbole, could be described as an execution" ([46]). Her Honour stated that while the applicant did not have a lengthy criminal history for domestic violence, the incident occurred in the context of a history of significant domestic violence ([63]). It was against this background that the sentencing judge found the applicant to be motivated by hatred to kill the victim as she was instrumental in the issue of an ADVO and the bringing of associated criminal charges. She also highlighted the need for specific and general deterrence, "describing domestic violence as a profoundly serious problem in the community, extending not infrequently to the murder of a spouse or partner" ([64]). Her Honour did not make a finding of special circumstances and emphasised that the "principle consideration is to ensure that the minimum period of incarceration reflects the crime and the subjective case".

Issue: The applicant sought leave to appeal against the aggregate sentence on two grounds:

- The sentencing judge erred in determining that it was unnecessary to make a finding of special circumstances because of the length of the sentence that she proposed to impose and the ordinary statutory ratio that applied;
- The sentence was manifestly excessive.

Held:

Appeal Ground 1:

It was submitted that the sentencing judge erred in determining that it was unnecessary to make a finding of special circumstances, having regard to the applicant’s age, health, lack of experience in prison and risk of institutionalisation ([70]). All judges dismissed the first ground of appeal. Bathurst CJ held that the sentencing judge did not err in reaching her conclusion that the non-parole period was the minimum period of incarceration appropriate, as she took into account the applicant’s age, the nature of the case and the applicant’s subjective circumstances ([77]). Fullerton J added that the sentencing judge was justified in

declining to make a finding of special circumstances, as she gave "extensive consideration" to matters relevant to determining the minimum period of incarceration, including, but not limited to, the objective gravity of the totality of the offending, and the lack of evidence of genuine remorse or prospects of rehabilitation ([125]). Similarly, Bellew J found that just because a sentence may have the practical effect of amounting to a sentence of life imprisonment, it does not mean that a sentencing judge has erred. The objective seriousness of an offence is a fundamental principle that should be reflected in a sentence, even where adherence to such a principle may impose a life sentence on an offender of middle to advanced age ([215]).

Appeal Ground 2:

Bathurst CJ dissented on the second ground of appeal. His Honour found that the indicative sentence of 40 years and 6 months imposed after a discount for the guilty plea was extremely high. He noted that the sentence appeared to be inconsistent with legal principle in sentencing for this type of offence ([112]). Further, he found that the aggregate sentence was substantially imposed for the murder offence, and as a consequence, it was manifestly excessive and should be set aside ([114]-[115]). As this was a dissenting judgment, it was not necessary for his Honour to re-sentence the applicant ([116]).

Fullerton and Bellew JJ, on the other hand, dismissed the second ground of appeal. After taking into account the sentencing judge's sentencing remarks and giving due weight to "the applicant's calculated and brazen determination to kill his wife in an act of callous and unbridled revenge", Fullerton J was not satisfied that the aggregate sentence was "unreasonably or plainly unjust" ([132]-[133]). Before concluding that the sentence imposed was not unreasonable or unjust, Bellew J set out the circumstances of the offending which indicated that it was towards the very top of the range:

- The commission of the offences in the context of domestic violence, and in the context of a breach of an ADVO, were circumstances which called for the need for specific and general deterrence, and denunciation ([261]);
- Another important part of the background to the offending was the fact that the applicant made a number of statements prior to the offending in which he expressed an intention to kill the deceased ([262]);
- The applicant's planning of the murder was significant - he travelled a considerable distance to the victim's home, and arrived in the early morning at a time when he knew that she would likely be asleep ([263]-]264]);
- The offending was in the nature of an execution and involved gratuitous cruelty towards the victim ([265]).

- The offending was in breach of the ADVO and the applicant's conditions of bail ([266]).

***Amante v R* [2020] NSWCCA 34 (11 March 2020) – New South Wales Court of Criminal Appeal**

'Arson' – 'Domestic violence offences' – 'Judicial notice' – 'People affected by substance abuse' – 'Photographic evidence' – 'Property damage' – 'Protection orders'

Charges: Destroying or damaging property x 1 (domestic violence offence).

Case type: Application for leave to appeal against sentence

Facts: This is an application for leave to appeal against the sentence imposed by Colefax DCJ in R v Amante [2019] NSWDC 222. The applicant, whilst under the influence of ice, threatened his estranged partner and subsequently set fire to her Department of Housing unit causing significant damage, potential danger and hardship to other residents ([11]). The applicant was sentenced to 3 years and 9 months imprisonment, with a non-parole period of 2 years.

Issue: The applicant sought leave to appeal against his sentence on two grounds. Firstly, he contended that the sentencing judge erred in taking "judicial notice" of the fact that the fire in the roof cavity "posed a serious structural risk to the integrity of the building". Secondly, he alleged error in the way in which the sentencing judge dealt with the applicant's mental health issues, specifically in finding that they were "largely untreated and largely unresolved".

Held: The application for leave to appeal was granted, but the appeal was dismissed.

Beech-Jones J acknowledged the sentencing judge's remarks at [46]-[48]. The applicant had a dysfunctional upbringing, which reduced his moral culpability. Moreover, he was genuinely remorseful and his rehabilitation prospects were found to be reasonable provided that he "receive appropriate treatment". The sentencing judge also found special circumstances and varied the statutory ratio accordingly.

The first ground was a challenge to the factual finding of the sentencing judge. The applicant contended that the sentencing judge erred in taking judicial notice of the fact that the spread of the fire to the roof cavity "posed a serious structural risk to the integrity of the building". The applicant argued that he had found this fact to be an aggravating factor, and as such was required to be satisfied of it beyond reasonable doubt. The applicant warned of the dangers of relying on photographic evidence, and contended that it was "somewhat

remarkable" that the sentencing judge purported to take judicial notice of the structural integrity of the building, whilst also noting the lack of expert evidence in relation to the fire ([52]). N Adams J (Payne JA concurring) found that Ground 1 had not been established. She treated Ground 1 as a challenge to the factual conclusion of the sentencing judge and in submissions counsel for the applicant accepted that the relevant test was whether the conclusion was open to His Honour (R v O'Donoghue (1988) 34 A Crim R 397) [55]. Beech-Jones J agreed the matter should be considered by reference to evidence available to support His Honour's conclusion. Her Honour found that the sentencing judge drew an inference that was open to him based on both the agreed facts that the fire went into the roof void, as well as the photographic evidence which showed that the wooden beams in the roof were burnt ([62]). She was also not satisfied that the sentencing judge found the fact as an aggravating factor, as he had not stated anything to this effect ([64]).

In relation to the second ground, it was submitted that his Honour denied the applicant procedural fairness by finding that considerations of specific deterrence and the need to protect the community were "fully engaged" in the applicant's case because of his "largely untreated and largely unresolved" mental health issues. The applicant submitted that his mental health issues were being treated with medication and that his major depressive disorder was in remission. Ground 2 was also not established. N Adams J (Payne JA and Beech-Jones J concurring) found that it was open to the sentencing judge to find that the applicant's mental health issues were unresolved, given his poor history ([82]-[83]). This case is a "classic example" of how sentencing judges may be required to make "individualised discretionary decisions" based on the available material. The sentencing judge "ameliorated the sentence on the basis that no rational person would react to a break-up by setting fire to their ex partner's house threatening the lives of other people", however, specific deterrence became a relevant consideration as the applicant's mental health and drug issues was found to have led him to commit the offence ([85]).

Consequently, the appeal against sentence was dismissed.

***Ross, Christopher v R* [2019] NSWCCA 314 (20 December 2019) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – 'Children' – 'Coercion' – 'Controlling behaviour' – 'History of abuse' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Specific considerations' – 'Stalking' – 'Threats to kill' – 'Victims as (alleged) perpetrators'

Charges: Stalking or intimidation with intent to cause fear or physical or mental harm x 2; aggravated detain for advantage x 1; common assault x 1; influence witness x 1

Case type: Application for leave to appeal against sentence

Facts: The applicant man was sentenced with respect to 5 offences involving domestic violence against his female de facto partner (complainant), including one offence of seeking to dissuade her from giving truthful evidence. He was sentenced to an aggregate term of 6 years' 6 months' imprisonment, with a non-parole period of 4 years 8 months. The applicant and complainant had known each other since childhood, and their relationship commenced in 2016. At that stage, the complainant had 5 children living with her. The Department of Community Services took the children into care as both parties were using drugs. The relationship soon became dysfunctional with constant arguments and pushing and shoving by each party.

The applicant had intimidated the complainant on several occasions by making threats to kill. One incident involved the use of a syringe to intimidate, and another involved the complainant threatening to take her own life ([5]-[7]). The applicant also detained the complainant without her consent with an intention to obtain an advantage, namely psychological satisfaction, and caused actual bodily harm ([10]]-[11]). On another occasion, the applicant pushed the complainant, causing her to fell particularly frightened ([13]). Whilst the applicant was shopping, the complainant ran to a nearby police station, claiming to have been kept hostage by him and fearful for her life. He was later arrested, charged and refused bail. The police also gave an ADVO for the complainant's protection, prohibiting the applicant from contacting her. While in custody, the applicant contacted the complainant and pressured her to give false evidence by making a statutory declaration which described her allegations as false and misleading ([17]). She did so, and the applicant was released on bail. He continued to commit further offences against the complainant. He was arrested again and charged with contravening the ADVO, assault occasioning actual bodily harm, common assault, intentionally choking a person with recklessness, and escaping police custody ([18]-[19]).

Grounds: The aggregate sentence was manifestly excessive

Held: The application for leave to appeal against the aggregate sentence was granted; the appeal was dismissed. The Appeal Court was unable to conclude that the sentencing judge failed to apply the relevant principles such that there was an error in the sentence imposed ([42]-[45]). The sentence was not manifestly excessive ([56]).

It was submitted inter alia that the sentence did not reflect the factual findings made by the judge as to his

disadvantaged background and the genesis of his drug dependency ([2]).

The sentencing judge emphasised the need for the court to provide full protection to domestic violence victims, because such conduct involves a violation of trust and the use of physical strength to control and subordinate the other party to an intimate relationship ([28]). The sentencing judge found that the offence of influencing a witness involved overtones of domestic violence in that the applicant, although in custody, continued "to exert the power, influence and control that he had established over the complainant, as a result of her dependency upon him" ([34]).

The applicant's subjective circumstances included that: his father was murdered, he grew up in a household which involved alcohol and drug use, and violence, and he began using drugs and alcohol himself at an early age ([40]). The sentencing judge noted that although his deprived upbringing and early onset of drug and alcohol abuse served to ameliorate his level of moral culpability, he nevertheless had a substantial level of moral culpability ([41]). The Appeal Court considered cases like R v Fernando and Bugmy v The Queen, which discussed the role of alcohol abuse and alcohol-fuelled violence in Aboriginal communities. Wood J in Fernando recognised that both of these problems are endemic in some Aboriginal communities, and considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised, it should be taken into account as a mitigating factor. In Munda, the Court addressed the tension between accepting a reduction in moral culpability due to the offender's disadvantaged background, and the need to provide the victim of violence with "such protection and vindication as the criminal law can provide."

***Elwood v R* [2019] NSWCCA 315 (20 December 2019) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'History of jealous, obsessive and stalking behaviour' – 'History of abuse' – 'Manifestly excessive' – 'Past domestic violence' – 'People with intellectual disability'

Offences: Sexual intercourse without consent; Contravene Apprehended Domestic Violence Order ('ADVO')

Proceedings: Application for leave to appeal against sentence

Grounds:

1. The sentencing judge erred in the assessment of the objective seriousness of the sexual offence.
2. The sentencing judge erred in his approach to the applicant's intellectual disability.

3. The sentencing judge erred by failing to give effect to his findings of special circumstances in relation to the overall effective sentence.

4. The sentence is manifestly excessive.

Facts: The male applicant and female victim had been in a relationship for six years and lived with the applicant's parents (as they were only 18 and 20 years old respectively). At the time of the offending, the applicant was subject to an ADVO not to assault, molest, harass, threaten or otherwise interfere with his partner. The order did not prohibit contact or cohabitation with her. The applicant and victim were having consensual intercourse when the applicant started touching the victim's bottom without her consent. He then inserted his finger into her anus with force, causing the victim to scream so loudly that the applicant's mother called out to them. The applicant responded by pushing the victim away from him with both fists. The victim immediately complained to the applicant's mother and asked her to notify the police.

The applicant plead guilty and was sentenced to four years and six months' imprisonment with a non-parole period of three years, after the sentencing judge took into account an offence of common assault on a Form 1.

Judgment: The court granted leave and allowed the appeal, upholding Ground 3, and resentenced the applicant to three years and two months' imprisonment with a non-parole period of one year and eight months. The court found that the sentencing judge was satisfied that a number of circumstances, both personal to the applicant (such as his compromised level of cognitive functioning) and features of the sentencing process itself, supported a finding of special circumstances [50]. Having made such a finding, the sentencing judge was required to determine the extent or the degree to which the statutory ratio should be reduced, both in the appointment of the aggregate sentence and after accumulation in the ultimate sentencing order [54]. Where a finding of special circumstances is not based solely on the fact of accumulation (as occurred in this case), the sentencing judge is required to carry that finding into effect on accumulation or give an explanation for why it was not done [61]. The court accepted the applicant's contention that the judge's discretion miscarried because the sentencing judge did not indicate that he intended that the effective non-parole period would not reflect the finding of special circumstances that had been given effect to in the appointment of the aggregate sentence [55].

While the court endorsed the sentencing judge's finding that there was an attenuation of the applicant's moral culpability for the sexual offending by reason of his compromised level of intellectual functioning, the court

also found that the applicant was, for that reason, an inappropriate vehicle for general deterrence [67]. Furthermore, the court accepted that the applicant had been convicted of multiple charges of assault and offences of stalk and intimidate in a domestic context, both as a juvenile and as an adult, none of which attracted a sentence of imprisonment [28].

The court rejected Ground 1, finding that the sentencing judge made the correct assessment of the objective seriousness of the offence (in the low and middle range) [40], [41]. The court also rejected Ground 2, finding that no sentencing error was committed because the sentencing judge failed to make mention of the impact of the applicant's intellectual or cognitive functioning on the question of either general or specific deterrence [48]. Based on its finding in regards to Ground 3, the court found it unnecessary to consider Ground 4.

***Wood v R* [2019] NSWCCA 94 (19 December 2019) – New South Wales Court of Criminal Appeal**

'Absence of planning' – 'Apprehended violence order' – 'Gratuitous cruelty' – 'Intoxication' – 'Manifestly excessive' – 'Misuse of alcohol' – 'Murder' – 'Past domestic violence' – 'Strangulation' – 'Weapon'

Charges: Murder x 1; Contravention of an Apprehended Violence Order x 1.

Proceedings: Appeal against sentence.

Facts: The applicant sought leave on the following grounds:

- The sentencing judge erred in having regard to the applicant's record of previous convictions as a matter that aggravated the offence;
- The judge erred in taking into account the fact that the applicant was on conditional liberty as a factor that aggravated the offence;
- The judge erred in failing to have regard to the lack of planning in assessing the objective seriousness of the offence;
- The judge erred in failing to take into account the applicant's disadvantaged background as a factor relevant to his moral culpability;
- The sentencing judge erred in finding that the applicant's intoxication aggravated the applicant's offending;
- The judge erred in find that the Crown had proven beyond reasonable doubt that the applicant's offending involved gratuitous cruelty; and

- The sentence was manifestly excessive. [5]

The applicant and the deceased had been in an 'on again/off again relationship' characterised by domestic violence for three years [9]. He pleaded guilty and was sentenced to a non-parole period of 19 years 1 month with a balance of term of 6 years and 5 months. The applicant violently killed the deceased, stabbing her with a knife, when both were intoxicated, the applicant having come home an hour earlier than the deceased. At the time of the murder he was subject to a s 20(1)(b) Crimes Act 1914 (Cth) recognisance for 18 months, commencing 17 May 2017 and expiring 16 November 2018 and a s 9 Crimes (Sentencing Procedure) Act bond for 18 months, commencing 17 May 2017 and expiring 16 November 2018.

Decision and reasoning: The application for leave to appeal was granted in respect of grounds 3 and 6, the appeal allowed substituting a sentence of 24 years' imprisonment with a non-parole period of 18 years.

Regarding the third ground, the court found that the absence of planning is a 'consideration which goes to the objective seriousness of the offending and was wrongly taken into account by the sentencing judge when considering the applicant's subjective case' [108]. This ground of appeal was made out.

Hoeben CJ held that the sixth ground was made out as on the evidence available to the sentencing judge it was not possible to conclude that the injuries were inflicted at a time other than of the killing.

***Moore v R* [2019] NSWCCA 264 (4 November 2019) – New South Wales Court of Criminal Appeal**

'Manifestly excessive' – 'Physical harm and violence -threats to kill' – 'Separation' – 'Suicide threat' – 'Weapon'

Charges: Grievous bodily harm with intent x 1; Detain with intent to obtain an advantage and immediately beforehand occasion actual bodily harm x 1; use offensive weapon with intent to commit an indictable offence x 1.

Proceedings: Appeal against sentence.

Facts: The applicant sought leave to appeal on grounds that the sentencing judge erred in his assessment of the objective seriousness of the counts, failed to accurately assess the applicant's prospects of rehabilitation and likelihood of reoffending and the sentence imposed was manifestly excessive (12 years imprisonment, non-parole period 9 years). The accused 'ambushed his ex-partner outside her house, beating her around the head and body with an improvised metal pole. He then forced the victim into her own car, which he

proceeded to drive around to [surrounding suburbs], all the while making threats to kill himself, or to kill them both'. When the victim tried to escape the applicant pulled her back into the car by her hair. The victim was trapped in the car for four hours before the applicant crashed into a telephone pole.

Grounds of appeal:

- The sentencing judge erred in his assessment of the objective seriousness of the counts;
- The judge failed to accurately assess the applicant's prospects of rehabilitation and likelihood of reoffending;
- The sentence imposed was manifestly excessive.

Held:

Ground 1: The sentencing judge did not err in his assessment of the objective seriousness of Count 1 because the seriousness of the offence was increased by factors including planning, duration, brutality, infliction of pain, lack of provocation, and that it occurred in a context of a domestic relationship. In relation to Count 2, it was found that the magistrate did not err in his assessment as the offence occurred spontaneously.

Ground 2: The court found that it was open on the evidence for the judge to approach the issues relating to the establishment of mitigating factors in the way he did.

Ground 3: 'Given the gravity of the applicant's offending and the findings of the judge as to objective seriousness, with full recognition of the mitigating factors that stood in the applicant's favour', Hulme J was of the view that the sentence imposed was not manifestly excessive

***Majzoub v Regina* [2019] NSWCCA 94 (8 May 2019) – New South Wales Court of Criminal Appeal**

'Accumulation of sentence' – 'Legal representation and self-represented litigants' – 'Obstruct justice' – 'Physical violence and harm' – 'Sentencing'

Charges: The applicant was arraigned on an indictment containing 17 counts. Counts 1 to 11 charged various offences of violence and of detaining for advantage (including common assault); while counts 12 to 15 alleged that the applicant attempted to influence the complainant not to give evidence against him.

Case type: Application for leave to appeal against sentence.

Facts: Norton DCJ sentenced the accused to an aggregate term of imprisonment for 12 years with a non-parole period of 9 years. That sentence was partly accumulated upon an aggregate sentence for other offences imposed on him by Bennett DCJ. The applicant pleaded guilty to offences, such as common assault and attempting to influence the complainant not to give evidence made directly by him and through one of his sisters. He was found guilty of possession of an offensive weapon with intent, reckless wounding, two counts of assault occasioning actual bodily harm, and two counts of detaining for advantage.

The applicant sought leave to appeal against the sentence on the basis that it was manifestly excessive. He sought a lesser non-parole period, and argued that there should be greater measure of concurrency in the indicative sentences ([14]). Although the application was outside the limitation period, there was no objection by the Crown that an extension of time should be granted ([6]).

Issue: Whether, in any event, the aggregate sentence is manifestly excessive.

Held: The Court granted leave to appeal, but would dismiss the appeal.

Personal circumstances:

The applicant was born in Lebanon, his father used to assault his mother under the influence of alcohol, he left school in year 8 and had very little employment since. He began to use drugs at the age of 14. At the time of his arrest, he was using ice on a daily basis ([11]). Notably, the applicant had an extensive criminal history, including drug offences, stalking and intimidating and contravening apprehended violence orders. The present offences were committed while he was on some kind of conditional liberty ([10]).

Non-parole period:

The Court noted that Norton DCJ needed to find special circumstances before departing from the 9 year non-parole period that was the statutory norm in accordance with section 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It was open her Honour to decline to make a finding of special circumstances ([16]-[18]).

Accumulation/concurrence:

The Crown noted that the total of the indicative sentences for the present offences was 29 years and 10 months, so that the aggregate sentence of 12 years would demonstrate a substantial measure of concurrence. The Court held that Norton DCJ's determination in that respect, and her decision as to the

measure of the accumulation of the aggregate sentence upon the sentence imposed by Bennett DCJ, demonstrated an exercise of discretion consistent with established principle ([23]).

Manifestly excessive:

A sentence will only be manifestly excessive if it is 'unreasonable or plainly unjust' ([25]). The Court stated that the offences constituted a pattern of domestic violence of considerable gravity, and noted the seriousness of domestic violence and the need for denunciatory and deterrent sentences. Their Honours found that Norton DCJ fairly described the applicant's subjective case as 'far from compelling', and held that the aggregate sentence, including the non-parole period, were well within the legitimate bounds of the exercise of her discretion. Therefore, the sentence was not shown to be unreasonable or plainly unjust ([28]-[29]).

***SC v R* [2019] NSWCCA 25 (15 February 2019) – New South Wales Court of Criminal Appeal**

'Breach of trust' – 'Children' – 'People with children' – 'Physical violence and harm' – 'Sexual and reproductive abuse'

Charges: Nine counts, including assault occasioning actual bodily harm, sexual intercourse without consent and armed with intent to intimidate.

Case type: Application for leave to appeal.

Facts: The applicant and the complainant were married with three children. The applicant was tried by a jury on nine counts, which included various sex offences and assaults. The complainant alleged that the applicant had punched her in the face and mouth, forcibly held her down and raped her, forced anal intercourse on two instances, pushed her head against a laundry wall, threw her out of a door, and grabbed a knife and threatened physical harm. The jury found the applicant guilty on Counts 6, 7 and 8 and not guilty on Counts 1-5 and 9. The sentencing judge imposed an aggregate sentence of 10 years with a non-parole period of 7 years and 6 months ([92]).

Issues: The appellant sought leave to appeal against the conviction on the grounds that (1) there was a miscarriage of justice as the trial judge failed to discharge the jury following the admission of unfairly prejudicial evidence (ground 1); and (2) the verdict in respect of Count 6 was inconsistent with the not guilty verdicts on Counts 1-5 and 9, and could not otherwise be supported by the evidence at trial (ground 2). The

appellant further sought leave to appeal against the sentence on the grounds that (1) there was an error by the sentencing judge in the assessment of the gravity of Count 6 (ground 3); and (2) the indicative sentences for Counts 6, 7 and 8 were excessive and that the level of accumulation was too great (ground 4).

Decision and reasoning: The Court granted leave to appeal against the conviction and sentence. Ground 1 related to an application to discharge the jury on the basis that the jury may have heard the word 'pistol'. The trial judge refused to discharge the jury and directed them at [78]. The Court held that the trial judge was entitled to assume that the jury understood and complied with his direction. Their Honours were not satisfied that there was any miscarriage of justice ([85]). As to ground 2, the Court held that there was no inconsistency between the jury's verdicts of not guilty and guilty ([69]). With respect to ground 3, their Honours held that the sentencing judge did not err in finding the offending in Count 6 to be 'above the mid-range', and that the indicative sentence for Count 6 was not excessive ([109]). In order to establish ground 4, the applicant was required to show that the sentence imposed was unreasonable or plainly unjust ([111]). The Court did not regard any of the indicative sentences as excessive, having regard to the sentencing judge's findings and assessment of their seriousness. All three counts involved a grave breach of trust and were aggravated by having occurred in the complainant's home. Count 7 was further aggravated by having been committed in the presence of their eldest child ([112]).

***Viavattene v R* [2018] NSWCCA 197 (5 September 2018) – New South Wales Court of Criminal Appeal**

'Bail' – 'Evidence' – 'Self-represented litigants' – 'Unacceptable risk and best interests'

Charges: Stalking or intimidation with intent to cause fear of physical or mental harm x 9; Knowingly contravene an apprehended violence order x 1; Using a carriage service in a manner that was menacing, harassing or offensive x 4.

Appeal type: An application pursuant to s 49 of the *Bail Act 2013 NSW* for release on bail pending the hearing of an appeal to the District Court against convictions recorded in, and sentences imposed by, the Local Court.

Facts: The applicant applied for release on bail pending the hearing of an appeal to the District Court against convictions recorded in, and sentences imposed by, the Local Court. The applicant was charged with nine offences of stalking or intimidation with intent to cause fear of physical or mental harm, one charge of knowingly contravening an apprehended violence order and four charges of using a carriage service in a manner that was menacing, harassing or offensive.

Issues: Whether bail should be ordered.

Decision and reasoning: Bail was refused as the Court was not satisfied that cause was established by the applicant. At the time of sentencing, the applicant was 49 years old. He also had health difficulties and family responsibilities. However, the Court noted that the evidence led by the prosecution, his prior criminal record and the Presiding Magistrate's comments suggested that he was a substantial menace to the community. Evidence of the difficulties that the applicant was experiencing in custody was inadequate ([27]). His Honour nevertheless accepted that the applicant's family was experiencing hardship as a result of his absence, and that he was experiencing some problems in custody. To the extent that the matters relevant to unacceptable risks can inform whether a show cause was established, the Court noted that there was not any proper bail proposal put forward to the Court which would alleviate the risks to the various persons who experienced the applicant's behaviour in previous years.

***Suksa-Ngacharoen v Regina* [2018] NSWCCA 142 (10 August 2018) – New South Wales Court of Criminal Appeal**

'Appeal against sentence' – 'Breach of protection order' – 'Concurrent sentences' – 'Physical violence and harm' – 'Sentencing'

Charges: Grievous bodily harm by the explosion of a substance x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and the victim were in a relationship. In 2013, the applicant was charged with common assault and an apprehended domestic violence order ('ADVO') was imposed upon him. In 2014, the applicant doused the victim with methylated spirits and set her alight.

District Judge Syme imposed a sentence of 18 years' imprisonment with a non-parole period of 13 years and 3 months. The applicant was also sentenced to: 18 months' imprisonment for the charge of contravening an apprehended domestic violence order; seven months' imprisonment for breach of bond in relation to the charge of contravening an apprehended domestic violence order; and three months' imprisonment for breach of bond in relation to the charge of common assault.

Issues: Appeal against sentence on 7 grounds.

Decision and Reasoning: The appeal was allowed.

Leeming JA and Bellew J agreed with Wilson J's reasoning with respect to grounds 1-6. However, their Honours held that ground 7 (the sentence was manifestly excessive) was established. The applicant had participated in courses, had expressed remorse, had not used drugs in custody, had no other criminal records, and experienced language and cultural difficulties in custody owing to his Thai heritage. Whilst these factors did not detract from the objective seriousness of the offending, they suggested that there was an unarticulated error of principle on the part of the sentencing judge. Their Honours quashed the sentence and imposed a total sentence of 17 years imprisonment, with a non-parole period of 12 years.

Wilson J held that the appeal should be dismissed. Her Honour dismissed ground 4 (failure to properly assess the applicant's evidence of remorse) on the basis that the applicant had not made reparation and blamed his drug use for the commission of the crime. Accordingly, Wilson J considered that the applicant's expression of remorse was no more than 'the often ritual incantation', easily uttered, whether sincerely or otherwise ([116]).

Her Honour dismissed ground 6 (error by partly accumulating the sentence for the substantive offence on the related offence of contravene ADVO) on the basis that offences committed in breach of an ADVO and the offence of breaching an ADVO, involved separate and distinct criminality which warranted the imposition of distinct sentences for each offence ([131]). Wilson J said at [132]:

> *'The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship… Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in Pearce v The Queen (1989) 194 CLR 610.'*

Her Honour disagreed with the majority with respect to appeal ground 7. The applicant's crime was extremely serious, and the consequences for the victim were devastating and long-term. The gravity of the crime warranted a stern sentence representing condign punishment. Accordingly, the sentence imposed was not manifestly excessive ([145]).

Director of Public Prosecutions (NSW) v Al-Zuhairi **[2018] NSWCCA 151 (27 July 2018) – New South Wales Court of Criminal Appeal**

'Evidence' – 'Fair hearing and safety' – 'Physical violence and harm' – 'Safety and protection of victims and witnesses' – 'Victim experiences of court processes'

Charges: Assault occasioning actual bodily harm x 1

Appeal type: Appeal on the case stated; Appeal against acquittal

Facts: The respondent was convicted of assault occasioning actual bodily harm for assaulting the brother of his ex-partner (the complainant). The complainant's evidence-in-chief was a recorded statement pursuant to s 289F(1) of the *Criminal Procedure Act* (NSW). The recording was not tendered in evidence. The transcript did not set out the content of the recorded statement.

On appeal, Colefax SC DCJ held that the recorded statement was required to be tendered as an exhibit. He set aside the respondent's conviction.

Issues: Whether, in a proceeding for a 'domestic violence offence', a recorded statement by a complainant must be formally tendered in the Local Court for the contents of the recorded statement to be put into evidence.

Decision and Reasoning: The Court of Appeal (Payne JA, Hulme and Fagan JJ) quashed the orders made by the District Court, and remitted the matter to the District Court for re-hearing. The Court held that the playing of the recording in the Local Court was sufficient to render it evidence for the purpose of an appeal to the District Court.

The significance of the decision is that recorded statements given by complainants in domestic violence offences can be accepted as evidence as if the contents were given by the complainant in person, notwithstanding that the contents were not recorded on the Local Court transcript or admitted formally as an exhibit.

R v Patsan **[2018] NSWCCA 129 (29 June 2018) – New South Wales Court of Criminal Appeal**

'Dynamics of domestic violence' – 'Physical violence and harm'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced

imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Recklessly causing grievous bodily harm x 1.

Case type Application for leave to appeal against sentence.

Facts: The applicant sought an extension of time for leave to appeal against a sentence of 2 years and 3 months imprisonment, with a non-parole period of 1 year and 4 months, for recklessly causing grievous bodily harm to which he pleaded guilty. A further charge of assault occasioning actual bodily harm was taken into account in the sentence.

Issue: The applicant sought to appeal against the sentence on the ground that it was manifestly excessive.

Held: The Court was not persuaded that the sentence imposed was unreasonable or plainly unjust, and consequently, refused leave to appeal against the sentence ([47]-[48]). Importantly, the Court acknowledged the special dynamics of domestic violence. Their Honours rejected the applicant's submission that the sentencing judge used him as a scapegoat for the prevalence of domestic violence offences. 'While every sentence imposed must have regard to all the circumstances particular to the specific case, individualised justice does not require sentencing judges to ignore patterns of behaviour which are repeated all too frequently before them'. In most cases, the conduct will involve an attack by a male who is in a position to inflict considerable harm to his victim because of his superior physical strength, and where there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths ([39]-[40]).

***Glynn Kaderavek v R* [2018] NSWCCA 92 (11 May 2018) – New South Wales Court of Criminal Appeal**

'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Sentencing' – 'Strangulation' – 'Systems abuse'

Charges: Assault x 1; Recklessly causing grievous bodily harm x 1; Perverting the course of justice x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and complainant lived together and had two children. The assault charge occurred when the applicant choked the victim and chased her around the backyard with a wooden stick. The grievous bodily harm charge occurred when the applicant punched the victim, breaking her jaw. The offender then smashed

walls with a tow bar and broke belongings in the house. The offender gave a false statement to police alleging that there was a home invasion ([8]).

The chronology of sentencing was ‘unusual’ ([7]). The present offences were committed in August 2013, but the complainant did not report them to the police until July 2014 because of emotional abuse from the applicant ([8]). In March 2014, the applicant committed further offences against the complainant and was sentenced for those offences. At the time of sentencing for the present offences, the applicant was still in custody for the March 2014 offences ([7]). The judge made a finding of special circumstances to recognise the applicant’s mental health issues. The sentencing judge stated that he would reduce the non-parole period so that the offender could be appropriately supervised when released into the community ([27]).

The applicant was sentenced to an aggregate sentence of 7 years’ imprisonment with a non-parole period of 5 years. The sentence was ordered to commence on 7 July 2015 ([5]), the date of expiry of the total sentence (non-parole period and the balance of the term) for the March 2014 offences ([7]).

Issues: The applicant argued that the sentencing judge erred in wholly accumulating the sentence on earlier sentences because the judge failed to take into account:

- a period of pre-sentence custody;
- the effect of the earlier sentences on the total ratio between the non-parole period and total sentence; and
- the principle of totality ([6]).

Decision and Reasoning: The first ground was upheld because Hamill J (Beazley P and Schmidt J agreeing) found that the sentence should have commenced on 7 April 2015, the expiry date of the non-parole period for the March 2014 offences. Hamill J dismissed the second and third grounds of appeal because there was no error in wholly accumulating the sentences or the judge’s application of the principle of totality ([23]-[24]).

Hamill J held that the total impact of the sentence negated the judge’s finding of special circumstances. This was because the when the entire period of imprisonment was taken into account, there was no decrease in the non-parole period ([28]).

Hamill J considered that he needed to exercise the sentencing discretion afresh, in accordance with *Kentwell v The Queen* [2014] HCA 37 ([30]). Hamill J imposed the same head sentence. His Honour commenced the sentence on 7 April 2015 and reduced the non-parole period to 4 years and 6 months to reflect the finding of

special circumstances ([31]).

***Ussher-Clarke v The Queen* [2018] NSWCCA 61 (13 April 2018) – New South Wales Court of Criminal Appeal**

'Factors affecting risk' – 'Impact on consent and disclosure' – 'Pregnancy' – 'Systems abuse' – 'Women'

Charges: Recklessly cause grievous bodily harm x 1; Intending to procure a witness to give false evidence x 1.

Appeal type: Application for leave to appeal against conviction.

Facts: The appellant kicked his partner, the complainant, in the abdomen. The complainant was 12 weeks pregnant, and she miscarried the following morning ([10]). There were conflicting opinions given by experts as to the likelihood that the kick could have caused the miscarriage (see [17]-[44]).

The complainant gave statements to the police immediately after the incident indicating that the appellant had kicked her. In the weeks after the incident, the appellant made a number of phone calls to the complainant to encourage her to lie to the police. In a subsequent statement and in her evidence at trial, the complainant claimed that the appellant had not assaulted her ([8]).

The appellant pleaded guilty to the charge in relation to influencing a witness. The applicant was convicted of the recklessly cause grievous bodily harm charge and was sentenced to a head sentence of 5 years and 6 months with a non-parole period of 4 years.

Issues: Whether the conviction was unreasonable and unable to be supported by the evidence.

Decision and Reasoning: Leave to appeal was refused. The Court discussed the principles governing granting leave to appeal against conviction ([59]-[60]). The Court noted that the Crown had to prove that the kick was a significant cause of the miscarriage, not that that it was the sole cause ([60]-[61]). The Court concluded that it was open to the jury to accept the experts' evidence, while conflicting, as supporting the conclusion that the kick caused the miscarriage ([89]).

***Diaz v The Queen* [2018] NSWCCA 33 (14 March 2018) – New South Wales Court of Criminal Appeal**

'Aggravated kidnapping' – 'Damaging property' – 'General deterrence' – 'Physical violence and harm' – 'Sentencing'

– ‘Sexual and reproductive abuse’ – ‘Specific deterrence’ – ‘Women’

Charges: Aggravated kidnapping x 1; Sexual intercourse without consent x 1; Destroying or damaging property x 4; Assault occasioning actual bodily harm x 1; Common assault x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and victim had been in a relationship for approximately 5 months. The assault and destroying property charges were in relation to arguments where the applicant pulled out some of the victim’s hair, and smashed her phone, a vase and a television set ([13]-[15]). The aggravated kidnapping and sexual intercourse without consent charges occurred when the applicant pinned the victim onto a bed ([17]). He digitally penetrated her, became angry about the contents of her Facebook and text messages ([18]) and punched her approximately 20 to 30 times ([19]-[20]). This continued for about 5 hours ([21]). The applicant had a ‘disturbing’ criminal history including two similar domestic violence offences where the applicant detained the victim in her apartment ([28]-[31]). The applicant was on parole for those sentences at the time of this offence ([33]).

The applicant was sentenced to a head sentence of 7 years and 9 months imprisonment with a non-parole period of 4 years and 6 months ([10]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Acting Justice Hidden at [47] endorsed the trial judge’s characterisation of the manner in which the applicant detained the victim “by instilling fear and control over her… by his conduct, demeanour, words and assault” (at [39]).

It was significant that the offences were committed while the applicant was on parole. The domestic violence context of these offences was also important, with Hidden AJ quoting from Johnson J’s judgement in *R v Hamid* [2006] NSWCCA 302 at [86]:

> In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important.

Justice Garling added: '[in] *R v Edigarov* [2001] NSWCCA 436, Wood CJ at CL (with whom Studdert and Bell JJ agreed) said at [41] of violent attacks in domestic settings this:

> Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically or otherwise to enforce their silence and their acceptance of such conduct. In truth, such conduct is brutal, cowardly and inexcusable, and the courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.

***Armstrong v R* [2017] NSWCCA 323 (15 December 2017) – New South Wales Court of Criminal Appeal**

'Conviction' – 'Exposing children to violence' – 'Humiliation' – 'Sentencing' – 'Sexual abuse' – 'Tendency evidence' – 'Women'

Charges: Assault x 1; Sexual assault x 2; Aggravated sexual assault x 2.

Appeal type: Appeal against conviction and sentence in relation to the two counts of aggravated sexual assault.

Facts: The appellant and complainant were in a relationship. In the presence of the complainant's son, the appellant punched and bit the complainant, held her down while she was screaming and pushed his fingers into her vagina and anus ([15]).

The prosecution sought to adduce tendency evidence ([8]). CCTV footage showed the appellant dragging the complainant by her hair ([13]). The Crown relied upon the CCTV evidence to argue that the appellant had a tendency to be violent towards the complainant ([8]). The tendency evidence was admitted, and the appellant was found guilty of the two counts of aggravated sexual assault and was sentenced to a head sentence of 8 years and 9 months' imprisonment with a non-parole period of 5 years and 9 months.

Issues: Whether the tendency evidence) should have been admitted; and whether the sentencing judge erred in determining the objective seriousness of the offences by not taking into account the fact that they were not committed for sexual gratification.

Decision and Reasoning: The appeal against conviction was dismissed and leave to appeal against sentence was refused. In relation to the appeal against conviction, the Court (Meagher JA, Rothman and Button JJ) stated that tendency evidence need not directly establish the elements of an offence charged, but should

make one or more of the facts in issue significantly more likely ([20]). The Court at [19] quoted the majority of the High Court in *Hughes v The Queen* [2017] HCA 20 (14 June 2017) at [40]:

> The test posed by s 97(1)(b) [of the Evidence Act 1995 (NSW)] is as stated in Ford [(2009) 201 A Crim R 451 at [125]]: 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged'. The only qualification to this is that it is not necessary that the disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. [emphasis in original]

Since the appellant's case was that he was acting in self-defence, the Court held that the trial judge did not err in admitting the CCTV footage. The footage was sufficiently probative of the appellant's propensity to act violently towards the complainant ([21]).

In relation to the appeal against sentence, the Court held that the trial judge did not err, Meagher JA stated that: 'there is nothing to commend the proposition that engaging in sexual intercourse without consent to gratify oneself is in any sense more objectionable than doing so to humiliate and physically dominate another' ([35]). Thus, the trial judge did not err in measuring the objective seriousness of the offence.

***R v Evans* [2017] NSWCCA 281 (21 November 2017) – New South Wales Court of Criminal Appeal**

'Aggravating circumstances: breach of bail and protection order' – 'Assault' – 'Fair hearing' – 'People with children' – 'Power and control' – 'Sexual abuse' – 'Strangulation' – 'Systems abuse' – 'Text messages' – 'Women'

Charges: Indecent assault x 1; Common assault x 2; intentionally destroy property x 1; Contravene apprehended domestic violence order x 1; Do act with intent to influence witness x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and complainant had been in a relationship and had three children ([10]). The common assault charges occurred when the applicant grabbed the complainant's throat and forced her against the wall, onto the bed and onto the ground ([11]-[14], [22]-[24]). The indecent assault charge occurred when the applicant forced her onto the bed and placed his fingers in her vagina ([15]-[18]). The 'do act with intent to influence witness' charge occurred when the applicant asked the complainant over text message to drop the charges on at least 16 occasions ([33]). For example, one of the text messages said, 'you will be left with the

kids full time with no break so I couldn't handily [sic] going away so that's why I want you to drop the charges' ([33]).

After a plea of guilty, the applicant received a head sentence of 5 years and 6 months' imprisonment with a non-parole period of 3 years and 6 months ([3]). For the 'do act with intent to influence witness' charge, the applicant was sentenced to 3 years and 2 months' imprisonment ([4]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. Adamson J, with whom Hoeben CJ at CL and Davies J agreed, held that the sentence was manifestly excessive.

In relation to the 'do act with intent to influence witness' charge, Adamson J at [38] quoted the sentencing judge:

> [the charge] reveals a course of conduct that I regard as being particularly serious. It was repetitive and was clearly designed to emotionally manipulate and blackmail the complainant to discontinue the charges against him. It was also conduct that was in breach of his bail conditions as well as another court order, namely an interim ADVO. These are aggravating features.

Adamson J similarly commented at [46] on the importance of the charge (s 323(a) of the *Crimes Act 1900* (NSW)) in the context of domestic violence offences:

> It is within the common experience of courts that many charges of domestic violence cannot be prosecuted because the defendant manages to persuade the complainant, including by threatening violence, not to give evidence against him. Conduct of this nature against complainants is inimical to the interests of justice and the administration of justice. The perpetrators of domestic violence may, by committing offences under s 323(a) of the *Crimes Act*, effectively immunise themselves from prosecution.

However, his Honour considered that the text messages were not as serious compared to other possible offences under s 323(a) of the *Crimes Act*, such as bribing a witness or threatening violence (see [48]-[51]). Therefore, the sentence of 3 years and 2 months was manifestly excessive, and led to the head sentence being manifestly excessive ([51]).

The applicant was re-sentenced to an aggregate sentence of 3 years and 6 months with a non-parole period

of 2 years ([61]). On the 'do act with intent to influence witness' charge, the applicant was sentenced to 1 year imprisonment (after applying the 20% reduction for his plea of guilty) ([59]).

***DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 (13 September 2017) – New South Wales Court of Criminal Appeal**

'Aggregate sentence' – 'Community interest' – 'General deterrence' – 'People living in regional, rural and remote communities' – 'Suspending an aggregate sentence'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Reckless wounding x 1; kidnapping x 1; assault occasioning actual bodily harm x 1; reckless grievous bodily harm x 1.

Case type Appeal against sentence.

Facts: The respondent was sentenced to 150 hours of community service for reckless wounding, and an aggregate sentence of 21 months imprisonment, which was suspended upon the offender entering into an 18 month good behaviour bond for assault occasioning actual bodily harm and recklessly causing grievous bodily harm. The assaults were committed against the respondent's partner, with whom he had 3 children, and her father. The respondent, his partner and their children lived in a small town with a largely Aboriginal population.

The respondent struck his partner, causing her to fall to the ground (Count 1). Later that evening, he drove her around the neighbourhood doing burnouts in his vehicle (Count 2). The respondent also hit her in the face while she was still in the car, pulled her from the car and hit her again, knocking her to the ground (Count 3). He also punched his partner's father a few times (Count 4).

Issue: The issue for the Court was whether to allow the appeal against the sentences.

Held: The Court held that the sentences imposed did not adequately reflect the community interest in general deterrence ([85]). Their Honours allowed the appeal against the sentences, and resentenced the respondent to an aggregate sentence comprising a non-parole period of 15 months, with a balance of term of 15 months, giving a sentence of 2 years and 6 months.

General deterrence is a matter of some importance in cases of domestic violence ([82]-[85]). Citing *The Queen v Kilic* [2016] HCA 48, the Court noted that '…current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations'. This statement has been understood by the Court as reflecting the current response of the criminal law in relation to domestic violence as requiring 'rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community' ([83]-[84], see also *Cherry v R* [2017] NSWCCA 150 at [78]).

Further, it did not appear on the evidence that the respondent expressed any remorse in relation to his attack on his de facto partner. In the absence of any finding of remorse or significant insight into the behaviour which led to the offending, specific deterrence should have been a key sentencing consideration ([82]). The violence to his partner occurred in a remote community which was not close to any police presence. Importantly, Count 3 took place in the presence of his partner's father, who tried to stop the attack. The Court held that her father did not escalate the violence or take the law into his own hands. He simply warned that he was calling the police. This act ought to have caused the respondent to come to his senses and cease the violent behaviour, but instead he started to attack the victim's father, causing grievous bodily harm. Therefore, in light of the statutory purposes of sentencing and the role of criminal law in redressing violence of this nature, the Court held that offences of such gravity cannot be dealt with as leniently as was done in this case ([107]-[108]).

***Cherry v R* [2017] NSWCCA 150 (28 June 2017) – New South Wales Court of Criminal Appeal**

'Contravention of a domestic violence order' – 'Escalation of violence' – 'People affected by substance misuse' – 'Strangulation'

Charges: Assault occasioning actual bodily harm x 3; Assault x 4; Breaking and entering x 1; Contravening domestic violence order x 4.

Appeal type: Application for leave to appeal against sentence.

Facts: The applicant and complainant had been in a relationship since 2013 ([12]). The applicant committed a series of assaults, including striking the complainant with his hands ([16]) and car keys ([13]), touching her with a hot pipe used to smoke ice ([27]), and choking her, once until she was nearly unconscious ([14], [20], [25]). The applicant also entered the home of the complainant's friend, assaulted her and stole her mobile

phone ([34]). The applicant pleaded guilty, and was sentenced to 6 years' imprisonment with a non-parole period of 4 years ([6]).

Issues: The applicant appealed on three grounds: first, that the judge erred in finding that the offending was in the mid-range of objective seriousness; second, that the sentence accorded insufficient weight to the prospects of rehabilitation; and third, that the sentence was manifestly excessive ([9]).

Decision and Reasoning: The appeal was dismissed.

Justice Johnson briefly dismissed the first and second grounds of appeal ([60, [68]). On the third ground, His Honour discussed the importance of general and specific deterrence and denunciation in domestic violence cases (see [74]-[80]).

His Honour observed: "It is correct to characterise the Applicant's course of conduct towards NR as one involving escalating violence. His act of choking NR in Count 4 had the potential for very grave consequences. Although not applicable to the Applicant in this case, it is noteworthy that in the second reading speech in support of the Crimes Amendment (Strangulation) Act 2014, which amended s.37 Crimes Act 1900, the Attorney General, Mr Hazzard, observed that strangulation "is prevalent in domestic violence incidents" (Hansard, Legislative Assembly, 7 May 2014)" [75].

He further noted: "In the context of domestic violence offences, the High Court has observed that it is a longstanding obligation of the State to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending and to afford such protection as can be afforded by the State to the vulnerable against repetition of violence: Munda v State of Western Australia (2013) 249 CLR 600; [2013] HCA 38 at 620 [54]." [79]

The applicant's regular use of the drug Ice was a relevant factor but not a of itself a mitigating circumstance. [81]

This case concerned repeated offences of escalating violence, in breach of a domestic violence order ([80]). Having regard to these considerations, the sentence was not manifestly excessive ([83]).

***Xue v R* [2017] NSWCCA 137 (21 June 2017) – New South Wales Court of Criminal Appeal**

'Cultural considerations' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Starting point'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Wounding with intent to cause grievous bodily harm x 1.

Case type Appeal against sentence.

Facts: The applicant pleaded guilty to one count of wound with intent to cause grievous bodily harm, and was sentenced to 6 years imprisonment with a non-parole period of 4 years. The applicant received a discount of 25% for his guilty plea.

The applicant and victim were husband and wife and had been married for 30 years. The witnesses to the incident were the applicant's son and daughter-in-law. There had been some history of domestic violence. The applicant started accusing the victim of having an affair, and began to violently threaten and assault her with a knife. Their son intervened and drove his mother to the hospital where she was admitted for her injuries. The applicant said that he had argued with his wife and had accused her of having an affair. He also said that it was very shameful for a man if his wife had an affair in Chinese culture.

Issue: The issue for the Court was whether the sentence was manifestly excessive. The applicant submitted that allowing for the 25% discount for an early plea of guilty, the starting point for the sentence must have been 8 years, which in the circumstances was excessive. The applicant also argued that the 4 year non-parole period was above the majority of sentences imposed for this offence.

Held: The appeal against sentence was refused. The applicant's circumstances at the time of the offending and his genuine belief that the victim may have been having an affair could not justify or ameliorate the seriousness of the offending. The catalyst of domestic violence is often a genuine, albeit irrational, belief of being wronged in some way by the victim. A resort to violence in such circumstances is unjustifiable, even if the offender's belief is correct. The court regarded the sentencing judge's remarks about the courts' and the community's concern at the level of domestic violence in the community as 'timely and appropriate' ([53]).

Further, the Court found that the notional starting point was not manifestly excessive as no evidence was put before the Court to establish that such a starting point was excessive in the circumstances. In considering whether a sentence is manifestly excessive, approaching the case from a hypothetical starting point diverts attention from the question as to whether the sentence actually imposed was unreasonable ([50]). However, where there is no dispute over whether the discount was excessive, justice demands that the focus be on the

starting point ([4], see also *TYN v R* [2009] NSWCCA 146 [33]-[34]).

***Hurst v R* [2017] NSWCCA 114 (31 May 2017) – New South Wales Court of Criminal Appeal**

'Delay' – 'Objective seriousness' – 'Physical violence and harm' – 'Sexual violence'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Assault x 2; aggravated detain for advantage x 1; incite another to commit an act of indecency x 1; maliciously inflict grievous bodily harm with intent to do grievous bodily harm x 1; use offensive weapon with intent to commit the indictable offence of assault occasioning actual bodily harm x 2; aggravated sexual intercourse without consent x 1; assault occasioning bodily harm x 1;

Case type Appeal against sentence.

Facts: The applicant pleaded guilty to 9 offences, relating to physical and sexual violence against his then girlfriend (the complainant), with whom he commenced an intimate domestic relationship in 2005. The sentencing judge imposed a total effective sentence of 18 years imprisonment, with a non-parole period of 12 years. His Honour had regard to the delay in prosecution and noted that the delay was largely due to the complainant's decision not to proceed against the applicant at the time that the offences occurred.

Issue: The applicant appealed against the sentence on various grounds, including that the sentencing judge erred by failing to make an assessment of the objective seriousness of the offence of aggravated detention for advantage (Ground 1), and that he did not take into account the delay in prosecution and the prejudice suffered by the applicant on sentence (Ground 3).

Held: The Court granted leave to appeal against the sentence, but dismissed the appeal.

Objective seriousness:

The Court was not satisfied that Ground 1 was established on the evidence ([105]-[110]). When a sentencing judge has made it clear from his or her findings that they regard the offence as serious, little more is required ([105]). While he did not expressly determine the objective criminality of the offence of aggravated detain for advantage, he gave due consideration to the nature of the conduct and the circumstances in which it occurred ([109]). Further, the evidence of the applicant's conduct made a conclusion of significant seriousness self-

evident ([109]).

Delay:

Hoeben CJ at CL (with Price and Longergan JJ agreeing) noted that a common aspect of domestic violence related offences is that there may be a considerable delay between the occurrence of the offence and the complaint being made. However such delay should not be held against the victim. It is a direct product of the nature of the offending itself, and it would be incongruous if an offender could gain a benefit from such delay ([132]). Where there is unexplained considerable delay during which there has been steps taken towards rehabilitation, and/or a change of circumstances that increases the hardship brought about by a custodial sentence, it may be appropriate to impose a sentence that would otherwise be considered to fall below the range of an appropriate sentence ([133], see also *Hughes v R* [2013] NSWCCA 129 at [58]).

The Court noted the significant difference between delay that can be attributed to a police failure to charge and what occurred with the complainant. She was a victim of ongoing domestic violence which involved extremely controlling behaviour, and she chose not to proceed with those charges at the time. It appeared that she did not feel ready and able to address these matters for many years ([138]). The applicant did not make any attempt to rehabilitate in the lengthy period between offending and sentencing. It was open to the sentencing judge to take into account the lack of evidence that the applicant suffered any anxiety as a consequence of concern that he would be prosecuted in connection with any of these matters. His Honour's further finding that there was no evidence that the applicant had contributed to any delay was 'somewhat generous' since the applicant could have brought these matters to the attention of the authorities at any time after they occurred ([140]).

Further, there was no evidence that the delay in the proceedings caused the applicant increased hardship. Even if there were, this ground of appeal was founded entirely upon the apportionment of weight to a particular sentencing factor in the exercise of the sentencing judge's discretion. In those circumstances, it is well established that matters of weight will only rarely justify the intervention of the Court. Circumstances warranting the Court's intervention have not been demonstrated in this case ([141]).

***Vaiusu v The Queen* [2017] NSWCCA 71 (5 April 2017) – New South Wales Court of Criminal Appeal**

'Appeal against sentence' – 'Ex tempore judgement' – 'Impact on children' – 'Imprisonment' – 'Manifestly excessive' – 'Perpetrator victim of domestic violence' – 'Subjective circumstances'

Charges: Wounding with intent to do grievous bodily harm x 1.

Appeal type: Appeal against sentence.

Facts: The victim was the appellant's brother in law. The victim had hit the appellant's sister, apparently accidentally, in a scuffle outside a nightclub. The appellant's sister told her that the victim had hit her, but she did not tell her that it was an accident. The appellant followed the victim to a train station and stabbed him in the neck with a broken bottle ([7]).

The appellant pleaded guilty and was sentenced to 2 years and 3 months imprisonment with a non-parole period of 1 year and 2 months.

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The appellant argued that the trial judge failed to take sufficient account of her background as a victim of domestic violence by her stepfather growing up ([23]). It was also submitted that the appellant was subject to domestic violence by her husband, whose death she was still mourning at the time of the offending ([24]). Further, the trial judge made no mention of the fact that her daughter would be left without a parent if the appellant was sentenced to imprisonment ([26]).

The Court of Appeal (Bathurst CJ, R A Hulme and Beech-Jones JJ) emphasised that a trial judge cannot carefully consider their remarks while delivering an ex tempore judgement. If a trial judge does not mention a particular factor, that does not mean that they have not had regard to it ([31]). Even though the trial judge did not specifically mention the factors raised by the appellant, it was evident that the trial judge adopted a sympathetic approach to sentencing while having regard to the maximum sentence and current sentencing practices ([36]-[38]).

***McIlwraith v R* [2017] NSWCCA 13 (22 February 2017) – New South Wales Court of Criminal Appeal**

'Intimidation' – 'Intoxication' – 'Property damage' – 'Specific intent'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Numerous charges, including aggravated breaking etc into any house etc and committing serious indictable offence under section 112(2) of the *Crimes Act 1900* (NSW).

Case type Appeal against conviction.

Facts: On 18 June 2014, the applicant entered 3 properties, and was arrested and charged with a number of offences alleging breaking and entering, and stealing property. The applicant pleaded guilty to one (Count 5) of 8 counts, and elected to be tried by judge alone. The trial judge acquitted the applicant on Counts 1, 2, 3 and 8, and convicted him on Count 7 (an offence of aggravated break, enter and commit serious indictable offence under section 112(2) of the *Crimes Act 1900* (NSW)). The serious indictable offence was one of intimidation with intent to cause fear of physical or mental harm under section 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

The applicant was sentenced to 22 months imprisonment with a non-parole period of 14 months with respect to Count 5. He was also sentenced to 4 years imprisonment with a non-parole period of 3 years with respect to Count 7. The first sentence was wholly concurrent with, and consumed within, the longer second sentence.

The applicant appealed on the ground that the trial judge erred in finding that the offence of intimidation under section 13 is not an offence of 'specific intent'.

Issue: A key question for the Court was whether the offence of intimidation under section 13 is one of 'specific intent', and whether the applicant's intoxication at the time of the offending can be taken into account in determining his guilt.

Held: The Court refused to grant leave to appeal with respect to the challenge to the findings of fact, and otherwise dismissed the appeal against the conviction. It also refused leave to appeal against the sentence imposed in the District Court.

The provisions of Part 11A dealing with intoxication are concerned with circumstances in which a particular state of mind is required and can be viewed as wrongful. A particular state of mind can involve a specific intent to achieve an identified consequence (as in section 13(1) or section 13(3)), matters of which the accused is aware and consequences which he or she knows to be likely ([39]). The question for the Court was whether the offence of intimidation is an offence of specific intent and whether the provisions under Part 11A of *Crimes Act* regarding intoxication apply to it.

Basten J found that the offence of intimidation under section 13(1) is one of specific intent, and thus subject to the provisions of Part 11A ([39]). Therefore an offender's intoxication can be taken into account in determining criminal liability. His Honour reached this conclusion by considering the decisions of *R v Grant* (2002) 55

NSWLR 80 and *Harkins v R* [2015] NSWCCA 263 ([39]-[42]).

***Drew v R* [2016] NSWCCA 310 (16 December 2016) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Aggravation' – 'Culture considerations' – 'Judicial notice' – 'Physical violence and harm' – 'Vulnerability' – 'Worst category'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Initially charged with wound with intent to murder. He entered into a plea of guilty to a charge of wound with intent to cause grievous bodily harm, as well as one count of contravening an Apprehended Domestic Violence Order (ADVO).

Case type Appeal against decision.

Facts: The appellant pleaded guilty to a charge of wounding with intent to cause grievous bodily harm, as well as one count of contravening an ADVO. He was sentenced to 12 years and 6 months imprisonment, with a non-parole period of 9 years and 4 months. The sentencing judge made a number of observations, including a statement that the victim was a vulnerable person due to the culture of silence and ostracism of those who complain in relation to acts of violence in the Indigenous community. Her Honour also stated that the offence fell within the worst category of offences of its kind.

The appellant was in a domestic relationship with the victim at the time of the offending. There was a history of domestic violence in the relationship to the extent that an ADVO had been taken out against the appellant. He has a long and varied criminal history which included numerous violent offences against 13 separate victims. 3 of those victims were his domestic partners at the time of the offence, and one was his own son. 9 of those instances involved a weapon.

Issue: The appellant relied on the following grounds of appeal:

- The judge erred by finding the offending was aggravated due to the victim being Aboriginal and thereby a vulnerable person.
- The judge erred in the characterisation of the offence as falling within the 'worst category'.
- The sentence imposed was manifestly excessive.

Held: The Court granted leave to appeal, but dismissed the appeal. It made remarks on the need to take special care when making findings of fact about vulnerable victims.

Vulnerability:

A question arose as to whether the sentencing judge was entitled to take into account the serious problem of under-reporting of domestic violence in Indigenous communities due to a culture of 'silence and ostracism', and aggravate the offence on that basis ([83]). Her Honour was entitled to note both the high rates of domestic violence, and the vulnerability of women and children in Indigenous communities, but she erred in finding the offence to be aggravated on account of the victim being classified 'vulnerable' due to this under-reporting problem ([85], [90]). 'A Court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities' ([84], see also [1], [8]). No evidence was capable of establishing beyond reasonable doubt that the victim was a member of a particular class bearing those characteristics ([90]).

Further, the aggravating factor of vulnerability under section 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* is only engaged where the victim belongs to a class that is vulnerable because of a common characteristic ([8], [75]-[78]). An ultimate finding of vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the appellant or to defend herself in the event of conflict was open as an inference from primary facts ([5]).

Fagan J noted that it was a circumstance of the offence, relevant to determining an appropriate sentence, that because of the victim's emotional and intimate attachment to the appellant, she was less likely than any other potential victim to avoid him or to put herself out of harm's way ([7]). The individual vulnerability of the victim was an 'inescapable conclusion from the evidence' and had, in practical terms, the same consequence for assessment of the objective seriousness of the offence ([8]).

'Worst category':

The use of the phrase 'worst category' should be avoided by judges unless it is in the context of imposing the maximum penalty available for that offence ([105]). However, when taking into account the features of the offence, such as the seriousness of the victim's injuries, the appellant's earlier threat to the victim, the fact that the offence occurred without regard to the ADVO, the prolonged nature of the attack, the location of the offence (the victim's home), and the appellant's intoxication at the time of the offence, it was open to the sentencing judge to classify the objective seriousness of the offence as her Honour did ([106]-[114]). It is not

necessary for the injuries to be of the 'worst type' for an offence to fall into the 'worst case' category. The nature of the offence can bring a case within that category ([107]).

Manifestly excessive:

The sentence imposed was not manifestly excessive. The appellant had a history of violent offending, which included offending during parole periods. The sentencing factors of specific deterrence and community protection meant that no shorter sentence could be warranted in law.

***Morgan v R* [2016] NSWCCA 298 (16 December 2016) – New South Wales Court of Criminal Appeal**

'Exposing children to domestic and family violence' – 'People who are gay, lesbian, bisexual, transgender, intersex and queer' – 'Physical violence and harm' – 'Women'

Charges: Specially aggravated break, enter and commit an indictable offence, namely reckless wounding x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and complainant (both women) lived together with the victim's two children and had been in an intimate relationship ([4]). The victim and applicant argued, which escalated into a physical confrontation. The victim barricaded herself in a bedroom and picked up her infant child. The applicant broke into the room and stabbed the victim in the back. The applicant continued to chase, hit and choke the victim, and the victim sustained stab wounds to her buttock, arms, wrist and neck ([5]-[8]). The applicant pleaded guilty and was sentenced to 6 years and 3 months' imprisonment, with a non-parole period of 2 years and 9 months.

Issues: Whether the sentence is manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The Court of Appeal (Ward JA, Bellew J and Hidden AJ) had regard to the applicant's subjective circumstances, such as the fact that she had experienced domestic violence and sexual abuse as a child, and had been diagnosed with anxiety, depression and borderline personality disorder ([10]-[12]). The Court of Appeal found that the trial judge had adequate regard to the subjective circumstances proffered by the applicant ([27]). The victim did not sustain any serious injuries ([16]).

The Court of Appeal remarked that the charge of break and enter was unusual in this case, given that the

applicant broke an internal door. This fact made it impossible to find comparable cases ([22], [26]).

***Silva v The Queen* [2016] NSWCCA 284 (7 December 2016) – New South Wales Court of Criminal Appeal**

'Manslaughter' – 'Physical violence and harm' – 'Reasonableness' – 'Relevance of past violent conduct' – 'Self-defence'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction.

Facts: The female appellant was in a relationship with the deceased, James Polkinghorne, and they had a child together. Evidence was led at trial that the deceased had physically and verbally abused the appellant throughout their relationship. She was unable to leave the relationship and saw seeking help from the police as impossible.

On the 13 May 2012, the appellant went to her parents' place, against the deceased's wishes. During the course of the day, there were 80 calls and SMS messages between the appellant and the deceased. These messages and calls were tendered as evidence at trial (recordings were available because the police had been tapping the deceased's phone in light of his suspected involvement in a previous murder). These messages, while not phrased in terms of 'killing' the appellant, were extremely threatening and abusive. The deceased was affected by methylamphetamine.

That night, the deceased went to the home of the appellant's parents. He was 'going crazy, screaming and kicking items'. The appellant's brother called 000. From here, there were some inconsistencies in the accounts of the appellant's father, brother and the record of interview from the appellant produced after the killing. There was no contention that the appellant was punched and thrown around by the deceased. Both the appellant in her record of interview and her brother at trial said that the deceased yelled, "I'm going to fucking kill her' and 'I'll get youse cunts'. The appellant's father and brother started fighting with the deceased. The appellant retrieved a knife from inside and stabbed the deceased. After trial by a jury, she was found not guilty of murder but guilty of manslaughter and sentenced to 18 months imprisonment wholly suspended.

Issue/s: Whether it was open for the jury to conclude, to the criminal standard of proof, that the fatal stab wound inflicted by the appellant was not a reasonable response to the circumstances as she saw them?

Decision and Reasoning: The appeal was allowed (McCallum J and RS Hulme AJ in majority, Leeming JA in dissent). In the majority judgment, RS Hulme AJ first held that there was no rational reason for the jury to reject the substance of the evidence before them. This evidence included the terms and tone of what the deceased had said in the phone calls and messages that day. As per His Honour at [163]:

'Certainly he had not in terms threatened to "kill" the Appellant. However he was powerful, had been violent in the past, had previously attacked the Appellant and on the day in question he was very angry, irrational, and had threatened to seriously hurt her and to come to where the Appellant was, thus providing some opportunity to carry out his threats'.

Further, notwithstanding the inconsistencies, much of the evidence suggested that the appellant and her brother had been in serious danger. Accordingly, RS Hulme AJ concluded that there was sufficient evidence that the appellant believed her act was necessary to defend herself or some other person (see [170]).

Second, His Honour held that the appellant's response was reasonable. This was in circumstances where the police would have taken time to arrive, the appellant saw substantial disadvantages in calling the police, and it was not obvious that they would be able to overwhelm the deceased. Therefore, it was not open to the jury to be satisfied beyond reasonable doubt that the Appellant had not acted in defence of herself or her brother and father (see [171]-[173]). The appeal was allowed.

McCallum J largely agreed with RS Hulme AJ but provided some additional comments. Her Honour was also unable to accept that the jury could, acting reasonably, have been satisfied beyond reasonable doubt that the appellant's conduct was not reasonable in the circumstances as she perceived them at the time of the stabbing (see [93]). Her Honour noted that Leeming JA in dissent had placed emphasis on the objective medical evidence and the evidence of eye witnesses at the confrontation. Acknowledging that it is important to have regard to the whole of the evidence, McCallum J continued:

'Ultimately, however, the critical issue in this case is the reasonableness of inflicting mortal injury judging that issue by reference to an assessment of the circumstances in that instant as perceived by Ms Silva. While the evidence directly relating to the time of the stabbing is important, that assessment is also critically informed by a close analysis of the circumstances leading up to the fatal confrontation' (see [94]).

McCallum J's own assessment was that the appellant could only have seen the deceased's attack on her that evening as 'urgent, life-threatening and inescapable' and that the events in the street could not be divorced from the 'irrational, menacing rage exhibited by the deceased in his calls to Ms Silva in the period leading up

to the time when he confronted her physically' (see especially [95]-[109]). Her Honour concluded at [110]:

'The circumstances described in the evidence in this case are the kind in which, more commonly, it is the woman who is killed. In my assessment of the record of the trial, the evidence was not capable of proving beyond reasonable doubt…that Ms Silva's conduct in fatally stabbing the deceased was not reasonable in the circumstances as she perceived them at the time of the stabbing'.

In dissent, Leeming J was not persuaded that a deep penetrating stab into the deceased's chest cavity, while he was struggling with two other men, was a reasonable response to the circumstances as the appellant saw them at 9.09pm and it was therefore open to the jury to reach this conclusion (see discussion at [83]). His Honour also noted that the jury had the advantage of seeing the evidence first hand and therefore declined to interfere with the verdict.

See also *R v Silva* [2015] NSWSC 148 (6 March 2015).

***Ngatamariki v R* [2016] NSWCCA 155 (9 August 2016) – New South Wales Court of Criminal Appeal**

'Objective seriousness' – 'Physical violence and harm'

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Grievous bodily harm x 2.

Case type Appeal against sentence.

Facts: The applicant was convicted of causing grievous bodily harm with intent to his partner (the victim), with whom he resided with their 2 children. He was intoxicated at the time of the offending and had a prior conviction for domestic violence towards the victim. He was sentenced to 5 years imprisonment with a non-parole period of 3 years.

Issue: The applicant sought leave to appeal on the grounds that the trial judge erred by having regard to his prior conviction in determining the objective seriousness of the offence, and that the sentence was manifestly excessive.

Held: The Court granted leave to appeal, but dismissed the appeal. The applicant's offending was extremely

serious, and constituted a 'brutal and violent attack…on an innocent, and largely defenceless, victim'. The Court noted that the sentence imposed required a strong measure of general deterrence ([71]). The trial judge correctly took into account the fact that the offending occurred in the context of a domestic relationship ([72]). Denunciation of, and punishment for, 'brutal' and 'alcohol-fuelled' conduct in such circumstances is particularly apt ([73]).

Further, the trial judge was found not to have improperly used the applicant's prior convictions as a factor which aggravated the seriousness of his offending. The domestic relationship between the applicant and victim was relevant to determining the objective seriousness of the offending ([45]). In order to make a complaint of manifest excessiveness, the applicant must demonstrate that the sentence imposed was unreasonable or plainly unjust. The submissions and evidence did not establish that the sentence imposed fell into such a category. In light of the circumstances, the sentence was one that might be regarded as modest ([75]).

Browning v The Queen **[2015] NSWCCA 147 (17 June 2015) – New South Wales Court of Criminal Appeal**

'Breach of an apprehended domestic violence order' – 'Conditional liberty' – 'Deterrence' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Repeated breaches' – 'Using etc explosive substance or corrosive fluid etc with intent to burn, maim, disfigure, disable or do grievous bodily harm'

Charge/s: Using etc explosive substance or corrosive fluid etc with intent to burn, maim, disfigure, disable or do grievous bodily harm, breach of an apprehended domestic violence order x 2.

Appeal Type: Appeal against sentence.

Facts: The applicant and the complainant had been married for 30 years but separated in August 2012. The complainant obtained an Apprehended Domestic Violence order (ADVO) against the applicant for 12 months. Notwithstanding this, the applicant breached the order on two occasions. On a subsequent occasion, the applicant doused the complainant in petrol and made a sustained attempt to light her on fire. He was stopped by three teenage boys. The applicant was sentenced to 7.5 years imprisonment for the offence of using an explosive substance or corrosive fluid with intent, with a non-parole period of four years.

Issue/s: One of the grounds of appeal was that the Court's finding that the offence of using an explosive substance or corrosive fluid with intent was in the mid-range of seriousness failed to adequately account for

the Court's findings that:

1. the offence was not pre-meditated but spontaneous;
2. no significant harm was occasioned to the victim;
3. the applicant's attempts to carry out his intended actions were less determined than in other examples of this offence; and
4. other matters bore on the assessment of the seriousness of the offence.

Decision and Reasoning: This ground of appeal was dismissed. Garling J held (Gleeson JA and Johnson J agreeing) that the finding of the sentencing judge that this offence was in the mid-range was, if anything, unduly favourable to the applicant. This was a sustained attempt to set the complainant alight after the applicant had doused her in petrol. The only impediment to his success was the repeated intervention of the teenage men (See [96]-[100] and [3]).

Johnson J made some additional observations at [5]-[8]. His Honour cited with approval Spigelman CJ's observations regarding apprehended domestic violence orders in *John Fairfax Publications Pty Limited v Ryde Local Court* [2005] NSWCA 101 at [20]:

'The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law'.

His Honour further noted that the applicant was a repeat domestic violence offender. Accordingly, in sentencing for these offences, it was appropriate to have in mind the statement of the Court in *R v Hamid* [2006] NSWCCA 302 (20 September 2006) at [86]:

'In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important'.

Finally, Johnson J stated:

'Where a court has made an apprehended domestic violence order to protect a person, and then further orders are made by way of conditional liberty for criminal offences arising from breaches of that order, the commission of another offence, in breach of that conditional liberty, will constitute significant aggravating circumstances: s 21A(2)(j) Crimes (Sentencing Procedure) Act 1999. This is especially so where the offence against the protected person is of the very grave character of the s 47 offence in this case, with the offence being committed so soon after the applicant had been given the benefit of conditional liberty by order of the District Court'.

Note: Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced on 25 September 2018 imposing additional requirements in sentencing for domestic violence offences in NSW.

***Ahmu v The Queen; DPP v Ahmu* [2014] NSWCCA 312 (15 December 2014) – New South Wales Court of Criminal Appeal**

'Crown appeal against sentence' – 'Denunciation' – 'Deterrence' – 'Exposing children' – 'Indecent assault' – 'Offender often believes violence is justified' – 'Physical violence and harm' – 'Pregnant women' – 'Protection of the community' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Vindication of the victim' – 'Women'

Charge/s: Rape x 15, indecent assault x 2.

Appeal Type: Appeal against conviction and Crown appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship and had a two year old son at the time of the offences. At trial, it was alleged by the prosecution that the appellant was sexually predatory, violent and abusive in his relationship with the complainant and that he was a child molester with a sexual interest in children, including his two year old son. The complainant obtained an apprehended violence order against the applicant in 2009 but the relationship resumed in 2010 because she was concerned about the appellant having unsupervised access with the child. The rape and indecent assault offences occurred throughout one night in 2010, in the presence of their two year old son. The complainant, who was pregnant at the time, pleaded with the appellant to stop, but the appellant threatened to kill her and continued regardless. A number of the sexual acts were accompanied by humiliating and degrading conduct. The appellant was sentenced to seven years imprisonment, with a non-parole period of four years.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal against conviction was dismissed but the Crown appeal against sentence was allowed. The overall sentence demonstrated that the sentencing judge either misapprehended the significance of the standard non-parole period or underestimated the objective seriousness of the offences. Here, the gross, repeated attacks on the complainant occurred over an extended period and were committed by the appellant who understood what he was doing despite his (limited) mental issues and possible intoxication. This, combined with deliberate additional humiliation and a callous indifference to the presence of their son, meant that the objective seriousness of the offence fell within the middle of the range and brought the standard non-parole period into sharp focus as a yardstick: *Muldrock v The Queen* (See [78]-[79]).

Even in light of the residual discretion of the Court to decline to interfere with the sentence, re-sentencing the appellant to nine years and six months imprisonment with a non-parole period of six years and six months was appropriate in the interests of justice. As per Adams J at [83]:

'In considering the exercise of the residual discretion, it is appropriate in my view to bear in mind - in terms not usually used but implicit in sentencing for offences such as the present - the need to do justice to the victim, so appallingly dealt with, whose vindication is part of the function of the administration of criminal justice. This applies with particular force in cases of so-called domestic violence, where there seems to often be present in offenders a degree of self-justification as if, in some way, the victim (to use the vernacular) had it coming. I do not say that this was specifically the offender's state of mind in the present case but the facts strongly suggest that he thought he had some kind of right to do what he did. This aspect of domestic violence emphasises the importance, to my mind, of general deterrence, as well as the protection of the community, especially women, who are far too often the victims of this attitude. These considerations also underline the importance of denunciation'.

***Pasoski v The Queen* [2014] NSWCCA 309 (15 December 2014) – New South Wales Court of Criminal Appeal**

'Admissibility' – 'Assault occasioning actual bodily harm' – 'Context evidence' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Sexual assault' – 'Tendency evidence'

Charges: Assault occasioning bodily harm x 2, sexual assault x 5.

Appeal type: Application for leave to appeal against conviction and sentence.

Facts: The applicant and complainant lived together with their daughters and were in a relationship since 2003. In November 2010, the applicant physically assaulted the complainant in their home on two occasions, by kicking her in the legs, and slapping her face, causing her to fall (see [13]). The sexual assault charges were alleged to have occurred on one night, where the applicant had vaginal penile intercourse five times without her consent (see [13]).

At a *voir dire* during trial, the applicant's trial counsel successfully objected to the admission of other evidence of previous penile vaginal penetration without consent (see [27]). That evidence was not admitted because the trial judge found that the '*evidence is more in the nature of tendency evidence than contextual evidence'* (see [31]). However, evidence of the applicant's controlling behaviour was admitted, and was relied upon at trial (see [12]).

In summing up, the trial judge gave directions as to the use of the evidence of controlling behaviour, stating that '*the Crown relies upon this evidence only for one purpose… to put the complainant's allegations concerning the offences in November 2010 into a realistic context'* (see [42]). Her Honour also stated: '*if that evidence was not there, you would be asking yourselves, well, why would the accused throw his weight around in this horrible manner with the complainant completely out of the blue, when they had been in an apparently normal relationship for the previous six years?*' (see [42]).

Issues: Two of the grounds of appeal concerned 'context evidence' (see [6], [44]):

1. 'A miscarriage of justice was occasioned by the admission of the so-called context evidence' because it was not relevant and was prejudicial, and
2. The trial judge erred by failing to identify the precise issues to which the evidence was directed.

Decision and Reasoning: Leave to appeal was refused on both the 'context evidence' grounds.

In relation to the first ground, Meagher JA referred to the use of context evidence as being admissible if it is used to 'remove implausibility that might attach to a complainant's account of what otherwise would be seen as isolated incidents' (see [24]). His Honour referred to *HML v The Queen* [2008] HCA 16; 235 CLR 334 [6] to observe that '*by doing so, it bears upon the assessment of the probability of the existence of facts directly in issue (Evidence Act 1995 (NSW), s 55) …* Similar observations were made in *Roach v The Queen* [2011] HCA 12; 242 CLR 610 at [42] and *BBH v The Queen* [2012] HCA 9; 245 CLR 499 at [146]-[150].'

Meagher JA held that the evidence was properly admitted (see [45]). His Honour found that from the conduct of the trial, *'it was apparent that the Crown was relying upon it only as showing that the relationship was an unhappy one from the complainant's perspective so as to make more plausible her evidence that she did not consent to having sexual intercourse with the applicant on the five occasions in question'* (see [33]). Furthermore, the fact that trial counsel had not objected to the evidence at the *voir dire*, despite having objected to the evidence of the other sexual assaults on the grounds that it might invite propensity reasoning, indicated that '*the parties and the Court were conscious that evidence tendered to explain the context in which the alleged offences occurred might, depending on its content, be relied on or used for a tendency purpose*' (see [30]).

In relation to the second ground, regarding the directions given by the trial judge to the jury, Meagher JA held that the directions did not give rise to a real risk that the jury might employ propensity reasoning, and thus did not occasion a miscarriage of justice (see [49]). His Honour found that the direction regarding the applicant 'throwing his weight around' did verge on an invitation to the jury to employ propensity reasoning (see [47]). However, his Honour held that, assessed in context, the other directions made clear to the jury that the evidence of controlling behaviour was not being relied upon to suggest a 'propensity of the applicant physically or sexually to impose his will on the complainant' (see [48]).

The other issues concerned two failures of the trial judge. First, the trial judge failed to properly comply with s 55F(2)(b) of the *Jury Act 1977* (NSW), and therefore two counts of sexual assault were quashed (see [8]-[11]). Second, the trial judge erred in taking into account as an aggravating factor in sentencing that the offences were committed in the complainant's home: *EK v R* [2010] NSWCCA 199; 79 NSWLR 740 at [79] (see [54]). Accordingly, the aggregate sentence of imprisonment was reduced from five years and six months with a non-parole period of two years and nine months to four years and eleven months with a non-parole period of two years and five and a half months.

***Monteiro v The Queen* [2014] NSWCCA 277 (26 November 2014) – New South Wales Court of Criminal Appeal**

'Aggravated rape' – 'Deterrence' – 'Emotional abuse' – 'Physical violence and harm' – 'Relevance of a prior relationship' – 'Sentencing'

Charge/s: Aggravated rape namely, immediately before sexual intercourse the appellant inflicted actual bodily

harm.

Appeal Type: Appeal against sentence.

Facts: The male appellant was physically and verbally abusive towards the female complainant throughout their relationship. At the time of the offence, the relationship had ended and the appellant started yelling at the complainant that they should resume this relationship. He slapped the complainant in the face and proceeded to have sexual intercourse with her without her consent. The appellant was sentenced to 11 years imprisonment with a non-parole period of six years and six months for the principal offence of aggravated rape.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The manifest excess argument was dismissed. Counsel for the appellant submitted that the prior relationship between the appellant and the complainant was a factor that should have mitigated the sentence imposed. Bellew J noted that while the existence of a relationship between offender and victim can be a relevant consideration in determining the objective seriousness of sexual offending, each case must turn on its own facts. Here, the relationship was over and it therefore followed that the existence of a prior relationship was not a factor that warranted mitigation of sentence. In particular, this was not a case where the complainant had invited the appellant to engage in sexual intercourse with her or had indicated that she was prepared to do so (cf *NM v R* [2012] NSWCCA 215 and *Norman v R* [2012] NSWCCA 230.) His Honour continued at [131]-[132]:

'What remains important is that even though the relationship had ended, the offending occurred in what might be loosely described as a domestic setting. In R v Edigarov [2001] NSWCCA 436, Wood CJ at CL (with whom Studdert and Bell JJ agreed) said at [41]:

"As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996, Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell [2000] NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence."

These principles were confirmed, after a review of the relevant authorities, by Johnson J (with whom Hunt AJA and Latham J agreed) in R v Hamid [2006] NSWCCA 302 at [65] and following. Leaving aside the question of general deterrence, the observations of Wood CJ at CL are directly apposite to the present case'.

***R v Eckermann* [2013] NSWCCA 188 (15 August 2013) – New South Wales Court of Criminal Appeal**

'Aggravated break and enter and commit serious indictable offence' – 'Damaging property' – 'Denunciation' – 'Deterrence' – 'Exposing children' – 'Physical violence and harm' – 'Protection of the community' – 'Sentencing' – 'Suspended sentences' – 'Where the offender is known to the victim'

Charge/s: Aggravated break and enter and commit serious indictable offence (assault occasioning actual bodily harm).

Appeal Type: Crown appeal against sentence.

Facts: After being in a domestic relationship for nine years and having two children together, the respondent and the complainant separated due to domestic violence perpetrated by the respondent. The complainant was asleep when she was woken by the respondent breaking into the property. He was shouting and looking for the complainant's new partner. This woke and scared the children. He started throttling the complainant and then punched her in the face. The complainant managed to call the police. In sentencing, the judge characterised the offending as being towards the lower end of the spectrum. This was in light of a number of factors including that the respondent was not a stranger to the complainant (and therefore the offence would have been less frightening than a home invasion by a stranger) and that the respondent's primary motivation was to protect his children from danger from the complainant's new partner. The respondent was sentenced to two years imprisonment, suspended conditional upon entering into a good behaviour bond.

Issue/s: Some of the grounds of appeal were –

1. The sentencing judge erred in characterising the objective seriousness of the offending as being 'towards the lower end of the spectrum'.
2. The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed and the respondent re-sentenced to imprisonment with a non-parole period of 14 months and a balance term of 10 months. First, Price J held that the sentencing judge

erred in characterising the objective seriousness of the offence as at the lower end. Home invasion offences do not become less serious by virtue of a prior domestic relationship between an offender and the victim. Rather, the objective gravity of the crime is to be assessed on the facts of the case and here it was not open to the sentencing judge to conclude that the offence would have been less frightening than a home invasion by a stranger (See [35]-[36]). Further, very little weight could be given to the respondent's motivation to protect his children. His actions terrified the complainant and the children. The offending was aggravated by the fact that it was committed in the presence of the children (See [37]-[45]). Accordingly, the offending was towards the middle of the range for such offences (See [46]).

Second, notwithstanding the respondent's subjective circumstances including his love for his children, his employment, and good prospects of rehabilitation, a suspended sentence was manifestly inadequate. As per Price J at [54]-[55]:

'This was a serious offence of violence by the respondent. When women (and men) enter into a new domestic relationship, they are entitled to do so without the threat of violence from a former partner. This is particularly so when there are children of the prior relationship as acts of violence towards a parent particularly when committed in the children's presence have the potential to impact severely upon their well-being and future development.

This Court has emphasised the seriousness with which violent attacks in domestic settings must be treated: Hiron v R [2007] NSWCCA 336. Specific and general deterrence, denunciation of the offending conduct and the protection of the community are important factors in sentencing a domestic violence offender: R v Dunn [2004] NSWCCA 41; *R v Edigarov [2001] NSWCCA 436; R v Hamid [2006] NSWCCA 302. In my view, the respondent's subjective circumstances could not justify the suspension of the sentence. A full-time sentence of imprisonment was called for'.*

***McLaughlin v R* [2013] NSWCCA 152 (3 July 2013) – New South Wales Court of Criminal Appeal**

'Assault occasioning actual bodily harm' – 'Common assault' – 'Exposing children' – 'Imprisonment' – 'Physical violence and harm' – 'Protection orders'

Charge/s: Assault occasioning actual bodily harm x 2, common assault.

Appeal Type: Appeal against sentence.

Facts: The female complainant and her young son moved from Tasmania to Victoria to live with the male applicant, her then de facto partner. At the time of offence, the complainant was vulnerable and isolated in that she was unemployed, cut off from friends and family, and suffered from a physical disability to her leg. Count 1 occurred when the applicant and complainant were arguing and the applicant dragged her off the bed, causing her to hit her jaw and bite her lip. Count 2 occurred when the applicant and complainant were again arguing and the applicant hit her to the side of her head near her eye. Count 3 occurred when they were arguing about an apprehended violence order (AVO) that had been made for the protection of the complainant and, as the complainant walked into her son's room, the applicant grabbed her by the hair and throat. The applicant was sentenced to a total head sentence of two years and four months imprisonment with a non-parole period of four months.

Issue/s:

1. The sentencing judge erred when she found that the offences were aggravated by the fact that they took place in the generalised presence of a child under the age of 18 years.
2. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Error was demonstrated with ground one of the appeal. While there was evidence for Count 3 on which it might have been open to the sentencing judge to find that the child must have realised what was happening (even though he did not see the events), Her Honour did not make such a finding. Accordingly, the sentencing judge erred in taking into account that the offence was committed in the presence of the child (See [31]). Further, for Counts 1 and 2 there was no direct evidence of the presence of a child (See [32]). However, Button J declined to intervene with the sentence on appeal (See [54]-[55]).

The second ground of appeal was dismissed. At [48]-[49] Button J noted that:

'The approach of this Court to men who assault vulnerable women is well established and need not be elaborated upon by me: see R v Edigarov [2001] NSWCCA 436, R v Dunn [2004] NSWCCA 41, and R v Hamid [2006] NSWCCA 302'.

'If an offender sees fit repeatedly to visit violence upon a woman in breach of a bond and an apprehended violence order imposed months before with regard to the same behaviour and the same victim, he should expect to be imprisoned, and not for an insubstantial period'.

***R v Cortese* [2013] NSWCCA 148 (26 June 2013) – New South Wales Court of Criminal Appeal**

'Indecent assault' – 'Mitigating factors' – 'Rape' – 'Relevance of a prior relationship in sexual assault offences' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Indecent assault, rape.

Appeal Type: Crown appeal against sentence.

Facts: The female victim told the male respondent that she wanted to end their relationship. They argued, during which the respondent tried to make sexual advances towards the victim, including trying to kiss her and rubbing her vagina. Despite protestations from the victim, the respondent stayed over the night. The next morning the respondent forced himself on top of the victim, forced at least two fingers into her vagina, and then forced his penis into her vagina and had penile/vaginal intercourse with the victim without her consent. The respondent was sentenced to a good behaviour bond for twelve months for the indecent assault and two years imprisonment, wholly suspended, for the rape offence. In assessing the seriousness of the offending, the sentencing judge stated that the 'prior sexual relationship [between the respondent and the victim] is an important mitigating factor' and held the offending was at the bottom of the range (See [36]-[39]).

Issue/s: One of the grounds of appeal was that the sentencing judge erred in her assessment of the objective seriousness of each offence.

Decision and Reasoning: The appeal was allowed and the respondent re-sentenced to three years imprisonment with a non-parole period of 18 months. The sentencing judge erred in her characterisation of the seriousness of the offending. In reaching this conclusion, Beech-Jones J stated at [55] that:

'…cases confirm that the mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality involved. Needless to say, each case will depend upon facts, but one common circumstance in which a pre-existing relationship has been found to diminish the seriousness of the offence is where it suggests some prevarication or at least initial consent on the part of the victim. Thus, if sexual contact is initiated by the victim or initially consented to by the victim, then the ensuing offence may be considered less serious': See *NM v R* [2012] NSWCCA 215; *Bellchambers v R* [2011] NSWCCA 131; *R v Hendricks* [2011] NSWCCA 203; *Stewart v R* [2012] NSWCCA 183.

Here, the pre-existing relationship had no relevance as the victim repeatedly expressed her lack of consent

(See [55]). Following from this, it was clear that the sentencing judge's assessment of the culpability of the respondent was clearly erroneous. This was a case involving the rape of a young woman which occurred in the context of threats of violence, as well as aggressive and humiliating language. It came after she was detained overnight. The offending would likely fall below the mid-range of offences of this character but was not 'bottom of the range' (See [56]-[58]).

***ZZ v The Queen* [2013] NSWCCA 83 (19 April 2013) – New South Wales Court of Criminal Appeal**

'Aggravated rape' – 'Mitigating factors' – 'Physical violence and harm' – 'Rape' – 'Relevance of a prior relationship in sexual assault offences' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Aggravated rape (recklessly inflicting actual bodily harm), rape.

Appeal Type: Appeal against sentence.

Facts: The sexual offences were committed in the context of a sexual relationship between the male applicant and the female complainant. The applicant and complainant had been drinking, taking drugs and engaging in consensual sexual relations. The applicant then asked the complainant to drink his urine and, after urging the uncertain complainant to try it, the applicant urinated into her mouth. The complainant, gagging and nearly vomiting, tried to pull away but the applicant forced her head back towards his penis (count 1 — rape). After further sexual activity, the complainant became increasingly distressed and uncomfortable. She attempted to leave but was pushed into the bathroom wall by the applicant. He penetrated her anus with his penis so forcefully that she smashed her head against the tiles and suffered a deep four-centimetre laceration to her forehead. He continued penetrating her and smashed her head against the wall again (count 2 — aggravated rape). The applicant was sentenced to a total effective sentence of nine years and six months with a non-parole period of seven years.

Issue/s: Some of the grounds of appeal were that –

1. The sentencing judge erred in the assessment of the objective seriousness of count 1.
2. The sentencing judge erred in the way the applicable standard non-parole periods in respect of the sexual assault offences were taken into account.

Decision and Reasoning: The appeal was allowed. First, while the sentencing judge accepted the offence as 'being in the mid range of seriousness', His Honour later incorrectly referred to count 1 as 'being at the top of

the mid range' and erroneously sentenced the applicant on this basis. Second, the standard non-parole period played a greater role in the sentencing judge's decision than as a guidepost, to be taken into account with other factors on sentence, contrary to the principle articulated in *Muldrock v The Queen*.

In re-sentencing the applicant, Johnson J took into account the objective gravity of the applicant's offences, his subjective circumstances and other aspects bearing upon the question of sentence, including the maximum penalty and the standard non-parole period for counts 1 and 2. Johnson J noted that the objective gravity of the applicant's offences needed to be assessed in the context of the relationship between the applicant and the victim. It was true that the complainant was not sexually assaulted by a stranger, where, if she had been, a further element of fear and terror would have been expected. However, the fact that the victim knew the offender and trusted him provided her with 'little comfort' here (See [103]). In a case such as this, involving significant violence and infliction of injury, the context of this relationship offered no real assistance to the offender on sentence (See [107]).

Norman v The Queen **[2012] NSWCCA 230 (9 November 2012) – New South Wales Court of Criminal Appeal**

'Evidence' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape x 3.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: During the course of the complainant's 13 year marriage to the appellant, the complainant and the appellant had anal intercourse five times but only twice with her consent. At trial, the Crown sought to tender evidence of non-sexual domestic violence (see [22]). They argued that the evidence was not being admitted as evidence indicating a propensity on the part of the appellant which rendered it more likely that he had committed the crimes with which he was charged (therefore ss 97 and 101 of the *Evidence Act* and the test in *Pfennig v R* [1995] HCA 7; 182 CLR 461 did not apply). The trial judge accepted this argument and ruled that evidence of non-sexual domestic violence could be admitted for the purpose of showing the relationship between the appellant and the complainant. The appellant was found guilty.

Issue/s: One of the grounds of appeal was that 'relationship' evidence should not have been admitted.

Decision and Reasoning: The appeal was dismissed. MacFarlane J noted the relevant law, stating that: *'As*

pointed out in Roach v R [2011] HCA 12; 242 CLR 610, *evidence which incidentally shows propensity but which is otherwise relevant will not be excluded provided that the jury is properly warned against its use as propensity evidence (see also BBH v R [2012] HCA 9 at [146] - [149])'.*

Relationship evidence may be relevant if it assists in the evaluation of other evidence such as that of a complainant. His Honour continued at [26]: *'In other words, relationship evidence may be admitted on the basis that, without it, the jury would be faced with a seemingly inexplicable or fanciful isolated incident. To enable complainants to give their account of events comprehensively, they must be permitted to place the incidents of which they complain in a meaningful context'.*

However, the Courts have emphasised that it is necessary to consider carefully the basis upon which 'relationship' evidence is relevant in a particular case (see *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 463 at [112]; *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 at [28] - [30] and *RG v R* [2010] NSWCCA 173 at [36] - [37]) (at [29]).

Here, MacFarlane J held that evidence of two isolated incidents of non-sexual domestic violence was irrelevant and should have been excluded. While the Crown submitted that the evidence was relevant to demonstrate 'the nature of the relationship,' MacFarlane J noted:

'[C]onsistently with the approach taken by this Court in Qualtieri and DJV, it is insufficient to rely solely upon such a proposition. Evidence "is not relevant merely because it discloses aspects of the relationship between an accused and a complainant. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context": DJV per McClellan CJ at CL at [29]. Particularly because of its potentially prejudicial character, the precise basis upon which the evidence is relevant must be closely analysed'.

The evidence was also not relevant to demonstrate why the alleged sexual assaults were not reported earlier, and nor could it be said that the evidence would have assisted the jury, in any permissible way, in evaluating the complainant's evidence (see [32]-[34]).

Therefore, His Honour concluded at [35]-[36]:

'[E]vidence of the two isolated incidents of non-sexual domestic violence was not necessary to place the sexual assaults within a meaningful context… [I]t is difficult to see what, if any, use the jury could have made of the evidence other than to engage in impermissible propensity reasoning that the appellant was the type of

man who might have sexual intercourse with a woman without her consent. Whilst the trial judge directed the jury not to reason in that way, there was unfairness to the appellant in the evidence being before the jury when it was not relevant on any basis'.

Despite this, on the facts, there was no substantial miscarriage of justice. The Crown case against the appellant was so overwhelming there was no significant possibility that a jury would have acquitted the appellant (See [38]).

***Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012) – New South Wales Court of Criminal Appeal**

'Dominance' – 'Mitigating factors' – 'People affected by substance misuse' – 'Psychological consequences' – 'Rape' – 'Relevance of a prior relationship in sexual assault offences' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Victim impact statements'

Charge/s: Rape.

Appeal Type: Appeal against sentence.

Facts: The male applicant and female complainant had been in a somewhat disrupted and non-continuous relationship for some years. On the day of the offence, the complainant informed the applicant that their relationship was over and she was communicating with other men on Facebook. Jealous, the applicant smashed the complainant's mobile phone. Later that evening, the intoxicated applicant lay on top of the complainant and, while she was struggling, placed his fingers into her vagina for about 30 seconds. The applicant was sentenced to five years and six months imprisonment, with a non-parole period of two years and eight months. In his remarks, the sentencing judge noted that:

'I just want to make it clear, as I have to do unfortunately in cases of this nature, as far as I am concerned, cases of sexual assault have significant effects on the victim. There are two particular ways, they result in significant distrust as far as the victim is concerned in forming relationships, particularly with males if the assailant was a male. The other very broad area that is affected is the confidence or self-confidence of the victim is significantly damaged, they have concerns about their own self-worth, sometimes that is demonstrated by self-harm but there are other ways in which it is demonstrated. There is no satisfactory material yet available to indicate how long those matters may last, I always proceed on the basis that they will continue to be present for a very long time' at [58].

Issue/s: Some of the grounds of appeal included –

1. The sentencing judge erred in his consideration of the impact of the offence on the victim.
2. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The first ground of appeal was dismissed. It would have been preferable for the sentencing judge not to state that he 'always' proceeded on the basis that the psychological effects of sexual assaults would last for a long time. This ground of appeal may have had some force if there had been evidence that the complainant had not suffered psychological injury. However, here, the victim impact statement contained clear evidence of the significant psychological injuries the complainant had suffered (See [62]-[64]).

The second ground of appeal was also dismissed. This was a serious example of an offence against the section. Button J noted at [69] that:

'The matter can be sharply contrasted with a case where two persons are engaged in intimate contact by consent, and one of them fleetingly goes too far. The digital penetration in this case was not fleeting, and it was preceded by a physical assault upon the victim. Throughout the sexual offence the victim was making her lack of consent abundantly clear and struggling to put an end to the invasion of her body. Most importantly, His Honour found that the offence was an attempt to demonstrate dominance over a young woman who was in truth free to engage in Facebook contact, or any other kind of contact, with whomever she wished. An offence of sexual penetration that is motivated by a desire to dominate the victim, because he or she has failed to comply with the expectations of the offender, will very rarely be anything other than a serious offence'.

Further, while this was a stern sentence in light of the applicant's subjective circumstances, it was not manifestly excessive (See [71]).

***Bellchambers v The Queen* [2011] NSWCCA 131 (10 June 2011) – New South Wales Court of Criminal Appeal**

'Mitigating factors' – 'Rape' – 'Relevance of a prior relationship in sexual assault offences' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape x 4.

Appeal Type: Appeal against sentence.

Facts: The female complainant and the male applicant were in a relationship. Counts 1 and 2 took place after the complainant refused to have sex with the applicant but he had sexual intercourse with her regardless. The complainant reported these incidents to her general practitioner and the applicant was charged. Despite these charges, a sexual relationship continued between the applicant and the complainant. Counts 3 and 4 took place again after the complainant said she did not want to have sexual intercourse with the applicant. The applicant was sentenced to ten years imprisonment with a non-parole period of seven years.

Issue/s: Some of the grounds of appeal included –

- The sentencing judge erred by failing to impose a non-parole period for the first two counts.
- The sentencing judge failed to determine the objective seriousness of the offences.
- The sentencing judge did not properly assess the totality of the criminal offending by determining the individual sentences and then assessing the totality but rather did the reverse.
- The sentence was manifestly excessive.

Decision and Reasoning: The sentencing judge's decision was replete with errors and the appeal was allowed. First, the sentencing judge failed to set a non-parole period for the first two counts (See [30]-[31]). Second, the sentencing judge erred by stating that the objective seriousness of the offences were 'at least' in the mid-range of gravity. The sentencing judge must make apparent and define the extent to which the offence is above the mid-range (See [32]-[36]). Third, the sentencing judge did not follow the approach set out in *R v Pearce.*

Finally, the sentence was manifestly excessive. The sentencing judge failed to fix individual sentences and review these provisional sentences to ensure they were appropriate for the offences at hand. Further, the sentencing judge erred in his characterisation of the objective seriousness of the offences. While the offences were serious, they occurred in the context of a domestic relationship 'which involved considerable ambivalence on the part of the complainant' (See [47]). The sentencing judge also failed to review the subjective circumstances of the applicant. The applicant was resentenced to seven years imprisonment with a non-parole period of five years.

***Sudath v The Queen* [2008] NSWCCA 207 (9 September 2008) – New South Wales Court of Criminal Appeal**

'Assault' – 'Evidence issues' – 'Evidence via cctv' – 'Exposing children' – 'Physical violence and harm' – 'Rape' – 'Sexual and reproductive abuse'

Charge/s: Rape, assault.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male appellant had become violent and abusive towards the female complainant throughout their relationship. On the night of the offences, the complainant was breast feeding their child when the appellant started pulling up her night dress. The complainant said no. She then put her son down and tried to get something from under the bed. While she was kneeling, the appellant forced his penis into her anus. She screamed no but the appellant continued. The next day the appellant yelled at the complainant and physically assaulted her. The appellant was sentenced to three years and six months imprisonment with an aggregate balance of term of two years.

Issue/s: One of the grounds of appeal was that the trial judge erred in law by holding that he was 'satisfied' within the meaning of s 294B(6) of the *Criminal Procedure Act* 1986 that the complainant was "entitled" to give her evidence pursuant to the provisions of s 294B(3) of the Act.

Decision and Reasoning: The appeal was dismissed. The trial judge was correct in ruling that evidence could be given by alternative means. For complaints in sexual offence proceedings, it is generally not a sufficient reason to deny the use of CCTV or other technology merely because the jury might form the impression that the accused is/was violent. As per McClellan CJ at [29]:

'The submission which the appellant made could of course be made in any case where there is an allegation of sexual intercourse without consent in a relationship of ongoing violence. There are many cases of this character. It was because of the personal trauma likely to be experienced by a complainant when giving evidence that s 294B was enacted. If the submission was accepted a substantial purpose of the legislative provision would be defeated. It may be that in an unusual case a submission in these terms may be accepted by a trial judge. However, the discretion is to be exercised in the individual circumstances of each case'.

***Raczkowski v The Queen* [2008] NSWCCA 152 (4 July 2008) – New South Wales Court of Criminal Appeal**

'Attempted rape' – 'Breach of apprehended domestic violence order' – 'Detain with intent to obtain advantage occasioning actual bodily harm' – 'Indecent assault' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Relevance of a prior relationship' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Using a prohibited pistol without a licence or permit'

Charge/s: Using a prohibited pistol without a licence or permit, detain with intent to obtain advantage occasioning actual bodily harm, attempted rape, indecent assault, breach of apprehended domestic violence order.

Appeal Type: Appeal against sentence.

Facts: The complainant was the applicant's wife of over 40 years. Their relationship had deteriorated and an apprehended domestic violence order (ADVO) had been issued for the protection of the complainant. The applicant breached this order on a number of occasions and was charged. He was bailed on conditions which included that he not approach or contact the complainant. However, again, the applicant breached these conditions. He wrote to the complainant. Further, one night the applicant, who was intoxicated, entered the property of the complainant without her consent and engaged in serious misconduct throughout the night including physically assaulting the complainant, typing her up, attempting to rape her, pulling out a pistol and threatening the complainant with it, and sexual assaults.

Issue/s:

- The sentencing judge gave insufficient weight to the fact that the applicant was suffering from severe depression at the time of the offences.
- The sentence was manifestly excessive in light of the applicant's depression and that they occurred in the context of a domestic relationship.

Decision and Reasoning: These grounds of appeal were dismissed but the appeal was allowed on other grounds. First, the sentencing judge was not obliged to find that the applicant's judgment was impaired by his illness. To the extent that the depression may have contributed to the applicant's poor judgement, its significance was diminished by the applicant's voluntary consumption of large amounts of alcohol. Additionally, there was evidence of advance planning by the applicant. In these circumstances, specific and

general deterrence were particularly important. This approach of the sentencing judge was amply endorsed by authority, particularly when offences have been committed in a domestic context: *R v Hamid* and when such offences occur in breach of extant restraining orders such as an ADVO: *Hiron v The Queen*(See [33]-[37]).

Second, the sentence could not be said to be manifestly excessive. The relevance of depression was considered in the above ground of appeal. Additionally, in terms of the relevance of a (broken down) domestic relationship, as per Grove J at [46]:

'That a violent and pre planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness: R v Edigarov; *R v Dunn*; and *R v Burton*'.

Here, the applicant detained and abused his wife verbally, physically and sexually. He did so in defiance of the conditions imposed by the ADVO and by bail. The production and use of the pistol, particularly where the applicant was ingesting significance quantities of alcohol, magnified the fear in the complainant (See [47]).

***Jeffries v The Queen* [2008] NSWCCA 144 (26 June 2008) – New South Wales Court of Criminal Appeal**

'Aggravated kidnapping' – 'Aggravating factor' – 'Exposing children' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Detain for advantage and cause actual bodily harm, detain for advantage.

Appeal Type: Appeal against sentence.

Facts: The victim of the aggravated kidnapping was the male applicant's domestic partner (AW) and the victim of the kidnapping offence was AW's 15 year old daughter, KW. The relationship between the applicant and AW had been marked by incidents of physical violence. At the time of the offence, AW had obtained an apprehended domestic violence order (ADVO) against the applicant. The applicant physically assaulted and verbally abused AW and KW, including partially ripping AW's tongue. There was a knock on the door during the incident and someone called out, 'It's the police'. The applicant told AW and KW not to say anything. AW and KW were unable to leave the house that night. The applicant was sentenced to seven years and six months imprisonment.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The sentence was not manifestly excessive in light of the objective seriousness of the offences and the absence of any subjective factors operating in the applicant's favour (at [99]). The offences involved the protracted detention of AW and KW for the advantage of fending off police intervention with respect to the applicant's violence against both victims. They were committed in the context of the applicant's controlling and violent relationship with the victim, and he inflicted actual bodily harm of a serious (and bizarre) type on AW. Great fear was instilled in both victims (See [90]).

Significant aggravating factors existed on the facts namely, that the offences were committed whilst the Applicant was on bail for an offence of violence committed against AW and was subject to an apprehended domestic violence order intended to control his conduct towards his domestic partner. These were flagrant violations of both forms of conditional liberty intended to protect AW (See [91]). It was also a significant aggravating factor that the offender's 'recidivist conduct demonstrated a propensity to act violently towards his partners' (See [92]).

***R v Burton* [2008] NSWCCA 128 (20 June 2008) – New South Wales Court of Criminal Appeal**

'Assault occasioning bodily harm' – 'Common assault' – 'Community protection' – 'Denunciation' – 'Detain for advantage' – 'Deterrence' – 'Emotional and psychological abuse' – 'Exposing children' – 'Influencing witness' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Relevance of victim's expression of forgiveness' – 'Victim contribution' – 'Victim's wishes'

Charge/s: Common assault x 3, assault occasioning actual bodily harm x 2, detain for advantage, influencing witness.

Appeal Type: Crown appeal against sentence.

Facts: The respondent was released on parole as part of a sentence of imprisonment for break, enter and steal. He subsequently commenced a relationship with the female complainant, who was eight years older than him, and moved into her home with her two children. The respondent committed a series of offences against the complainant involving violent assaults and threats, including an offence of influencing a witness by convincing the complainant to withdraw the charges against him. The total effective sentence included a non-parole period of one year and nine months with a balance of term of one year. The sentencing judge backdated sentences for Counts 1, 2 and 3 so that they operated concurrently with the balance of parole.

Even at sentence, the victim provided a measure of support to the respondent.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. The sentences imposed failed to reflect the objective seriousness of the offences and were so inadequate as to be plainly unjust. Several aspects of the sentence imposed supported this conclusion. First, the approach of making the sentences concurrent meant that no effective sentence was imposed for three separate and serious offences of violence (See [92]-[93]). Second, the sentence for the detain for advantage offence did not reflect its objective seriousness, which was aggravated by the use of a knife. It was committed in the context of a 'controlling and violent relationship', extended over some hours, and involved actual threats of violence towards the victim (See [94]-[95]). It was additionally noted at [97] domestic violence offences involve the exercise of 'power, dominance and control' over the victim.

Third, the use of a bond for the offence of influencing a witness diluted significantly, and erroneously, the objective criminality in this case and a custodial sentence should have instead been imposed. Johnson J then made some observations regarding the role of victim's attitude towards the respondent in sentencing, noting that it ought to play 'no part on sentence' at [102]. His Honour quoted (at [104]) the remarks of Simpson J in *R v Glen* [1994] NSWCCA 1 (19 December 1994) which deal directly with this issue:

'*There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.'*

Fourth, the sentencing judge's remarks made no reference to specific deterrence, general deterrence nor the need for denunciation of the respondent's conduct (See [106]-[107]). Finally, the final count of assault was a significant and unusual feature, committed after the respondent had been in custody for over two months. It

was a further incident of control or dominance by the respondent over the victim, this time in a prison setting (See [108]-[110]).

In resentencing, the Court emphasised the importance of general and personal deterrence, denunciation and community protection, and noted that the offending took different forms and occurred at different times against the same victim and often in the presence of his children. The respondent had a substantial criminal history and showed little prospects for rehabilitation. The total effective sentenced was increased to four years and six months, with a non-parole period of three years (See [115]-[130]).

***Shaw v The Queen* [2008] NSWCCA 58 (14 March 2008) – New South Wales Court of Criminal Appeal**

'Aggravated break and enter (with actual bodily harm)' – 'Damaging property' – 'Denunciation' – 'General deterrence' – 'Malicious damage' – 'Offender character references' – 'Relevance of victim's expression of forgiveness' – 'Sentencing' – 'Specific deterrence' – 'Victim contribution' – 'Victim's wishes'

Charge/s: Aggravated break and enter with actual bodily harm, malicious damage to property.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant had been in a domestic relationship for approximately five years and lived together with their three children. Following a domestic dispute, the complainant went with the three children to stay at a friend's place. Over the next five days, the applicant made a number of threats to the complainant's physical safety by telephone before he, intoxicated, broke into the friend's place. He demanded to see his son before grabbing the complainant by her hair and striking her a number of times. The applicant had a long criminal history of offending in the domestic context and while those incidents did not involve actual violence, they evidenced a propensity to harassment in domestic situations and a failure to manage his anger. The complainant submitted a statutory declaration taking some responsibility for what she considered to be her part in provoking the applicant to act as he did. The applicant pleaded guilty and was sentenced to six years imprisonment, with a non-parole period of four years.

Issue/s: Whether the sentence was disproportionate to the gravity of the offending.

Decision and Reasoning: The appeal was allowed. Fullerton J found that the fact the offence was a domestic violence offence and that the victim was in a vulnerable position, did not elevate the offending to an 'objectively high' level. (See at [36]). The offending was not planned or premeditated, and the applicant did

not arm himself with a weapon to inflict injury. As such, the offending was better characterised as in the middle of the range. In relation to the victim's strong expression of support for the applicant, His Honour acknowledged the caution that must be exercised in attaching weight to such sentiments. In *R v Glen* [1994] NSWCCA 1 (19 December 1994) Simpson J said:

'In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind [general evidence of forgiveness and desire that the assailant/ partner not be imprisoned] in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been he) could attain the victim's forgiveness.

There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position.

Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases…'

Notwithstanding this, Fullerton J was persuaded to give the victim's support significant weight in this case. The victim's view that the offending was 'totally out of character' was also supported in evidence from the applicant's work supervisor. The sentence was reduced accordingly (See at [48]).

***Kennedy v The Queen* [2008] NSWCCA 21 (22 February 2008) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Grievous bodily harm with intent' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Grievous bodily harm with intent.

Appeal Type: Appeal against sentence.

Facts: The male Aboriginal applicant had been in a de facto relationship with the female Aboriginal victim of the assault. Their relationship had been volatile and the police had taken out an interim apprehended violence order (AVO) on behalf of the victim. Three weeks prior to the offence, the victim had ended the relationship and taken the applicant's medication for schizophrenia with her in her handbag. The applicant began experiencing auditory hallucinations and attacked the victim. She suffered severe physical injuries including facial fractures, fractures to her nasal bones and fractures of the mandible.

At sentence, the applicant explained that he did not obtain replacement medicine because there was no doctor and he did not want to leave his sick father. Nevertheless, the sentencing judge found that the applicant's state of mind was induced by his failure to take his medication, such that his psychological status was of his own default. The applicant was sentenced to a term of imprisonment consisting of a non-parole period of four years, with a balance of term of three years.

Issue/s: Some of the grounds of appeal included –

- The sentencing judge erred in finding that the applicant's psychological status was his own fault.
- The sentencing judge erred in his assessment that the offence was in the 'upper level of seriousness'.
- The sentencing judge failed to appropriately take into account the applicant's mental disorder when

imposing sentence.

Decision and Reasoning: The appeal was allowed. First, the sentencing judge failed to give reasons for his finding that the applicant's psychological status was his own fault. In particular, the sentencing judge failed to examine the circumstances which led to the applicant ceasing to take his medication. Such failure means that the sentencing judge could not arrived at such a conclusion beyond reasonable doubt (See [25]-[27]). Second, the sentencing judge erred in determining the objective seriousness of the offence by only having regard to the physical aspects of the assault and failing to consider the applicant's psychological condition (See [38]-[40]). Third, the sentencing judge failed to take into account the applicant's mental disorder as being relevant to the applicant's moral culpability (See [46]-[49]). Relevant to domestic violence, an aggravating factor of this offending was that at the time of the offence, the applicant was subject to an AVO, taken out to protect the victim (at [8]).

***Hiron v The Queen* [2007] NSWCCA 336 (7 December 2007) – New South Wales Court of Criminal Appeal**

'Assault occasioning actual bodily harm' – 'Denunciation' – 'Deterrence' – 'False imprisonment' – 'Physical violence and harm' – 'Pregnant women' – 'Protection of the community' – 'Sentencing'

Charge/s: Assault occasioning actual bodily harm x 4, false imprisonment, resist arrest x 2.

Appeal Type: Appeal against sentence.

Facts: The female victim of the assaults and false imprisonment was the applicant's de facto partner, who was pregnant at the time. The applicant was sentenced to a total effective sentence of imprisonment comprising of a non-parole period of four years with a balance of term of two years.

Issue/s: Some of the grounds of appeal included –

- The sentencing judge erred in not having proper regard to the totality principle.
- The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Price J noted at [32] that:

'Offences for violent attacks in domestic settings, this Court has emphasised, must be treated with real seriousness. Important factors in sentencing a domestic violence offender are specific and general

deterrence, denunciation of the offending conduct and protection of the community: see for example R v Edigarov; *R v Dunn*; and *R v Hamid*'.

Price J then quoted from Wood CJ in *Edigarov* at [41] where it was said that:

'…such conduct is brutal, cowardly and inexcusable, and the courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.'

Here, the sentence could not be said to be manifestly excessive or that the sentencing judge erred in his application of the totality principle. Each of the four offences of assault occasioning actual bodily harm involved separate episodes of violence towards the victim. After each occasion, the applicant had the opportunity to stop. The false imprisonment was serious and distressing to the victim. Some offences involved the use of a weapon and the offences involved gratuitous cruelty. The offences were committed while the applicant was on conditional liberty. The offender abused a position of trust, as the partner of the victim and the father of their children. The victim was vulnerable in that she was a pregnant female of much smaller build than the applicant (See [34]-[39]).

***Vragovic v The Queen* [2007] NSWCCA 46 (27 February 2007) – New South Wales Court of Criminal Appeal**

'Characterisation of seriousness' – 'Deterrence' – 'Grievous bodily harm with intent' – 'Physical violence and harm' – 'Protection orders' – 'Sentencing' – 'Women'

Charge/s: Grievous bodily harm with intent.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male applicant and the female victim had been married for some years before they divorced in mid-2003. The victim then commenced a relationship with another man and an apprehended domestic violence order was obtained protecting both the victim and her new partner. One evening, the victim was at home alone speaking on the telephone when the line went dead. The applicant then broke into the house and beat her with a piece of exhaust pipe and a shortened firearm. The applicant was sentenced to 12 years imprisonment, with a non-parole period of 8 years. This sentence was partially accumulated upon an earlier imposed sentence for grievous bodily harm with intent against the victim's new partner. Accordingly, the

effective overall sentence for both offences was 14 years imprisonment, with a non-parole period of 10 years.

Issue/s: One of the grounds of appeal was that the sentencing judge erred in his description that the offence 'must be near the top of the range of seriousness'.

Decision and Reasoning: The appeal was dismissed. Adams J stated at [33]:

'It was once thought in some circles that domestic violence was somehow less serious than criminal violence inflicted in other circumstances. I do not agree. In many cases of domestic violence a distinguishing characteristic is the notion of the offender that he (and it is almost invariably a male) is entitled to act as he did pursuant to some perverted view of the rights of a male over a female with whom he is or was intimately connected. It is this characteristic of self-justification which requires particular emphasis to be given, in cases of this kind, to the elements of general and personal deterrence. In this case, the appellant had already been arrested for another extremely vicious attack on [his ex-wife's new partner] for motives which were plainly related to those for which he attacked his ex-wife. The notion that this was some kind of temporary aberration is, I think, disproved by this concatenation of events. There was no a sudden loss of control arising out of circumstances beyond his capacity to deal with. It was a cold, calculating and brutal attack upon a helpless woman at night in her own home'.

Here, the characterisation of the offence by the sentencing judge as 'near the top of the range of seriousness' related not to the actual physical injuries or to the overall seriousness of the offence but to the circumstances in which the injuries were inflicted. This characterisation was correct (See [34]).

***Walker v The Queen* [2006] NSWCCA 347 (1 November 2006) – New South Wales Court of Criminal Appeal**

'Attempted wounding with intent to cause grievous bodily harm' – 'Distress at the breakdown of a relationship is no excuse for violence' – 'Objective seriousness' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Attempted wounding with intent to cause grievous bodily harm.

Appeal Type: Appeal against sentence.

Facts: The offence arose out of the breakdown of the fifteen year marriage between the applicant and the victim. The victim told the applicant that she was seeing another man and that their marriage was over. Some

days later, the applicant beat the victim and attacked her with a 32 cm long kitchen knife. The applicant was sentenced to a head sentence of three years with a non-parole period of eighteen months.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The sentencing judge correctly characterised the objective criminality of the offending as very serious. The sentencing judge emphasised, as many on the bench had done so previously, that however sad and distressing a matrimonial breakdown might be, violence of any kind is not to be accepted as a more or less natural incident of such a breakdown (See [7]). The sentencing judge further gave appropriate weight to the relevant subjective matters (See [8]-[9]).

***R v Hamid* [2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

'Assault occasioning bodily harm' – 'Coercive control' – 'Denunciation' – 'General deterrence' – 'Multiple victims' – 'People with mental illness' – 'Physical violence and harm' – 'Protection of the community' – 'Repeat domestic violence offenders' – 'Sentencing' – 'Specific deterrence' – 'Vulnerability of the victim' – 'Wounding'

Charge/s: Assault x 2, assault occasioning actual bodily harm x 5, detaining without consent and with intent to obtain an advantage (to avoid detection for assaulting her), malicious wounding.

Appeal Type: Crown appeal against sentence.

Facts: The total effective sentence included a non-parole period of two years and six months, with the balance of the term lasting two years. The offending involved prolonged and serious violence committed against three women with whom the respondent was either married or in a relationship over an eight year period.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Johnson J at [65] - [88] provided a very useful summary of the relevant principles, particularly of relevant Court of Criminal Appeal authority. This authority has placed great emphasis on general deterrence, due to the prevalence of domestic violence, as well as the vulnerability of victims and breaches of trust involved. Specific deterrence and denunciation is also important.

Johnson J also quoted Wood CJ in *R v Edigarov* [2001] NSWCCA 436 who stated –

'As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996,

Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell(2000) NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.'

Her Honour went on at [77] –

'These judicial statements are complemented by criminological research concerning domestic violence. An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6-7.

Her Honour then commented specifically on the relevant considerations when sentencing — '*In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important'* at [86].

'This is not to say that promotion of rehabilitation of the offender is not an important factor. It remains necessary to provide individualised justice in the circumstances of the particular sentencing decision. Nevertheless, the factors to which reference has been made above assume particular significance in the case of a domestic violence offender who has committed a series of offences over an extended period of time against different victims' at [88].

While the respondent did have a mental illness, Her Honour found that it was not such as to reduce his moral culpability, or reduce the need for general deterrence, as he was aware of the gravity of the offending. In

applying these principles to the facts, Johnson J found that the sentences imposed at trial were manifestly inadequate and did not reflect the 'objective criminality' that was involved. The respondent showed minimal remorse, was seeking to 'justify his crimes' and had a criminal record of assaults and breaches of apprehended domestic violence orders. The respondent was re-sentenced accordingly (See at [152]).

***R v Kershaw* [2005] NSWCCA 56 (1 March 2005) – New South Wales Court of Criminal Appeal**

'Breach of apprehended violence order' – 'Rape' – 'Relevance of victim's expression of forgiveness' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Victim's wishes'

Charge/s: Rape, breach of an apprehended violence order.

Appeal Type: Appeal against sentence.

Facts: The applicant and the complainant had been married for 16 years and lived with their eight year old daughter. They had been arguing when the applicant pushed the complainant forcefully. She rang the police and obtained an apprehended violence order (AVO) restraining intimidating conduct and restraining the applicant from being at their premises under the influence of alcohol, liquor or drugs. The applicant arrived back at their premises and complained about the AVO. He then stripped naked. The complainant told the applicant that she was not willing to have sex with him and was not going to change her mind about the AVO. He then raped the complainant. The applicant pleaded guilty and was sentenced to 5 years imprisonment, with a non-parole period of two and a half years. A 10 percent reduction in sentence was made to take into account this guilty plea.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The Court held that the discount for the guilty plea was appropriate, was not 'meagre' and was actually quite significant. Further, the applicant contended that the trial judge erred by taking a 'harsh view' in finding that the applicant and the complainant continuing their relationship is an issue with regards to the applicant's rehabilitation. The complainant maintained a 'favourable' view of the applicant and the relationship (See at [21]). Bryson JA held that the complainant's 'forgiving and optimistic attitude' should not play a large part in the sentencing decision. The trial judge was correct to conclude that the fact that the offence was committed against his wife was an aggravating factor. As per the trial judge, at [24] *'The sentencing process is not and of course should not be in the hands of complainants, and the merciful or relenting attitude of a complainant does not reduce the gravity of the*

offence and does not have much effect on the interest of justice in imposing an appropriate sentence'.

The trial judge's view that the gravity of the offence was severe was correct. Other aggravating factors included his previous conviction for assaulting his wife, the fact that offence was committed after ongoing supervision and a good behaviour bond was completed, and it was in breach of an AVO. This justified a correspondingly high sentence.

***R v Dunn* [2004] NSWCCA 41 (23 February 2004) – New South Wales Court of Criminal Appeal**

'Assault occasioning actual bodily harm' – 'Breach of an apprehended violence order' – 'Break and entering a dwelling armed with an offensive weapon' – 'Denunciation' – 'Deterrence' – 'Exposing children' – 'Manifestly inadequate' – 'Physical violence and harm' – 'Purposes of sentencing' – 'Sentencing'

Charge/s: Breaking and entering a dwelling armed with an offensive weapon, assault occasioning actual bodily harm, breach of an apprehended domestic violence order.

Appeal Type: Crown appeal against sentence.

Facts: The de facto relationship between the male respondent and the female complainant had ended in mid-2000. In 2001, the respondent was convicted of assault occasioning actual bodily harm and placed on a bond for two years. Six months later, the poorly disguised respondent crashed his car into the complainant's car, which she was driving with her two children. The respondent then tried to force the complainant out of her car and punched her in the nose, eye and head. In 2002, the respondent broke into the complainant's house and attacked her with a Stanley knife. The complainant's new partner intervened. The respondent was sentenced to three years and nine months imprisonment with a non-parole period of one year and nine months.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Adams J stated at [47]:

'Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence: firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat. These elements also usually mean that the victim never feels truly safe. Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted. To my mind these considerations emphasise not only the need for general and personal

deterrence but also of denunciation in cases of this kind'.

He found that the sentencing judge did not give adequate weight to the need for deterrence and denunciation. Further, the extent of injury committed by the offender is an important factor in assessing the appropriate measure of punishment and the sentence here did not adequately reflect the pain and suffering the respondent caused. Finally, the sentencing judge erred in imposing wholly concurrent sentences because there were two distinct and separate instances of violence against the complainant and her new partner. The respondent was re-sentenced to four years and six months imprisonment.

***R v O'Brien* [2003] NSWCCA 121 (6 May 2003) – New South Wales Court of Criminal Appeal**

'Battered woman syndrome' – 'Defences' – 'Expert evidence' – 'Forensic psychiatrist's evidence' – 'Manslaughter' – 'Physical violence and harm' – 'Where the victim is an offender'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The appellant was found guilty of the manslaughter of her daughter, who died of malnutrition at the age of 14 months. The appellant refused to take the child to the hospital, against the advice of medical practitioners and friends. In a record of interview, the appellant said that she did not take the deceased to the hospital because her husband believed that children should not be infused with fluids or have any artificial substances injected into their bodies. At trial, the appellant gave evidence that her husband was controlling, verbally abusive and violent, and she was afraid to contravene his wishes. Defence counsel also called evidence from a forensic psychiatrist, Dr Nielssen. Dr Nielssen did not find that the appellant suffered from any kind of psychiatric disorder but that her situation fitted 'battered wife syndrome'. As a result of this, the appellant accepted the decisions made by her husband, despite having reservations about them (See [31]). The appellant was sentenced to five years imprisonment with a non-parole period of two years.

Issue/s: Some of the grounds of appeal included –

- The trial judge erred in summarising Dr Nielssen's evidence altogether, as it related to the defence of duress. Rather, His Honour ought to have summarised the parts of Dr Nielssen's evidence that were relevant to the subjective test, and then after describing the objective test, directed the jury's attention to those parts of Dr Nielssen's evidence that were relevant to that test and how a hypothetical person in the

same circumstances, i.e. a battered wife, would have acted as to withdrawing from the relationship etc.

- The trial judge's summing-up on the evidence of battered wives syndrome from Dr Nielssen was inadequate.

Decision and Reasoning: The appeal was dismissed. First, as per Durford J at [43], *'although it is undoubtedly the duty of a trial judge in summing up to relate the different pieces of evidence to the different issues in the trial: R v Zorad (1990) 19 NSWLR 91 at 105, this was a "single issue" trial and that single issue was duress. The evidence of Dr Nielssen about the battered wife syndrome was relevant to both the subjective and objective tests and there was no need to divide it up in a way which had not been suggested by either counsel in their addresses: Osland v The Queen [1998] HCA 75 at [59]-[60]'.*

Second, a trial judge is not required to read or summarise the whole of the relevant evidence to the jury which has already been heard from witnesses, but merely to present a balanced summary of the salient parts which is fair to both sides. The evidence of Dr Nielssen was sufficiently and fairly summarised by the trial judge. Some of the questions and answers not repeated in the summing-up were merely elaboration of general propositions of the doctor which had been summarised, and one answer in particular which it was claimed should not have been omitted had been substantially paraphrased by the appellant's trial counsel in his final address (See [47]-[48]).

***R v Palu* [2002] NSWCCA 381 (17 September 2002) – New South Wales Court of Criminal Appeal**

'Malicious grievous bodily harm' – 'Physical violence and harm' – 'Protection of the community' – 'Relevance of the attitude of the victim' – 'Sentencing' – 'Victim contribution'

Charge/s: Maliciously inflicting grievous bodily harm.

Appeal Type: Crown appeal against sentence.

Facts: The male respondent and the male victim were drinking partners and got into a fight. The victim suffered a skull fracture. The sentencing judge adjourned proceedings and granted bail to the respondent on certain conditions, under s 11 of the *Crimes (Sentencing Procedure) Act*

Issue/s: In light of the seriousness of the offence and because it was inevitable that a full-time custodial sentence had to be imposed, it was outside the exercise of His Honour's discretion to make an order adjourning proceedings.

Decision and Reasoning: The appeal was allowed. This was not a case involving domestic violence but Howie J's comments regarding the relevance of a victim's attitude to sentence have been cited in subsequent domestic violence cases. Here, the sentencing judge was unduly influenced by the fact that the victim and the respondent were still friends. At [37] His Honour provided:

'The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness: R v Glen [1994] NSWCCA 1 (19 December 1994). *Sentencing proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences: Henderson (NSWCCA, unreported, 5 November 1997). Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim'.*

Howie J also noted that a sentencing judge should only give very limited weight to statements made by an offender to a psychiatrist or psychologist reproduced in reports, including expressions of remorse (See [39]-[41]).

Note: Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced on 25 September 2018 imposing additional requirements in sentencing for domestic violence offences in NSW.

***R v Quach* [2002] NSWCCA 173 (15 May 2002) – New South Wales Court of Criminal Appeal**

'Contrition' – 'Forgiveness by the victim' – 'Good character' – 'Grievous bodily harm with intent to murder' – 'Physical violence and harm' – 'Sentencing' – 'Victim contribution'

Charge/s: Grievous bodily harm with intent to murder.

Appeal Type: Appeal against sentence.

Facts: The applicant began to suspect that his wife, the victim, was having an affair (an allegation without basis). One morning, while the children were at school, the victim was lying in bed and was struck several times, mainly on the head, with a bottle wielded by the applicant. The applicant said to the victim that he

wanted to kill her because she did not respect him. He then tied the victim up and gagged her whilst continuing to threaten to kill her and then himself. The victim was not released until her children returned home from school and the victim lost a lot of blood. The applicant was sentenced to nine years imprisonment with a non-parole period of five years. In imposing this sentence, the sentencing judge made reference to the former good character of the accused and stated:

'We must all accept the fact that differences in marriages do occur and it is expected that people will try and resolve any differences without violence. However to go to the stage of wanting to end the marriage by killing someone is quite unacceptable of course and quite frightening to the wider community. There can be no mitigating factors in such an act with that intention. We do accept the realities of marriages breaking up and people separating but we can never accept or tolerate any person killing someone as the solution. And so it is difficult with reference to a person being a man of good character up until now. It is difficult to know what relevance that has where a person has considered the final solution' at [16].

The fact is that at the start of the assault that morning the prisoner did state and evidence an intention to kill. Such an expression and intention must immediately negate any consideration of mitigating factors because of good character, then to extend the trauma and terror of the assault all day until the late afternoon takes the actions of the prisoner into a further level of callousness' at [17].

Issue/s: Some of the grounds of appeal included –

- The sentencing judge did not take into account the previous good character of the applicant when fixing the sentence.
- The sentencing judge failed to consider the contrition of the applicant.

Decision and Reasoning: The appeal was dismissed. First, O'Keefe J noted that there is nothing wrong with a judge discussing the weight which should be given to the previous good character of an offender. While the sentencing judge's remarks at [16] were unexceptional, the sentencing judge erred at [17] when he completely excluded the applicant's previous good character as a mitigating factor and therefore did not take it into consideration in mitigation of the penalty (see [19]). However, the sentence imposed by the judge and the non-parole period were very lenient given the objective gravity of the offence and taking into account the subjective features of the applicant, and a lesser sentence would not have been appropriate in the circumstances. This ground of appeal was therefore dismissed.

Second, on the facts, it was arguable that the applicant showed contrition and further, the absence of an

affirmative finding in relation to contrition by the sentencing judge was not to be regarded as a matter overlooked by His Honour (See [27]). Additionally, O'Keefe J commented on forgiveness of the victim at [28] and stated:

'The fact that he expressed contrition to his wife and that she said that she forgave him did not detract from the duty of the judge to impose a proper sentence. Her views in relation to the contrition of the Applicant, as opposed to what he said to her, do not seem to have been tested. Furthermore, even the stated acceptance by the victim of her acceptance of her attacker's contrition does not bind the court, nor does it detract from the need to give proper weight to the principle of general deterrence, R v Kanj [2000] NSWCCA 408, a principle that is important in cases of domestic violence (R v Green [2001] NSWCCA 258; R v Glen [1994] [1994] NSWCCA 1). Furthermore, the fact that a victim may forgive her attacker is not determinative. Indeed, its weight in relation to general deterrence will be a variable depending on the offence and the circumstances. It is a matter for judgment by the sentencing judge'.

***R v Edigarov* [2001] NSWCCA 436 (5 October 2001) – New South Wales Court of Criminal Appeal**

'Assault police officer occasioning actual bodily harm' – 'Common assault' – 'Deterrence' – 'Double jeopardy in sentencing' – 'Exposing children' – 'Kidnapping' – 'Mitigating factors' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Common assault, assault police officer occasioning actual bodily harm, kidnapping.

Appeal Type: Crown appeal against sentence.

Facts: On 3 August 1999, the respondent assaulted his wife (the victim) in the presence of their three year old daughter by pushing her against a refrigerator, pursuing her into the bedroom and pushing her to the floor. After throwing and kicking items, he left the unit and the victim went to a friend's unit for safety. The respondent arrived there an hour later and threatened to kill her if she did not return home. Police were called and the respondent assaulted these officers. The respondent was released on bail and became subject to an apprehended domestic violence order. On 7 October 2000, the respondent kidnapped the victim while she was walking along the street with her daughter. He drove her to his parents' home and repeatedly punched and kicked her. The victim managed to escape and called the police. The sentencing judge imposed the following sentences:

- Common assault: six months imprisonment.

- Assault police officer occasioning actual bodily harm: 18 months imprisonment, suspended upon the condition that he enter into a good behaviour bond.
- Kidnapping: two years imprisonment with a non-parole period of six months and 12 days.

In imposing the sentence for kidnapping, His Honour found that there were special circumstances in that all of the offences of the respondent were *'by-products of (his) anger and frustration and disappointment at the failure of (his) marriage and at the imposition of the apprehended violence order against (him)'.*

Issue/s: One of the grounds of appeal was that the sentencing judge failed to give sufficient weight to the objective seriousness of the combination of the offences involved.

Decision and Reasoning: The appeal was allowed. Wood CJ held that the sentence imposed failed to give sufficient weight to the objective seriousness of the offences and too much significance was attached to the emotional reaction of the respondent to being thwarted in the marriage, a circumstance that provided no excuse whatsoever for his behaviour (See [39], [52]). In relation to the assault of his wife, Wood CJ found that the offence involved the sustained use of physical violence causing fear in the presence of an equally terrified child. It could not be characterised as a momentary or uncharacteristic loss of self-control, as the aggression continued into the evening. Further, at [41]:

'As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996, Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell (2000) NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence'.

Additionally, the kidnapping offence involved sustained violence by the respondent who caused substantial injury to his wife and again threatened to kill her. It was again committed in the presence of their young daughter and caused significant fear. Further, the sentencing judge failed to reflect three aggravating factors in the sentence namely, this was not an isolated act of violence, and the offence was committed while the offender was on bail and while the offender was subject to an apprehended violence order in relation to the same victim (See [47]-[51]). In re-sentencing the respondent, the court took into account the principle of

double jeopardy (See [55]-[65]).

R v MacAdam-Kellie **[2001] NSWCCA 170 (9 May 2001) – New South Wales Court of Criminal Appeal**

'Aggravating factor' – 'Attempted murder' – 'Breach of an apprehended domestic violence order' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Attempted murder.

Appeal Type: Appeal against sentence.

Facts: The applicant and the victim had been married for 21 years before the victim left the family home and obtained an apprehended violence order. On the day of the offence, the victim was arriving at the Family Court accompanied by their four year old son when the applicant approached her and produced a knife, approximately 30 cm in length with a serrated edge blade. The victim fled but was chased by the applicant and almost fatally stabbed in the arm, back and stomach. The applicant was sentenced to 16 years imprisonment, with a non-parole period of 12 years. A psychiatric report tendered from Dr Nielssen diagnosed the applicant as suffering from a major depressive illness and a personality disorder.

Issue/s: One of the grounds of appeal was that the sentencing judge erred in failing to accept the findings of Dr Nielssen and in concluding that there was no evidence which established a link between the major depressive illness the applicant was suffering and the commission of the offence (See [51]).

Decision and Reasoning: The appeal was allowed. In light of the opinion of Dr Nielssen and fresh evidence adduced, there was a link between the illness suffered by the applicant and the offence (See [58]). James J also noted that the sentencing judge's conclusions regarding the severity of the attack (particularly in light of the apprehended violence order) were entirely open to him. The attack was very severe and showed a degree of viciousness. The offence was committed in breach of an apprehended domestic violence order and this was a significant aggravating factor (See [37]-[38]).

R v Grech **[1999] NSWCCA 268 (6 September 1999) – New South Wales Court of Criminal Appeal**

'Deterrence' – 'People with disability and impairment' – 'Person in authority having sexual intercourse with person with intellectual disability' – 'Position of trust' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Person in authority having sexual intercourse with a person with intellectual disability x 2.

Appeal Type: Appeal against sentence.

Facts: The male complainant, who had an intellectual disability, lived in a group home where the male applicant worked as a team leader. They formed a sexual relationship. The complainant gave evidence at trial that the sexual contact commenced when he turned 18 and that they loved each other. The applicant was found guilty after a trial of two counts of a person in authority having sexual intercourse with a person who has an intellectual disability under *Crimes Act 1900* (NSW) s 66F. The applicant was sentenced to a minimum term of three years imprisonment with an additional term of two years imprisonment.

Issue/s: The sentencing judge failed to adequately take into account the evidence of the nature of the relationship between the applicant and the complainant together with the lack of evidence of psychological or other injury suffered by the complainant and his borderline degree of intellectual disability.

Decision and Reasoning: The appeal was dismissed. Carruthers AJ held that even if one were to accept that there was a genuine mutual loving relationship on the facts (of which there was some doubt), this did not reduce the criminality of the applicant as assessed by the trial judge. His Honour noted that the legislature did not encumber s 66F(2) with qualifications and it was clearly intended to prohibit absolutely, persons with authority (as defined) having sexual intercourse with intellectually disabled persons over whom they have authority (See [32]). Deterrence looms large for offences under s 66F(2) as '*it is the mark of a civilised society that those who are incapable fully of protecting their own interests, should be protected from exploitation by those in whom society vests the responsibility of caring for them. Carers who breach this trust must expect condign punishment*' (See [37]). The seriousness of the offence was explained by Carruthers AJ at [33]-[34]:

'strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.

'Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into one of a continuing and prolonged violation of the provisions of s 66F(2). The applicant knew not only that he was in breach of his position of trust, but that he was in breach of the criminal law, and he was also aware that the complainant had previously been the victim of sexual exploitation and as a consequence a prior carer was serving a lengthy custodial sentence. The fact that the relationship may have developed, as the applicant

contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor'.

***R v Kotevski* [1998] NSWCCA 1 (3 April 1998) – New South Wales Court of Criminal Appeal**

'Malicious wounding with intent to cause grievous bodily harm' – 'Physical violence and harm' – 'Sentencing' – 'Sentencing judge should not enter into a determination of the merits of matrimonial disputes'

Charge/s: Malicious wounding with intent to cause grievous bodily harm.

Appeal Type: Appeal against sentence.

Facts: The victim was the applicant's estranged wife. Despite living apart and having commenced Family Court proceedings, they continued to work together in a takeaway food business. One day at work, they were arguing and the applicant 'snapped'. He repeatedly stabbed the victim with a scraper and a trowel before picking up a long bladed knife and lunging at the victim. Someone heard the victim's screams and managed to intervene. The applicant was sentenced to three years imprisonment with a minimum term of two years and three months.

Issue/s: Some of the grounds of appeal included –

1. Whether the sentencing judge erred in not taking into account, or in not sufficiently taking into account, the belief by the applicant that he had been unfairly treated by his wife and the applicant's consequential feelings of anger and frustration.
2. Whether the sentencing judge erred in declining to enter into a determination of the merits of the matrimonial disputes between the applicant and his wife.

Decision and Reasoning: The appeal was dismissed by James J (Simpson J agreeing). First, the sentencing judge did not proceed on the basis that the applicant's belief and feelings about his wife were irrelevant in the sentencing of the applicant. On the contrary, the sentencing judge appropriately took into account these feelings expressly when he noted that the attack by the applicant on his wife was not pre-meditated and that the applicant while subject to stress had 'snapped' and had 'on the spur of the moment' engaged in a 'heated' attack. His Honour was not required to take the applicant's belief and feelings about his wife any further into account (10-11). Second, the sentencing judge was justified in adopting the position that he would not enter into a determination of the merits of the matrimonial disputes (i.e. who was right and who was wrong) and this

was irrelevant to sentencing, except insofar as determining the attack was not pre-meditated (11-14).

***R v O'Grady* [1997] NSWCCA 1 (13 May 1997) – New South Wales Court of Criminal Appeal**

'Aggravated sexual intercourse without consent' – 'Character' – 'Denunciation' – 'Detention against will with intent to carnally know the victim' – 'Deterrence' – 'Factors not mitigating at sentence' – 'Public confidence in the criminal system' – 'Relevance of a prior relationship' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Women'

Charge/s: Aggravated sexual intercourse without consent, detention against will with intent to carnally know the victim.

Appeal Type: Crown appeal against sentence.

Facts: The female victim and the male respondent had previously been in a consenting sexual relationship but at the time of the offence the relationship had ended and they were merely seeing each other as friends. The respondent asked the victim for another chance at the relationship but the victim refused. He then threatened the victim with a knife and tied her up. The respondent fondled the victim and had penile intercourse with her without her consent. The respondent was sentenced to three years imprisonment, to be served by way of periodic detention for the aggravated sexual intercourse without consent and deferred sentence for the detention offence on the condition that the respondent enter into a recognisance to be of good behaviour for a period of five years. In imposing this sentence, the judge found that these offences were 'foreign' to the respondent's normal character, had their roots in compulsive gambling, and were an 'aberration committed by a young man who loved a young girl'.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Sully J held that while there was sufficient evidence to support a finding that the offences were 'foreign' to the respondent's normal character, the offending did not have its roots in 'compulsive gambling' and nor could the objective seriousness of the offences be broken down as being no more than 'an aberration committed by a young man who loved a young girl'. These were extremely serious offences which resulted from the breakdown of the relationship between respondent and the victim and the victim's rejection of the respondent's request to resume the relationship (See 8). As per Sully J at p. 9 that where a relationship breaks down:

' *the woman who is involved in the relationship is entitled to feel that, whatever other consequences ensue,*

her personal safety will not be threatened at all, let alone threatened by the commission of criminal offences of the gravity of those with which we are now called upon to deal'.

In sum, the sentences imposed were manifestly inadequate. They were wholly inadequate to denounce the violent rape, at knife point, of a defenceless young woman in what ought to have been the safety and security of her own home. They were wholly inadequate to properly denounce the victim's violent and prolonged detention for that purpose. They were also wholly inadequate to deter both the respondent and other young men from similar behaviour. Further, very importantly, the sentences imposed were hopelessly inadequate to ensure that there is maintained public respect for and confidence in current standards of criminal justice (See 11). The respondent was resentenced to five years imprisonment for the sexual intercourse with consent offence with a minimum term of three years and three years imprisonment on the detention offence.

***R v Rowe* [1996] NSWCCA 1 (3 October 1996) – New South Wales Court of Criminal Appeal**

'Deterrence' – 'Family hardship' – 'Kidnapping' – 'Physical violence and harm' – 'Rape' – 'Relevance of victim's wishes' – 'Sentencing' – 'Victim contribution'

Charge/s: Kidnapping, rape.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant lived in an 'off and on' de facto relationship over a period of five years and had two children together. Immediately prior to the offences, the relationship had broken down again. The applicant became jealous because he believed the complainant was seeing a new man. He then forced the complainant into his car, drove her to his premises, threatened to kill her family and this new man, and proceeded to have sexual intercourse with her without consent. He was sentenced to seven years imprisonment, with an effective minimum term of four years. The complainant wrote to the sentencing judge stating that she had resumed a relationship with the applicant, she did not want him to go to prison (particularly because of the trauma that would result to their children), and she had forgiven the applicant.

Issue/s: Some of the grounds of appeal included –

1. The sentencing judge gave insufficient weight to his subjective features including his age, background, disrupted and violent upbringing, education and employment.

2. The sentencing judge gave insufficient weight to the wishes of the complainant

Decision and Reasoning: The appeal was dismissed. First, the sentencing judge did not err when he rejected the claim that these subjective circumstances had a relationship to the commission of these offences and therefore ought to have mitigated the sentence (See 472). Second, Hunt CJ dismissed the contention that the sentencing judge ought to have given greater weight to the wishes of the complainant. As at 472-473:

'This Court has said more than once that the attitude of complainants cannot govern the approach to be taken in sentencing. In Glen, Simpson J pointed out that, whilst forgiveness by the victim may be relevant in some cases, exceptional caution is required in allowing such evidence to be given in relation to domestic violence type offences. The present offences fell within the same category, where the nature of the relationship between the offender and the victim is such that the victim will frequently, and clearly contrary to their own interests and welfare, forgive their attacker. The importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

'This Court has also said more than once that the hardship upon the family of an offender will not be relevant in mitigation unless it goes beyond that which inevitably results in any case of incarceration and unless it is sufficiently extreme as to demand that the judge draw back. That has not been established in this case. It may be ironic, as has been suggested, that the victim and her children are going to suffer the punishment imposed upon the offender, but the fact remains that the law requires such a punishment to be imposed'.

***R v Glen* [1994] NSWCCA 1 (19 December 1994) – New South Wales Court of Criminal Appeal**

'Deterrence' – 'Physical violence and harm' – 'Relevance of victim's forgiveness' – 'Sentencing' – 'Sexual intercourse with consent' – 'Victim contribution'

Charge/s: Sexual intercourse without consent.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male appellant and the female victim had been in an intermittent relationship for two years and had a daughter together. The appellant had sexual intercourse with the victim without her consent in the front yard of his premises. At the time of offence, he was upset about his possible denial of access to his daughter.

Issue/s:

1. The appellant did not appreciate when he pleaded guilty that he was acknowledging the absence of consent of the victim to sexual intercourse.
2. The admission of guilt involved in the plea should be regarded as tainted and not a free and voluntary confession.
3. The sentencing judge fell into error by failing to give adequate weight to the lack of any relevant prior record, the emotional background to the incident - including the appellant's fears concerning future contact with his daughter, the remorse expressed and the attitude of the complainant.

Decision and Reasoning: As per Grove J (Loveday AJ and Simpson J agreeing) the appeal against conviction and the appeal against sentence was dismissed. First, counsel for the appellant at trial obtained adequate written instructions prior to the arraignment that the appellant wished to plead guilty. These evidenced that the appellant knew the consequences of pleading guilty (See 5-6). Second, the terms of the written instructions, the evidence of the solicitor and the lack of credibility attaching to the appellant's assertion combine to made this ground of appeal untenable (See 7). Finally, none of the above matters were overlooked by the sentencing judge and no error was accordingly demonstrated. In particular, the sentencing judge made express reference to the attitude of the complainant, which cannot govern the duty of the court when proceeding to sentence (See 8).

After agreeing with the reasons of Grove J, Simpson J made further comments on the relevance of the victim's attitude of the offences to the sentence which should be imposed. Her Honour provided:

'In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been be) could attain the victim's forgiveness.

There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.

The second reason of principle for treating with extreme caution the evidence of the forgiveness of the victim in the circumstances of this case is that the legislature has, since 1982, made clear its intention that special considerations apply to offences of domestic violence'.

Supreme Court

R v Songcuan (No 3) [2023] NSWSC 183 (3 March 2023) – New South Wales Supreme Court

'Advanced age' – 'Coercive control' – 'Common law' – 'Covid19' – 'Extreme provocation' – 'Female primary perpetrator' – 'History of domestic and family violence' – 'Homicide' – 'Jealousy' – 'Male primary victim' – 'Manslaughter' – 'Older people' – 'Otherwise exemplary character' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence' – 'Sentencing' – 'Victim as (alleged) perpetrator'

Proceeding: Sentencing hearing for manslaughter conviction.

Charge(s): Manslaughter.

Facts: The male accused and female deceased were married in the Philippines before immigrating to Australia. Their relationship had deteriorated over the decade prior to the wife's death. Tension had escalated significantly during COVID lockdowns and the deceased wife was increasingly aggressive, controlling and violent towards the accused, believing him to be unfaithful to her.

The deceased had found a birthday card sent by a co-worker to the accused and an argument had ensued, during which the deceased wife struck the accused with a rolled-up canvas-photograph and threw a remote control. The accused went into the garage and was followed by the deceased, where she threatened the accused with pliers. The accused disarmed her, put his arm around her throat and hand over her mouth and applied pressure until she stopped breathing.

Decision and Reasoning: The accused was sentenced to a term of imprisonment of 7 years and 6 months with a non-parole period of 5 years.

Campbell J accepted the accused's account of the deterioration of the couple's relationship and the deceased's aggressive, controlling and violent behaviour towards him. It was significant that were no allegations of previous domestic violence by the accused and there was evidence he had sought reconcile the relationship by seeking the intervention of their daughter and the local pastor.

Campbell J found that the manslaughter had been an isolated incident in which the accused had uncharacteristically lost self-control. The intensification of the deceased's ongoing threatening, controlling and violent behaviour towards him was found to constitute intimidation (s13 *Crimes Act* (NSW)) and HH found that the manslaughter was one of extreme provocation, both cumulative and immediate.

The starting point were the principles of retribution and denunciation, particularly important in the context of an instance of serious domestic violence where the accused had clear moral culpability. However, the accused was found to have lived an ‘exemplary’ and ‘completely blameless’ pro-social life and his conduct was an ‘aberration.’ These factors in conjunction with his old age gave him strong prospects of rehabilitation and made him extremely unlikely to reoffend, reducing the relevance of deterrence. The accused’s early plea of guilty and the additional hardships imposed upon him by COVID-related delays were also taken into account.

***R v Ahmed (No 2)* [2023] NSWSC 105 (17 February 2023) – New South Wales Supreme Court**

‘Coercive control’ – ‘Following, harassing and monitoring’ – ‘Jealousy’ – ‘Murder’ – ‘Past domestic violence’ – ‘People from culturally and linguistically diverse backgrounds’ – ‘People with mental illness’ – ‘Physical violence’ – ‘Sentencing’ – ‘Separation’ – ‘Suicide threat’ – ‘Suicide threats’

Charges: Murder.

Proceeding: Sentencing.

Facts: The male offender and female victim were married and had immigrated from Bangladesh together. The relationship began to deteriorate, and the victim developed a romantic attachment with a mutual friend.

The offender became suspicious of their relationship, confronting the parties and expressing mental health concerns to his GP. He began to act aggressively and controllingly towards the victim, losing his temper, threatening to kill himself, tracking her location, calling her frequently at work and insisting she go to bed at the same time as him.

The victim began to express her desire to separate but agreed to take a break and travel to Bangladesh. During this time, the offender monitored the victim’s Facebook, messaged her requesting details of the minutiae of her life and searched on the internet for how to punish an unfaithful wife in Islam. Upon returning to Australia, the victim made it known that there was no future in their relationship.

On the day of the murder, the offender confronted the victim in her home about the affair and threatened her with a knife, demanding her phone. Upon seeing that the victim remained romantically involved with the friend, the offender stabbed her 14 times. As she died, he uploaded a photo and status on Facebook before calling triple-zero 20 minutes later and admitting to killing his wife.

Sentence: 24 years imprisonment with a non-parole period of 18 years.

While the offender was suffering an adjustment order, N Adams J was not satisfied that he was substantially impaired and found that the murder was one of a jealous and humiliated husband flying into a rage about his wife leaving.

The offence was a grave example of murder. While not premeditated, the evidence established that the victim was in fear of her life within the relationship. Her defencelessness and pleas for forgiveness, the brutality of the attack, the offender's deliberate delay in calling 000 and failure to render any assistance, and his internet search of punishment prior to the killing all increased the seriousness.

The adjustment disorder slightly reduced the offender's moral culpability and regard was had to his good prospects of rehabilitation and unlikeliness of reoffending, as he had demonstrated remorse, made admissions and had no criminal history.

***R v Gina Kennedy (a pseudonym)* [2022] NSWSC 1499 (4 November 2022) – New South Wales Supreme Court**

'Axe' – 'Controlling behaviour' – 'Female perpetrator' – 'Guilty plea' – 'Killing of estranged husband' – 'Motivation of jealousy and revenge' – 'Murder' – 'Past domestic and family violence' – 'Planning' – 'Remorse' – 'Sentence' – 'Victim as (alleged) perpetrator' – 'Weapon'

Charge: Murder x 1.

Proceedings: Sentencing.

Facts: The offender pleaded guilty to killing her estranged husband with an axe. She then handed herself into police the next day. Their relationship had been marred by domestic violence. Police had been called numerous times and their four children had been removed by Child Protection due to the offender's assault on her eldest child. The deceased had assaulted the offender three times [101]. The offender had behaved in a jealous and controlling way towards her husband, did not like him talking to his mother, was jealous of him being with other women and conducted multiple online searches into methods of killing someone [102]. The offender killed the deceased in his home while he was asleep and while she was subject to an Apprehended Domestic Violence Order.

Issues: Appropriate sentence: had the offender killed her husband in self-defence or for motives of jealousy and revenge for him leaving the relationship?

Decision and Reasoning: Sentenced to 27 years' imprisonment with a non-parole period of 19 years.

At [111] Adams J found that it was 'a planned killing committed out of revenge and jealousy' not due to the history of domestic violence. Her Honour reduced the sentence by 25% due to the offender's early offer to plead guilty [172].

***Transport Accident Commission v Haimour* [2020] NSWSC 868 (8 July 2020) – New South Wales Supreme Court**

'Administrative law' – 'Judicial review' – 'Legal error' – 'Motor Accidents Compensation (MAC) ACT 1999' – 'People affected by trauma' – 'Permanent impairment guidelines for pre-existing or subsequent condition'

Proceedings: Judicial review of the Medical Assessment Review Panel assessment that the female first defendant's whole person impairment (WPI) for psychiatric and/or psychological injury sustained in a motor vehicle accident was 21%.

Facts: The plaintiff argued that the assessment of the first defendant's pre-existing and/or subsequent impairment for injuries unrelated to the motor vehicle accident was flawed because the domestic violence she was exposed to before and after the accident contributed significantly to the exacerbation of her symptomology. Based on collateral materials, the Review Panel found the first defendant was 'subjected to a pattern of both physical and emotional abuse in a dysfunctional marriage which both pre-dated and post-dated the accident'. The first defendant 'maintain[ed] that she was not the victim of any domestic violence before or after the accident'.

The Review Panel did not determine what percentage of the WPI was attributable to the motor vehicle accident and what percentage to domestic violence.

Decision and reasoning: *Medical Assessment Review Panel decision set aside. Matter to be returned to the Review Panel.* There was an error of law in:

> the Panel's failure to undertake for themselves an assessment of the degree to which one episode of trauma versus an unrelated episode of trauma or, in this case episodic trauma, contributed to the first defendant's WPI for the purposes of the MAC Act.

State of NSW v Monteiro (Final) **[2020] NSWSC 881 (8 July 2020) – New South Wales Supreme Court**

'Aggravated sexual assault in the context of an intimate relationship' – 'Animal abuse' – 'Assessment of whether defendant poses an unacceptable risk' – 'Damage to property' – 'Extended supervision order' – 'False report' – 'High risk offender' – 'High/unacceptable risk of re-offending' – 'History of offending in the context of intimate relationships'

Charges: Aggravated sexual assault without consent x 1; Malicious damage x 1; Larceny x 1.

Proceedings: Extended Supervision Order (ESO) application.

Facts: The defendant had previously been found guilty of aggravated sexual assault without consent. The defendant never accepted responsibility for the offence and contested the charges at trial. At the time of the offence, the male defendant was in an intimate relationship with the female victim. The defendant was possessive, erratic, physically and verbally abusive and 'intimidating and demanding' towards the victim. The victim asked the defendant to move out of the parties' shared accommodation and when they met to 'hand over his keys', the defendant physically assaulted and raped the victim. Later, when the victim went to report the assault to the police, it transpired that 'the defendant had earlier made a false report that he had been assaulted by the victim and that she had threatened to invent a charge of rape' as an attempt to pre-empt the victim's report. While she was at the police station the defendant had returned to her flat and 'destroyed the interior' [14] of it, he overturned the fish tank killing her fish and damaged photographs and other personal items. The trial judge's assessment of a high risk of re-offending is supported by the statements of two forensic psychiatrists. The defendant has been subject to a number of allegations of and charges relating to verbal and physical abuse and sexual assault in the context of historical intimate relationships (spanning from 1997-present).

Issues: Whether the Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision.

Decision and reasoning: *Extended Supervision Order made* for a five-years including the requirement of electronic monitoring and reporting and restrictions on changing personal details (including the defendant's name).

Allegations (not charged or prosecuted), withdrawn charges and/or dropped prosecutions are able to be relied upon by psychiatrists in assessing risk of re-offending. There is a high degree of probability that the defendant

poses an unacceptable risk of committing another serious offence if not kept under supervision.

Note: The offender in this matter lodged an appeal against imposition of the Extended Supervision order, which he has not pursued, and has also sought an order revoking the imposition of the Extended Supervision Order imposed in this matter. Orders were made in respect of that matter on 24 February 2022 including an order that the self-represented applicant regularise the proceedings by filing a summons as initiating process in accordance with Rule 6.4(1)(h) UCPR stating the grounds upon which the revocation of the extended supervision order is sought. (*Monteiro v State of New South Wales* [2022] NSWSC 148 (24 February 2022)).

***Rakielbakhour v DPP* [2020] NSWSC 323 (31 March 2020) – New South Wales Supreme Court**

'Bail application - covid-19 pandemic' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm - relevance of covid-19 pandemic to application for bail'

Offences: Common assault x 1; Assault occasioning bodily harm x1.

Proceedings: Application for bail

Issues: Whether to grant bail; Relevance of the COVID-19 pandemic

Facts: The female victim was married to the accused man and it is alleged that he believed she was conducting an affair with another man (his mother told him she exchanged telephone numbers with a real estate agent) at the time of the alleged offending. It is alleged that the accused became jealous and "punched the victim repeatedly to the face and body, before tackling her to the ground and continuing to punch her." [3] The accused then allegedly hit the victim in the head and face with a hair dryer. The victim had significant bruising and swelling as well as a laceration across the forehead and scratches to her neck.

The victim told police "she fell in the shower and hit her head on the step" [8] while the offender claimed to have not been home at the victim sustained the injuries and refused to give evidence. The offender pleaded not guilty to both charges.

Judgment: Bail granted subject to conditions. The judge noted that in some domestic violence cases, a victim's refusal to provide evidence may be "a reason for hesitating before granting bail" due to the concern "that the psychology of the victim of domestic abuse is such that they do not want to implicate their intimate partner out of fear or out of love or loyalty. The release of the alleged perpetrator may heighten those emotions" [7].

The judge found that the applicant had a relatively minor criminal history and enjoyed significant family and community support. He accepted evidence demonstrating that the applicant and his father suffer from various illnesses, and that the applicant's business was experiencing a significant downturn due to his incarceration and the COVID-19 pandemic. Justice Hamill acknowledged that the pandemic and its associated risks were "matters properly to be taken into account" when considering a release application under s 18 of the Bail Act [15]. "Without attempting to be exhaustive, the pandemic may be relevant to the following paragraphs within s 18(1):

- Section 18(1)(m) says it is relevant to consider "the need for an accused person to be free for any other lawful reason". That might (or must) include the need for an applicant to protect themselves from infection and to support their family if there is evidence to support such a finding. It is relevant to the present application because of the applicant's father's ill-health.
- Section 18(1)(h) is also relevant. The length of time a person will remain in custody will often be affected by the measures courts are taking to ensure that participants in litigation are safe. As has been seen, many cases have been, and will be, adjourned or delayed.
- Section 18(1)(l) relates to the need for the accused to prepare for their appearance in court or obtain legal advice. At present, all legal visits in NSW prisons are being conducted by video-link. While the same is probably true of most conferences between lawyers and their clients, the facilities within the prison system must be under great strain because so many court cases are being conducted by video link and the number of available audio-visual suites is finite.
- Section 18(1)(k) refers to any "special vulnerability the accused person has". While not relevant to present application, the literature published by the Health authorities suggest Aboriginal and Torres Strait Islanders are particularly susceptible to the spread of the virus."[15]

R v Edwards (No 3) **[2019] NSWSC 1815 (18 December 2019) – New South Wales Supreme Court**

'Controlling, obsessive behaviour' – 'Criminal history' – 'Lack of evidence' – 'Murder' – 'Sentencing -separation - following, harrassing, monitoring'

Charges: Murder x 1

Proceedings: Sentencing

Facts: The accused was found to have killed his estranged wife in an unknown manner after she ended their relationship and rekindled a relationship with a man she had an affair with early in the marriage. The accused frequently monitored his estranged wife's life.

Issues: Appropriate sentence

Decision and reasoning: The accused was sentenced to 24 years imprisonment with a fixed non-parole period of 18 years. At [67] Hulme J said: "Punishment, denunciation, and deterrence are particularly important aspects of the assessment of sentence in a case such as this. I endorse the following observations recently made by Wilson J: [in R v Keith Owen Goodbun [2018] NSWSC 1025 at [202]-[204]]

> "[D]omestic violence is a profoundly serious problem in this community, extending, not infrequently, to the murder of a spouse or partner …
>
> Too often, these are crimes committed by men against women who have chosen to live a separate life – a decision the male partner is not prepared to accept …
>
> … The courts must ensure that those who commit offences like those now before this Court pay a heavy price for their crimes, to punish them, to denounce the crime, and to deter others. The victims of domestic violence must be protected insofar as the courts are able to afford them protection."

***R v Latu (No 3)* [2019] NSWSC 951 (26 July 2019) – New South Wales Supreme Court**

'Physical violence and harm' – 'Protection order' – 'Sentence'

Charges: 1 x murder; 1 x breach of ADVO

Case type: Sentence

Facts: The victim was murdered by the offender, caused by multiple blows to her head. At the time of the murder, the offender and victim were living together in an intimate domestic relationship. The offender had a tendency to be violent towards his partners by using physical force to their 'head region' ([11]). He was subjected to an ADVO, which prohibited him from assaulting or intimidating the victim. Despite the ADVO, the offender continued to be violent towards the victim. The offender called 000, and performed CPR as instructed by the operator. It was argued that this demonstrated a lack of intention to kill ([52]).

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: In assessing the objective seriousness of the offence, the offender's intention at the time of the offence was relevant ([50]). Although his Honour could not find that the offender intended to kill the victim beyond reasonable doubt, he accepted the Crown's submission that he must have known that this was 'a harder and more comprehensive attack' ([57]-[58]). His Honour also rejected the submission that the attack was a 'crime of passion' without premeditation, as it was not an isolated incident, but rather another violent beating, 'inflicted as part of a sickeningly repeated pattern of physical subjugation' ([60]-[61]). The absence of specific planning was not a mitigating factor in this instance, given the long history of intentional and disfiguring attacks on the victim and threats to 'cave her head in' ([62]).

Lonergan J also took into account the fact that the offence was committed in the victim's home where she was entitled to feel safe. It was also committed in breach of an ADVO – a matter of serious aggravation ([63]-[65]). The offending was 'very serious', given the number of individual injuries, the victim's powerlessness, and the callousness of the manner in which her head injuries were inflicted ([66]-[67]). Specific deterrence, community protection and retribution were important sentencing factors, as the offender had a history of criminal offending and had inflicted beatings on the victim prior to her death ([68]-[71]). The offender's subjective circumstances are also discussed at [72]-[92]. The offender continued to deny the offending and 'victim blame', showed no remorse for or recognition of what he did, and told lies about the incident on the night of the offending and in his police interview ([86]-[88]). Lonergan J sentenced the offender to 28 years' imprisonment with a non-parole period of 21 years.

***R v June Oh Seo* [2019] NSWSC 639 (31 May 2019) – New South Wales Supreme Court**

'Factors affecting risk' – 'Following, harassing and monitoring' – 'Jealousy' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Poor literacy skills' – 'Separation' – 'Suicide threats'

Charges: Murder x 1.

Case type: Conviction and sentence.

Facts: The offender and victim were in a 'romantic' relationship and lived together at the victim's apartment. The victim found the offender to be possessive and controlling. The victim tried to end the relationship, but the offender threatened to commit suicide if she did. The offender eventually moved out of the victim's apartment, but continued to contact her. On 7 October 2017, the offender went to the victim's apartment. He punched her in the face, and then threw her body over the balcony railing. He did not call for help. The precise cause of

death is not entirely clear. The offender had two prior convictions for common assault and contravention of an apprehended domestic violence order for which he was placed on bonds ([43]-[44]). The bond imposed on the offender for the assault was current at the time of the offending, and thus was breached ([45]).

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: Wilson J convicted the offender of murder. Taking into account a further offence of assaulting and occasioning actual bodily harm to the victim, and his guilty plea, the offender was sentenced to imprisonment for 22 years and 6 months, with a non-parole period of 16 years and 10 months. Wilson J took into account the objective gravity of the crimes, the personal circumstances of the offender, and the relevant principles of sentencing.

The murder was found to be serious ([51]) and brutal ([57]). The victim was physically smaller than the offender, and was unable to sufficiently defend herself. An aggravating circumstance was that she was attacked in her own home – a place of peace and safety ([53]). The offender's moral culpability was found to be high, as his conduct demonstrated a violent disregard for the victim's right to autonomy, that is, to choose to end their relationship if she wishes ([59]). He acted from a profound sense of entitlement ([79]). Her Honour noted the 'distressing frequency' of the offender's crime, and the significant role of general and specific deterrence in determining his sentence [79]-[84].

The offender's background and the breach of his bond suggested that he had relatively poor prospects of rehabilitation ([85]-[86]). Further, the offender was a Korean national with limited English skills and no family locally. Although Wilson J took this into account when fixing the sentence, she was not persuaded that the offender's circumstances were special or that the statutory ratio of the sentence should be varied ([87]-[88]).

***R v Ahmed (No 2)* [2019] NSWSC 517 (8 May 2019) – New South Wales Supreme Court**

'Abnormality of mind' – 'Physical violence and harm' – 'Sentencing'

Charges: Murder x 1.

Case type: Judge alone trial.

Facts: Mr Ahmed allegedly murdered his wife (the victim) by inflicting 14 stab wounds. He called 000, and told the operator that he had stabbed and killed his wife. He told police that he assaulted and threatened to kill her

if she did not give him access to her phone, and that it was only after he read her recent text messages, which confirmed the continuation of an affair she had with Mr Khan, that he lost control and stabbed her. He also said that he did not intend to kill her. When Mr Ahmed killed the victim, he was suffering a mental illness, which the experts agreed was likely to have been an adjustment disorder, that being a form of depressive illness ([13]). He later offered to plead guilty to manslaughter, but this was not accepted by the Crown. At his trial, Mr Ahmed advanced a partial defence of substantial impairment under section 23A of the *Crimes Act 1900* (NSW) which would, if established, reduce the conviction of murder to manslaughter ([1]-[5]).

Section 23A requires that Mr Ahmed establish, on the balance of probabilities, that at the time that he killed the victim:

- He suffered an abnormality of mind arising from an underlying condition;
- That abnormality substantially impaired his capacity to control himself; and
- That his impairment was so substantial as to warrant his liability for murder being reduced to manslaughter.

Issues: The issue before the Court was whether the partial defence of substantial impairment could be established. There were also issues as to what should be made of Mr Ahmed's various accounts and which expert's opinion should be preferred.

Decision and reasoning: Mr Ahmed was convicted of murder and did not discharge his onus of establishing the partial defence of substantial impairment by abnormality of mind. In coming to this conclusion, Schmidt J considered the facts, as well as the issues about Mr Ahmed's accounts and the experts' competing opinions ([35]). His Honour noted that it was difficult to determine whether the stabbing was a result of Mr Ahmed's 'abnormality of mind' or his deliberately acting on his feelings of humiliation and fury ([221]). This was explained by the diverging expert opinions ([222]).

Schmidt J agreed that Mr Ahmed suffered from an 'abnormality of mind' when he killed the victim ([25]), but held that this did not 'substantially impair' his capacity to control himself ([200]-[253]). He was satisfied that it had been established on the evidence, beyond reasonable doubt, that he deliberately acted on an intention, formed when he read the text messages, to kill the victim, instead of having an impaired capacity to control himself ([253]). Not only was Mr Ahmed well aware that the victim was intent on divorce, but he also suspected that it was the continuation of her relationship with Mr Khan which was driving her desire for a divorce. This led him to assault and threaten her in order to gain access to her phone, and then kill her when

he read the text messages which confirmed his suspicions ([246]).

His Honour held that his sentence could not, in any event, be reduced to manslaughter, particularly in light of community standards. Mr Ahmed neither had a criminal record, nor any history of domestic violence, apart from one occasion in 2016 when he admitted to punching a wall in an argument. However, despite his prior good character, Mr Ahmed was found to have deliberately acted on his intention to kill his wife, evidenced by his deliberate delay in calling 000 until he was certain she had stopped breathing ([255]).

***R v Ahmed* [2019] NSWSC 55 (8 February 2019) – New South Wales Supreme Court**

'Adverse media' – 'Fair trial' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Prejudice' – 'Social media' – 'Trial by jury'

Charges: Murder x 1.

Case type: Application for trial by judge alone.

Facts: Mr Ahmed allegedly murdered his wife (the victim) by inflicting 14 stab wounds. He called 000, and told the operator that he had stabbed and killed his wife. He told police that he assaulted and threatened to kill her if she did not give him access to her phone, and that it was only after he read her recent text messages, which confirmed the continuation of an affair she had with Mr Khan, that he lost control and stabbed her. He also said that he did not intend to kill her. When Mr Ahmed killed the victim, he was suffering a mental illness, which the experts agreed was likely to have been an adjustment disorder, that being a form of depressive illness. He pleaded not guilty to murder, but later offered to plead guilty to manslaughter, which was not accepted by the Crown. At his trial, Mr Ahmed advanced a partial defence of substantial impairment under section 23A of the *Crimes Act 1900* (NSW) which would, if established, reduce the conviction of murder to manslaughter.

Issue: A key issue was that a fair trial was unlikely before a jury because of the significant general and social media posts about the accused and the homicide. There was a risk of prejudice from the adverse media and social media commentary about his racial background and faith.

Held: Schmidt J dismissed the application for a trial by judge alone.

The killing attracted substantial social media coverage, with such coverage being shared on Facebook pages of media organisations and 'professed anti-Islamic' groups. Many Facebook users shared 'negatively biased

views against Mr Ahmed' ([26]), and the majority of comments were either directly or indirectly racist ([27]). Some of this adverse coverage focused on his background as a Bangladeshi immigrant and presumed membership of the Muslim faith ([32]). However, as per the Court in *Hughes v R* [2015] NSWCCA 330, an offender who is subject to intense community interest may still be able to receive a fair trial ([33]). The Court in *Hughes v R* stated that the modern world is one of instant, largely unregulated communication of opinions, ranging from mild to extreme, which can be accessed and responded to by others. However, there is good reason to continue in the expectation that, notwithstanding advances in technology and what they permit, jurors will decide cases on the basis of evidence, the judge's directions, and the submissions advanced at trial.

Schmidt J held that a jury would be required to be directed at trial to impartially approach the issue as to whether he has a partial defence, and to make its decision only on the evidence, the parties' submissions and the judge's directions, rather than on the basis of their own enquires on the internet ([35]). His Honour held that 'there is no question that there is a risk, which exists at every trial, that a member of the jury will not adhere to such directions, but will access prejudicial material of the kind on which Mr Ahmed relies, to advance this application' ([36]). Nevertheless, as observed in *Hughes v R,* it has been long settled that jurors will 'approach their tasks conscientiously'. In Schmidt J's view, the stereotypical opinions expressed on social media about Mr Ahmed would not necessarily deprive him of a fair trial before the jury, even though it may have to consider some distressing photographs of the victim's injuries ([38]). The issues for determination in relation to the domestic violence killing had nothing to do with his racial background or religion, but on his mental state and whether that entitles him to a partial defence ([37]).

Note: Schmidt J refused Mr Ahmed's application for a judge alone trial. However, only days before the trial was due to commence, a large volume of documents was served, which included internet searches by Mr Ahmed about punishing adulterous wives. The Crown consented to the offender being tried by a judge alone. Therefore, a trial by judge alone order was made under section 132(2) of the *Criminal Procedure Act 1986* (NSW). See *R v Ahmed (No 2)* [2019] NSWSC 517 (8 May 2019).

***R v Raquel Hutchinson* [2019] NSWSC 25 (31 January 2019) – New South Wales Supreme Court**

'Children' – 'Factors affecting risk' – 'People with children' – 'Sentencing'

Charges: Manslaughter x 1.

Case type: Sentencing.

Facts: The offender, with the help of her new fiancé, murdered her ex-husband after luring him to his townhouse, where she was lying in wait for him. When he returned home, he was struck and punched many times, resulting in a broken nose. There was also evidence that an electrical prod or Taser was used during the assault. He later died of asphyxia. The major perpetrator of the violence was found to be the offender due to the anger and hatred she had for the victim as he had custody of their two children. One of those children, their son, was present in the house at the time of the offence and witnessed many of the events leading to his father's death ([4]-[11]).

Issues: The issue was the appropriate sentence to be imposed.

Decision and reasoning: The offender was sentenced to imprisonment for 9 years with a non-parole period of 5 years and 6 months. In Hamill J's opinion, this was a serious example of manslaughter because of the planning and premeditation involved in the assault. Even though there was no intention to inflict grievous bodily harm, the fact that the intention was formed whilst the offender was in a rage adds to the gravity of the manslaughter. There were various aggravating features, the most serious being the fact that the offence was committed in the presence of a child ([26]). She exposed her son to the extreme brutality of the assault and killing of his father, which resulted in emotional and psychological damage. Another powerful aggravating feature was the fact that the offence was committed inside the victim's home – a place where people are entitled to feel protected and safe ([27]). The psychiatric incapacity of the offender also played an important role in reducing her liability from murder to manslaughter, and was relevant to the subjective component of self-defence and to her defence of substantial impairment. The offender's personal circumstances were considered. She was a victim of child sexual abuse, had a long-standing substance abuse disorder and a history of psychiatric problems ([36]). Although it was found that she tried to be a good mother, Hamill J was not satisfied that she was a person of good character due to her bad associations, erratic behaviour and chronic drug dependence ([38]). However, given her lack of significant prior offences and the efforts she made in custody, his Honour was satisfied that she had good prospects of rehabilitation and was unlikely to reoffend. She also made an early plea of guilty to manslaughter.

***R v AKB* [2018] NSWSC 1628 (2 November 2018) – New South Wales Supreme Court**

'Arson' – 'Children' – 'Factors affecting risk' – 'Murder' – 'People with children' – 'Sentencing'

Charges: Murder x 1.

Proceeding type: Sentencing.

Facts: The offender and deceased married in Iran. The offender started a fire in his wife's bedroom in the family home. She died in the fire. Their relationship prior to the fire had 'deteriorated' [5]. Davies J accepted that the offender became aware of the deceased's intention to leave him. This was confirmed by the offender's visit to the Department of Human services the day before the fire where he made a claim for a benefit, on the basis that he was separated. His Honour also accepted beyond reasonable doubt that the offender was responsible for the fire in the presence of their two young children.

Issues: Davies J determined the appropriate sentence for the offender.

Decision and reasoning: The offender was sentenced to imprisonment for a period of 36 years with a non-parole period of 27 years. His Honour remarked that '[t]he murder of any person is intolerable and unacceptable, but the circumstances of this murder can only be described as confronting, shocking and gruesome to a marked degree' ([24]). The murder was aggravated by the fact that it was carried out in the presence of their two young children, in circumstances where the offender actively prevented one of their children from trying to save his mother, and at the deceased's home where she was entitled to feel safe. It also involved gratuitous cruelty and planning and preparation (albeit minimal, [32]). However, his level of culpability was not so extreme so as to attract a life sentence. Whilst specific and general deterrence are important factors in sentencing for murder in a domestic setting (see *Hiron v R* [2007] NSWCCA 336), specific deterrence was not significant because of the offender's low risk of reoffending. This was consolidated by the fact that the offender had no prior criminal record, the offence was committed against a person known to the offender (rather than the public at large) and his older age. His Honour concluded at [37] –

> *'This was a very bad murder, but the limited planning, the absence of the need to give significant weight to community protection, and the fact that a lengthy sentence will meet the need for specific deterrence, mean that the community interest in retribution, punishment, community protection and deterrence can be met by other than the imposition of life sentence.'*

Although his Honour noted that the offender had no prior convictions, he was not able to mitigate the enormity of the crime against the deceased ([46]). Further, his Honour found it difficult to see how the offender could be fully rehabilitated without acknowledging the shocking act against his wife and the impact that it continued to have on their children and the deceased's family. Accordingly, his prospects of rehabilitation were only

average.

R v Cahill (No 3) **[2018] NSWSC 2025 (12 October 2018) – New South Wales Supreme Court**

'Evidence issues' – 'History of abuse of accused' – 'Relationship, context, tendency and coincidence evidence'

Charges: Murder x 1.

Case type: Trial.

Facts: The accused and the victim were in a relationship, characterised by incidents of violence by both sides. They immigrated to Australia from Ireland and shared accommodation with different people over a period of time. The accused stabbed the victim in the neck, resulting in his death. This matter relates to the additional evidence that Johnson J demanded from the Crown in *R v Cahill (No 2)* [2018] NSWSC 1531. This evidence related to things said by the victim to other persons with respect to events concerning the accused ([2]). Firstly, the Crown sought to tender a statement by a man who claimed that the victim told him that the accused hit him when he was sleep ([3]). He also stated that the victim told him that the accused had sent him a text that she would kill him ([25]). Secondly, the Crown sought to tender evidence arising from another man's statement that the victim told him that he was attacked by the accused with a screwdriver ([16]).

Issues: Whether certain evidence is admissible.

Decision and reasoning: The decision involved rulings made on admissibility of evidence (see [12], [14], [24] and [28]). With respect to the first statement, the Court held that the passage of time and the lack of precision as to the incident to which the statement related affected the question as to whether or not it ought to be admitted as evidence of truth of the fact ([10]). However, the Court held that this evidence will be admitted at the trial, but the jury will be directed that it cannot be used as evidence of the truth of the facts of the matters asserted in the representation ([11]-[12]). The Court did not allow the Crown to adduce the additional statement about the text message as there was no indication as to when it was sent. The absence of any time when it was said to have occurred significantly reduced the evidentiary use of the material ([25]-[28]). With respect to the second statement, the Court considered s 65 of the *Evidence Act 1995* and admitted it as evidence of the truth of the fact ([21]-[24]).

R v Cahill (No 2) **[2018] NSWSC 1531 (11 October 2018) – New South Wales Supreme Court**

'Evidence issues' – 'History of abuse of accused' – 'Relationship, context, tendency and coincidence evidence'

Charges: Murder x 1.

Case type: Trial.

Facts: The accused and the victim were in a relationship, characterised by incidents of violence by both sides. They immigrated to Australia from Ireland and shared accommodation with different people over a period of time. The accused stabbed the victim in the neck, resulting in his death. The defence adduced evidence from various people, such as an ex-partner of the victim and the father of another ex-partner. Both provided supporting evidence of incidents of violence during the relationships ([92]-[93]). The Crown submitted that the material lacked significant probative value as it was expressed vaguely and was remote in time from the events in the trial ([94]). The Crown also sought to have admitted as relationship evidence the totality of the evidence sought to be tendered for tendency purposes together with additional evidence of the accused's various roommates ([96]-[98]).

Issues: Whether certain evidence of the Crown and defence was able to be adduced.

Decision and reasoning: The judgment by Johnson J deals with a number of evidentiary issues, involving tendency and relationship evidence ([99]-[123]). With respect to the statements by an ex-partner and the father of another ex-partner, the events to which they referred were significantly remote in time from those relevant to the trial and did not involve the accused. Consequently, his Honour did not allow the accused to rely upon this evidence for tendency purposes ([114]-[119]). Further, Johnson J was satisfied that the evidence tendered by the Crown should be admitted as relationship evidence ([99]-[103]). At [120]-[122], Johnson J sought further submissions about particular areas of the tendered material. These areas related to the Crown's intention to adduce evidence of things said by the victim to other persons with respect to events concerning the accused.

R v Jenkin (No 10) **[2018] NSWSC 705 (18 May 2018) – New South Wales Supreme Court**

'Audio visual link' – 'Fair hearing and safety' – 'Physical violence and harm' – 'Safety and protection of witnesses' – 'Tendency evidence'

Charges: Murder x 1.

Case type: Applications to adduce evidence from former partner of accused and to give evidence via video link.

Facts: The defendant was on trial for murder of an associate. The prosecution sought to adduce evidence from the defendant's former partner describing assaults he committed against her while he was on drugs ([5]). The prosecution sought to establish a tendency to 'detain persons and to intimidate and physically assault them' ([3]).

Issues: Whether the evidence should be admitted.

Decision and Reasoning: Most of the evidence was not admitted because it did not show that the accused had a tendency to detain persons ([8]). One paragraph of the evidence was admitted because it evidenced the defendant locking her in a room and making sure she couldn't leave ([14]). While the evidence concerned uncharged acts of violence, the judge considered that there was little risk of prejudice given that the trial is a judge-alone trial ([14]).

The former partner applied to give evidence via videolink after evidence from psychologists stated that giving evidence would be an extremely stressful situation. The judge accepted that using the videolink facility would reduce her trauma. The defence's ability to assess her credibility was not significantly compromised ([18]).

***R v TP* [2018] NSWSC 369 (23 March 2018) – New South Wales Supreme Court**

'Children' – 'Factors affecting risk' – 'People with children' – 'Physical violence and harm' – 'Sentencing'

Charges: Negligent manslaughter x 1.

Case type: Sentencing.

Facts: The offender's partner, JK, committed serious acts of physical and psychological violence against the defendant and her two daughters for years ([4]), including striking them with sticks, tying one of them (CN) to a bed and hitting her with wooden slats ([13]-19], [36]-[38]). The worst of the violence was directed towards CN, which eventually resulted in her death. By her plea of guilty, the offender acknowledged that her failure to remove CN from the violence and obtain medical treatment for her serious injuries was the cause of her death ([3], [25]). Expert evidence established that the offender suffered from 'battered wife syndrome' - a syndrome

likely to exhibit symptoms of post-traumatic stress disorder and depression caused by repeated exposure to violence ([5], [40]-[41]).

Issues: The issue was the appropriate sentence to be imposed.

Decision and reasoning: Hamill J remarked that '[the] criminal law is a blunt tool in circumstances such as these' ([8]). The offender's psychological conditions substantially impacted the application of the principles of sentencing, the purpose of punishment and reduced the ultimate sentence. The impact was significant for various reasons. Firstly, there was a clear and direct link between the violence suffered by the offender and her criminal neglect of CN ([55]). Secondly, the weight afforded to general deterrence was greatly reduced ([56]-[57]). Thirdly, the offender's rehabilitation through regular visits to psychologists and psychiatrists would be interrupted if a full-time custodial sentence was imposed ([58]). Fourthly, a custodial sentence would weigh more heavily on the offender than it would on a person who does not suffer from the severe depression, grief and post-traumatic stress disorder ([59]). Fifthly, the offender was unlikely to re-offend ([60]). The offending was aggravated by CN's young age and fragility after her long-term exposure to abuse ([62]). Having considered all possible alternatives, including a fine, bond or community service order, Hamill J concluded that only a period of imprisonment was appropriate ([78]). His Honour sentenced the offender to four years' imprisonment with a non-parole period of 18 months ([79]-[80]). Annexed to the judgement, at [82], is a useful summary of comparable cases. However, there are no cases in the annexure that had precisely the same features as this one.

Franklin v Commissioner of Police **[2018] NSWSC 310 (14 March 2018) – New South Wales Supreme Court**

'Assault' – 'Scope of subpoenas' – 'Self-represented litigant' – 'Systems abuse'

Charges: Assault x 1.

Case type: Application

Facts: The Plaintiff was charged with assaulting his wife ([2]). The Plaintiff issued a number of subpoenas to the Commissioner of Police and a hospital, seeking material including all police records for the immediate proceeding, the victim, all attendances at their home, all records of complaints proceedings instigated by the Plaintiff against the police, copies of notebooks of certain officers, and copies of all internal police communications in relation to the proceedings ([3], [28]).

At a hearing on 5 April 2017 in a Local Court, the police objected to the subpoenas on the basis that they were too wide ([29]). The Plaintiff then issued two more subpoenas to prosecution witnesses, which were also objected to on the grounds of absence of legitimate forensic purpose and public interest immunity ([34]). At a hearing on 18 and 19 July 2017, the magistrate allowed access to some documents but refused access to others ([36]).

Issues: The Plaintiff appealed against the Magistrate's decision on 5 April 2017 on 5 grounds outlined at [37]. The Plaintiff appealed against the Magistrate's decision on 19 July 2017 on 8 grounds outlined at [51].

Decision and Reasoning: The appeal was dismissed because there was no error of law and no basis for a grant of leave for the Plaintiff to rely upon the grounds of appeal ([46], [81]).

Justice Johnson appeared to refer to the Plaintiff being self-represented at [80]:

> I provided the Plaintiff with ample opportunity at the hearing on 2 and 10 November 2017 to advance arguments in support of his claim for relief. I have considered those arguments in this judgment, perhaps in greater detail than is called for by the limited statutory avenue of appeal which is available. One reason for taking this approach was to resolve what appeared to be a heavily litigated issue by the Plaintiff at the interlocutory level ahead of the summary hearing in the Local Court. It is appropriate that the way be cleared for the hearing and determination of the charge against him.

***R v Fesus (No 9)* [2018] NSWSC 176 (23 February 2018) – New South Wales Supreme Court**

'Factors effecting risk' – 'Historical offence' – 'Historical sentencing practice' – 'Murder' – 'Physical violence and harm' – 'Post-separation violence' – 'Strangulation'

Charges: Murder

Case type: Sentence.

Facts: The defendant was convicted of the 1997 murder of his 18-year-old wife. The judge found that the defendant strangled his wife after she proposed to leave him and take the children with her ([50]). The defendant denied the allegations and attempted to cover up the murder, but later made admissions to an undercover police officer in 2013 ([23]).

Issues: Sentence to be imposed.

Decision and Reasoning: Justice Johnson had regard to sentences imposed for similar cases in 1997 ([88]-[93]) and imposed a head sentence of 22 years' imprisonment with a non-parole period of 16 years and 6 months ([98]). At [50]-[51] Johnson J explained:

> The Offender murdered his young wife in the course of a domestic dispute arising from her declaration that she proposed to leave him and take the children with her. Although the Offender and Jodie had lived together for about two years, they had only been married for three months at the time of her death. Jodie was a young mother who, despite her considerable life experience at that time, was barely an adult. The Offender was 26 years old at the time of the offence.
>
> The fact that the marriage was breaking down (after only three months) does not assist the Offender. It has been observed that killings within a domestic situation occur very often when there has been a build-up of tension between the killer and victim over a period of years*: R v Whitmore* [1998] NSWCCA 75 at [16]. That is not the position in this case. Here, the Offender murdered his very young wife at a time of marital strain after just three months of marriage.

Justice Johnson also noted the lack of previous domestic violence, and the prevalence of choking in domestic violence:

> The evidence does not suggest a prior history of domestic violence on the part of the Offender towards Jodie. That said, their relationship was not a particularly long one and his response to Jodie's desire to leave was a savage and homicidal one.
>
> The use of choking in the course of domestic violence is now well recognised as a gross form of control with a capacity (as occurred here) to cause death: *Cherry v R* [2017] NSWCCA 150 at [75].

***R v Stephen (No 2)* [2018] NSWSC 167 (6 February 2018) – New South Wales Supreme Court**

'Abused person' – 'Court processes' – 'Fair hearing and safety' – 'Mental health' – 'Physical violence and harm' – 'Post-traumatic stress disorder'

Charges: Murder.

Case type: Application by the accused to sit outside the dock.

Facts: The accused was on trial for murder for stabbing the victim, who was her husband. It was undisputed that at the time of stabbing, she had been subjected to severe violence at the time of the offence, and for over a year prior to the stabbing (see *R v Stephen (No. 3)* [2018] NSWSC 168 (20 February 2018)). The accused made an application to sit outside the dock, next to her legal team. The Crown supported the application ([1]-[2]).

Issues: Whether the judge should exercise his discretion to grant the request pursuant to s 34 *Criminal Procedure Act 1986* (NSW).

Decision and Reasoning: The application was refused.

Justice Button weighed up the countervailing factors. Factors in favour of granting the application were that the accused had been on bail for many months, she was not a security risk, she suffers from post-traumatic stress disorder, and she argued that sitting in the dock will be prejudicial for the jury ([3]-[6], [9]). Factors weighing against granting the application were that the accused is not a child or a person suffering from a disability, that the dock is a traditional symbol of the gravity of the proceedings, that there is no inconvenience for the accused being in the dock, and she is charged with a very serious offence ([8], [10]-[14]).

Justice Button concluded that there was nothing exceptional about the matter to justify the request being granted. The next day, his Honour received further submissions with more detailed evidence about the accused's mental health issues but declined to alter the ruling ([18]).

***R v McMaster* [2017] NSWSC 1063 (16 August 2017) – New South Wales Supreme Court**

'Alcohol abuse' – 'Bail' – 'Co-operation with police' – 'Drug abuse' – 'Factors affecting risk' – 'Firearms'

Charges: Possession of unauthorised firearm x 1; Intimidation x 1; Handling firearm while intoxicated x 1.

Case type: Bail application.

Facts: While under the influence of alcohol and cocaine, the defendant repeatedly called and texted the complainant, his ex-partner ([5]). He drove to her house with the gun in the passenger seat (of which she took photographs). He aimed the gun at her with his finger on the trigger. He ultimately returned to his vehicle ([3]). The defendant refused to co-operate with the police or disclose the location of the firearm ([5]). The defendant had been in custody for four months ([6]).

Issues: Whether bail should be granted. The application was opposed by police.

Decision and Reasoning: Judge Harrison refused bail. The decisive matter was that the complainant had not revealed the location of the firearm, so there was a real possibility that he would have unrestricted access to it if he was released. But for this matter, Harrison J would have granted bail with appropriate conditions.

***R v Walker (No 7)* [2017] NSWSC 1049 (10 August 2017) – New South Wales Supreme Court**

'Hearsay evidence' – 'Murder' – 'Not unfairly prejudicial'

Charges: Murder x 1.

Case type: Voir dire.

Facts: The accused was on trial for murdering his de facto partner. During the relationship, neither the victim nor the police had obtained an AVO against the accused, despite evidence of injuries caused by the accused ([3]). The Crown sought to adduce hearsay evidence of statements the victim had made to her doctor. In a discussion about the victim taking out an AVO, the victim had said 'I don't deserve it' and 'don't want to cause trouble' ([1]).

Issues: Whether the evidence was admissible.

Decision and Reasoning: The evidence was admitted.

The statements fell within an exception to the hearsay rule because they were evidence of the victim's state of mind (*s 66A of the Evidence Act 1995* (NSW)) ([5]). Nevertheless, the accused argued that the statements should not be admitted for three reasons:

- the statements were not relevant because they could not affect an assessment of the probability of the existence of a disputed fact ([5]);
- the statements would result in unfair prejudice, because the victim had made contradictory statements that were not admitted ([6]); and
- the statements were simply likely to invoke sympathy for the deceased ([7]).

However, Schmidt J held that the statements should be admitted for three reasons:

- the statements allowed the jury to consider why the victim never sought an AVO despite complaints of

violence ([9]);

- the statements allowed the jury to consider the reliability of other hearsay representations to establish the tendency evidence led by the Crown ([9]); and
- the doctor to whom the representations were made was available to be cross-examined (citing *R v Clark* [2001] NSWCCA 494, per Heydon JA at [12]).

Therefore, the statements were not unfairly prejudicial ([11]).

***Romero v DPP* [2017] NSWSC 1190 (17 July 2017) – New South Wales Supreme Court**

'Error of law' – 'Judicial review' – 'Orders' – 'Post-separation violence' – 'Procedure' – 'Remitted to local court'

Charges: Common assault x 1.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted of common assault against his former partner ([1]). The police applied for an apprehended domestic violence order ([3]). The Magistrate conducted the summary trial on the basis that the Magistrates Court had jurisdiction to hear the criminal proceedings and civil proceedings for apprehended violence orders concurrently, which was incorrect ([5], [15]).

Issues: Orders to be made.

Decision and Reasoning: The DPP conceded that the Magistrate erred in law, so the only contentious point was in relation to the orders to be made. First, McCallum J ordered the DPP to pay half of the plaintiff's costs, since the plaintiff had been denied a hearing according to law ([22]). Second, the parties sought an order remitting the matter to a 'differently constituted Local Court' ([23]). Judge McCallum considered that there was no need for an order to a 'differently constituted' Court in the absence of apprehended bias or prejudgement ([24]). Judge McCallum remitted the matter of the assault charge to the Local Court to be heard and determined according to law.

***R v De Beyer* [2017] NSWSC 752 (13 June 2017) – New South Wales Supreme Court**

'Children's evidence' – 'Murder' – 'Relationship evidence'

Charges: Murder x 1.

Case type: Judgement on the admissibility of relationship evidence.

Facts: The accused and deceased were married. The accused was on trial for her murder. It was the Crown case that the accused had stabbed his wife. He gave evidence that she stabbed herself. The prosecution case was circumstantial ([1]).

Issues: Whether evidence of the accused and deceased's relationship was admissible ([2]).

Decision and Reasoning:

Evidence that was admitted without objection:

- Eyewitness evidence from the accused and deceased's son and daughter, including witnessing the accused punching and kicking the deceased, throwing things at the deceased and threatening to kill her ([3], [17]).
- Statements made to the police by one child, the deceased and police officers after police attendance at a violent incident ([9]-[10], [15]).
- Parts of recordings made by the deceased of arguments between her and the deceased ([13], [25]).

Evidence that was objected to, and admitted:

- A conversation between the deceased and her sister, including statements that the accused would not let the deceased out of the house or have a phone "because he was scared she would call the police", and that she would not leave him "because if he found her he would kill her" [23]. The statements were objected to on the basis that they were representations of the accused state of mind ([23]). The Court held that they were expressions of fear, and were admissible as an exception to the hearsay rule ([24]).
- Notes and diary entries made by the deceased, which included assertions of fact about episodes of abuse, and statements about the deceased's state of mind about the relationship ([31]). Only general statements of fact were admitted, because they were not hearsay evidence ([30]).

Evidence that was not admitted:

- Statements made by the deceased to her daughter that the accused attempted to drown her. The daughter only recollected these statements once she was shown the deceased's diary. The daughter's recollection did not appear to be firm. Therefore, Hidden AJ held that evidence was not highly probable to be reliable ([20]-[22]-[22]).

***R v Biles (No 2)* [2017] NSWSC 525 (3 May 2017) – New South Wales Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Murder' – 'Pattern of behaviour' – 'People affected by substance misuse'

Charges: Murder x 1.

Case type: Sentence.

Facts: The offender was found guilty at trial of murdering the victim, his 18-year-old girlfriend and mother of his child ([2]). Both were of Aboriginal descent ([32]). He had frequently been violent towards her over their relationship of two years ([8]). The murder occurred after both had consumed alcohol throughout the day ([13]). Six other women were in the house ([4]). The offender dragged her from the kitchen into the bedroom ([15]). There were no witnesses to the attack in the bedroom, but witnesses gave evidence that the deceased screamed for approximately twenty minutes before falling silent ([17]). When the police arrived, the bedroom was covered in blood, and she was declared dead at the scene ([21]). She had injuries consistent with multiple blows to the head ([24]).

Issues: Sentence to be imposed.

Decision and Reasoning: Fagan J sentenced the offender to 24 years' imprisonment, with a non-parole period of 18 years.

His Honour considered that the murder was in the middle of the range of objective seriousness ([31]). He considered that the deceased's young age, vulnerability, and the fact that the offender lied to other women who tried to intervene, all contributed to the seriousness of the offence ([31]).

His Honour examined the offender's personal circumstances ([32]-[38]). His verbal comprehension was in the lowest 1% of the general population, a circumstance which contributes to a higher propensity to violence ([34]). He had a criminal history since 15 years old ([39]), but he proved unresponsive to good behaviour bonds and community service orders ([42]-[47]).

His Honour considered that these offences were the culmination of a course of domestic violence (see from [52]). His Honour remarked at [52]:

> 'The experience of courts in this State has shown that men who perpetrate violence against their female

> partners do not stop after one occurrence. Often they become accustomed to inflicting violence of escalating severity.'

On the failure of the other women in the house to call the police, his Honour said [55]:

> 'The apparent lack of a sense of urgency amongst the other women in the house … may have been due to resignation amongst them; a feeling that to some extent domestic violence is inevitable and must be endured and, perhaps, that it is a matter private to the couple, in which others should not interfere. None of that is so.'

***R v Adams (No 6)* [2016] NSWSC 1565 (4 November 2016) – New South Wales Supreme Court**

'Evidence' – 'Judge-alone trial' – 'Murder' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Tendency'

Charge/s: Murder.

Hearing: Judge-alone trial judgment.

Facts: On 27 September 2016, the accused pleaded not guilty to the murder of Mary Wallace (the deceased) on 24 September 1983. A significant part of the Crown's circumstantial case was that the accused possessed a tendency at the time of the alleged murder to choke or strangle women in order to force them to submit to having penile/vaginal sexual intercourse with him. The Crown led evidence of three women who had alleged that they had been sexually assaulted by the accused.

Issue/s: Whether the accused was guilty of the charge of murder.

Decision and Reasoning: In reaching this decision, His Honour first listed the legal matters he took into account in reaching the verdict (see [320]-[359]). Most relevantly, Justice Button noted that it would have to be proven beyond reasonable doubt that at the time of offence the accused possessed a tendency to strangle women to cause them to submit to intercourse with him. This was for at least two reasons: (1) there was authority that tendency must be proven to the criminal standard in order to be taken into account (see the discussion of *HML v The Queen* in *DJV v R* at [30], and *R v Matonwal & Amood* at [92]). (2) In the circumstances of this case, it was agreed between parties that the alleged tendency was an indispensible intermediate fact with regard to the guilt of the accused (*Shepherd v The Queen*)(see [337]-[339]).

Justice Button then stepped through his sequential reasoning for reaching the verdict of guilty (see [360]-[493]). One of the steps in this reasoning was that His Honour found that the accused possessed a tendency to rape women and to strangle them ancillary to that crime. This was after considering the evidence of three women (see [419]-[420]).

In light of the following evidence, at [491]-[492], Justice Button held that the accused's guilt had been proven beyond reasonable doubt:

'the proven tendency of the accused to rape and strangle women; the marked similarities between his interaction with the deceased and his interactions with women whom, I am satisfied, he had raped and strangled; the fact that the deceased has never been seen again after she was in the company of the accused; the fact that, within 48 hours of his interaction with the deceased, the accused undertook an activity relating to his boot that featured the use of a hose; the fact that hairs (which shared a reasonably rare profile with those of the deceased) were seized from the boot of his vehicle, and not disputed at trial to be from the deceased; and the fact that, on any analysis, the accused had ample time to dispose of the body'.

Justice Button concluded: 'the accused treated the deceased very much as an object, just as he had treated three other young women'.

***R v Silva* [2015] NSWSC 148 (6 March 2015) – New South Wales Supreme Court**

'Battered woman syndrome' – 'Expert evidence - psychiatrist' – 'Manslaughter by excessive self-defence' – 'Physical violence and harm' – 'Post-traumatic stress disorder' – 'Sentence'

Charge/s: Manslaughter by excessive self-defence.

Hearing: Sentencing.

Facts: The offender stabbed and killed her partner, James Polkinghorne. The relationship had been characterised by escalating physical and verbal abuse from the deceased towards the offender. On the 13 May 2012, the deceased made increasingly threatening and abusive telephone calls and messages to the offender. That night, he went to the home of the offender's parents, where the offender was present. He was highly aggressive and high on methylamphetamine. The facts of what followed were confused and confusing (see [29]-[36]). In summary, the deceased threatened to kill the offender, he assaulted the offender, and the offender's brother and father intervened. They began fighting with the deceased. The offender retrieved a

knife from inside and, while the offender was on top of her brother, stabbed and killed the deceased. The offender was found not guilty of murder but guilty of manslaughter.

Decision and Reasoning: A sentence of 18 months imprisonment, wholly suspended was imposed. Hoeben CJ first made a number of factual findings. At [38] His Honour found that:

'the offender stabbed the deceased with an intention to inflict grievous bodily harm because she believed her act was necessary to defend not only herself but her brother and father. However, in accordance with the jury's verdict, the offender's conduct was not a reasonable response in the circumstances as she perceived them, thereby rendering her guilty of the crime of manslaughter by way of excessive self-defence'.

His Honour also had regard, with some qualifications, to the evidence of Associate Professor Quadrio, a consultant psychiatrist. In her report, Professor Quadrio concluded that during her relationship with the deceased, the offender developed chronic and complex Post Traumatic Stress Disorder (PTSD) with particular features which were described as 'Battered Woman Syndrome'. She also concluded that the offender continued to suffer from PTSD. Hoeben CJ found at [40]:

'In the absence of any psychiatric opinion to the contrary, I would normally accept such a diagnosis. In this case I am not prepared to do so. This is because the diagnosis is based upon significant pieces of history from the offender which are different to the evidence at trial and to what the offender said in her ERISP. I am prepared to accept that the offender currently suffers from PTSD. The events of the night of 13 May 2012 would of themselves be sufficient to bring about such a condition and there is no reason to doubt the existence of the symptoms which the offender described following the deceased's death. What I am not prepared to accept is that the Post Traumatic Stress Disorder was due to the offender's relationship with the deceased and was in existence before the deceased's death'.

However, His Honour did accept that the offender stabbed the deceased when she was in a highly emotional and hysterical state (see [41]-[43]).

In reaching an appropriate sentence, Hoeben CJ took into account a number of considerations. These included that specific deterrence were not relevant in light of the offender's rehabilitation and the unlikelihood of re-offending (see [58]). General deterrence was not accorded substantial weight in light of exceptional factual circumstances (the deceased had made escalating threats of violence approaching the offender's home and the offender's state of mind was affected by being already brutally assaulted and witnessing the struggle between her family members and the deceased) (see [59]). The objective seriousness was at the

lower end of the range as was the offender's culpability (see [60]-[61]).

As against these matters, Hoeben CJ had regard to the sanctity of human life, the need to denounce the conduct of the offender and hold her accountable for her actions (see [62]).

The offender successfully appealed against her conviction to the Court of Appeal. See *Silva v The Queen* [2016] NSWCCA 284 (7 December 2016).

***DPP (NSW) v Lucas* [2014] NSWSC 1441 (20 October 2014) – New South Wales Supreme Court**

'Damaging property' – 'Evidence' – 'Intentionally or recklessly damaging property' – 'Intimidation' – 'Relationship/context evidence'

Charge/s: Intentionally or recklessly damaging property, intimidation.

Appeal Type: Crown appeal against the dismissal of the charges.

Facts: The male defendant had been in a domestic relationship with the female complainant that had ended some years prior to the offence. Since that time, the complainant had taken steps to conceal where she was living with her children from the defendant. He found where they were living and was permitted to have contact and access to children. One evening, the defendant turned up to the complainant's home uninvited and unannounced. She locked herself and the children inside the house while the defendant was yelling and screaming and making threats, including threatening to deflate the tyres on her car. It was alleged that he then deflated a tyre on her car. These charges were dismissed by a magistrate.

Issue/s: One of the grounds of appeal was that the magistrate erred in excluding evidence of a 'pattern of violence', such evidence being relevant to the intimidation charge under s 7(2) of the *Crimes (Domestic and Personal Violence) Act*.

Decision and Reasoning: This ground of appeal was dismissed but the appeal was upheld on other grounds (failure to give reasons and error as to what constituted damage). Examination of the transcript indicated that the magistrate's approach was that the prosecutor should lead evidence of the actual incident itself before leading any other evidence under s 7(2), if it was then considered necessary (See [24]-[30]).

***R v Gittany (No 5)* [2014] NSWSC 49 (11 February 2014) – New South Wales Supreme Court**

'Character evidence' – 'Following, harassing, monitoring' – 'Moral culpability' – 'Murder' – 'Objective seriousness' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Murder.

Hearing: Sentencing hearing.

Facts: The offender was found guilty for the murder of his female de facto partner after a judge only trial. While the relationship was, at times, loving and happy it was also tumultuous as the offender was a jealous and possessive partner. The offender scrutinised the victim's conduct openly and covertly, keeping track of her movements through surveillance cameras and secretly monitoring her mobile phone. On 30 July 2011, the victim had decided she was leaving the offender and attempted to leave their apartment. She was physically dragged back into the apartment by the offender and sixty-nine seconds later she fell to her death from the balcony. McCallum J was satisfied beyond reasonable doubt that, in a state of rage, the offender carried the unconscious complainant to the balcony and 'unloaded' her over the edge.

Decision and Reasoning: A sentence of 26 years imprisonment with a non-parole period of 18 years was appropriate in the circumstances. McCallum J took into account of a number of considerations in imposing this sentence. Her Honour assessed the objective seriousness of the offence. McCallum J was satisfied beyond reasonable doubt that the act of unloading the complainant's body over the balcony was done with intent to kill and that, although unconscious, the complainant was undoubtedly in a state of complete terror in the last moments before her death (See [16]-[18]).

A further relevant issue in assessing objective seriousness was whether the killing was planned or premeditated. The Crown tried to adduce evidence establishing that the offender had long had in mind the possibility of committing such an act, and making it look like suicide, in the event of her leaving him. Although witness testimony substantiating this assertion was excluded for its prejudicial content, other evidence was relevant to assessing the offender's state of mind. During the relationship, the offender engaged in an extraordinary degree of manipulative behaviour and while he was not to be punished for this conduct nor did this conduct aggravate the offence, it did inform the state of mind in which he committed the offence. McCallum J was not satisfied that the offence was planned or premeditated in the traditional sense; however, she was satisfied that the offender must have anticipated the prospect that he would fly into a rage if ever she

were to leave him (See [19]-[39]). Her Honour concluded:

'In my view, that history informs the degree of moral culpability of the offence. The arrogance and sense of entitlement with which Mr Gittany sought to control Lisa Harnum throughout their relationship deny the characterisation of his state of mind in killing her as one of complete and unexpected spontaneity. By an attritional process, he allowed possessiveness and insecurity to overwhelm the most basic respect for her right to live her life as she chose. Although I accept that the intention to kill was formed suddenly and in a state of rage, it was facilitated by a sense of ownership and a lack of any true respect for the autonomy of the woman he claimed to love' at [40].

In sum, the objective seriousness of the offence committed was not above the middle of the notional range, having regard to the fact that the murder was not premeditated or planned. However, the offence was of sufficient seriousness that the standard non-parole period of twenty years was to be regarded as a strong guide in this case (See [43]).

McCallum J also noted the offender's personal circumstances, including a troubling prior conviction for malicious wounding (See [44]-[59]) and noted that the complainant was vulnerable. She took into account good character references provided (noting though the contradiction posed by the way he treated the complainant) but was not persuaded that any prospect of rehabilitation existed in this case (See [65]-[74]).

This case was unsuccessfully appealed to the New South Wales Court of Appeal. See *Gittany v R* [2016] NSWCCA 182 (19 August 2016).

***R v Yeoman* [2003] NSWSC 194 (21 March 2003) – New South Wales Supreme Court**

'Battered woman syndrome' – 'Difficulty leaving an abusive relationship' – 'Expert evidence - psychosocial report - specific experience in drug and alcohol related domestic violence issues' – 'Manslaughter' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Where the victim is an offender' – 'Women'

Charge/s: Manslaughter.

Hearing: Sentencing.

Facts: The female offender had lived with her male de facto partner, the deceased, for 25 years (since she was 17 years old). The deceased had been violent towards the offender throughout their relationship, including hitting her in the eye with a baseball bat, but she did not have the means to leave the relationship.

The deceased would often taunt the offender and dare her to stab him. They both suffered from alcoholism. One evening, the offender was heavily intoxicated and stabbed the deceased in the chest, killing him. At the time, she did not intend to kill him nor did she realise he was dead and she went to bed. The next morning she called the police and made full admissions. The offender's recollection of events was imperfect because of her intoxication.

Decision and Reasoning: Buddin J had extensive regard to a psychological report prepared by Ms Danielle Castles, who had 17 years' experience working in the social welfare field, with particular expertise about drug and alcohol issues and domestic violence (See [32]-[35]). Ms Castles commenced her report by explaining the nature of domestic violence and stated at [32] that:

'domestic violence is the term used to describe the violence and abuse perpetrated upon a partner in a marriage or marriage like relationship. It is essentially the misuse of power and the exercise of control by one person, usually the man, over another, usually the woman. "Women experiencing domestic violence are often subjected to physical, sexual, emotional/psychological, social and economic abuse. Abuse may be overt (physical violence) or it might be deceptively subtle (emotional abuse). It is the interplay between making the woman fearful and reducing her self-esteem which results in the abuse having significant and prolonged effects on the woman."

The effects of domestic violence are such that women in violent relationships are convinced they are hopeless, that they need to be dependent upon the abuser and could not possibly survive without him. The most significant aspect of prolonged abuse is the gradual breaking down of a woman's autonomy'.

Ms Castles then set out the ways in which domestic violence impacted upon the offender here (See [33]-[34]).

Buddin J ultimately found that the offender's criminality was at the lower end of the scale of culpability of an offence of this kind i.e. non-intentional homicide in circumstances of tragic misadventure. Her intention was no more and no less than to engage in a desperate and objectively dangerous gesture, without intending any real harm or worse to the deceased. This, in conjunction with the very powerful subjective case advanced on behalf of the offender, meant that an exceptional sentence of a good behaviour bond for four years was appropriate, notwithstanding the fact that a life was taken (See [50]). The subjective factors that mitigated sentence included that 'the offence took place against the background of continuing domestic violence over a prolonged period of time, the impact upon her of which cannot, for the reasons advanced by Ms Castles and others, be underestimated' (See [45]). Buddin J also derived assistance from cases involving 'battered

spouse or partner syndrome' (See [48]).

District Court

R v Reid [2023] NSWDC 161 (17 May 2023) – New South Wales District Court

'Appeal against conviction' – 'Crimes (sentencing procedure) act 1999 (nsw), s 10(1)(b)' – 'Discharge without conviction' – 'Expert evidence' – 'Female perpetrator' – 'Image abuse' – 'Intentionally distributing intimate image without consent' – 'People with mental illness' – 'Predominant victim' – 'Probation' – 'Psychologist report' – 'Revenge porn' – 'Severity appeal' – 'State and federal offences' – 'Using a carriage service to menace or harass' – 'Victim as (alleged) perpetrator'

Charges: Intentionally distributing intimate image without consent x 1, Using a carriage service to menace or harass.

Proceedings: Appeal against conviction and severity of sentence.

Facts: The female appellant was in a relationship with the male complainant for about a year from mid-2021 to mid-2022 and had one child together. During their relationship they consensually recorded intimate sexual acts performed individually or together. After the end of the relationship, despite obtaining a protection order protecting her and her two children, communication in relation to their child led to some episodes of intimacy, one of which was recorded by the complainant on the appellant's phone. Recognising the complainant was commencing a relationship with another woman, the appellant texted the intimate video to her former partner with the message "Does she suck you like this?" He responded that he was not interested and she subsequently distributed the video by Facebook to her former partner's new girlfriend with the message "Bet ya don't make him cum like this lol". She admitted she did this both in hopes it would encourage the breakdown of the complainant's new relationship and in frustration with his lack of parental responsibility. The subsequent charge related to the appellant repeatedly messaging the complainant via Facebook messenger over two days, questioning his intention to be involved in his daughter's life.

A psychologist report indicated that the appellant had an "emotionally defective upbringing", likely had ADHD, and that the assessment conducted indicated that the best account for her symptomatology and offending was a Bipolar II Disorder. The psychologist presented a detailed treatment plan and proposed a referral to a psychiatrist to confirm his diagnoses and prescribe necessary medication. The psychologist and police both appeared impressed with the appellant's insight into her actions and reasons.

Ground: The appellant should be diverted into the mental health system s 14 of the *Mental Health and*

Cognitive Impairment Forensic Provisions Act 2020 (NSW) (the *MHCIFP Act*) and s 20BQ of the *Crimes Act 1914* (Cth) (the "*Cth Crimes Act*").

Issues:

(a) whether the appellant had, at the dates of offending, a mental health impairment or mental illness; and (if she did)

(b) discretionary considerations as to whether she should be diverted (enumerated, especially, under s 15 of the *MHCIFP Act*).

Reasoning and decision:

1. The severity appeal is allowed.
2. In relation to sentence for sequence 1, I set aside the sentence and in lieu, impose a conditional release order for 7 months, commencing today, subject to an additional condition in being a rehabilitation or treatment condition that the appellant abide by the treatment plan identified in section 11 of the report of Mr George Dieter.
3. In relation to the sentence for sequence 2, set aside the sentence and in lieu, order that the appellant be discharged, without proceeding to conviction, of the charge upon her giving security in the amount of $100 and complies with the condition that she be of good behaviour for a period of 7 months.
4. Direct the appellant's legal representative to explain to the appellant her obligations under the conditional release order imposed under the *Crimes (Sentencing Procedure) Act* (1999) (NSW).

In considering whether to allow the appeal, Abadee DCJ noted the appellant's emotional dependence on the complainant in the context of his abuse of the complainant:

> I acknowledge harm to the victim, Mr Pobje, who was disgusted by this offence, but that does not appear substantially manifested by his delayed report of it to police. But as I have indicated, due to the clear emotional dependence that she had upon the victim who, the evidence indicates, abused her, the considerations of general deterrence, denunciation and retribution are substantially moderated as to weight. There were some extenuating circumstances. The appellant is a single mother with two young children, from separate relationships, with certain unconfirmed mental conditions, who has applied herself to her studies and is doing well in her job, which involves looking after children. Although the Court has not received the victim, Mr Pobje's, side of the story, as indicated, there is a consistent thread

> of a narrative in which the appellant was in an abusive relationship with that victim. Coupled with evidence from her psychologist of her sensitivity and anxiety towards slights and the fear of rejection, and a sliding scale of emotion, there are extenuating circumstances concerning sequence 1 [52].

Abadee DCJ also noted that a conviction could "severely prejudice" the appellant's employment prospects and educational aspirations given her work with children [53] and that the second sequence of offending was "of a trivial kind" [55].

***R v Grech (a pseudonym)* [2022] NSWDC 721 (15 December 2022) – New South Wales District Court**

'Emotional abuse' – 'Non-consensual sexual intercourse withing marriage' – 'Non-fatal strangulation' – 'Possession of child abuse material' – 'Sentencing' – 'Sexual abuse' – 'Sexual intercourse without consent' – 'Threats to implicate victim's child' – 'Victim illness' – 'Vulnerable victim'

Proceeding: Sentencing.

Charges: 3 x sexual intercourse without consent, 1 x intentionally choke, 1 x possession of child abuse material.

Facts: The sexual assault and choking offences were committed by the offender against his wife. Several years into their relationship, the complaint's behaviour changed significantly and he began making derogatory comments about and sexual demands of his wife which she could not meet due to her cancer and treatment.

The offender engaged in non-consensual sexual intercourse with his wife on four occasions over a number of years and attempted to do so on others. In December 2015 the offender held his wife against a wall and verbally abused her resulting in criminal charges. After his wife found pornography on his phone he threatened to implicate one of her sons, intimidated her by starting a chainsaw and said he could kill her by putting a spider in her bed. He was physically violent to her on three occasions, including placing his hands around her neck and strangling her.

After the victim went to the police, a police investigation found discs and video files including 30 video images that were classified as child abuse material.

Reasoning and decision: An aggregate sentence of 8 years imprisonment, with a 5 year minimum and 3 year parole period.

Haesler SC DCJ identified a level of violence, pain, humiliation and degradation involved in the sexual assaults that occurred in the victim's own home, while she was vulnerable as a cancer survivor. HH considered the domestic relationship significant, noting that the victim was personally targeted and the offences occurred as part of a larger pattern of violence and control. Additionally, the evidence revealed that the offender felt justified in his conduct and his behaviour was therefore a continued threat.

His Honour emphasised the seriousness of possessing child pornography, which supports the industry of child abuse and encourages a distorted reality.

The offender's depression and poor physical health condition were considered, His Honour determining that he would be more vulnerable in prison because of his illness as well as his lack of experience, demeanour and previous good character. While he showed some emotional response and his sister expressed remorse on his behalf, HH did not accept his remorse given the evidence that he continued to victim-blame his wife throughout their relationship. The duration and nature of the offending also weighed against his previously good character, as he put his own sexual needs above that of his wife and her autonomy.

Haesler SC DCJ observed:

[40] The offences, both the sexual offence and the choking offence, occurred in the context of a domestic relationship. They were domestic violence offences. Sexual assault is an offence of violence. In each matter the complainant was personally targeted, and it is clear from my brief recitation of the facts that the offences were part of a larger picture of physical and mental violence and the exercise of control. While the offender accused the complainant of controlling him, his behaviour demonstrated the lie of that statement.

[41] There is material before me which shows that he felt what he did he was justified or excused in doing what he did. In continued beliefs of this nature, beliefs that the person inflicting the violence is the person wronged, carries with it a continued threat. As a consequence, I accept, that the complainant in this matter would never have felt safe in his presence.

[42] Each of these matters is treated with real seriousness because of the exercise of coercive power and the other matters I have reviewed. Denunciation is also required. Men cannot behave as this offender did.

***Day (a pseudonym) v R* [2022] NSWDC 594 (24 November 2022) – New South Wales District Court**

'Magistrate's credibility findings' – 'Resolving 'oath on oath' domestic violence on appeal' – 'Reviewing credibility

findings on appeal' – 'Self-serving evidence'

Charges: common assault x 1; sexually touch another without consent x 1; intimidate intending to cause fear x 1.

Proceedings: Appeal against convictions.

Facts: The appellant was convicted of three offences against his partner: common assault s61 *Crimes Act 1900* (NSW); sexually touch another without consent s61KC(a) *Crimes Act* (NSW); intimidate intending to cause fear s13(1) *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The magistrate preferred the complainant's evidence, rejecting the appellant's version of the sexual touching as 'self-serving and lacking credibility' [42].

The appellant was acquitted of three offences relating to assaulting, intimidating and intentionally choking their daughter with a pillow ('the pillow incident'). The magistrate found the appellant's evidence in relation to how the pillow came up over the child's face 'lacked credibility and was overall self-serving and implausible' [36].

Grounds: The complainant's evidence was inconsistent (police Fact Sheet and Computer Aided Despatch (CAD) notes [61]). The appellant argued that this led to a finding of not guilty on three charges related to the pillow incident. Further, the magistrate should have returned a verdict of not guilty in relation to the three charges being appealed as the magistrate had found the appellant not guilty in relation to the pillow incident.

Decision and Reasoning: appeal dismissed.

Haesler SC DCJ held in relation to the magistrate's findings on credibility:

75. I do not accept that his Honour rejected the complainant's evidence in relation to the pillow incident. That is not what he said at [112]; nor did he make adverse findings in relation to her reliability and credibility as a witness. To the contrary, he correctly directed himself that different verdicts could be returned in relation to different counts. And early in his judgment he noted that a reasonable doubt about one part of the prosecution evidence on one charge had to be considered as to whether it caused him to have a reasonable doubt about another charge: at [16].

76. His Honour's approach to the acquittals indicated that he was aware of the need to give the appellant the benefit of the doubt, even if his version did not impress him. Ultimately, his decision came down to the fundamental element that had to be proved - "intention." He concluded, "I cannot be satisfied to the

required standard that the appellant intentionally placed the pillow over the face of the child with an intention of suffocating her ….”

81. … It would, with hindsight, have been prudent to mention the *Markulevski* [2001] NSWCCA 290 (1 August 2001) direction specifically when he made his credibility findings about the race day evidence, if only to forestall attack on appeal. Much time would have been saved had his Honour added a 10th issue - Given my findings in acquitting the appellant what impact do those findings have on the credibility of the complainant?

89. Criticism was made of his Honour’s use on several occasions of the term “self-serving” to describe the appellant’s evidence. As I understand it “self-serving” refers to; a form of bias; being the tendency of witnesses to give evidence in ways that advance their self-interest but which the trier of fact, on review, regards as indefensible or unethical or a distortion of what really happened to suit their own ends.

90. Having reviewed the judgment I reject the submission that his Honour simply concluded - that having seen and heard the witnesses he believed the evidence of the one over the other: *O'Connell v DPP* [2021] NSWSC 1519 (26 November 2021) at [37]. His credibility findings are of use to me.

91. I too was unimpressed by his [the appellant’s] evidence and would reject it. I too was impressed by the response of the complainant under sustained and ardent cross-examination and the consistency of her accounts. I would accept her testimony. Having rejected the appellant’s account that evidence satisfied each element of the charges subject to appeal beyond reasonable doubt.

***R v Lonergan* [2022] NSWDC 423 (21 September 2022) – New South Wales District Court**

‘revenge porn’’ – ‘Appeal against sentence’ – ‘Crime’ – ‘Distribute intimate image’ – ‘Domestic violence offence’ – ‘Female perpetrator’ – ‘Image abuse’ – ‘Image offence’ – ‘Intimidate’ – ‘Severity appeal’

Charges: distributing intimate image x 1; intimidate with intent of causing fear of physical or mental harm x 1.

Proceedings: DPP appeal against sentence.

Facts: The perpetrator pleaded guilty to one charge of distributing an intimate image contrary to s 91Q(1) of the *Crimes Act 1900* (NSW). The victim had sent her 3-4 pictures of his penis during their affair. After the perpetrator became aware that the victim was in an ongoing relationship, she forwarded one of these pictures

to the victim's partner, who had blocked the perpetrator so did not receive it. The perpetrator also pleaded guilty to intimidating with intent of causing fear of physical or mental harm under s13(1) of the*Crimes (Domestic and Personal Violence) Act 2007* (NSW). This charge related to an excessive number of text messages the perpetrator had sent to the victim.

Grounds of appeal: the DPP argued the Magistrate erred in his assessment of the severity of the offences.

Held: appeal upheld.

Charge 1 (image offence): Abadee DCJ imposed a conditional release order for 18 months whilst proceeding to conviction (the Local Court had not ordered a conviction to be recorded).

His Honour said that the offence was not trivial, that it was 'malicious' and 'unnecessary' [45]. He acknowledged that a conviction might mean that the perpetrator could lose her mortgage broking licence and be unable to work. However, he cited R v Beissel [1996], stating that '[t]he Court should not attempt to minimise the seriousness of criminal conduct with a view to influencing third parties, such as licensing authorities…'.[47]

Charge 2 (intimidate offence): same terms as Local Court ie conditional release for 18 months, no conviction recorded.

His Honour also noted that charge 2 was a domestic violence offence under the *Crimes (Personal and Domestic Violence) Act* 2007 but was satisfied that the sentence imposed was appropriate.

***R v SS* [2022] NSWDC 399 (1 September 2022) – New South Wales District Court**

'Aggravated sexual assault' – 'Child present' – 'Mental impairment' – 'Reduced moral capability' – 'Sentence' – 'Sexual assault without consent'

Charges: aggravated sexual assault x 1; sexual assault without consent x 1; assault occasioning actual bodily harm x 1; intentionally choke x 1.

Proceedings: sentence.

Facts: The offender pleaded guilty to aggravated sexual assault contrary to s 61J(1) of the *Crimes Act 1900* (NSW); sexual assault without consent contrary to s61I; assault occasioning actual bodily harm contrary to s 59(1) and intentionally choke a person without consent s 37(1A).

The victim wife and the offender husband had been in a relationship since 2015. In November 2018 the wife and her two children moved out of the family home. About three weeks later, she returned to collect her daughter who had stayed overnight with the offender. When the victim went upstairs to collect her belongings, the offender followed her and punched her in the face three times, knocking her to the ground. Their young daughter was standing nearby screaming, 'Mummy, mummy…stop, mummy!' The offender straddled the victim, grabbed her neck with both hands and squeezed. The victim was struggling to breathe and called for help. Their daughter was still screaming. The offender punched the victim in the face a fourth time, causing her to lose consciousness.

When the victim regained consciousness, the offender was on top of her, raping her. Their daughter was not there. The victim said, we need to check on her. They both got up and walked into the bedroom. Their daughter was hiding in the walk-in robe, crying. The victim sat down, feeling extreme pain, dizzy, and disoriented. The perpetrator pushed her onto her back on the bed and started to rape her again. When he finished, the victim tried to keep him calm, fearing for her life and that of her daughter, so she suggested they have a cigarette. She then ran out of the house into the street wearing only a singlet top and carrying her daughter. She flagged down a passing car and the driver called the police.

The offender was located almost 24 hours later. He was disoriented, had some deep cuts on his face and leg and claimed that he had been lost in the bush for four days. The offender suffered a stroke following the offending.

Held: Wilson SC DCJ sentenced the offender to 8 years' imprisonment with a non-parole period of 4 years. He said at [48]:

> the offending occurred in the context of the breakdown of the marriage. In my opinion whilst this provides context it does not reduce the objective seriousness of the offending. In a sense, it heightens the objective seriousness as the offending took place in a domestic violence setting.

His Honour also found at [78] that, due to the offender's diagnosis of an adjustment disorder with anxiety and depression, the offender was impaired at the time of the offending so as to attract the moderation of the sentence considered by the court in De La Rosa [2010] NSWCCA 194 (17 September 2010) I find that the offender's moral culpability is reduced and that he would be an inappropriate vehicle for general deterrence. I also find the need for specific deterrence is reduced.

***R v Pattinson* [2022] NSWDC 475 (27 May 2022) – New South Wales District Court**

'Aggravating factor' – 'Bdsm' – 'Choking, suffocation or strangulation' – 'Crime' – 'Home of victim' – 'Sentence' – 'Tendency evidence' – 'Violent offence'

Charges: choking x 1; sexual intercourse without consent x 7; incite to sexually touch without consent x 1.

Proceedings: Sentence.

Facts: The male perpetrator had been acquitted of 7 counts of sexual intercourse without consent and 1 count of incite to sexually touch without consent. He had offered to plead guilty only to choking contrary to s 37(1) *Crimes Act 1900* (NSW).

The perpetrator lived in Dubai. When he visited Sydney from time to time, he and the victim had a sexual relationship characterised by bondage, domination, sado-masochism (BDSM). The perpetrator took the dominant role and the victim the submissive role. The charges arose after the sexual conduct had ceased and after the victim had said the safe word. The perpetrator held the victim up against the wall, grabbed her throat and choked her until she lost consciousness. The victim had been saying, 'stop' 'enough' 'I can't breathe' and using the safe word, 'Leigh'. This occurred when the victim was bleeding and injured.

Decision and Reasoning: Sentenced to 2 years and 6 months imprisonment, with a non-parole period of 1 year and 6 months. Protection order imposed protecting the victim or person with whom she has a domestic relationship.

Buscombe DCJ held that the choking was 'always serious' because of its 'life-threatening nature' and this offence was 'a serious example of such an offence.' [14]

> An offence of choking a person to the point of unconsciousness is a very serious offence because of the risk of death that accompanies such a violent act. To do that to a woman who is bleeding and injured in her own home, who does not consent to that conduct, knowing she did not consent, is a particularly serious form of the offence, in my opinion. The sentence that is to be imposed here needs to have a significant component of general deterrence reflected in it in order to send the message to the community that such offences will receive significant sentences, to deter not just this offender but others in our community who seek to engage in such conduct. The maximum penalty has been taken into account as a legislative guidepost. I have had some regard to the fact that if this offence stood on its

> own, the offender may have been sentenced in the Local Court, although the offence is a very serious one in my opinion. [27]
>
> The submission was advanced that the offence did not call for a sentence of imprisonment. In my opinion, the offence is far too serious an offence to call for anything other than a sentence of imprisonment. There is nothing before me that in any way reduces the offender's moral culpability for the offence. The submission was advanced that if a sentence of imprisonment was to be imposed then the offender should be extended leniency and allowed to serve it in the community by way of an intensive correction order. It will shortly be seen that I do not consider that a sentence of two years or less is an appropriate sentence to impose, so that sentencing option is simply not available. [28]

***R v Campbell-Buck* [2022] NSWDC 60 (1 March 2022) – New South Wales District Court**

'Aboriginal and Torres Strait Islander people' – 'Image-based abuse' – 'No prior convictions' – 'People with disability and impairment' – 'People with mental illness' – 'Rape' – 'Sentencing' – 'Sexual assault' – 'Strangulation' – 'Suicide threats' – 'Technology facilitated abuse'

Charges: Sexually touch another person without consent x 3, sexual intercourse without consent x 1, intentionally recording an intimate image without consent x 1, intentionally choke a person with recklessness x 1.

Proceedings: Sentencing.

Issues: Sentence to be imposed.

Facts: The female complainant and male defendant were in an intimate relationship. The complainant experienced pain due to a shoulder injury and took pain medication to enable her to sleep soundly. The effects of this medication were exploited by the defendant. On several occasions the defendant filmed himself performing sexual acts, including sexual intercourse, on the complainant while she was asleep. The complainant usually awoke during these incidents and made it clear that she did not consent to what had occurred. On one occasion, when the parties were arguing, the defendant strangled the complainant until she lost consciousness. When the complainant regained consciousness, the defendant threatened to commit suicide if she reported the incidents [9]-[21]. The defendant pleaded guilty to the charges.

Decision and Reasoning: The defendant was sentenced to four years and three months imprisonment, with a

non-parole period of two years and six months [78]. The defendant's sentence was reduced to take into account the utilitarian value of his guilty pleas [4]. Justice Haesler noted the objective seriousness of the offending [22]-[32]. His Honour highlighted the complainant's victim impact statement, which detailed her fears of 'a lifetime of pain, suffering, anxiety and therapy', a fear of going to sleep and 'difficulty enjoying life' [35]-[38]. His Honour noted that the defendant had a history of anxiety, depression and bipolar disorder, and was experiencing manic symptoms during all or part of his offending [42]. His Honour stated that the defendant's 'mental health condition, particularly his bipolar disorder… has a mitigatory effect', and 'to some modest degree' ameliorates 'his moral culpability' but 'does not mean that what he did cannot and should not be denounced' [54].

In sentencing the defendant Haesler SC DCJ: 'Any assault in a domestic context carries with it undertones, sometimes overtones, of control and targeting. All these offences are part of a larger picture of physical, sexual and mental violence. When someone is assaulted, as the complainant was, there is serious risk of significant harm can be caused. This is one reason why this is a separate offence and why it carries a maximum penalty of ten years.' [29]

***R v Trisic* [2021] NSWDC 687 (14 December 2021) – New South Wales District Court**

'Appeal against conviction' – 'Assault' – 'Following, harassing and monitoring' – 'Interpreter' – 'Intimidation' – 'Intoxication' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Separation' – 'Stalking' – 'Threat to kill'

Charges: common assault x2; stalking, intimidating, or intending to cause fear of physical or mental harm x1.

Proceedings: Appeal against conviction.

Facts: The male appellant was convicted of domestic violence offences against his wife, who he was separated from, and adult son. Following an argument with his son the intoxicated appellant threatened to slit his wife's throat (intimidation) and struck her right shoulder causing her to fall against the wall and bang her head (assault) [13]. The son interposed himself between his parents and the appellant struck the top of his son's head with an open hand (assault) [14]. The wife struggled to understand trial questioning despite an interpreter [25] and the son gave conflicting statements as to the timeline of events [21].

Decision and reasoning: Appeal dismissed. Abadee DCJ was satisfied the offending conduct occurred [94].

Justice Abadee found it was clear the Magistrate considered all the evidence [92]. The court granted leave for the appellant to adduce fresh evidence showing good character. His Honour held that assessing the dynamic of the relationships between the appellant and victims is “more probative than the absence of prior convictions” [81]. The appellant’s intoxication diminished the weight of his prior good character when evaluating his likelihood of offending [88].

Justice Abadee acknowledged the trauma of the incident compounded with the wife’s language difficulties meant the Magistrate was entitled to express misgivings in relation to her initial interview [67]. He did not regard this as fundamentally undermining her reliability or credibility [68]. The extent of discrepancies between the son’s account to police and evidence in Court over 4 months later was immaterial as the narrative of the mistreatment of the wife was consistent [73].

The Appellant submissions as to the possibility of collusion through the victims discussing their evidence was undercut due to his submissions that their testimonies had inconsistencies [72].

R v Mulquin **[2021] NSWDC 662 (19 August 2021) – New South Wales District Court**

‘Animal abuse’ – ‘Assault’ – ‘Breach of protection order’ – ‘Coercive and controlling behaviour’ – ‘Emotional abuse’ – ‘History of family violence’ – ‘Limited prospects of rehabilitation’ – ‘People affected by substance misuse’ – ‘Sentencing’ – ‘Strangulation’

Charges: Common assault x 4, intentionally choke x 1, stalk and intimidate x 2, contravene prohibition in an apprehended violence order x 1, damage property x 1.

Proceedings: Sentence.

Facts: The male defendant was found guilty of several domestic violence offences perpetrated in the context of his relationship with the female victim. On several occasions, the defendant made derogatory comments and threats during assaults that included pushing and punching the victim, slamming her head into a wall, strangling her with a vacuum cleaner pole by forcibly placing it on her throat until she vomited, and preventing the victim from leaving her home by making threats towards her and her pets that included threats to kill [5]-[16] in contravention of protection order.

Decision and Reasoning: 3 years and 6 months imprisonment, with a non-parole period of 2 years.

Haesler SC DCJ noted the objective seriousness of the offending, referring to it as a serious and persistent

course of domestic violence that included derogatory comments, threats to kill, attacks to the victim's head, and choking which carried a risk of death [5]-[16]. The defendant's breach of the apprehended violence order was an aggravating factor [33]. The defendant's personal circumstances, which included a long history of alcohol abuse, failed attempts at rehabilitation, anxiety, and prior domestic violence offences [3], [30]. The defendant's prospects for rehabilitation were limited [27] as while the defendant had shown remorse and an intention to engage in rehabilitation he had not acted in accordance with these aspirations [26]. His Honour considered the physical and emotional harm caused by the offending and found that there was a need for accumulation and the imposition of a significant sentence due to the course of conduct and objective seriousness of the offending [24], making a finding of special circumstances [36]. The sentence imposed should express community's disapproval for reoffending in the context of domestic violence [33].

***Perrin v R* [2021] NSWDC 408 (17 August 2021) – New South Wales District Court**

'Aboriginal and Torres Strait Islander people' – 'Age disparity' – 'Allegations of infidelity' – 'Appeal against sentence' – 'Children' – 'Coercive control' – 'Covid-19' – 'Emotional abuse' – 'Exposing children to domestic and family violence' – 'Jealous behaviour' – 'People affected by substance misuse' – 'People with mental illness' – 'Pregnancy' – 'Protection order' – 'Strangulation' – 'Use of weapon' – 'Young people'

Charges: Common assault (DV) x 9; Assault Occasioning Actual Bodily Harm (DV) x 6; Stalking and or Intimidating x 3; Destroying or damaging Property (DV) x 3; Reckless Grievous Bodily Harm (DV) x 1.

Proceedings: Appeal against sentence.

Facts: The male appellant pleaded guilty to 19 offences committed against his female partner. He was sentenced to 5 years imprisonment with a non-parole period of 3 years 2 months [2]. The offender appealed under s11 *Crimes (Appeal and Review) Act 2001* [5].

The appellant is an Aboriginal man who was 19 years old when he met the victim in 2015. The victim was 28 years old when they met and had a 4-year-old son. They had a child together in 2016. The victim was pregnant with another child in November 2017.

The appellant used drugs, was controlling and jealous [15]and suffered delusions including seeing "demons", "receiving messages from the television" and feelings the victim was cheating on him [100]. On 19 February 2015, after the appellant placed his hands around the victim's throat and squeezed until she became dizzy and could not breathe, police obtained a protection order for the victim [37]. The offending included repeated

punching, kicking, and spitting on the victim, leaving bruises on her body. The violence was frequently accompanied by the appellant screaming derogatory comments at the victim, leaving her ears ringing and sore. On two occasions the victim's son witnessed the offending and attempted to intervene on one occasion.

Decision & Reasoning: Haesler SC DCJ confirmed the convictions but varied the sentence. His Honour imposed an aggregate sentence of 4 years 6 months, with a non-parole period of 2 years 9 months.

Justice Haesler held that with few exceptions, each offence was a serious example of the type of offence charged [59]. The lack of long-term physical injuries recorded and Victim Impact Statement did not mean the offending had little or no impact on the victim [58]. The number and severity of offences meant that even making allowances for the appellant's undiagnosed mental illness and background of deprivation, an aggregate sentence of 5 years was justifiable [116].

His Honour found the sentencing Magistrate erred in her application of s58 of *Crimes (Sentencing Procedure) Act 1999* by exceeding the 5-year limit on any continuous series of sentences. The offences were not crimes that so offended the public interest that the maximum sentence, without any discount for any purpose, was appropriate [121]. He found that a guilty plea in the context of COVID-19 was "worthy of greater weight in mitigation and amelioration" [120].

Note: In re-sentencing, Haesler DCJ referred questions in this matter to the New South Wales Court of Criminal Appeal [*R v Perrin* [2022] NSWCCA 170 (15 August 2022)] pursuant to s 5B(2) of the *Criminal Appeal Act 1912* (NSW). The questions posed concerned the operation of s 58 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the "*CSP Act*"). Wright J (Ward P and Harris J agreeing) held Haesler SC DCJ was wrong to engage s 58 as there was no 'existing sentence' when either the Local Court or District Court imposed its sentence. Therefore, there was no requirement that Mr Perrin's sentence expire 5 years from 22 September 2019 [87]. As the sentence was affected by an error of law, the Court of Criminal Appeal quashed Haesler SC DCJ's sentence and remitted the matter back to the District Court for the appeal to be determined according to the proper construction of s 58 of the *CSP Act* (NSW) [89].

***R v Argyle (a pseudonym)* [2021] NSWDC 267 (18 June 2021) – New South Wales District Court**

'Aggravated sexual intercourse without consent' – 'Children' – 'Coercive control' – 'Emotional and psychological abuse' – 'Past domestic and family violence' – 'People living in regional, rural and remote communities' – 'People who have experienced trauma' – 'People with children' – 'People with disability and impairment' – 'Post-traumatic

stress disorder' – 'Pregnancy of victim' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Social abuse' – 'Victims as (alleged) perpetrators'

Charges: Aggravated sexual intercourse without consent x 2.

Proceedings: Sentencing.

Facts: The offender was in a relationship with the co-accused. The co-accused forced himself on the offender's younger sister, aged 17. The younger sister was visiting the house of the offender and co-accused to assist with the offender's pregnancy. The offender assisted the co-accused, or interacted with the victim in certain ways, such as holding the victim's hands, at the co-accused's request.

Issue: Sentence to be imposed.

Decision and Reasoning: The judge refused to impose a custodial sentence and instead imposed a community corrections order for a period of 2 years: [101]. The judge accepted that the objective gravity of the offending was low: [64]. This was so despite the fact that the offences occurred in the offender's home and that the offending amounted to a breach of trust that the offender's younger sister was owed: [63]. The offender acted spontaneously in response to the co-accused's actions and was unable to control the situation: [65].

The offender had diminished moral culpability due to the untreated sexual abuse she faced as a child, her own cognitive impairment and the causal connection between her intellectual capacity and her offending: [67]–[70]. Further, she was operating under duress due to her own experiences of the 'coercive controlling behaviour' of the accused and her fear that he would harm her or her unborn child: [69]. This diminished moral culpability indicated that specific and general deterrence were not relevant sentencing factors: [75]. The judge considered that moral culpability was a more appropriate touchstone for sentencing, as opposed to objective gravity of the offending: [85].

In addition, the co-accused would have succeeded in the offending regardless of the complicity of the offender, the offender was in genuine fear of the co-accused and the offender, keeping in mind her cognitive impairment, was trying to make the situation better for her sister: [72]–[74]. Further factors tending towards a non-custodial sentence were that the offending was almost 15 years ago ([92]), hardship would be caused to the offender and her two young children ([96]), the offender's physical and intellectual disabilities would make custody more onerous and treatment for her trauma was only readily available in the community ([99]).

***Barber v DPP* [2021] NSWDC 7 (3 February 2021) – New South Wales District Court**

'Appeal against conviction' – 'Strangulation' – 'Victim experiences of court processes'

Charges: Common assault x 1.

Proceedings: Appeal against conviction.

Facts: The male appellant was convicted of assaulting his then female partner by strangulation. The appellant alleged that the complainant was the initial aggressor. He also gave evidence of past incidents, alleging that the complainant was "prone to act erratically or unpredictably."

Grounds of appeal:

1. The complainant was not a credible witness due to inconsistencies in her evidence and, accordingly, the prosecution did not prove that the assault occurred to the requisite standard.
2. If an assault did occur, it was done in self-defence and the Crown did not negative that defence to the requisite standard.

Held: Appeal dismissed.

Ground 1: The appellant's argument that the Crown did not prove that the elements of the offence of common assault beyond reasonable doubt was rejected, notwithstanding some differences in detail in the complainant's evidence. "As to the suggested materiality of inconsistencies in detail in the complainant's account, the Magistrate observed that the complainant had certain issues with her language, which she was entitled to take into account": at [9].

Ground 2: In light of recent instances of the complainant throwing items at the accused and his laptop, "there was a reasonable possibility that the appellant subjectively perceived the prospect of further attack." However, "a reasonable person would not have shared the same belief. There was, in truth, nothing to stop him from diffusing the situation simply by leaving the room": at [30].

***R v Corak Phan* [2021] NSWDC 3 (28 January 2021) – New South Wales District Court**

'Assault' – 'Breach protection order' – 'Bugmy principles' – 'People affected by substance misuse' – 'People affected by trauma' – 'People with mental illness' – 'Sentencing' – 'Separation' – 'Sibling abuse'

Charges: Common assault x 2; Knowingly contravene a prohibition or restriction in an Apprehended Domestic Violence Order x 1.

Proceedings: Sentencing.

Facts: The male offender and the female first victim had previously been in a domestic relationship (they had a child together) and had separated. The offender breached a protection order by being in the vicinity of the victim, and subsequently punched her a number of times to the head and upper body. The second victim was the offender's sister. The offender pulled his sister by her ankles off a couch. The offender had an extensive criminal history and was on conditional liberty at the time of the offending. He had a dysfunctional childhood, and an extensive history of drug and alcohol misuse. A psychologist opined that he met the criteria for Substance Induced Psychotic Disorder, and Post-Traumatic Stress Disorder.

Decision and reasoning: An aggregate sentence of 20 months imprisonment was imposed, with a non-parole period of 10 months.

The offences against the offender's former partner fell in the mid-range of objective seriousness, as she was protected by an Apprehended Domestic Violence Order at the time and there was clear contravention of a court order ([43]-[44]). The assault of the offender's sister fell in the lower range of objective seriousness ([45]).

Mahoney SC DCJ noted at [46]-[47], discussing the principles in *Bugmy v R*:

> "That the offending occurred whilst the offender was in the grip of a drug addiction, does not mitigate the seriousness of the offending. Notwithstanding that the offender gave no evidence, and the court must approach self-serving reports to psychologists with some caution, I do take into account the subjective matters outlined in the report of Ms Minovski, namely, a dysfunctional childhood marred with neglect, physical and sexual abuse and exposure from an early age to drug and alcohol abuse, together with domestic violence, giving rise to the principles outlined by the High Court in *Bugmy v R*……
>
> "I am therefore satisfied that the offender's recourse to violence in the circumstances outlined above, albeit fuelled by his drug addiction, are such that the offender's moral culpability for his inability to control his impulses must be somewhat reduced."

***R v French* [2020] NSWDC 767 (17 December 2020) – New South Wales District Court**

'Animal abuse' – 'Controlling, jealous, obsessive behaviours by the perpetrator' – 'People affected by substance misuse' – 'Sentencing' – 'Stalking' – 'Step-children'

Charges: Animal cruelty x 1; Detain for advantage x 1; Intimidation x 1; Common assault x 1; Aggravated break and enter and commit serious indictable offence (and two related offences of stalking/intimidation and maliciously damaging property) x 1.

Proceedings: Sentencing.

Facts: The male offender and the female victim (who had two children) had been in an on-off relationship for 12 months. The offender killed the victim's cat in a planned way (animal cruelty). Two weeks later, the offender, while affected by drugs and alcohol, forcibly took the victim from a neighbour's home and detained her for 1-2 minutes (detain for advantage). Later, the offender's behaviour caused the victim to hide in the toilet and wardrobe of her home (intimidation), and when the offender started punching a wall, another person present who tried to stop him and the offender struck the bystander on the head (common assault). The victim told the offender that the relationship was over, and to move out. One month later, the offender damaged his sister's car while she was at the victim's house, and later sent persistent calls/texts to the victim (malicious damage and stalk/intimidate). That same evening, the offender broke into the victim's house and intimidated her and her children (aggravated break and enter). Sentence and reasoning: A non-parole period of 2 years, with a balance term of 15 months.

The animal cruelty offence was just below the mid-range of objective seriousness ([14]).

The objective seriousness of the other offences ranged from the lower-end to just below mid-range. Relevant factors included repeated attempts to control and intimidate the victim (a form of domestic violence) ([16]-[32]). The offender's subjective circumstances were given some weight (including his family history, mental health issues, and drug and alcohol misuse at [35]-[50]), but did not result in any marked reduced need for both general and specific deterrence ([57]). Priestley SC DCJ took into account the totality principle ([51]-[53]), and special circumstances due to the need for rehabilitation with drug/alcohol issues and counselling ([54]).

***James v James No 3* [2020] NSWDC 797 (16 November 2020) – New South Wales District Court**

'Assault and assault and battery' – 'Assessment of damages' – 'Civil matter' – 'Emotional and psychological abuse' –

'People affected by trauma' – 'People with mental illness' – 'Physical violence and harm' – 'Social abuse' – 'Tort'

Proceedings: Assessment of damages for the torts of assault and assault and battery.

Facts: The plaintiff woman brought proceedings against her former husband, and obtained default judgment, which the court refused to set aside ([1]). The plaintiff and the defendant had two children, and previously lived on a farm (the subject of settlement proceedings in the Federal Circuit Court) ([4], [18]).

The first torts occurred on 26 September 2017. The defendant caused the plaintiff to fear that she would be battered by calling her names in an aggressive and violent manner, restrained the defendant by her shoulders and arms, and then ordered her to leave the property with her daughter ([2], [5]-[8]). The defendant was prosecuted but the charges were dropped by way of an apparent plea bargain ([7]).

The second torts occurred on 20 February 2018. There was an audio recording of these events, which the plaintiff was permitted to tender despite a 'technical breach' of the *Surveillance Devices Act 2007* (see decision in *James v James No 2* [2020] NSWDC 796 (13 November 2020)) ([11]). The defendant physically assaulted and verbally assaulted the plaintiff ([10]-[17]). The defendant was also prosecuted for this offending, and sentenced to an Intensive Corrections Order for 16 months and an Apprehended Violence Order for two years ([19]).

Issues: Assessment of damages.

Decision and reasoning: Judgment for the plaintiff, damages of $358,520 plus costs.

For the torts on 26 September 2017, the court held at [9] that "[t]he tort of assault and the tort of assault and battery are actions which do not depend upon proof of damage. In any event there was actual bodily harm sustained by the plaintiff". For the torts on 20 February 2018, the court again held that the torts were actionable per se without proof of damage but here there was "grave damage proven to the Court's satisfaction". This included evidence of chronic post-traumatic stress disorder, a recurrent major depressive disorder, and recurrent panic attacks caused by the events of 20 February 2018 ([28]-[32]). The court noted that the plaintiff's ongoing psychiatric problems would have a continuing impact on her (including her earning capacity) and that (at [29]):

> "When this case is finished no doubt she can try to put the events of the past behind her and try to get on with her life. Not having to relive the events by coming to Court and telling the Court of them will no doubt assist in her recovery".

The plaintiff was awarded compensatory damages, aggravated damages and exemplary damages ([9], [32]). The plaintiff was also awarded damages for past and future economic loss ([33]-[35]).

See also: *James v James No 2* [2020] NSWDC 796 (13 November 2020) – New South Wales District Court.

***James v James No 2* [2020] NSWDC 796 (13 November 2020) – New South Wales District Court**

'Application to tender recordings' – 'Assessment of damages' – 'Evidence' – 'Tort'

Proceedings: Application to tender recordings.

Facts: The recordings were made of the interactions between the plaintiff and the defendant on 20 February 2018 at their former home. The recordings were of a private conversation between the plaintiff and the defendant made without the defendant's consent, thereby in contravention of s 7(1)(b) of the *Surveillance Devices Act 2007*.

Issues:

1. Whether it was reasonably necessary for the plaintiff to make the recording for the protection of her lawful interests, per the exception in s 7(3)(b)(i) of the *Surveillance Devices Act 2007*.
2. Whether the recording nonetheless admissible as the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in an unlawful manner, per the exception in s 138(3) of the *Evidence Act 1995*.

Decision and reasoning: The recording did not fall within the exception under s s 7(3)(b)(i) of the *Surveillance Devices Act 2007*. The meaning of "lawful interest", referring to the decisions in *DW v R* [2014] NSWCCA 28 and *Corby v Corby* [2015] FCCA 1099, did not extend to the plaintiff's purpose which was to record the abuse to replay to the defendant later and change his behaviour: (at [3]-[4]). The recording was instead admitted into evidence in the exercise of the court's discretion under s 138(3) of the *Evidence Act 1995*: at [7]-[9]. It had probative value of the extent of the plaintiff's damages for her claim in tort. The impropriety of the contravention was not great. The recordings were referred to in the assessment of damages judgment: see *James v James No 3* NSWDC 797 (16 November 2020).

***R v Collins* [2020] NSWDC 276 (5 June 2020) – New South Wales District Court**

'Appeal against sentence' – 'History of abuse' – 'Indecent assault' – 'Obsessive behaviours' – 'Separation'

Offences: Indecent assault; The appellant requested that the learned Magistrate take into account two additional offences on a Form 1, they being, that on the same date and in the same place, the appellant:

(a) intimidated Kristy Rochester with the intention of causing her to fear physical or mental harm, contrary to s 13(1) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW); and

(b) assaulted Kristy Rochester, contrary to s 61 of the Crimes Act 1900 (NSW).

Proceedings: Appeal against sentence

Facts: The male appellant and female victim had been married since 2003 and had a child together. They divorced in 2008 but recommenced a relationship in 2014 and started living together. In 2015, the appellant assaulted the victim, giving rise to an Apprehended Violence Order. In July 2017, their relationship began to deteriorate. In the lead up to the offending, the victim obtained alternative accommodation and was in the process of moving her belongings. One night, the appellant exchanged text messages with the victim, requesting they have sex (though acknowledging that the victim was moving on), but the victim refused. The appellant went to the lounge room where the victim was on the couch listening to music on her phone, took her phone and refused to give it back unless they talked. The couple began yelling and the victim felt scared so she picked up a knife and told the appellant that she would stab him if he came near her. The appellant left the home with the victim's phone and refused to return it. The victim slashed two tyres on the appellant's car then went back inside and locked all the windows and doors, except for a window in her bedroom. The appellant accessed the victim's phone then returned to the house and demanded she speak to him outside. The victim complied as she was afraid of the appellant, the appellant throwing a beer over her when she got there.

After this, the victim drove to a nearby lookout and fell asleep. The appellant arrived in his truck and parked the victim in so she could not drive away. The appellant demanded that the victim open the doors. She complied as she was afraid. The appellant grabbed the victim's hair and told her that she had to talk to him to get her phone back. They returned to the house separately and the appellant told the victim he wanted to talk to her in the bedroom. He told her to lie on the bed; she complied. He then started touching her, took her

clothes off, pinned her wrists above her head, rubbed his groin all over her and ejaculated on her, despite her cries that she did not want to engage in sexual activity. The appellant told the victim to leave, which she did. The appellant was convicted and sentenced to 21 months' imprisonment with a 12-month non-parole period.

Judgment: The judge dismissed the appeal, holding that the sentence could be regarded as "lenient" [65]. Her Honour rejected that the appellant's conduct involved a low level of criminality [59] and further held that there was a greater need for personal deterrence and retribution in this case [61]. Her Honour held that, "whilst acknowledging the relevance of the appellant's rehabilitation, that consideration is subordinate to the considerations of general deterrence, denunciation and the imposition of adequate punishment, which factor recognises the indignity inflicted upon the complainant" and that "the safety to the community is not seriously imperilled by the appellant if a penalty other than full-time incarceration is imposed. But that consideration is not, in my opinion, paramount in the circumstances of this case" [64].

Her Honour found that the appellant's contention that the sex occurred as 'make-up sex' was a "rank distortion" of what objectively occurred, because the relationship had completely broken down [27]. The appellant did not wish for the relationship to have ended as it did, "So he resorted to the exertion of psychological and physical force against the complainant in order to get her to do what he wanted her to do" [28]. Her Honour found that the appellant knew his conduct was non-consensual and there was nothing to suggest the victim wanted to make up with the appellant [30], and that there was a "humiliating overtone" to the activity [31]. As such, her Honour held the conduct to be above the mid-range of objective gravity [32].

Her Honour rejected the contention that the appellant was sorry for his conduct and had acquired real insight into the wrongfulness of his conduct [47]. However, her Honour found that the likelihood of reoffending was low [55].

***R v Shepherd* [2020] NSWDC 273 (3 June 2020) – New South Wales District Court**

'Appeal against sentence' – 'Breach of protection orders' – 'Covid-19 pandemic' – 'History of domestic violence' – 'People affected by substance misuse' – 'Significant criminal history'

Charges: Contravening a prohibition or restriction under an Apprehended Violence Order (AVO) x 2

Case type: Appeal against severity of sentence

Facts: The appellant man was sentenced to 12 months' imprisonment with a non-parole period of 9 months.

He pleaded guilty to 2 charges that he contravened a prohibition or restriction under an AVO. The appellant has remained in custody for a period of around 2 months. Although he lodged an appeal in May 2020, he was refused bail.

The appellant was in a relationship with his then female partner (the victim). As at 26 March 2020, there was an enforceable AVO for her protection which named the appellant as the defendant. A condition of the order was that the appellant not approach or be in her company for at least 12 hours after drinking alcohol or taking illicit drugs. At about 1:00 am on 26 March 2020, police attended the couple's residence after a domestic dispute. The appellant admitted that he had breached the AVO and had consumed a large quantity of alcohol. There was no suggestion that the appellant was likely to inflict imminent violence or commit some other more serious contravention of the AVO at that time. He was arrested and released on conditional bail at 3:00 am. At about 4:00 am on the same day, police returned to the same address following another complaint of a domestic dispute, and found the appellant intoxicated again.

Grounds: Whether an Intensive Correction Order (ICO) is more appropriate than a period of full time custody; whether there are special circumstances to justify variation of non-parole period.

Held: The appeal was dismissed, but the Court varied the statutory ratio for the non-parole period on account of special circumstances in order to assist with rehabilitative efforts with respect to the appellant's alcohol consumption issues. Consequently, the Court varied each sentence to 1 year imprisonment, with a non-parole period of 7 months, to be served concurrently ([43]-[47]).

Held: Aggravating circumstances included the fact that the offending conduct occurred not only in contravention of an AVO, but whilst the appellant was subject to an ICO. Further, the second offence occurred when he was on conditional bail after having committed the first offence ([12]-[15]). There was little evidence of the appellant's circumstances that directly explained why he acted as he did. In May, the appellant acknowledged to a community corrections officer that he breached the condition of the AVO because he had "no choice". However, the Court accepted the characterisation of the community corrections officer that he "blatantly disregarded" the condition twice on the one night ([16]-[18]). The appellant also has a significant criminal history, and has been convicted of several domestic violence offences in the past. Most of these offences were the product of alcohol consumption ([22]). There was no evidence before the Court to indicate remorse or contrition: the appellant blamed the victim and was said to have showed no insight into his offending ([24]). The appellant had a long history of alcohol dependence, and had been diagnosed with depression, post-traumatic stress and attention deficit hyperactivity disorder. He made attempts to rehabilitate

himself, but relapsed into consuming alcohol on a regular basis ([25]-[27]).

The ICO breach report noted that since the order had been imposed, the appellant had minimal engagement with community corrections, which impeded his attempts to treat his alcohol usage. The report also expressed concerns for the victim's safety. The appellant's prospects of rehabilitation were no more than reasonable. Despite his demonstrated ability to overcome illicit substance abuse, he has struggled to deal with his alcoholism. The Court also noted that the level of community service work that the appellant needs to undertake may be reduced or altered as a result of the COVID-19 pandemic ([28]-[33]).

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***R v Ragg* [2020] NSWDC 210 (18 May 2020) – New South Wales District Court**

'Aggravated sexual assault' – 'Controlling, jealous, obsessive behaviour' – 'History of abuse' – 'Lack of remorse' – 'People with mental illness' – 'Physical violence and harm' – 'Poor prospects of rehabilitation' – 'Protection of the community' – 'Protection order' – 'Risk of reoffending' – 'Sentencing' – 'Specific deterrence' – 'Step-children in home' – 'Substance abuse' – 'Threat to set on fire' – 'Threats to kill' – 'Weapon'

Offences: Common assault; Reckless wounding; Intimidation; Using explosive fluid; Attempted cause grievous bodily harm to person with intent x 2; Aggravated sexual assault x 4; Contravene Apprehended Violence Order; Threaten witness to withhold true evidence; Aggravated detention with the intention of assaulting and intimidating the victim (at the time of the detention actual bodily harm was occasioned to the victim)

Proceedings: Sentencing

Facts: The male offender and female victim were in an on and off domestic relationship for 12 years. The victim had three children, one of which was the son of the offender. Throughout the relationship, the offender was physically and mentally abusive towards the victim and both parties used drugs. One night, the offender and victim stayed up smoking marijuana and ice. The next morning, the couple were in their car and the

offender accused the victim of sleeping with up to 20 men at one time while the offender had been in custody for other charges. The victim denied this, but the offender got angry and cut the victim's hair with scissors before punching her in the face multiple times, one of these being so hard that the victim's head hit the windscreen (Common assault). The offender then ordered the victim into the back seat and told her that every time she lied, he would stab her with the scissors (which were small and blunt, not sharp). The offender stabbed the victim on her legs about 30 times (four of which punctured her skin – the others resulted in bruises only) whenever she gave an answer he did not like (Reckless wounding). He also stabbed her left ear and cut open her shirt, exposing her breasts and stomach (Reckless wounding).

The offender than threatened to cut off the victim's nipples and vagina/clitoris (after removing her pants). The victim tried to deflect the offender and pleaded for him to stop (Intimidation). The offender locked the windows and doors of the vehicle to stop the victim from escaping. A while after a man walked past the vehicle and looked inside, the offender unlocked the car and the victim ran outside screaming for help, although the man could not be seen. The victim ran down the riverbank and saw the offender get out of the car with a jerry can. The offender tipped the can containing diesel over the victim's head and body (Using explosive fluid). The victim ran down to the river and hid, but the offender chased the victim and told her she needed to wash the diesel out of her hair. The victim complied.

The offender told the victim to go back to the car and she complied. When there, the offender tried to light the victim's hair on fire with a cigarette lighter (Attempted cause GBH with intent). The victim put it out with her hands, but the offender lit her hair another two times (Attempted cause GBH with intent). The offender and victim then travelled to the offender's friend's house, stopping at various places along the way. The offender threatened to harm or kill the victim if she drove off, so the victim complied and did not leave. After visiting the friend's house, the offender and victim drove to a deserted scrub area where the offender continued to question the victim. The victim told the offender false stories to keep him happy, then the offender told the victim to get in the backseat because he was going to do what they did to her (implying that he would rape her but she would like it). The offender got some lubricant and put this in the victim's vagina and anus. He then penetrated her vagina and anus, the victim crying the whole time (Aggravated sexual assault x 2). The offender then inserted his entire first into the victim's vagina and then anus, while the victim screamed in pain and begged the offender to stop (Aggravated sexual assault x 2). The offender could see blood on the ground, running down her legs and on the offender's hand. The offender then punched the victim in the throat and told her he would do it again to knock her out. He then left her in the bush and drove off. She made it to a road and was picked up by a man passing by in a ute who took her to the police station. When the victim was

recovering in hospital later, the offender called her and threatened to shoot the victim's mum and dad if she pressed charges (Threaten witness to withhold true evidence).

Medical reports showed that the victim may suffer long term issues as a result of her injuries and were potentially life threatening if they had not been treated.

Judgment: The judge convicted the offender of all charges and sentenced him to an aggregate of 24 years' imprisonment, with an 18-year non-parole period. Although a discount was given for the utilitarian value of the offender's early pleas, His Honour found that most offences were in the mid-range of objective seriousness, with the Aggravated sexual assault charges being in the highest range of seriousness, having been committed as "deliberate sadistic torture" [36]. His Honour further emphasised that the offender's "warped and sadistic desire to gratuitously inflict pain, dominate and terrorise overcame any empathy or concern for the wellbeing of his long-time partner, the mother of his child" [7].

All of the offences were committed in the context of a long-term relationship, so were each domestic violence offences. His Honour held that "It has long been recognised that such offences, particularly where the offender is a repeat domestic violence offender, require emphasis in sentencing on specific and general deterrence, together with powerful denunciation by the community of such conduct and the need for the protection of the community" [54].

The judge accepted that the offender's "long history of emotional and behavioural dysregulation, emanating from his early adolescence, and his complex trauma background, including a history of physical and sexual abuse, loss of family stability and structure from his childhood and a lack of positive and nurturing influences, his exposure to drug and alcohol abuse" had normalised his offending behaviour and desensitised him to the anti-sociality of his crimes, so the offender's moral culpability should be reduced according to principle in Bugmy v R [2013] HCA 37 [77]. However, His Honour held that, due to the nature of the offending, the offender's antecedents and his criminal history, there was a need in this case to give significant weight to retribution, specific deterrence and protection of the community, over and above diminution of the sentence by virtue of lessened weight to general deterrence and reduced moral culpability [79].

The judge specifically noted that the offender still blamed the victim for his violent offending, had no insight into his offending, had no compassion, and continued to hold negative attitudes towards interventions [80]. Furthermore, the offender lacked genuine remorse, with all representations on this point being entirely self-serving [91]. His Honour held that the offender had extremely poor prospects of rehabilitation and his risk of

reoffending was medium to high [98], finding that he had "a significant history of hostility and aggression towards women, especially his female family members and intimate partners, including expressions of intention to kill" [82].

***R v Barnett* [2020] NSWDC 193 (12 May 2020) – New South Wales District Court**

'Alcohol abuse' – 'Jealous behaviours' – 'Physical violence and harm' – 'Relevance of covid-19 pandemic to sentencing considerations- breach protection order.' – 'Sentencing' – 'Threat to kill' – 'Weapon'

Offences: Aggravated detention of a person with intent to obtain advantage occasioning actual bodily harm x 2; Reckless wounding causing actual bodily harm x 1; Contravention of a prohibition/restriction under an AVO x 1

Proceedings: Sentencing

Issues: The relevance of a pre-existing alcohol disorder to the assessment of the objective seriousness of the offending; relevance of the COVID-19 pandemic to sentencing considerations.

Facts: The female victim was married to the offender man, although they had not resided together for eight to nine years. The victim was the subject of an Apprehended Domestic Violence Order (AVO) that protected her from the offender. A condition of the order prohibited the offender from approaching the victim or being in her company for at least 12 hours after drinking alcohol or taking illicit drugs. The offender asked the victim to stay with him for a few days at a caravan park where he lived. The victim agreed. On one night, the victim and offender met with Mr Wallace at his caravan and drank alcohol. The offender left earlier than the victim, but later returned and accused Mr Wallace and the victim of being unfaithful together. The offender produced a knife and pressed it to Mr Wallace's chest before placing it on Mr Wallace's throat, creating a superficial laceration. The victim attempted to grab the offender's arm but the offender pushed her backwards where she fell and hit furniture, losing consciousness. Every time the victim tried to get up, the offender hit her against the walls and furniture. He also cut her right leg, causing three wounds. Mr Wallace tried to remove the knife from the offender, but the offender lacerated Mr Wallace's finger. He told the victim that if she screamed, he would kill Mr Wallace, and told them both that they could not leave.

During the period when the victim and Mr Wallace were detained, the victim also suffered a subdural haematoma, bruising under her right eye, a fractured rib and many abrasions. The offender was heavily intoxicated at the time, having suffered from an alcohol use disorder since he was nine years old.

Held: The offender was sentenced to seven years and six months' imprisonment, with a non-parole period of four years and six months. The sentencing judge found that the prospects of rehabilitation were reasonable to good [62] because the offender entered an early plea, his conduct was out of character (he had not previously engaged in violent conduct) [49], he was sincerely remorseful, he was suffering significant grief over the death of his wife [53], he behaved in an exemplary fashion whilst in custody [56], and he had agreed to avail himself of alcohol and drug treatment programs upon his release [58].

However, His Honour held that the offending was objectively very serious [70]. The Detention charges fell at the mid-range of objective seriousness for that kind of offence as the detention was relatively short and its purpose was to exert "psychological control" and "emotional ascendency" [21]-[22]. Furthermore, the offender made numerous threats to kill the victim and Mr Wallace when he was unstable. His Honour held that the Wounding charges fell above mid-range as the victim was conscious at the time the wounds were inflicted but was unable to resist [25]-[26]. Breach of the AVO was held to be an aggravating factor [27], as was the use of a weapon [28].

His Honour held that there was a causal connection between the Offender's alcohol use disorder and the offending, because the disorder led him to misperceive the dealings between the victim and Mr Wallace [11]. As such, His Honour held that the disorder "mitigate[d] to some degree the level of the objective seriousness of the offending" and also had implications for the offender's prospects of rehabilitation [11]. However, His Honour found that the offender was still culpable for his actions because he had not previously engaged in violent conduct and had stopped making efforts to manage his alcoholism six years earlier [33]. The judge further held that the offender's culpability was not reduced because of a combination of intoxication and sexual jealousy because he had previously managed these conditions prior to the offending [38].

In relation to the relevance of the COVID-19 pandemic as a sentencing consideration, His Honour provided that "in the short term, the [offender] is likely to find custody generally more onerous to some degree as a result of the general restrictions imposed because of the pandemic" [70], however, "because of the objective gravity of his conduct, he will receive a very substantial period of incarceration" [71]. His Honour further stated that "It is realistic and not unfair to say that the incidence and effect of the pandemic may be more keenly felt for an offender who has a short non-parole period … in comparison to someone who will receive a significant head sentence" [71] and warned that "courts should not be too ready, in the absence of express legislative action, to be unduly influenced by the pandemic when weighting its significance in the sentencing exercise" [71].

***R v Aumash* [2020] NSWDC 168 (1 May 2020) – New South Wales District Court**

'Coercive control' – 'Controlling, jealous obsessive behaviours by the perpetrator' – 'Emotional and psychological abuse' – 'Following, harassing and monitoring' – 'People with children' – 'People with mental illness' – 'Relevance of covid-19 to sentencing' – 'Sentencing' – 'Separation' – 'Stalking' – 'Substance abuse' – 'Threats to kill' – 'Women'

Offences: Entering dwelling-house (aggravated offence) x 2; Using a carriage service to menace, harass or cause offence.

Proceedings: Sentencing.

Facts: The male offender had been in a relationship with the female victim (who had a child from a previous relationship). The victim ended the relationship after a year due to the offender's controlling behaviour and anger, but the offender refused to accept that the relationship was over. He continued to contact the victim via telephone and text message (the messages were abusive, controlling and threatening) and attended her home uninvited. One night, the offender repeatedly called the victim and demanded to know who was in her home, threatening to kill anyone who was there. He then went to her house and entered it without her permission. The victim threatened to call police so the offender left the house, but remained outside yelling at her and knocking on doors and windows. He then climbed in through her bedroom window and confronted the victim, standing over her and frightening her (first entering dwelling house offence). The offender threatened to stab the victim's male friend and searched the victim's house. He then picked up a pocket-knife and accused the victim of trying to stab him with it. The victim tried to leave the house and the offender stopped her, but she was ultimately able to get away. The offender followed her into the street and continued to yell at her, despite the victim telling the offender that they were no longer together. The victim ran away and hid in a nearby park, and had a friend call 000. The offender searched for her using the victim's car but when police arrived, they were unable to find him. An Interim Apprehend Violence Order was obtained by police.

The next day, the victim and her friend, Mick, were in the victim's backyard when the offender came out of the garage carrying a piece of wood. He took the victim to her car (where he left it the night before) and she drove it home. The offender remained at the victim's home but the victim would not let him inside. Later that day, the victim found the offender in her kitchen. The offender left after the victim threatened to call police, but he continued to send her text messages. That afternoon, the victim found the offender under her son's bed (second entering dwelling house offence). She locked him in the room and ran to her car, but the offender

jumped out the window and entered the car and would not leave. The victim continuously sounded the car horn and police arrived.

The offender continued to return to the victim's house over the next few days, threatening to hurt her and her family, and yelling abuse at the victim and anyone she was with. He also continued to send her text messages and make phone calls to her. During the course of one day, the offender made 488 calls to the victim and sent 98 text messages. Many of these messages sought to cajole her into dropping the charges against him and excusing his criminal actions towards her. The police eventually found the offender at the victim's home, served him with an Apprehended Violence Order and arrested him.

Sentence: The judge sentenced the offender to three years and three months' imprisonment for the entering a dwelling-house offences, with a non-parole period of two years, and nine months' imprisonment for the using a carriage service offence. The judge emphasised that the offender's conduct constituted a "sustained attack on [the victim's] physical and psychological integrity over a period of weeks" [54] and that "his crimes were so serious he must be removed from the community for a time" [62]. His Honour found that the offender had no concern for the victim's emotional state and sought to exercise coercive control over her by putting her in fear [31].

When determining the appropriate sentence for each offence, His Honour also took into account other offences that the offender committed. Regarding the offender's entry into the victim's bedroom via the window when he knew the victim would be home, His Honour took into account the offender's crime of intimidation, taking of the victim's car, and two entries to the victim's property without her consent [36]. Regarding the offender being found under the victim's son's bed, His Honour also took into account the offender's three acts of intimidation, entry to the victim's property without her consent and remaining on her property without her consent [37].

His Honour specifically noted that the number and content of the calls and text messages showed that the offender's intention was to seek to control, threaten and demean the victim, and this was part of a pattern of behaviour [33]. His Honour stated that "the extent of [the offender's] harassment and motivations for his actions make this a particularly serious example of this type of offence [the using a carriage service offence]" and therefore a custodial sentence was required [34].

His Honour found that the offender had committed previous domestic violence offences, so was not entitled to any leniency [43]. Although the offender had a history of drug use and mental illness, His Honour held that

neither of these mitigated his offending [47]. However, each sentence was reduced to reflect the utilitarian value of the offender's early pleas.

His Honour also commented on the COVID-19 pandemic, holding that "these concerns and considerations [regarding COVID-19 and its restrictions] apply to every prisoner sentenced" [52]. His Honour considered that "if/when COVID-19 enters gaols, early parole may be given to some but not all prisoners" and that the offender is in a category that can be considered for early release [53].

***R v Misdale* [2019] NSWDC 858 (16 December 2019) – New South Wales District Court**

'Domestic violence offences' – 'Guilty pleas' – 'People affected by substance misuse' – 'Physical violence and harm'

Charges: Wounding with intent to cause grievous bodily harm x 1; assault occasioning actual bodily harm x 1; reckless wounding x 1

Case type: Sentence

Facts: The male offender pleaded guilty to wounding with intent to cause grievous bodily harm, assault occasioning actual bodily harm and reckless wounding. Neilson DCJ also took into account 2 matters on a Form 1, namely, offences of common assault and intimidation. The female complainant (in respect of the charges of wounding with intent to cause grievous bodily harm, intimidation, assault occasioning actual bodily harm and common assault) was in an intimate relationship with the offender, which ended in October 2017 but recommenced a year later. The victim (in respect of the charge of reckless wounding) was a male friend of the offender and complainant. All but one offence (reckless wounding) were domestic violence offences. The offender's relationship with the complainant was described as 'toxic'.

Issue: The issue for the Court was to determine the appropriate sentence for the offender.

Held: The offender's extensive criminal history evidenced a pattern of alcohol-fueled violence and, more recently, offences committed against the current complainant ([28]-[38]). The offender's personal circumstances were discussed at [39]-[48]: he had a long history of drug and alcohol abuse; he had a problematic pattern of gambling when under the influence of alcohol and cocaine; he only had intermittent and low paying employment; he struggled to maintain stable intimate relationships and his relationship with the complainant was marred by verbal and physical arguments; and he displayed insight into his need for treatment for his addictions and showed no impairment in cognition when he was free of alcohol and drugs.

Further, the offender was assessed as being at a high risk of re-offending ([49]), and was considered as requiring 'as much supervision…and assistance as he can obtain from Community Corrections…to stay free of drugs and alcohol and turn his life around' ([53]). The Court noted the importance of denunciation, as well as deterrence 'both of the offender and of others who might want to practise violence, in particular domestic violence' ([56]). Consequently, the offender was convicted of the 3 charges to which he pleaded guilty, and sentenced to 7 years and 6 months' imprisonment, with a non-parole period of 4 years and 6 months ([66]). Special circumstances were established because of the offender's need for treatment and support for his drug and alcohol addiction ([64]).

R v Brisbane (a pseudonym) **[2019] NSWDC 785 (12 December 2019) – New South Wales District Court**

'Domestic violence' – 'People affected by substance misuse' – 'Poor prospects of rehabilitation' – 'Sentence' – 'Sexual and reproductive abuse'

Charges: 1 x sexual intercourse without consent; 1 x general offence of perverting the course of justice; 1 x contravention of an apprehended violence order (AVO)

Case type: Sentencing

Facts: The offender was in a domestic relationship with the female victim for 3 years, during the course of which the victim had a child. The relationship was marred by domestic abuse, which eventually led to its termination ([7]-[10]). The offender attended the victim's house in breach of his bail, told her that she would be raped, and proceeded to have non-consensual intercourse with her ([13]-[20]). The offender also attempted to get the victim to withdraw her cooperation with police, which constituted the breach of the AVO and the pervert course of justice offences ([25]).

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The offender was sentenced to an aggregate term of imprisonment of 7 years, with a non-parole period of 5 years and 3 months ([47]). The sexual assault offence was aggravated because it occurred in the victim's home, was committed while the offender was on conditional liberty, and involved threats and the use of actual violence ([27]). The Court addressed the offender's personal circumstances at [30]-[34]: he was 28 years old, had a criminal history, and used various drugs for a long period of time. His Honour described the offender as a 'vicious' sex offender ([32]). Although the offender pleaded guilty, he did not express remorse ([35]-[37]). The material before his Honour did not indicate that the offender was interested in rehabilitation, and thus his

prospects were found to be poor ([38]). Further, specific and general deterrence, and the need for community protection were highly relevant ([39]).

***R v Edwards* [2019] NSWDC 825 (13 November 2019) – New South Wales District Court**

'Aboriginal and Torres Strait Islander people' – 'Breach of bond' – 'Domestic violence offences' – 'Guilty pleas' – 'Intimidation' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Threats to kill'

Charges: Breach of s12 bond by reason of offences of common assault, intimidation, and use of a carriage service to threaten to kill

Case type: Breach hearing and sentence

Facts: The male offender was called up in respect of alleged breaches of a s 12 Crimes (Sentencing Procedure) Act bond that was imposed by Norrish QC DCJ in 2017 in relation to an offence contrary to s 25A Drug (Misuse and Trafficking) Act 1985 ([1]). The offences that constituted the breaches involved elements of domestic violence, and included offences of common assault, intimidation, and use of a carriage service to threaten to kill, to which the offender pleaded guilty ([4]). Material presented to the Court included an apology letter from the offender and a report from a psychiatrist working with the Aboriginal Legal Service ([3]).

Issue: The issue for the Court was whether the breaches were proven and, if so, the appropriate sentence for the offender.

Held: The offences constituting the breach were the offender's first domestic violence offences but were considered to be serious matters. Norrish QC DCJ noted that the offender's mental health significantly deteriorated since 2017: he had been diagnosed with post-traumatic stress disorder, a form of schizophrenia or schizoid condition and a polysubstance abuse disorder ([3]). The offender was un-medicated at the time of the offending and exhibited a motivation to address his drug use and a willingness to comply with the requirements of supervision. While the offender's deteriorating mental condition did not provide a basis for excusing the breaches, it assisted his Honour in determining the non-parole period. He was assessed as being a medium to high risk of reoffending ([10]). Consequently, the Court found the breaches to be proven, revoked the s 12 bond and fixed a term of imprisonment of 1 year 9 months, with a non-parole period of 6 months.

***R v Cranston* [2019] NSWDC 619 (1 November 2019) – New South Wales District Court**

'Assault police' – 'Exposing a child' – 'Guilty plea' – 'Intoxication' – 'Physical harm and violence' – 'Sentencing' – 'Step-child'

Charges: Common assault x 1; assaulting a police officer x 3; attempting to use an offensive weapon with intent to commit an indictable offence x 1; chocking a police officer and being reckless as to render the officer incapable of resistance x 1.

Proceedings: Sentencing

Facts: The accused pushed his partner during an argument, causing her to stumble. Concerned by the accused's actions, his partner instructed one of their children to call the police. The accused became further enraged when the police arrived, kicking one of the officers while being questioned. Two of the officers wrestled with the accused while he continued to physically lash out. The accused then grabbed the cord of one of the officer's radio as she called for assistance and attempted to choke her. As the officers tried to handcuff him the accused attempted to obtain one of their firearms, threatening to use the gun on the police and then bit the officer. When other officers arrived another officer was also bitten by the accused. The accused was intoxicated at the time of offending. The accused pleaded guilty to all charges.

Issue: Appropriate sentence

Decision and reasoning: The accused was sentenced to 3 years and 6 months' imprisonment with a fixed non-parole period of 1 year and 9 months.

Objective Seriousness: Regarding the assault against the police officers, Abadee J thought that the assault occurring during a violent struggle and in the presence of children were aggravating factors [32]. Consequently, the conduct was assessed as falling within the mid-range of seriousness for the offence.

The presence of children when the accused threatened to use the firearm on the officers was considered to be an aggravating factor along with the context of escalating violence. Abadee J 'characterise[d] the conduct as falling beyond the mid-range and toward the high range of objective seriousness' [35]. The same circumstances were aggravating factors for the offence of chocking on of the officer, with the conduct also falling within the high range of objective seriousness.

Subjective Circumstances The accused was 50 at the time of offending and had a criminal history which

included some offences of a violent character. The guilty pleas entered by the accused were not made at the earliest opportunity. As the accused was intoxicated, 'his offending was impulsive or spontaneous; and not pre-planned'. 'The most significant issue in the sentencing hearing concerned the offender's background' of a dysfunctional childhood marked with sexual abuse and moderate alcoholism.

In considering these circumstances, the objective seriousness of the offences and the general principles of deterrence, Abadee J ordered 'an aggregate sentence to fit the totality of the criminal conduct overall' discounted by 15% [76].

***R v Bohun* [2019] NSWDC 807 (25 October 2019) – New South Wales District Court**

'Assault occasioning actual bodily harm' – 'Breach of protection order' – 'Coercive control' – 'History of domestic and family violence' – 'Imprisonment' – 'People affected by substance misuse' – 'Protection order'

Charges: 1x aggravated steal from a person; 2x assault occasioning actual bodily harm; 1x aggravated break, enter and commit serious offence; 1x dangerous driving; 1x assault; 1x drive while disqualified; 1x take and drive; 1x contravene apprehended violence order; 1x possess prohibited weapon.

Proceedings: Sentencing.

Facts: The offender was convicted of ten charges, relating to two separate courses of conduct against his then girlfriend. At the time of the offending, he was affected by illicit non-prescription drugs and was also on a suspended sentence and subject to a protection order.

The offender and victim argued in a vehicle driven by the offender's friend and the victim got out of the vehicle. The offender ran after her, pushed her to the ground, pushed her down a set of stairs, and punched her in the back, rib and head multiple times (assault occasioning actual bodily harm). Bystanders intervened. The victim suffered 'bruising, swelling to her face, lips, head, shoulders, ribs, back and arms': [9]. The offender walked away, and then returned to steal the victim's handbag (aggravated steal from a person). When the offender went back to the car, the friend drove away in order to protect the victim from him and asked him to get out of the vehicle. He did so, leaving the handbag behind.

The remainder of charges related to an unrelated series of incidents.

Issues: Sentence to be imposed.

Decision and Reasoning:

Haesler SC DCJ imposed an aggregate sentence of six years' imprisonment, with a three years and six months' non-parole period [77].

The fact that the offender and victim were in a domestic relationship showed that there was a pattern of personally targeted violence that required denunciation: [33]. This was coercive power and control that should be denounced, regardless of whether the offender thought he was justified: [34]. Denunciation was necessary, despite recognition that jails are violent environments that can have a crime-producing effect: [35]. Stealing the handbag from the victim was spontaneous and not the most serious of the offences committed: [36].

***Best v Rosamond* [2019] NSWDC 344 (24 July 2019) – New South Wales District Court**

'Bipolar affective disorder' – 'Guilty plea' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing'

Offences: recklessly causing grievous bodily harm; assault occasioning actual bodily harm (DV).

Proceedings: Sentencing

Facts: The male perpetrator and female victim were married at the time of offending and the male victim was a friend of theirs. The offender became angered after seeing the female and male victims sharing an 'intimate' kiss. He punched the male victim in the left eye before pushing the female victim to the ground. He continued to punch the male victim several times in the head and kick him on the left side of his torso until the female victim asked him to stop. The offender turned to the female victim, slapped her forcefully across the face and kicked her thigh while she lay on the ground. The offender left the scene after punching the male victim a few more times. Neither victim provided a statement to police until a year after the offending, despite the male victim being left with substantial injuries requiring surgical treatment.

The offender was heavily intoxicated at the time of offending.

Decision: The offender was sentenced to Intensive Corrections Order for 1 year and 10 months' and to a Community Release Order or 1 year and 8 months'.

The Court noted that while the offence is a domestic violence offence, the offender's violence was "primarily

directed at the male victim" [53]. The assault occasioning actual bodily harm was at the lower end of the scale. The female victim suffered minor injuries and the forced used against her was considerably less than that used against the male victim. Furthermore, while the Court acknowledged her victim impact statement, they found its length and detail to be "disproportionate to the seriousness of the harm that could reasonably be considered to have been caused" [31].

In assessing the objective gravity of the offending and sentencing purposes, the Court considered the fact that the offence was unplanned and in response to some form of provocation, the offending was uncharacteristic of the offender, and that the offender's bipolar affective disorder had some underlying relevance. A discount was given to recognise the utilitarian benefit of the offender's guilty plea.

***R v AK* [2019] NSWDC 456 (19 June 2019) – New South Wales District Court**

'Detention' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Sexual and reproductive abuse' – 'Social abuse'

Charges: 2 x detain a person with the intent of obtaining an advantage; 1 x sexual assault; 1 x influencing witness; 2 x common assault; 1 x stalking/intimidating with intent to cause fear of physical or mental harm; 1 x contravening Apprehended Domestic Violence Order (ADVO)

Case type: Sentencing

Facts: The victim and offender were married and had a child who was 2 years old at the time of the offending. The victim had 2 children from a previous marriage, who were 20 and 15 years of age. The offender pleaded guilty to the charges of detaining his wife and his 15 year old stepdaughter without her consent, with the intention of obtaining an advantage (that is, psychological gratification), and the charge of sexual intercourse with his wife without her consent. He also pleaded guilty to the charge of communicating with his wife, who was to be called as a witness, to persuade her to withhold true evidence with the intent of procuring his acquittal of the assault occasioning actual bodily harm. In addition, the offender also requested that the Court sentence him in respect to the charges of common assault, stalking/intimidating with the intent to cause fear of physical harm, and contravening an ADVO.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The Court imposed an aggregate sentence of 10 years' imprisonment with a non-parole period of 7

years. In relation to the objective seriousness of the detention charges, it was submitted that the Court should consider a number of factors, such as the persons being detained, the period of detention, the circumstances of detention, and the purpose of the detention ([41]). The detainees included his wife, and her 15 year old daughter and 2 year old son. The detention lasted around 10 hours. As part of the detention, there were acts of violence perpetrated against his wife and step-daughter. His wife was also intimidated into changing her story before going to court. Additionally, the offender had sexual intercourse with his wife without her consent while she was being detained ([43]). The purpose of the detention was difficult to ascertain as the offender refused to give evidence on the question. Therefore, the Court could merely speculate ([45]).

Wilson SC DCJ analysed the offender's medical history. In 2016, he had been diagnosed with a neurocognitive disorder with possibilities of a dementia type illness with psychotic symptoms. Another expert opined that the offender likely suffered from major depression at the time of the offending ([56]-60]).

Aggravating factors affecting the sentence included ([61]):

- The actual or threatened use of violence;
- The offences were committed in the presence of his wife's children, aged 2 and 15 respectively. The 15 year old child was also assaulted, and that offending occurred in the presence of the 2 year old child;
- The offending was committed in the victims' home, a place where they are entitled to expect to be safe, particularly in light of the fact that an ADVO had been taken out which prevented the offender from attending the premises; and
- The offences were committed while the offender was the subject of conditional liberty.

The offender's prior criminal history did not aggravate the objective seriousness of the offences, however, it did disentitle him to any leniency resulting from a finding of good character ([65]). His Honour declined to find statutory remorse as a mitigating factor ([66]).

R v Wyatt [2019] NSWDC 490 (21 June 2019) – New South Wales District Court

'Aboriginal and Torres Strait Islander people' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentence'

Charges: 1 x wounding with intent to cause grievous bodily harm; 1 x reckless wounding

Case type: Sentencing

Facts: The offender initially pleaded not guilty to the charges of reckless wounding and wounding with intent to cause grievous bodily harm. On the fifth and final day of trial, the offender pleaded guilty to the alternative Count 2. The victim was in an intimate relationship with a woman for about 13 years, with whom he had 2 children. On the day of the offending, the offender stabbed the victim around 3 times.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The offender was sentenced to 3 years' and 3 months' imprisonment with a non-parole period of 2 years and 2 months. The objective seriousness of the offending was deemed as being in the middle of the range, given the nature of the violence, the nature and extent of the injuries, the fact that the wounds were inflicted by the use of a knife, and the fact that the wounding was completely unprovoked by the victim ([23]-[24]). Aggravating features of the offending included: the use of a weapon, the offending occurred in the victim's home, and the offender was on conditional liberty at the time of the offending. Although the offender had previous convictions for violent offences and the conduct was an act of gratuitous violence, the Court did not take these matters into account as aggravating features ([25]-[29]). The offender had a long-standing history of drug use ([50]), as well as an extensive criminal history ([30]). He identifies as Aboriginal, and reportedly witnessed domestic violence as a child and had been assaulted ([44]-[46]). There was no evidence of any mental disorder, although the offender reported symptoms of anxiety ([51]). Given his lengthy drug and criminal history, the Court was unable to find that he was unlikely to re-offend ([53]). The offender's expression of remorse was given limited weight ([54]). Further, the Court was satisfied that special circumstances existed as it was clear that the offender would need extensive supervision on parole to ensure that he did not relapse into drug use ([55]-[56]).

***R v Yee (a pseudonym)* [2019] NSWDC 326 (19 June 2019) – New South Wales District Court**

'Domestic violence related offences' – 'People from culturally and linguistically diverse backgrounds' – 'People with poor literacy skills' – 'Physical violence and harm' – 'Special circumstances'

Charges: 1 x causing grievous bodily harm to a person with intent; 1 x intentionally choking a person with recklessness

Case type: Sentencing

Facts: The offender and victim, with whom he started communicating on a social media app, married in

China. After relocating to Australia, the relationship deteriorated. The victim formed a romantic attachment to a customer while she was working as a sex worker. When she was asleep, the offender struck the victim 5 times to her head with a hammer and choked her. He suddenly stopped this attack and immediately assisted the victim. He also called his employer, told him that he had seriously injured his wife and asked him to call an ambulance as his English was poor. The victim was physically and psychologically injured. As a result of the incident, she could not work and was in 'a state of confusion, helplessness, anxiety and panic' ([35]).

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The grievous bodily harm was a mid-range offence, and the choking with recklessness was slightly below a mid-range offence. Each offence was aggravated by the fact that they occurred in the victim's home. The offender had no issues with alcohol or drugs, expressed genuine remorse, and the offending was 'completely out of…character' and was a result of 'a perfect storm of a mixture of conflicting emotions' ([37]-[44]). A psychologist highlighted the need for the offender to continue psychological treatment for a persistent depressive disorder, which was in an acute state leading up to the offence ([45]). The offender's prospects of rehabilitation were found to be 'very good' ([46]). The sentence imposed on the offender sought to discourage others from committing similar offences, and encourage his rehabilitation ([47]). He pleaded guilty at the first available opportunity ([48]), and given his problems with English and his social isolation, the Court made a finding of 'special circumstances' ([52]). For the offence of causing grievous bodily harm, the offender was sentenced to 7 years' and 6 months' imprisonment, with a non-parole period of 4 years. For the offence of intentionally choking a person with recklessness, the offender was sentenced to a fixed term of 3 years' imprisonment. Both sentences were ordered to be served totally concurrently.

***R v Casini* [2019] NSWDC 376 (18 June 2019) – New South Wales District Court**

'Emotional and psychological abuse' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Remorse'

Charges: 1 x aggravated detention, causing actual bodily harm (kidnapping)

Case type: Sentencing

Facts: The offender pleaded guilty to one count of aggravated detention, causing actual bodily harm. The victim and offender had been in an intimate relationship for 5 months and were living together at the time of the offending. The offender was formerly married for 22 years and had 2 children.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The offender was convicted, and sentenced to 3 years and 9 months imprisonment with a non-parole period of 2 years and 6 months. In assessing the objective seriousness of the offending, Bright DCJ took into account the following factors ([27]):

- The conduct was a serious instance of domestic violence;
- The assault was vicious and sustained, involving multiple forceful blows and punches to the victim's head and body. The offender would have known that the victim was unlikely to physically retaliate;
- The offending involved significant emotional intimidation and verbal threats;
- The nature of the victim's injuries;
- The length of the detention was for a period of 2 hours; and
- The offender sought psychological gratification.

The objective seriousness of the offending was found to be at the higher end of the mid-range ([28]). An aggravating feature was that the offence occurred at the victim's home ([29]). The offender began using drugs after separating from his former wife, but otherwise described no use of drugs in his adult life ([47]). While the offender's self-induced intoxication was not a mitigating factor, his underlying Adjustment Disorder was found to have had an impact on his moral culpability ([60]). He was also remorseful, as evidenced by his letter to the Court ([61]-[63]). His Honour was satisfied that the offender had good prospects of rehabilitation, having regard to his motivation to participate in counselling and rehabilitation, previous employment, insight into his offending behaviour and commitment to being a good father upon release ([64]).

***R v Halacoglu* [2019] NSWDC 384 (7 May 2019) – New South Wales District Court**

'Good character' – 'People from culturally and linguistically diverse backgrounds' – 'Sentence'

Charges: 1 x use of a carriage service to menace

Case type: Sentencing

Facts: The offender pleaded guilty to one count of using a carriage service to menace. The offender moved to Australia in 2010 on a student visa sponsored by the victim, with whom he was in a relationship. They lived together, with the victim's 2 children from a previous relationship. 'Troubles' in their relationship emerged, and

the victim entered into another relationship in the beginning of 2016. A few months later, the parties exchanged a series of text messages. The offender sent a text in Turkish, saying 'If I'm not going to live, you are not going to live either'. The victim reported feeling threatened by the offender. Although he admitted to using those words, he claimed that they had a different meaning.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The offence was at the very low end of the scale of objective seriousness. The offender had no previous convictions ([5]). Given the fact that he was on bail with strict conditions and had the matter 'hanging over his head for almost 3 years without any offending', Williams SC DCJ dismissed the charges under s 19B of the Crimes Act 1914 (Cth) ([7]).

***R v Amante* [2019] NSWDC 222 (1 May 2019) – New South Wales District Court**

(This decision was the subject of an unsuccessful appeal to the New South Wales Court of Criminal Appeal Amante v R [2020] NSWCCA 34 (11 March 2020) – New South Wales Supreme Court)

'Arson' – 'People affected by substance abuse' – 'Property damage' – 'Special circumstances'

Charges: Destroying or damaging property x 1.

Case type: Sentencing.

Facts: As at January 2018, the offender had been in a turbulent domestic relationship with the victim. The situation between them deteriorated to a point where the victim had obtained an apprehended violence order against the offender. The offender started a fire in the victim's unit ([16]). As a consequence, the fire caused serious damage to the limited personal belongings of the victim, who was in a somewhat perilous financial situation so as to require Housing Commission accommodation ([25]).

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: An important consideration in sentencing the offender was the fact that it was a domestic violence offence ([45]). Colefax SC DCJ noted the offender's long history of offending, and unresolved drug abuse and psychological issues. His Honour stated that the offender is a 'man of intelligence', who has been able to work hard and has the support of his immediate family ([51]). The offender's father was a violent man and he was sexually abused by his brother ([32]-[33]). His mental health problems and excessive drug consumption contributed to the commission of the offence. No rational person would have reacted to a break-up by setting

fire to another person's house, threatening other people's lives ([42]). Because of his mental health issues, he was not seen as an 'appropriate vehicle for the full application of general deterrence' ([44]). The offending was aggravated by the fact that the offender was on bail and that the property damaged was the victim's home ([28]). He pleaded guilty at the first available opportunity, indicating an element of remorse ([46]). However, remorse is an important but not determinative factor. It was also important to note that the offender had not received effective treatment for his underlying mental health or drug addiction issues ([48]).

Taking into account his guilty plea, reasonable prospects of rehabilitation and the fact that he was in protection, the offender was sentenced to a term of imprisonment of 3 years and 9 months, with a non-parole period of 2 years.

R v Phillip Michael Summerfield **[2019] NSWDC 126 (16 April 2019) – New South Wales District Court**

'Bail' – 'Following, harassing and monitoring' – 'People affected by substance misuse' – 'People with mental illness' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse'

Charges: The offender pleaded guilty to 3 charges, namely, stalking or intimidation with intent to cause fear of physical or mental harm (Count 1), assault occasioning actual bodily harm (Count 2), and sexual intercourse without consent (Count 3). There was also a charge of driving while suspended.

Case type: Sentencing.

Facts: The victim had been in an intimate domestic relationship with the offender for approximately 2 years, during which time the offender sometimes lived at the victim's home. The relationship was characterised by violence. On 10 May 2017, the offender carried out the attack after picking the victim up from her home. He began shouting at the victim about a man named Adam. The victim tried to escape from the car. The offender stopped the car, opened the passenger's door and punched the victim several times in the face, causing bleeding (Count 2). The victim moved to the back seat of the car and called 000 on 3 separate occasions in the hope that the operator would hear what was happening. The offender drove to an address in Young, where he committed Count 3. Count 1 related to the offender's ongoing threatening and violent behaviour towards the victim. The offender later drove the victim to her home, and apologised to her. When he was arrested, he agreed to be interviewed and admitted to assaulting the victim.

The offender asked the Court to also deal with his appeal against sentence severity in relation to an

aggregate sentence of 26 months with a non-parole period of 15 months which had been imposed at the Local Court in respect of two offences (one of which was contravention of a domestic violence order). That offending was committed while the offender was on bail for the other offences for which the offender appeared for sentence.

Issue: The Court determined the appropriate sentence for the offences in the circumstances.

Held:

Severity appeal from the Local Court:

His Honour dismissed the appeal, and confirmed the convictions and the aggregate sentence of 26 months with a non-parole period of 15 months.

Sentence matters:

Judge Lerve noted that the offending was committed in contravention of an apprehended domestic violence order, and highlighted the need for general deterrence in such cases ([35]-[42]). The circumstances in which Count 2 was committed were relevant to the assessment. It was particularly nasty and cowardly as it occurred on the side of the road; however the injuries were limited to bleeding ([19]). Count 1 was found to be serious, as it involved an ongoing course of violent and aggressive threats ([20]). In relation to Count 3, his Honour noted that, in light of the victim's reaction and the violence which occurred that day, it must have been obvious to the offender that the victim was not consenting ([21]).

Further, the offender's criminal history was extensive, and he had previously been convicted of offences including contraventions of domestic violence orders, intimidation of a police officer, damage to property, and a number of assault matters. However, the offender had not previously been charged with a sexual offence ([43]-[48]). He also regularly uses drugs, and self-reported that he was diagnosed with PTSD and experienced trauma as a child. He attended a rehabilitation facility while on bail in 2018, but was discharged because of non-compliance with the requirements of the facility ([54]). Judge Lerve could not be satisfied on balance that the offender had good prospects of rehabilitation ([58]). The evidence before his Honour suggested that, given his lack of treatment, he is at an increased risk of violent re-offending in the future ([57]).

His Honour recorded a conviction for each of the matters to which the offender pleaded guilty, and imposed an aggregate sentence of 7 years and 4 months with a non-parole period of 5 years. He also recommended

that the offender participate in the Violent Offenders Treatment Programme while in custody. The total effective sentence was one of 8 years and 4 months with a period of 6 years in actual custody.

***R v Lumsden* [2019] NSWDC 149 (15 March 2019) – New South Wales District Court**

'Burden of proof' – 'Credible witness' – 'Damaging property' – 'Evidence' – 'Physical violence and harm'

Charges: Intentionally or recklessly destroy/damage property x 1; common assault x 1.

Case type: Appeal against conviction.

Facts: The appellant and complainant had separated and have a child together. They had ongoing issues regarding the complainant's use of a phone and their separation in general. The appellant grabbed the complainant's handbag, containing her phone. In cross-examination, he confirmed that he held the bag to taunt her about the phone because he was upset ([11]). The altercation resulted in the complainant suffering bruises and a scratch on her leg.

Issue: The appellant appealed against the conviction, pursuant to section 18 *Crimes (Appeal and Review) Act 2001*.

Held: Grant DCJ allowed the appeal. He quashed the conviction, set aside all other orders of the Local Court, found the appellant not guilty and dismissed the charges.

The appellant gave sworn evidence of his good character which was uncontested ([10]). The magistrate was faced with a single witness with no independent supportive evidence ([12]). The appellant had the presumption of innocence ([22]).

Grant DCJ found that, in determining the guilt of the appellant, the Magistrate engaged in 'illogical, speculative, reverse reasoning' that led him into error. The Magistrate's reasoning in respect of the matters listed at para [14] was found to be flawed. He wrongly inferred that because the complainant had not been cross-examined about any inconsistency with a statement made to police, the evidence she gave must be consistent with that statement, therefore supporting her credibility. Such an inference was found to be entirely speculative as no one knew the contents of the statement. Further, Grant DCJ held that making a self-serving statement, or any statement to the police, and giving evidence in accordance with that statement, does not automatically add to a witness' credibility ([15]-[16]).

The appellant was given the opportunity to conduct an electronic record of interview which he declined. Grant DCJ found that the Magistrate correctly set out the law in that the refusal to participate in a record of interview cannot be construed as an admission of guilt. However, the Magistrate went on to say that such a refusal was relevant in assessing the accuracy of memories in relation to a certain account noted in [19]. Grant DCJ found that this reasoning would lead to the proposition that 'if a defendant engaged in a record of interview and it was consistent with his evidence, then a witness could be looked upon as a more credible witness.' This finding would undermine the appellant's right to silence and may shift the onus on the appellant to demonstrate his credibility by participating in a record of interview ([18]-[20]).

To find the appellant guilty, the magistrate would have to disbelieve his account beyond reasonable doubt ([23]). Grant DCJ was not persuaded that the Magistrate could have properly convicted the appellant ([23]).

***R v Smethurst* [2018] NSWDC 488 (9 November 2018) – New South Wales District Court**

'Imprisonment' – 'Options' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Suffocation'

Charges: Assault occasioning actual bodily harm x 1.

Case type: Sentencing.

Facts: The offender had known the complainant for a number of years. In the course of a dispute between the parties at the complainant's residence, the offender put a pillow over her face (common assault). The complainant then ran out of the house, followed by the offender. The offender pushed her on the ground and started to drag her towards the house by the shirt which caused a graze to her back (assault occasioning actual bodily harm). The complainant ran onto the neighbour's driveway and told the neighbour to 'call the police'. The police attended the complainant's residence soon after the incident and recorded her statement on camera.

Issues: The Court determined the appropriate sentence for the offence in the circumstances.

Decision and reasoning: The Court sentenced the offender to an aggregate period of imprisonment of 22 months which, after a discount of 15% for his guilty plea, was a sentence of 18 months ([64]). A non-parole period of 12 months was imposed.

The Court assessed the objective seriousness of the offending, and found that aggravating factors included

the offender's five good behaviour bonds and a string of intensive corrections orders at the time of offending, the place of the offending (complainant's home), and the brutality of the consecutive acts committed over a short period of time ([13]-[17]).

The Court must be satisfied that imprisonment is more appropriate than all other alternatives, such as non-custodial sentences ([54]). The benefits of rehabilitation in the community were found to be outweighed by the fact that the offender previously had the benefit of conditional liberty orders and failed to comply with them ([56]). General principles of sentencing, such as denunciation, accountability, punishment, deterrence and protection were considered at [46]-[52]. The offender had a number of prior convictions, including common assault, contravention of an AVO, and assault occasioning actual bodily harm ([21]). The matter before the Court was the fourth domestic violence type offence for which the offender had been charged ([30]). Although the number of previous offences was a relevant factor, they were of moderate application as there was no evidence of any present risk. Nevertheless, the court observed at [33] that the offender had a history of domestic violence and non-compliance with court-ordered community based sentencing options.

Although the offender pleaded guilty, the Court was reluctant to accept his expressions of remorse, particularly given his partial attribution of blame to the victim in the Sentencing Assessment Report. The Court referred *Munda v Western Australia* (2013) 649 CLR 600 at [54]-[55] which held that the State has an obligation to 'vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the State to the vulnerable against repetition of violence'. The Court noted the offender's history of drug abuse at [24]-[29], but did not accept that a piece of oral evidence at [29] was sufficient to establish a connection between his domestic violence offending and his substance abuse. The offender's prospects of rehabilitation were also seen to be 'guarded' ([45]).

***Degampathi Jayasekra* [2018] NSWDC 59 (23 March 2018) – New South Wales District Court**

'Appeal against conviction' – 'Damaging property' – 'Gifts' – 'Presumption of advancement' – 'Property ownership' – 'Trusts'

Charges: Destroy or damage property x 1.

Appeal type: Appeal against conviction.

Facts: In the course of an argument with the complainant, his wife, the appellant damaged a laptop and mobile phone ([4]). The appellant's case was that he was the sole owner of the items, and thus could not be

convicted of the offence ([5]). The appellant had purchased the items and had given them to his wife and did not say they were gifts ([6]). The complainant had day to day use of both items ([7]).

Issues: Whether the items were the property of the appellant or another person.

Decision and reasoning: In reliance on the law of trusts, Scotting J inferred from the actions of the parties that the items were intended to be gifts ([21]-[26]). The presumption of advancement could not be rebutted. The Magistrate's decision that the items belonged to both the appellant and complainant was affirmed ([28]). Therefore, the appellant's conviction for property damage is upheld.

***R v MJ* [2016] NSWDC 272 (12 May 2016) – New South Wales District Court**

'Assault occasioning bodily harm' – 'General deterrence' – 'Myths and misunderstandings' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Sexual intercourse without consent' – 'Specific deterrence' – 'Women'

Charge/s: Assault occasioning bodily harm x 5, sexual intercourse without consent, common assault x 4, breach of AVO x 5.

Hearing: Sentencing hearing.

Facts: After being found guilty in a trial by jury, the offender was sentenced for 10 domestic violence offences committed against his former female partner. The offender was also sentenced for a number of other charges namely, driving disqualified and numerous breaches of an Apprehended Violence Order (AVO).

Decision and Reasoning: Berman J imposed an aggregate sentence of 14 years imprisonment with a non-parole period of 10 and a half years. At the outset, His Honour noted that: *'Women, and it is usually women, too often find themselves subjugated to the demands of their partners, who seem to regard it as entirely acceptable for them to control and manipulate someone with whom they are in a relationship through violent and degrading means'* (see [1]).

Berman J noted that the offender here felt a sense of entitlement and ownership over the victim and blamed her for his violent behaviour. His manipulation of the victim, using violence and protestations of love, was so effective that she did not leave the relationship (even after she had been repeatedly beaten and raped) until she received counselling (see [4]). She was left with significant physical and psychological injury (see [26]).

Moreover, there were a number of serious features of this offending. The victim was assaulted in her own home. Many of the offences occurred in context of offender's demands that the victim withdraw a complaint she made to the police about him. There were similarities in the way he had treated a previous partner. Some offences were committed in the presence of the victim's daughter. Many offences constituted breaches of an AVO and demonstrated contempt of these orders (see [28]-[30]).

In the context of mitigating factors, His Honour acknowledged that the offender grew up with domestic violence as a feature of his early life. However, this was not a case in which the offender thought that such behaviour was normal and acceptable because his stepfather was a good role model for him (see [33]-[40]). The offender had taken some steps towards rehabilitation and some references spoke positively of his character (showing how an offender can have a very different face in private life) but there was still need for the sentence to reflect an element of specific deterrence (see [42]-[43]). More importantly, the sentence needed to take into account general deterrence. As per Berman J:

'Offences such as these cause enormous harm, both to the individual victims concerned and to the community generally. Offenders who commit crimes such as I have described, particularly after they have been subject to apprehended violence orders, put in place to protect their partners from precisely such conduct, need to be given in sentences which will deter others who may be tempted to act in a similar way. Most fundamentally in assessing the relevant sentence to impose upon the offender is, of course, the objective gravity of what he has done' (see [42]).

***Rich v The Queen* [2015] NSWDC 71 (18 May 2015) – New South Wales District Court**

'Common assault' – 'Contravention of a protection order' – 'Physical violence and harm' – 'Protection orders' – 'Service'

Charge/s: Contravention of a protection order, common assault.

Appeal Type: Appeal against conviction.

Facts: A Provisional Apprehended Order was made nominating the appellant's partner as the protected person and the appellant as the defendant. This was served on the appellant by the police. The appellant then appeared in court represented by counsel from the Aboriginal Legal Service and an interim Apprehended Violence Order (AVO) was made. The appellant assaulted the protected person and was charged. There was a hearing in the Local Court where a plea of guilty was entered with respect to the

assault charge and the appellant defended the contravene AVO charge. The Local Court found the appellant guilty of the contravene AVO.

Issue/s: Some of the grounds of appeal included –

1. The prosecution was unable to prove service of the Provisional Apprehended Order on the appellant because the Statement of Service submitted breached the hearsay rule in s 59 of *Evidence Act 1995.*
2. The magistrate in the Local Court should not have informed himself of the events of the appellant's appearances in court for the interim AVO.

Decision and Reasoning: The appeal was dismissed. First, the Statement of Service complied with the Local Court Rules. It did not need to be signed as it was served by a police officer and it was sufficient that the officer wrote 'Dubbo' in the space for the address (r 5.12 Local Court Rules). Rule 5.12 exists to serve the purpose of facilitating proof of service of the process (See [29]-[36]). In any event, the appellant was present in court when the Interim Order was made (See [48]). Second, the magistrate informed himself of the course of events by reading the bench sheet. He was entitled to do so (See [49], [57]).

Civil and Administrative Tribunal

***DUD v Commissioner of Victims Rights* [2019] NSWCATAD 163 (15 August 2019) – New South Wales Civil and Administrative Tribunal**

'Administrative review' – 'Children' – 'Civil and administrative tribunal' – 'Eggshell psyche' – 'Physical violence and harm' – 'Psychological injury'

Charges: Act of domestic/family violence

Case type: Application for Administrative Review

Facts: The applicant sought administrative review of a decision in respect of an application for Victims Support. In 2015, the applicant's solicitor lodged an Application for Victims Support which alleged that she was the primary victim of an act of domestic/family violence. She also alleged to have suffered a psychological injury as a result of the violent conduct, and she sought counselling, financial assistance for immediate needs or economic loss, and a recognition payment ([2]-[3]).

At first instance, the Assessor approved a Category D recognition payment in the sum of $1500 on the basis that the evidence indicated that the applicant was a victim of an assault that did not result in grievous bodily harm ([7]). Subsequently, the applicant's lawyer signed an Internal Review request form, submitting that she had suffered grievous bodily harm as a result of the violence and that a Category C recognition payment should have been approved ([9]). The Senior Assessor, however, re-affirmed that the applicant was the primary victim of an act of violence, and was only eligible for a Category D recognition payment in the sum of $1500 ([12]).

Issue: The Tribunal was required to determine an application for an administrative review. Its powers derive from s 63 of the Administrative Decisions Review Act 1997 (NSW).

Held: The applicant's solicitor cited Helm v Pel-Air Aviation Pty Ltd and BWQ v Commissioner of Victims Rights in the Internal Review form, both of which relate to the characterisation of psychological injury as 'bodily harm'. The Senior Assessor determined that 'as [the applicant] relies on a psychological injury as evidence of grievous bodily harm in order to be eligible for a Category C recognition payment', it is necessary to consider 'whether the evidence establishes a "really serious" psychological injury'. The Senior Assessor was not satisfied that the applicant's functioning had been impacted solely as a 'direct result' of the domestic violence, or that her psychological injury was sufficiently serious to justify the approval of a Category C

recognition payment ([12]).

Ultimately, the decision of the Senior Assessor was set aside, and the Tribunal decided that the applicant was eligible for a Category C recognition payment in the sum of $5000. The Tribunal discussed CZU v Commissioner of Victims Rights and DEL v Commissioner of Victims Rights, which provide some guidance on the types of evidence which may assist in determining whether a psychological injury is sufficiently serious to be considered grievous bodily harm, in order to approve a Category C recognition payment ([11]-[13]). Although the applicant had experienced prior psychological issues, the Tribunal found that the evidence did not support a finding that she required any ongoing psychological treatment for these issues when the act of violence occurred ([32]). Further, the Tribunal was satisfied on the balance of probabilities that the applicant's current psychological injury resulted from the act of violence ([37]), and that it could properly be considered as being 'really serious' ([44]). The applicant was found to have suffered grievous bodily harm, thereby satisfying the eligibility requirement for a Category C recognition payment. Even if the Tribunal had been incorrect in its finding as to the causation of her current psychological condition, it was satisfied that the 'eggshell psyche' principle applied and that her pre-existing 'eggshell psyche' was aggravated as a direct result of the violent act ([39]).

Northern Territory

Court of Appeal

***Olsen v Sims* [2010] NTCA 8 (30 November 2010) – Northern Territory Court of Appeal**

'Breach of restraining order' – 'Repeal of statute' – 'Statutory interpretation'

Charge: Breach of restraining order

Appeal type: Appeal against sentence

Facts: The appellant was convicted of breaching a restraining order. Some months later he was convicted of failing to comply with the terms of the order. Contrary to the order, the appellant visited the victim at her home and entered in a verbal argument with her after consuming alcohol. The restraining order was made and the offences were against the *Domestic Violence Act 1992* (NT) (the former Act). This Act was repealed on 1 July 2008 and replaced by the *Domestic and Family Violence Act 2007* (NT) (the current Act). The appellant's trial in respect to the second offence did not occur until after the current Act came into force. The magistrate found that sentencing provisions under the former Act applied to the appellant. Under s 10(1A) of the former Act, where a person is found guilty of a second offence the Court must impose a minimum sentence of at least seven days' imprisonment. Accordingly, the magistrate imposed a sentence of seven days' imprisonment. Section 121 of the current Act provides no mandatory minimum sentence for a second breach where no harm is caused and the court is satisfied it is not appropriate to record a conviction and sentence in the circumstances.

On appeal to the Supreme Court, Riley J held the magistrate did not err in sentencing the appellant.

Issue: Whether the magistrate erred in punishing the appellant to a greater extent than was authorised by the current Act by imposing the mandatory sentence of imprisonment of seven days under s 10(1A) of the former Act.

Decision and Reasoning: All three judges on the Court of Appeal allowed the appeal. The sentence was quashed and the matter was referred back to the Court of Summary Jurisdiction for the appellant to be

resentenced.

Section 14(2) of the *Criminal Code* (NT) provides that while the appellant could be sentenced under the former Act for his second breach of the restraining order, he could not be punished to any greater extent than was authorised by both the former Act and the current Act.

Mildren J concluded that the mandatory minimum sentence of seven days' imprisonment under s 10(1A) of the former Act is a punishment 'to any greater extent than is authorised by the current law' pursuant to s 14(2) of the *Criminal Code* (NT). The Magistrate's discretion to impose a lesser sentence than seven days under the current Act conferred a punishment to a greater extent than authorised by the current Act.

Southwood J, agreeing with Mildren J, held that the sentence of seven days imprisonment imposed on the appellant was a greater punishment than authorised by ss 121(1) and (3) of the current Act. Those provisions of the current Act decreased the severity of the penalty required to be imposed for a second breach of a restraining order for the purposes of s 14(2) of the *Criminal Code* (NT). The sentence imposed was disproportionate to the gravity of the offending. Had the magistrate sentenced the appellant pursuant to s 121, he would not have imposed a sentence of seven days' imprisonment. As a result, the Magistrate failed to sentence the appellant in accordance with s 14(2) of the *Criminal Code* (NT).

Blokland J held that s 121(3) of the current Act does not authorise a sentencing magistrate to sentence on the basis that its starting point is a conviction and seven days' imprisonment unless that penalty is appropriate and just in all the circumstances. This was the approach of the magistrate in finding he was bound to apply the mandatory minimum term under s 10(1A) of the former Act. The sentence imposed by the magistrate was not authorised when considering the application of s 14(2) of the *Criminal Code* (NT).

Court of Criminal Appeal

The Queen v Bonney [2022] NTCCA 3 (25 February 2022) – Northern Territory Court of Criminal Appeal

'Aboriginal and Torres Strait Islander people' – 'Alcohol misuse' – 'Not manifestly inadequate history of domestic and family violence' – 'Physical violence' – 'Sentencing' – 'Weapons'

Charges: Aggravated assault x 1, property damage x 1, unlawfully cause serious harm x 1.

Proceedings: Crown manifest inadequacy appeal against sentence.

Issue: Whether sentence manifestly inadequate.

Facts: The male respondent and female victim were in a de-facto relationship and had three primary school aged children [24]. On 19 November 2020, while intoxicated, the respondent became angry and punched the victim in the face twice. The following day, the respondent punched, kicked, and repeatedly hit the victim with a cricket bat and frying pan. The victim sustained multiple injuries, including a hand fracture that amounted to serious physical harm [8]-[9]. The respondent had previous domestic violence convictions and a history of alcohol misuse [26]. The respondent pleaded guilty to the charges and was sentenced to 3 years and 3 months imprisonment, with a non-parole period of 1 year and 8 months [2]-[3]. The Crown appealed the sentence on the ground that it was manifestly excessive.

Decision and Reasoning: Appeal dismissed.

The appellant emphasised 'principles enunciated by… Courts in relation to domestic violence offending and the need… to impose sentences which serve to protect the victim and the community and… serve as a deterrent', citing *The Queen v Wurramara* [2011] NTSC 89 (21 October 2011): 'The courts have been concerned to send what has been described as 'the correct message' to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so' [32].

The appellant also cited *Emitja v The Queen* [2016] NTCCA 4 (21 October 2016): 'As this Court has repeatedly observed before and since that statement was made, such conduct must be dealt with in a manner which reflects the serious nature of the offending and its corrosive effect on well-being in Aboriginal communities. While it may be accepted that some Aboriginal communities have an unusually high incidence

of serious crimes of violence, and that the courts are powerless to alleviate the dysfunction and deprivation which underlies that violence, Aboriginal women and children living in those communities "are entitled to equality of treatment in the law's responses to offences against them". The protection which the law affords includes the imposition of sentences which include a component designed to deter other members of the community from committing crimes of that nature' [33].

The Court concluded that 'the sentence, while lenient, perhaps even very lenient, does not fall outside the legitimate limits of the sentencing discretion. The appellant has not identified any error of principle and the sentence is not so disproportionate to the seriousness of the offending as to shock the public conscience and demonstrate error in principle. It is not unreasonable or plainly unjust' [44].

***Morton v The Queen* [2020] NTCCA 2 (25 May 2020) – Northern Territory Court of Criminal Appeal**

'Application for leave to appeal against conviction' – 'Judicial error' – 'Miscarriage of justice' – 'Murder' – 'Physical violence and harm' – 'Substance misuse' – 'Weapons'

Offences: Murder

Proceedings: Application for leave to appeal against conviction

Ground: The trial judge erred in directions that were given to the jury bearing on the burden and standard of proof.

Facts: The female victim and male applicant had been in a domestic relationship for a number of years and were staying together at the applicant's mother's home the night before the offending. On the morning of the offending, the applicant and victim were alone together at the house. The applicant beat the victim and caused at least 28 injuries, many of which required severe force, including impacts to the scalp and face, impacts to the trunk (corresponding to three fractured ribs), impacts to the arms (causing a complete break in one arm), and impacts to the legs (including stab wounds). Afterwards, the applicant went to a neighbouring house to get help, telling the neighbour that the applicant's wife was in pain and had been hitting herself. The neighbour took the applicant to the nurse's residence where the applicant told the nurse that his wife had been drinking, had a sore arm and felt sick. The nurse told the applicant to bring his wife to the clinic at 8:30am as it was not an emergency. The neighbour dropped the applicant back at the house before going back there himself where he saw that the victim was not moving. They fetched the nurse who confirmed that the victim had died.

When police arrived, the applicant told them that his wife "went crazy" after drinking alcohol and hit herself on the head with rocks. He also told them that she started to go a bit crazy and make him angry so he "picked up a knife and stabbed her in the bum and the leg and her hand" and "grabbed [his] axe and hit her on the arm, the leg and the top of the head" [7]-[8]. An axe and knife were found in the applicant's bedroom. The applicant was found guilty of murder (but argued at trial that it should only have been manslaughter). He appealed this conviction on the ground that the trial judge erred in directions that were given to the jury bearing on the burden and standard of proof.

Judgment: The court dismissed the appeal, finding that the specific directions given by the trial judge were not attended by error nor did they give rise to any miscarriage of justice. The court found that at trial, defence counsel did not raise any query in relation to the first impugned direction and held that "The direction was not at that time considered inconsistent with or inimical to the legal and forensic basis of the defence case" [24]. Furthermore, while the court found that it may have been appropriate to remind the jury, at the point the direction was made, that the prosecution had to prove beyond reasonable doubt that the applicant intended to cause the victim at least serious harm and in that context that the jury should take into account all of the evidence, the court considered that it was unnecessary to do so because of the directions given elsewhere [30].

The court further held that no error was made in relation to the second impugned direction. The court held that it was open to the jury to make no conclusive finding on the issue of whether the applicant thought he was hitting the victim with a stick and still nonetheless be satisfied beyond reasonable doubt that the applicant meant to cause serious harm, simply because of the prolonged nature of the beating and the multiple impacts involved [36].

The court also held that no error was made in relation to the third impugned direction, finding that "the trial judge's summing up adequately conveyed to the jury that the ultimate question was whether, in the light of the evidence of intoxication and all other relevant circumstances, the prosecution had proven beyond reasonable doubt the intent necessary for the crime of murder" [47].

***Deacon v The Queen* [2019] NTCCA 21 (11 October 2019) – Northern Territory Court of Criminal Appeal**

'Admissibility of admissions' – 'Mr big operation' – 'Murder' – 'Whether admissions made to undercover police

influenced by "oppressive conduct"'

Charges: Murder x 1.

Case type: Application for leave to appeal against conviction.

Facts: The applicant man pleaded not guilty to an ex officio indictment charging him with the murder of his female de facto partner (the deceased). Prior to the jury trial, a voir dire was conducted to determine the admissibility of admissions made to undercover police and in a police interview. The trial judge ruled these admissions admissible. The applicant was later found guilty of murder by majority verdict and sentenced to life imprisonment with a 21 year and 6 month non-parole period.

A key issue on appeal related to the evidence in relation to the undercover police operation. The Court detailed how undercover police established a fake criminal operation and used various tactics to gain the applicant's trust. The applicant had participated in various tasks or scenarios, none of which were illegal. These scenarios were designed to make the applicant believe that the group had power, by virtue of its links, to corrupt law enforcement officers, and to destroy incriminating evidence. The applicant then met with a fictitious crime boss. The 'boss' utilised the interview technique of 'minimization', by which he sought to devalue the deceased and other women in order to create a bond of misogyny to gain the applicant's trust. The applicant eventually admitted to killing the deceased by punching her to the head and then choking her, and led the operatives to the site of the remains. He subsequently gave evidence at trial that he had killed her under provocation.

Issue: The appellant sought leave to appeal against the conviction on the grounds that:

- the trial judge erred in assessing the conduct of the undercover operatives only in terms of its bearing and effect on the applicant, rather than by reference to the fact that it was oppressive conduct because it involved deception, subverted the right to silence, and was directed solely to obtaining a confession;
- the covert operatives were exercising the authority of the state during the time they placed pressure on and offered inducements to the applicant;
- the trial judge misdirected himself as to the meaning of oppressive conduct.

Held: The application for leave to appeal was refused. The trial judge observed that there was no evidence that the scenarios in which the applicant participated involved violence and held that the undercover police did not engage in oppressive conduct. His Honour had contrasted that position with the scenarios in some of

the Mr Big operations in Canada which employed violence to create an impression that the fictitious criminal organisation tolerated and was prepared to use violence. The Canadian approach did not assist the applicant as there was no issue that the applicant made a false or unreliable confession.

***The Queen v Deacon* [2019] NTCCA 22 (11 October 2019) – Northern Territory Court of Criminal Appeal**

'Child - criminal history' – 'Crown appeal against sentence' – 'Deterrence' – 'Manifestly inadequate' – 'Murder'

Charges: Murder x 1

Proceedings: Crown appeal against sentence

Grounds: The non-parole period fixed by the sentencing judge is manifestly inadequate:

1. The sentencing judge failed to give primacy to the sentencing objectives of general deterrence and denunciation in the sentencing synthesis;
2. The sentencing judge erred in his assessment of the respondent's prospects for rehabilitation.

Facts: The respondent man was sentenced to imprisonment for life with a non-parole period of 21 years and six months for the murder of his de facto partner. While initially pleading not guilty, the respondent admitted to killing the deceased during the trial but 'asserted that he had done so under provocation' [3]. The trial judge found that a longer non-parole period was warranted because the respondent 'killed the deceased specifically to ensure that she would have no role in their son's upbringing…That the respondent engaged in detailed and calculated planning prior to the killing, and a complex cover-up after the event…The respondent positively obstructed and misled police investigating the disappearance of the deceased…[and] that the respondent demonstrated no remorse for killing the deceased' [5].

Decision and reasoning:

The appeal was dismissed.

'In our opinion, the sentencing judge was no doubt correct in determining that a longer non-parole period was warranted because the objective and subjective factors affecting the relative seriousness of the crime placed the offending above the middle of the range of objective seriousness even allowing for mitigating factors. The question is whether the non-parole period fixed as part of that assessment was manifestly inadequate.' The

court provided that because the crime committed 'did not involve the use of a weapon; it was not committed in company; the attack upon the victim was relatively swift and did not involve a prolonged physical assault upon her; the victim was not mutilated; the victim was not psychologically tormented prior to being killed; and the victim was not made to suffer physically prior to being killed' [56], the non-parole period was not manifestly inadequate. They also provided that 'the respondent's lack of remorse did not operate as a ground for increasing the length of the non-parole period' [56], and that the respondent's criminal history and personal circumstances were not aggravating factors.

***Scrutton v The Queen* [2019] NTCCA 9 (18 April 2019) – Northern Territory Court of Criminal Appeal**

'Evidence' – 'Extension of time' – 'Legal representation and self-represented litigants' – 'Relationship, context, tendency and coincidence evidence'

Charges: Murder x 1.

Case type: Application for an extension of time and leave to appeal.

Facts: It was alleged that the applicant and the deceased were drinking with others and became heavily intoxicated. They began arguing over jealousy issues. They made their way to a shed in which the applicant was staying at the time. The following morning, the applicant told an officer at the police station that he had a fight with his wife the previous evening, but did not disclose the nature of the fight or the deceased's condition. At that time the deceased was lying dead on a mattress in the shed. Forensic testing detected the deceased's blood on the jeans and boots that the applicant was wearing at the time of his arrest. It is important to note that the Crown adduced evidence of 10 assaults between 2005 and 2013 by the applicant on the deceased to which the applicant had pleaded guilty before the Local Court. The trial judge ruled that the evidence of the assault was admissible as relationship evidence. The applicant filed an application for leave to appeal, as well as an application for an extension of time.

The applicant sought leave to appeal on the grounds that:

- The forensic and expert evidence concerning the bloodstains on his boots and jeans was false, misleading, flawed and/or inconsistent with the prosecution case and guilt;
- The trial judge's direction to the jury concerning the bloodstains was inconsistent with the evidence;
- The trial judge wrongly admitted evidence of the assaults previously committed by the applicant upon the

deceased ([17]).

Issue: Whether extension of time should be granted; Whether forensic evidence concerning bloodstains were false, misleading, inconsistent, flawed and/or inconsistent with the prosecution case and guilt; Whether the trial judge's direction to the jury concerning the bloodstains were inconsistent with the evidence; Whether the trial judge wrongly admitted relationship evidence.

Held: By reference to the principles in *Green v The Queen* [1989] NTCCA 5, the Court dismissed the application to extend time. The applicant did not provide any reason for the delay beyond the fact that he 'could not find a lawyer', and there were no exceptional circumstances or special reasons to warrant granting an extension ([31]). The Court also held that no viable grounds of appeal were established. Notably, their Honours upheld the trial judge's decision to admit the evidence of 10 prior domestic assaults as relationship evidence under *Evidence (National Uniform Legislation) Act*. They held that the relationship evidence provided insight into the nature of the applicant's and deceased's relationship. Such evidence would potentially assist the jury to determine if they were in a 'harmonious and caring relationship or a relationship marred by anger and violence', and whether the applicant killed the deceased and, if so, his intention at the time. The probative value of the relationship evidence was not outweighed by the risk of unfair prejudice to the accused. The trial judge's directions in relation to the jury's use of the relationship evidence were therefore correct in law ([46]).

***Emitja v The Queen* [2016] NTCCA 4 (21 October 2016) – Northern Territory Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Coercive control' – 'Controlling behaviour' – 'General deterrence' – 'Personal deterrence' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Unlawfully causing serious harm'

Charge/s: Unlawfully causing serious harm.

Appeal Type: Appeal against sentence.

Facts: The applicant and the victim had been married in a traditional Aboriginal manner for 13 years before separating in 2013. The relationship had been blighted by domestic violence, one consequence of which was the issue of a domestic violence order in 2013 protecting the victim. In 2014, the applicant entered the victim's house without permission. The applicant kicked the victim at the bottom of her left leg, causing her compound fractures. The applicant was sentenced to six years imprisonment without a non-parole period.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed by majority (Grant CJ and Kelly J concurring, Barr J in dissent). The majority made relevant statements about domestic violence in Aboriginal communities. Grant CJ and Kelly J quoted from *Amagula v White* (unreported, Northern Territory Supreme Court, 7 January 1998): *'The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased'.*

Their Honours continued:

'As this Court has repeatedly observed before and since that statement was made, such conduct must be dealt with in a manner which reflects the serious nature of the offending and its corrosive effect on well-being in Aboriginal communities' (at [32]).

They note that while *'some Aboriginal communities have an unusually high incidence of serious crimes of violence and that the courts are powerless to alleviate the dysfunction and deprivation which underlies that violence. Aboriginal women and children living in those communities 'are entitled to equality of treatment in the law's responses to offences against them'. The protection which the law affords includes the imposition of sentences which include a component designed to deter other members of the community from committing crimes of that nature'* (see [33]-[34]). There are also practical societal reasons to consider personal and general deterrence. As in *The Queen v Haji-Noor*:

'The offender's crime against Mr Ellis was committed in a domestic context. Domestic violence is a leading contributor to death, disability and illness in the community. Such violence affects the whole community. Medical and hospital treatment for the victims of domestic violence is extremely costly and imposes a considerable strain on the health system and those who work in it'.

Finally, Their Honours described the offending as 'a deliberate and violent pattern of behaviour engaged in… for the purposes of intimidating and controlling the victim' and noted that due to the patterned nature of the appellant's violence, the spontaneity of his conduct was 'less relevant to the assessment of… objective seriousness' [52].

***R v Duncan* [2015] NTCCA 2 (9 February 2015) – Northern Territory Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Alcohol' – 'Exceptional circumstances' – 'Manifestly inadequate' – 'Mitigating factors' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing' – 'Unlawfully causing serious harm' – 'Victim'

Charge: Unlawfully causing serious harm

Appeal Type: Crown appeal against sentence

Facts: The respondent and the victim were in a domestic relationship and had a young daughter. After drinking together near the remote community of Kalkarindji, the respondent and victim got in an argument. The respondent, who was intoxicated, threatened to stab the victim with a pen and subsequently stabbed him in the back with a knife.

Following an early guilty plea the respondent was sentenced to 18 months imprisonment, suspended immediately. The respondent is an Aboriginal woman who attended school until the end of year 6. She had never been employed and lived with the victim, their child and family. She received parenting payments from Centrelink. The trial judge found the respondent's remorse was genuine. She waited for emergency services to arrive, made immediate admissions to police and subsequent formal admissions. The respondent continued to look after her young child while living with the victim, who had forgiven her. Finally, the trial judge found she had reasonable to good prospects of rehabilitation having not consumed alcohol since she committed the offence.

Issues:

- Whether the sentence imposed was manifestly inadequate.
- Whether the circumstances of the case were 'exceptional' pursuant to section 78DI of the *Sentencing Act* to displace the minimum mandatory term of 3 months imprisonment.

Decision and Reasoning: The appeal was allowed and the respondent was resentenced.

- The sentence imposed on the respondent was manifestly inadequate. The offending was objectively very serious, with the respondent's violent response to the verbal argument being 'utterly disproportionate' ([18]). The Court noted that alcohol-related violent crimes are 'a great drain on the medical resources of the Northern Territory and are an enormous cost to the community' ([18]). In light of this and the

objective seriousness of the offending, the sentence imposed was 'so manifestly disproportionate to the seriousness of the offending that it shocks the public conscience' ([19]). While the respondent's subjective circumstances entitled her to considerable leniency, they could not justify a sentence disproportionate to the offending. As such, the sentence was increased to a term of three years imprisonment, to be suspended after six months with an operational period of two years and six months. In determining this sentence, the Court took into account the respondent's age of 19, her responsibility for her child and other mitigating factors referred to by the trial judge.

- As the Court upheld the sentence as manifestly inadequate and imposed a sentence that involved actual imprisonment for more than three months, it did not consider whether 'exceptional circumstances' for the purposes of section 78DI were present on the facts. However, the Court noted in obiter that what amounts to 'exceptional circumstances' will be a matter for the court in considering the facts of each individual case. The Court considered that whether the victim's wishes with respect to sentencing should be taken into account as exceptional circumstances is for the discretion of the court in each case ([24]).

***The Queen v Haji-Noor* [2007] NTCCA 7 (18 May 2007) – Northern Territory Court of Criminal Appeal**

'Aggravated assault' – 'Coercive control' – 'Control' – 'Controlling behaviour' – 'New partner' – 'Not manifestly inadequate' – 'Prosecution appeal against sentence' – 's 188(2)(b) Criminal Code (NT)' – 'Separation'

Charges: Intentionally causing grievous bodily harm x 1; Aggravated assault x 1; Possession of cannabis x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The respondent attacked his former girlfriend and her new partner with a baseball bat ([22]-[23]). The aggravated assault charge was in relation to the respondent attacking his former girlfriend, leaving her with bruises, and the grievous bodily harm charge was in relation to the attack on the former girlfriend's new partner, leaving him with permanent disability ([25]). There had been a history of domestic violence in the relationship between the defendant and his former girlfriend ([9]-[18]). The sentencing judge imposed a head sentence of 8 years and 6 months' imprisonment ([4]). In relation to the aggravated assault charge, the respondent was sentenced to 2 years and 6 months' imprisonment ([34]).

Issues: One issue was whether the sentence for the aggravated assault charge was manifestly inadequate.

Decision and Reasoning: The Court held that the sentence for the aggravated assault charge was within

range.

Justice Angel at [31] quoted the sentencing judge:

> The crimes of violence of the type you have committed are prevalent and too often occur against the background of a breakdown in a domestic relationship complicated by problems of access to children. Women in these situations are particularly vulnerable. They are entitled to such protection as the law can give them. Deterring you and other men who are minded to behave like you towards their female partners is an important factor in the exercise of the sentencing discretion.
>
> I need to add this. It is not uncommon for men in your position to harbour a belief that their former partner had been unreasonable. Nor is it uncommon for violent men in your position to harbour a belief that the former partner has brought the violence on themselves by being unreasonable. You and others like you must learn that only you are to blame for the situation in which you now find yourself.

Justice Southwood added at [183]:

> Domestic violence is a leading contributor to death, disability and illness in the community. Such violence affects the whole community. Medical and hospital treatment for the victims of domestic violence is extremely costly and imposes a considerable strain on the health system and those who work in it.

The violence perpetrated by the respondent 'was part of a pattern of fundamentally oppressive and coercive behaviour in which the respondent deliberately engaged to dominate and control Ms Hawksworth' [185].

***R v Secretary* [1996] NTCCA 18 (2 April 1996) – Northern Territory Court of Criminal Appeal**

*Note this case was decided under now superseded legislation (s 28(f) *Criminal Code Act 1986 (NT)*) however the case contains relevant statements of principle.

'Emotional abuse' – 'History of abuse' – 'Manslaughter' – 'Murder' – 'Physical violence and harm' – 'Self-defence' – 'Substance abuse'

Charge: Murder

Appeal type: Question of law under s 408(1) *Criminal Code* (NT)

Facts: The accused was charged and pleaded not guilty to murdering her husband (the deceased). For eight years leading up to this incident, the deceased had verbally, mentally and physically abused the accused and

their children. The violence and abuse increased substantially in the months prior to the killing. During this time, the deceased threatened to kill the accused, beat her with his hands and a belt and sexually assaulted her. The deceased was a chronic drug abuser. On a road trip the accused noticed a rifle in the back of the car. Upon returning home, the deceased threatened to beat the accused with a belt, punched her in the head, throttled her, and made further threats of abuse. Fearing for her life, the accused retrieved the gun and shot the deceased while he was asleep. At trial, the judge ruled that the issue of self-defence should not be left to the jury. Following this, the accused's counsel made an application that the subject of the ruling be reserved for the consideration of the Court of Criminal Appeal. Subsequently, the accused pleaded not guilty to the charge of murder, but pleaded guilty to the charge of manslaughter by reason of provocation. The indictment was amended accordingly and the jury found the accused guilty of manslaughter. No conviction was recorded; the trial judge postponed judgment until the Court of Appeal returned an answer on the reserved question of law.

Issue: Whether the trial judge was correct in ruling that self-defence was not open for consideration by the jury in the circumstances of the case.

Decision and Reasoning: In a 2:1 majority, the question was answered in the negative. The conviction was quashed and a retrial was ordered.

The defence counsel contended that as the deceased was asleep at the time he was shot, the accused could not have been acting in self-defence. The trial judge had accepted this reasoning: that because the deceased was asleep he had no ability to implement earlier threats. Mildren J of the Northern Territory Court of Criminal Appeal found that self-defence as provided under s 28(f) of the *Criminal Code* (NT) does not require a temporal connection between the assault and the force used to defend the assault: 'The lack of any specific requirement for an apprehension of immediate personal violence, so far as the Code definition of assault is concerned, reinforces the view that an assault is a continuing one so long as the threat remains and the factors relevant to the apparent ability to carry out the threat in the sense explained have not changed' ([16]-[17]). Accordingly, it was open to the jury to find the deceased's threat was an assault that continued while he was asleep. Having regard to the history of the domestic violence, it could also be inferred that, upon waking, the deceased intended to kill or cause grievous harm to the accused, and he had the ability to do so. It was also open for the jury to consider that the force used was not unnecessary in the circumstances. Mildren J regarded the jury's verdict as a conviction despite no conviction being formally recorded by the trial judge. Having found the trial judge was incorrect in ruling self-defence was not open, Mildren J quashed the

conviction and ordered a re-trial.

Angel J, agreeing with Mildren J, held that self-defence extends to taking action to defend oneself from threatened assault even if this action is ‘a pre-emptive strike’. It was open to the jury to find the threat of the deceased constituted an assault and this assault continued to exist at the time of the shooting. Therefore, self-defence should have been left to the jury.

In his dissenting judgement, Martin CJ found the trial judge was correct in his ruling. He considered the word ‘being’ in s 28(f) of the *Criminal Code* (NT) to require a contemporaneous connection between the assault and the act of self-defence. As the accused was asleep at the time of the shooting, no such connection could exist.

Supreme Court

The Queen v Kerridge [2021] NTSC (sentencing) (1 November 2021) – Northern Territory Supreme Court

'Coercive control' – 'Domestic violence order' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Financial abuse' – 'People living in regional, rural, and remote communities' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse'

Charges: Sexual intercourse without consent x12; aggravated assault x3.

Proceedings: Sentencing.

Facts: The male offender was found guilty of 12 counts of sexual intercourse without consent and 3 counts of aggravated assault committed against his female partner between 2017 and 2018. The relationship between the offender and the victim began in 2005 but after the birth of their first child in 2010 the relationship deteriorated.

The offender was controlling, demanding and repeatedly used threats to coerce compliance with his demands for unwanted sex acts, including threats to use a firearm pointed at the victim and also a cattle prod (which was actually used to shock her on the stomach). The offender blamed the victim for the couple's financial troubles and the victim was forced to not only work full time but also financially manage the offender's business and earn additional money repairing and selling second-hand items as well as attend to all of the domestic duties.

The Victim Impact Statement described the offender's physical, emotional, and financial control over her and her ongoing fear of the offender; she lives in a motor home so she can leave in a hurry if the offender is released from prison as she is scared the offender will seek revenge.

Decision and Reasoning: the offender was sentenced to 15 years imprisonment, with a fixed non-parole period of 12 years. The Domestic Violence Order was altered to forbid the offender from having any direct or indirect contact with the victim for 20 years.

Justice Mildren found there were no mitigating circumstances. His Honour considered the offender's prior convictions for assaults against the victim and aggravated assault against his son. His Honour classified the offences as really serious, and a significant sentence of imprisonment was needed for both personal and

general deterrence. He found the offender's behaviour to be 'callous, controlling and sadistic.'

The Queen v Lynch [2021] NTSC SCC22033629 (4 October 2021) (Sentence) – Northern Territory Supreme Court

'Aboriginal and Torres Strait Islander people' – 'Assault' – 'Coercive control' – 'Controlling and/or jealous behaviour' – 'Controlling, jealous, obsessive behaviours by the perpetrator' – 'Exposing children to domestic and family violence' – 'Following, harassing and monitoring' – 'Past domestic and family violence' – 'People living in regional, rural and remote communities' – 'People with children' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Separation' – 'Stalking' – 'Unlawful deprivation of liberty'

Charges: 1x unlawful deprivation of liberty; 1x assault; 1x driving disqualified; 2x breaching a protection order.

Proceedings: Sentencing.

Facts: The victim was in a relationship with the offender which ended when the offender became controlling and jealous over the victim seeing her previous partner. She had a young daughter from a previous relationship and also had a child with the offender. A protection order was in place.

The offending occurred in Alice Springs. The offender, driven by his ex-wife, went to Tennant Creek where the victim was living. The offender asked the victim to go home with him with her children but she refused. He then asked her to go to the nearby petrol station to buy items for the children, which she agreed to, taking both her children, not taking any of her valuables or necessities. The offender again demanded that the victim come home with her and he refused. She suggested leaving the offender's child with him and walking home with her daughter. The offender made threats.

The offender's ex-wife began driving towards Alice Springs, away from the victim's home. She asked to be taken home and the offender refused. The offender engaged the victim in a fight regarding her resuming her relationship with her ex-partner which culminated in the offender pushed the victim's her head against the window and punching the victim in her ear while she was holding her son on her lap (aggravated assault).

Instead of driving to Alice Springs, the offender decided to have his ex-wife drive the victim and her two children to the outstation (where he was living) and the victim wanted to go home (deprivation of liberty). The charge ceased when the offender left the outstation in the morning.

Issues: Sentence

Decision and Reasoning: The overall sentence was 2 years, with a non-parole period of 12 months.

Aggravating factors included multiple prior convictions for breaches of protection order and aggravated assaults on a female, subject to current order. The fact the offender was not affected by alcohol at time of offending indicated possessive and controlling urges while sober.

***The Queen v Lewis* [2021] NTSC 40 (6 May 2021) – Northern Territory Supreme Court**

'Evidence' – 'History of domestic and family violence' – 'Jury directions' – 'Probative value' – 'Protection order' – 'Relationship, context, tendency and coincidence evidence' – 'Relevance' – 'Threats to kill'

Charges: Aggravated unlawful assault x 1; Recklessly engaging in conduct giving rise to danger of serious harm x 1.

Proceedings: Application to adduce evidence.

Facts: The male accused and female complainant were in a relationship. The Crown's case was that the accused "flipped her" to the ground twice, threatened to kill her, and stamped his foot on her head, dragged, kicked and punched her. The Crown applied to adduce evidence of two prior charged assaults by the accused against the complainant (aggravated assault and contravention of a domestic violence order relating to her) as tendency or context (relationship) evidence.

Issues:

1. Whether the evidence ought to be adduced as tendency evidence.
2. Whether the evidence ought to be adduced as relationship evidence.

Decision and reasoning: Application to admit the evidence as tendency evidence was dismissed. Application to admit the evidence as relationship evidence was upheld.

Tendency evidence: The evidence did not have significant probative value. Additionally, on prejudice, the only other substantial evidence supporting the Crown's case was to be given by the complainant. There was consequently a risk that the jury might place too much reliance on the fact that the accused had tendencies and acted on them. This potential prejudice was virtually impossible to address by a direction to the jury as the concept of "not giving too much weight" would be very difficult for the jury to comprehend and follow.

Relationship evidence: The evidence was relevant to a fact in issue in the proceeding. While the defence argued that evidence of two physical assaults against the complainant in their 2.5 year relationship was more appropriately characterised as "transient flare-ups of anger or annoyance" not ongoing hostility, the court disagreed stating: "Physical assaults are not part of the ordinary incidents of a domestic relationship, and the second of those assaults occurred in the same month as the alleged offending."

Additionally, unlike the risk of unfair prejudice with the tendency evidence, the jury could be directed that they must not use the relationship evidence to engage in propensity or tendency reasoning, and that it was only tendered to ensure that they had a true and proper context to understand what the complainant said happened, rather than thinking what she said was unlikely because it happened "out of the blue". This would obviate any risk of unfair prejudice.

***Arnott v Blitner* [2020] NTSC 63 (1 October 2020) – Northern Territory Supreme Court**

'Breach of bail conditions' – 'Contravention of protection order' – 'Misuse of alcohol or drugs by the perpetrator' – 'No harm caused to protected person' – 'Prosecution appeal against sentence' – 'Protection order'

Charges: Contravening a Domestic Violence Order (DVO) x 1; Breach of bail x 1.

Proceedings: Prosecution appeal against sentence.

Facts: The male respondent breached a DVO protecting his female partner by being heavily intoxicated in her company. There was no harm to the protected person. The respondent later breached bail by consuming alcohol. He pleaded guilty and was sentenced to 4 days imprisonment for breach of the DVO and 3 days imprisonment for the breach of bail, to be served cumulatively.

Grounds of appeal: In relation to the sentence for breaching the DVO –

1. The sentencing judge erred in applying s 121(2) and 121(3) of the *Domestic and Family Violence Act 2007* (NT).
2. The learned sentencing judge erred in imposing a sentence which was manifestly inadequate in all the circumstances.

Held: Appeal dismissed.

Ground 1: There was no error in applying s 121(2) and (3) of the Act. The words "in the particular

circumstances of the offence" do not set a standard which the circumstances must meet or impose an additional test. The legislative purpose of s 121(3) is to ameliorate potential injustice arising from mandatory sentencing. It maintains the court's discretion not to impose the mandatory minimum in circumstances where the breach of a DVO does not result in harm to the protected person and where the court is satisfied it is not appropriate to record a conviction and sentence the person "in the particular circumstances of the offence" (meaning the specific, individual circumstances of the offence).

Ground 2: The sentence was not manifestly inadequate. The respondent's breach of the DVO did not display the kind of aggravating features that would merit the term "contemptuous". The conduct occurred 3½ months after the DVO was served in circumstances where the respondent believed the order was finished, no harm was caused to the protected person (despite police being called to respond to a disturbance), and the respondent's 2 previous convictions for breaching DVOs were 4 years previously.

***Carter v Firth* [2020] NTSC 62 (16 September 2020) – Northern Territory Supreme Court**

'Appeal against sentence' – 'Assault' – 'Threat to kill' – 'Weapon'

Charges: Using a carriage service to make threat to kill x 1; Unlawfully entering a building with intent to commit assault x 1; Unlawful assault x 1; Threat to kill x 2; Aggravated assault x 1.

Proceedings: Appeal against sentence.

Facts: The male appellant and KC had been in a domestic relationship for 18 months. KC ended the relationship. The offending escalated over a 2-hour period and included threats to kill, physical violence and use of weapons. The appellant pleaded guilty and was sentenced to an overall effective sentence of 4 years imprisonment, suspended after 12 months.

Grounds of appeal: The overall sentence was manifestly excessive.

Held: Appeal dismissed. The sentences could not be said to be manifestly excessive. While the appellant had compelling subjective circumstances, "the subjective circumstances of an offender can never justify a sentence that does not adequately reflect the objective seriousness of the offences. In the present case, the objective circumstances reveal[ed] serious criminal offending, including significant violence utilising weapons, in the context of threats having been made by the appellant to kill his former domestic partner": at [60].

The Queen v Anzac **[2020] NTSC 58 (7 August 2020) – Northern Territory Supreme Court**

'Breach' – 'Misuse of alcohol or drugs by the perpetrator' – 'Prosecution appeal against sentence' – 'Protection order'

Charges: Breach domestic violence order (DVO) x 1.

Proceedings: Prosecution appeal against sentence.

Facts: The male respondent contravened a DVO protecting his female partner by being intoxicated in her presence. As the respondent had previous convictions for breaching DVOs, he was required to be sentenced under s 121(2) of the *Domestic and Family Violence Act 2007* (NT) ("the Act"), unless the court was satisfied of the matters set out in s 121(3). The respondent was sentenced to a 6-month good behaviour bond on conditions.

Grounds of appeal:

1. The sentencing judge erred in applying ss 121(2) and (3) of the Act.
2. The sentencing judge failed to accord the complainant procedural fairness by not requesting submissions on proceeding without recording a conviction, where the sentencing judge had previously indicated he would impose a conviction.
3. The sentence was manifestly inadequate.

Held: Appeal allowed on ground 2 and the appellant re-sentenced to a 12-month good behaviour bond on conditions. Section 121(3) applied in this case. The offence did not result in harm being caused to the protected person, and, in the particular circumstances of the offence, it was not appropriate to record a conviction and impose a sentence of 7 days or more on the respondent under s 121(2) of the Act. The particular circumstances of the offence (which lowered the respondent's moral culpability) included his deprived background, chronic misuse of alcohol (including early exposure, inability to control drinking in town, mutual misuse in the relationship, and lack of treatment). The respondent was also genuinely remorseful.

Hardy v Rigby **[2020] NTSC 42 (10 July 2020) – Northern Territory Supreme Court**

'Appeal against sentence' – 'Exposing children to domestic and family violence' – 'Strangulation'

Charges: Aggravated unlawful assault x 1.

Proceedings: Appeal against sentence.

Facts: The male appellant pleaded guilty to unlawfully assaulting his wife. The offending involved threats to kill, squeezing his wife's throat with both hands and dragging her by the throat, removing access to telephones, and exposing their child to the offending. The appellant was sentenced to a 12-month good behaviour bond and a conviction was recorded.

Grounds of appeal: The sentence was manifestly excessive because it included the recording of the conviction. Specifically –

1. Too much weight was given to "denunciation".
2. Insufficient weight was given to evidence of positive good character including contrition and remorse.
3. The sentencing judge failed to take into account the views of the victim.
4. The sentencing judge erred by choosing to record a conviction.
5. Insufficient weight was given to evidence concerning the appellant's mental health, and the sentence failed to include appropriate conditions to address his mental health.
6. The sentencing judge took into account the irrelevant consideration of prospective legislation increasing the penalty for assaults by strangulation.

Held: The appeal was dismissed. While the court acknowledged that the appellant did not have a prior criminal history of domestic violence offending and no evidence of prior incidents of domestic violence, the offending was still appropriately characterised as an instance of domestic violence: "It involved the use and threats of violence to control and dominate the appellant's wife so she would 'tell [him] the answer'" (at [50]). The offending was very serious including the fact that the appellant "grabbed SH by the throat and squeezed her throat was a significant factor in the sentencing calculus." As per the Court in *DPP v Foster* [2019] TASCCA 15:

> "Lest it be thought that grabbing the complainant by the throat and applying pressure is somehow less insidious than punching or kicking, it has been noted in an article by Heather Douglas and Robin Fitzgerald entitled "Strangulation, Domestic Violence and the Legal Response", published in the [2014] SydLawRw 11; (2014) 36 (2) *Sydney Law Review* 231, that strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.

> "[Strangulation] can cause loss of consciousness and can cause death quickly. It has been suggested that death can occur within seven to fourteen seconds. Additionally, underlying internal injuries caused by the pressure applied to the throat can cause swelling which may develop gradually over days and airways obstruction causing death may be delayed."

It was also significant that the appellant removed the victim's access to telephones and outside help before strangling her, and that their child was exposed to domestic violence.

***Williams v Firth & Anor* [2020] NTSC 9 (24 February 2020) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Appeal against sentence' – 'Breach of bail' – 'Children' – 'Exceptional circumstances' – 'Female perpetrator' – 'Physical violence and harm'

Charges: Aggravated assault x2; Breach of bail x1.

Appeal type: Appeal against sentence.

Grounds:

1. That the sentences imposed were manifestly excessive; and
2. That the learned sentencing Judge erred in finding that the circumstances of the case were not exceptional pursuant to s 78DI of the Sentencing Act.

Facts: The appellant woman, a 28 year old Wurrumiyanga woman and the male second victim of aggravated assault (Elton Limbiari) had been in a domestic relationship for three years and had two children together. Their relationship ended in 2015, and Limbiari later commenced a 2-week relationship with the first aggravated assault victim (Raggett). On the night of offending, the appellant went to Raggett's property where she found both victims asleep on the veranda. She approached Raggett, grabbed her by the hair and dragged her down from the bed before punching her numerous times in the face, causing immediate pain and minor bruising. Limbiari was woken by the noise and, upon seeing Raggett being assaulted, tried to walk away but was stopped by the appellant punching him from behind. The punch caused minor swelling and bruising to his jaw.

The appellant was arrested and charged the next day. She pleaded guilty to both charges of aggravated assault and was sentenced to 3 months imprisonment for each count, to be served concurrently. While on bail

to appear, the appellant did not appear and a warrant issued, thus breaching one of her bail conditions. The appellant also pleaded guilty to breach of bail and was convicted and sentenced to imprisonment for 1 month to be served cumulatively with the other sentences. The sentencing judge gave consideration to some matters put in mitigation on the appellant's behalf, but very little consideration to the fact that she was the mother of four children.

Judgment:

The Appellant's circumstances were truly exceptional when all relevant circumstances were considered, "including the relatively minor offending, the lack of any serious injuries to the victims, the fact that the appellant has apologised to both victims and the apologies have been accepted, her limited criminal history, the previous assault conviction was a long time ago and only resulted in a good behaviour bond, the extraordinary efforts she has made voluntarily to give up alcohol and attend family violence courses, the fact that she has left Tennant Creek with her children to start a new life away from influences which have got her into trouble in the past and the fact that she is a sole parent of four young children" [30]. His Honour rejected counsel for the respondent's submission that "to establish one of the exceptions in R v Nagas, it is necessary to produce cogent evidence that imprisonment would effectively deprive the children of parental care", holding that "where the parent is a sole parent, particularly where the children are young and the appellant is the mother and sole carer of the children… different considerations arise. It is relevant that the children have someone close to them to look after them if the appellant is imprisoned, but a term of imprisonment which separates a mother from her young children can have a devastating effect on a child's welfare and upbringing."[29]

His honour rejected the submissions that the sentence in relation to the breach of bail was manifestly excessive, finding that the offender's "criminality was properly reflected in the sentences imposed" [31].

Queen v Pamkal **[2019] NTSC 80 (15 October 2019) – Northern Territory Supreme Court**

'Evidence' – 'Probative value' – 'Relationship evidence' – 'Sexual and reproductive violence' – 'Tendency purposes'

Proceedings: Voir dire on admissibility of evidence of past violent conduct by the accused against the complainant

Issues: Admissibility of tendency evidence; whether probative value of the evidence substantially outweighs

any potential prejudicial effect on the accused

Facts: One of the facts in issue is whether the complainant consented to sexual intercourse with the accused. The complainant alleged that the accused demanded she have sex with him and threatened her when she refused. The complainant complied by removing her shorts and underwear and lying down on the cement.

The Crown intended to lead evidence of past violent conduct by the accused towards to complainant [2]. The accused would resort "to violence against the [complainant] whenever she displeased him…or he had a state of mind in which he believed he was permitted to discipline her for any perceived failing – and that he was prepared to and did act on that state of mind." [3]. The Defence counsel conceded that the "evidence of past assaults is relevant for this ‘relationship’ or ‘context’ purpose but contends that it should be excluded under Evidence (National Uniform Legislation) Act 2011 (NT) ('UEA') s 137 because its probative value is outweighed by the danger of unfair prejudice to the defendant.

Judgment:

The evidence was admitted both as relationship or context evidence and as tendency evidence and will not be excluded under UEA s 137.

The Judge disagreed with the Defence’s contention that the evidence of past violence by the accused against the complainant should be limited to mere references of past assaults without revealing any details. Kelly J provided that restricting the evidence in this way would conceal the nature of the relationship rather than explain why the complainant submitted in the way she did. His Honour also rejected the claim that the evidence should be excluded under the UAE s 137 as it had high probative value. Namely, it "explains something that may otherwise be inexplicable" [5]. While the risks of rank propensity reasoning and the jury being emotionally repelled by the accused were acknowledged, Justice Kelly believed that the probative value of the evidence outweighed them and thus admitted the evidence of prior assaults as relationship evidence.

Justice Kelly then turned to the Prosecution’s request to use the evidence of prior assaults as tendency evidence. The Prosecution sought to Sought to use the tendency evidence to demonstrate the accused’s tendency to engage in violent conduct against the complainant; to have a violent and controlling disposition towards his domestic partner; to believe that he is permitted to discipline his domestic partner for any of her perceived ‘failings’ [13]. Court noted that under UEA s 97, tendency evidence is not admissible unless ‘appropriate notice has been given and the court thinks that the evidence will…have significant probative value’ [14]. Applying the principles established in Hughes v The Queen, Kelly J concluded that the evidence

of prior assaults satisfied the threshold test in UEA s 97, in that it supported "proof of a tendency to engage in violent behaviour, especially after consuming alcohol, for the purpose of controlling his partner's behaviour and/or punishing her for perceived failings"[18] and "if the jury accepts that the accused had this tendency (or tendencies) that "strongly supports proof of a fact that makes up the offence charged"… It explains what might otherwise be inexplicable and strongly supports proof of a fact in issue – namely whether the complainant consented to have sex with the accused and also, to perhaps a slightly lesser extent, proof that he knew of or was reckless as to her lack of consent."[19]. His Honour also concluded that the evidence substantially outweighed any prejudicial effect (as required by s 101 UEA) as the risks were "largely mitigated" by appropriate directions and warning to the jury. The tendency evidence was therefore admitted.

***Douglas v Dole & Ors* [2019] NTSC 80 (15 October 2019) – Northern Territory Supreme Court**

'Breach of bail' – 'Children' – 'Damaging property' – 'Deterrence' – 'Evidence of domestic violence history' – 'Exceptional circumstances' – 'Female perpetrator' – 'History of abuse' – 'Jealous behaviour' – 'Manifestly excessive' – 'Misuse of alcohol' – 'Past domestic violence' – 'People affected by substance misuse' – 'Physical violence and harm sentence' – 'Victims as (alleged) perpetrators'

Charges: Aggravated assault x 2; Criminal damage x 1; Breach of bail x 3

Proceedings: Appeal against sentence

Facts: The appellant and the first victim were in a domestic relationship for six years (since the appellant was 13), during which the appellant had allegedly been subjected to significant domestic violence at the hands of the victim. On the night of the incident, the appellant started verbally abusing the victim while intoxicated. The victim left the room, but shortly returned to get his wallet. The appellant had found the victim's wallet and started to cut up his licence. As the victim took and wallet back and tried to leave again the appellant stabbed him behind the knee with the scissors, preventing the victim from being able to walk. During the sentencing hearing, the appellant submitted 'that on the night the appellant attacked [the first victim] her emotions which had been built up over an extended period of time overflowed and she could not control herself', claiming the violence to be an exceptional circumstance.

The appellant (and her co-offender) assaulted the second victim a week later. The two offenders were intoxicated and engaged in a verbal argument with the victim. The co-offender then punched the victim in the side of her face with the appellant then punching the victim's forehead, causing a large haematoma. The two

offenders threw rocks at the glass door of the building the victim escaped to, causing the glass panel to break.

Issues:Two grounds of appeal – whether the sentencing Judge failed to properly exercise his discretion to find exceptional circumstances; and whether the sentence was manifestly excessive.

Descision and reasoning: The appeal on the first ground was allowed and the three months actual imprisonment set aside. The appeals on the other grounds were dismissed.

Ground 1:

The appellant had submitted that the violence characterising her relationship with the first appellant amounted to exceptional circumstances. While the sentencing judge had accepted that the appellant had been exposed to domestic violence, he concluded that 'the material placed before him was not sufficiently specific to allow a firm conclusion to be drawn that the appellant's background of domestic violence was operative on the appellant at, or generally around the time of offending' [42]. Southwood J agreed with the sentencing judge, providing that 'the difficulty with [the appellant's] submission was that 'there was no evidence before the Local Court or [the Supreme Court] that violence had become normalised for the appellant. To the contrary, the facts of the offending and the appellant's criminal record established that the violence was out of character for the appellant and the main criminogenic factors in her offending were the consumption of alcohol and jealousy' [46]. However, Southwood J still found that the sentencing judge had failed to consider the appellant's other 'exceptional' personal circumstances such as her young age and no prior convictions for criminal offences. As such, the sentence imposed was unjust.

Ground 2:

The sentence of one-month imprisonment is appropriate as it does not crush the appellant's prospects of rehabilitation and gives necessary and appropriate consideration to the principles of deterrence and denunciation.

***Anderson v Nicholas* [2019] NTSC 55 (5 July 2019) – Northern Territory Supreme Court**

'Appeal against sentence' – 'Misuse of alcohol' – 'Past domestic violence against former partners' – 'Physical violence and harm' – 'Poor prospects of rehabilitation' – 'Threats to kill' – 'Weapon'

Charges: Aggravated assault x 1; Threat to kill x 1.

Case type: Appeal against sentence

Facts: The appellant man pleaded guilty to, and was convicted of, committing aggravated assault against his female ex-partner with a knife, and threatening to kill another person who tried to assist his ex-partner with her injury. The appellant had 14 prior convictions, including 12 for aggravated assault, most on women and some of whom were his previous partners, as well as numerous breaches of domestic violence orders and orders suspending sentences. The offending occurred whilst he was intoxicated and angry. The sentencing judge found the conduct to be intentional, and imposed a sentence of 4 years' imprisonment, with a non-parole period of 3 years.

Issue:

- The sentence was manifestly excessive;
- The total effective sentence was manifestly excessive;
- The sentencing judge erred in the assessment of the appellant's moral culpability and in finding intoxication to be an aggravating circumstance;
- The sentencing judge failed to afford the appellant procedural fairness.

Held: The appeal was dismissed, as neither the head sentence nor the non-parole period was manifestly excessive. The appellant's extensive criminal history of violent conduct, particularly drunken violence, was relevant as it demonstrated a continuing attitude of disobedience to the law and the need to impose condign punishment for specific or general deterrence. It also indicated that the appellant had poor prospects of rehabilitation, and that community protection was a paramount consideration. Further, the Court noted that the offences, although taking place around the same time, involved two different victims and two different violent acts. It was therefore appropriate for the sentencing judge to reflect those differences in the way she did by fixing a total sentence and allowing for some concurrency ([60]-[61]). In relation to the non-parole period, the appellant's prospects of rehabilitation, his age, criminal record and the protection of the community were particularly relevant. The non-parole period was justified, given his very poor prospects of rehabilitation and his "dreadful criminal history" ([67]). Further, the sentencing judge did not err in finding that intoxication was an aggravating circumstance of the appellant's "brazen, excessive and egregious" conduct ([43]-[44]).

***O'Neill v Roy* [2019] NTSC 23 (12 April 2019) – Northern Territory Supreme Court**

'Appeal against sentence' – 'Misuse of alcohol' – 'Past domestic violence against former partners' – 'Physical violence and harm' – 'Poor prospects of rehabilitation' – 'Threats to kill' – 'Weapon'

Charges: Aggravated assault x 1; Threat to kill x 1.

Case type: Appeal against sentence

Facts: The appellant man pleaded guilty to, and was convicted of, committing aggravated assault against his female ex-partner with a knife, and threatening to kill another person who tried to assist his ex-partner with her injury. The appellant had 14 prior convictions, including 12 for aggravated assault, most on women and some of whom were his previous partners, as well as numerous breaches of domestic violence orders and orders suspending sentences. The offending occurred whilst he was intoxicated and angry. The sentencing judge found the conduct to be intentional, and imposed a sentence of 4 years' imprisonment, with a non-parole period of 3 years.

Issue: The appellant appealed his sentence on the grounds that:

- The sentence was manifestly excessive;
- The total effective sentence was manifestly excessive;
- The sentencing judge erred in the assessment of the appellant's moral culpability and in finding intoxication to be an aggravating circumstance;
- The sentencing judge failed to afford the appellant procedural fairness.

Held: The appeal was dismissed, as neither the head sentence nor the non-parole period was manifestly excessive. The appellant's extensive criminal history of violent conduct, particularly drunken violence, was relevant as it demonstrated a continuing attitude of disobedience to the law and the need to impose condign punishment for specific or general deterrence. It also indicated that the appellant had poor prospects of rehabilitation, and that community protection was a paramount consideration. Further, the Court noted that the offences, although taking place around the same time, involved two different victims and two different violent acts. It was therefore appropriate for the sentencing judge to reflect those differences in the way she did by fixing a total sentence and allowing for some concurrency ([60]-[61]). In relation to the non-parole period, the appellant's prospects of rehabilitation, his age, criminal record and the protection of the community

were particularly relevant. The non-parole period was justified, given his very poor prospects of rehabilitation and his "dreadful criminal history" ([67]). Further, the sentencing judge did not err in finding that intoxication was an aggravating circumstance of the appellant's "brazen, excessive and egregious" conduct ([43]-[44]).

***AB v Hayes & Anor* [2019] NTSC 13 (6 March 2019) – Northern Territory Supreme Court**

'Conditions' – 'Evidence' – 'Protection order' – 'Sexually explicit images'

Case type: Appeal about domestic violence orders.

Facts: The appellant is an NT police officer stationed in Alice Springs. In 2016, the NT police applied to the Local Court for 2 domestic violence orders. The two applications were heard together.

The two protected persons named in the applications were the appellant's wife and her daughter from a previous relationship. Both persons immigrated from South East Asia, and started living with the appellant in 2011. The appellant and his wife also had a child together, but separated in 2016. The Local Court in Alice Springs ordered that the appellant be restrained from contacting or approaching the protected persons, either directly or indirectly ('first order'). In a different proceeding on the same day, the Local Court ordered that the appellant delete and destroy all sexually explicit images of the protected person in his possession or control, and not deal with or publish those images in any other way for a period of 2 months ('second order') ([3]-[4]).

The appellant filed 2 appeals in the Supreme Court, one for each of the Local Court proceedings. On 22 June 2017, Southwood J set aside the first order on the basis that the Local Court Judge could not reasonably infer from the facts that the appellant's wife's daughter feared the commission of domestic violence from the appellant, and there was no evidence that the appellant harassed her by engaging in regular and unwanted contact ([13]).

His Honour considered the appeal against the second order. The grounds of appeal included that:

- The order was ultra vires as the Local Court did not have power to compel the appellant to destroy his property;
- There was no proper evidential basis for the Local Court to conclude that there were reasonable grounds for the protected person to fear the commission of domestic violence arising out of the appellant's possession of the images ([6])

Issue: Whether Local Court acted ultra vires in making an order to compel the destruction of sexually explicit

images; whether there was a proper evidential basis for the Local Court to conclude there were reasonable grounds for the protected person to fear the commission of domestic violence arising out of the possession of the images.

Held: Southwood J allowed the appeals and set aside both domestic violence orders. His Honour held that the Local Court did not have the power to make the second order. Section 21 of the *Domestic and Family Violence Act* (the Act) does not grant the Local Court power to order a defendant to destroy his or her personal property. Rather, it enables the Local Court to impose conditions on a defendant's behaviour with the aim of ensuring that the defendant does not engage in domestic violence. Further, the Act makes specific provision for circumstances in which property rights may be interfered with by the Local Court, none of which applied in this case ([46]-[48]). His Honour was satisfied that the appellant was the owner of the sexually explicit images and that his wife consented to him taking them ([45]).

His Honour also held that the Local Court erred in concluding that there was a reasonable fear that the appellant may use, or threaten to use, the sexually explicit images to continue to control his wife. This conclusion was 'unreasonable and irrational' ([54]). Further, the evidence showed that the appellant and his wife took sexually explicit images over a number of years for their own enjoyment ([50]).

***Bush v Lyons* [2018] NTSC 20 (28 April 2018) – Northern Territory Supreme Court**

'Breach of domestic violence order' – 'Imprisonment' – 'Manifestly excessive' – 'People affected by substance misuse' – 'Perpetrator interventions' – 'Sentencing'

Charges: Contravention of domestic violence order x 1; Contravention of alcohol prevention order x 1.

Appeal type: Appeal against sentence.

Facts: The appellant was subject to an alcohol prevention order and a domestic violence order which named his wife and daughter as protected persons. The appellant attended the house at which his wife and daughter were residing, under the influence of alcohol, and caused a disturbance ([2]). The Local Court restored a previously suspended sentence and imposed cumulative terms of imprisonment of 4 months for the breach of domestic violence order and 5 days for the breach of alcohol protection order ([3]). The appellant had a history of breaching the same domestic violence and alcohol prevention orders ([5]).

Issues: The appellant appealed on the grounds that the sentencing judge erred by:

- misusing the appellant's previous convictions in the sentencing process;
- failing to include a rehabilitative component in the sentence;
- failing to partially suspend the sentence; and
- imposing a manifestly excessive sentence.

Decision and Reasoning: The first, second and third grounds were dismissed (see [11], [19] and [25] respectively). The fourth ground, manifest excess, was upheld. Grant CJ outlined the following mitigating factors:

- the low objective seriousness of the offending;
- the maximum penalty of 2 years imprisonment;
- the fact that the appellant has no record of violent offending against the protected persons; and
- his early plea of guilty ([27], [35]).

His Honour characterised the appellant's repeated breaches as spontaneous and triggered by alcohol abuse, rather than premeditated ([32]). Quoting from *Manakgu v Russell* [2013] NTSC 48, his Honour agreed that penalties of more than 3 months' imprisonment are properly reserved for conduct which constitutes physical assault or serious intimidation and threats ([31], [34]). His Honour reduced the sentence for breach of domestic violence order from 4 months to 2 months' imprisonment ([37]).

***Andalong v O'Neill* [2017] NTSC 77 (19 October 2017)– Northern Territory Supreme Court**

'Autrefois acquit' – 'Autrefois convict' – 'Double jeopardy' – 'Double punishment' – 'Sentencing'

Charges: Driving unregistered vehicle x 1; driving uninsured or improperly insured vehicle x 1; driving whilst disqualified x 1; driving with a high range breath alcohol content x 1.

Case type: Appeal

Facts: On 25 November 2015, the appellant was apprehended while driving a motor vehicle while intoxicated. The appellant was charged with a range of offences under the *Traffic Act* (NT) (the Act), including driving an unregistered vehicle on a public street (section 33(1)), and driving a vehicle in relation to which a current compensation contribution had not been paid (section 34(1)). The appellant indicated that he would plead guilty to the offence of driving an unregistered motor vehicle, but contended that the offence of driving an uninsured vehicle was a 'similar offence' and thus entitled him to the defence under section 18(b) of the

Criminal Code (NT). The Local Court found the appellant guilty of these offences.

Issue: The issue for determination is whether the offence under section 33(1) of the Act is a 'similar offence', within the meaning of section 18 of the Criminal Code (NT), to the offence under section 34(1).

Held: The Court held that the offence under section 33(1) was not a 'similar offence' to the offence under section 34(1). While it may be accepted that the 2 offences shared common features, they nevertheless remained distinct and addressed separate obligations imposed under traffic laws for the protection of the community ([53]-[54]).

The fundamental principle is that a person cannot be prosecuted twice for the same criminal conduct ([16]). The double jeopardy doctrine has a number of different aspects with different operation, including the pleas of autrefois acquit and autrefois convict and the rule against double punishment ([17]). The availability of the pleas of autrefois acquit and autrefois convict will depend on a comparison between the elements of the two offences under consideration. It is insufficient that the two offences arise out of the same conduct, or out of a single event or connected series of events ([21]). The question is whether the elements of the offences charged are identical, or substantially the same in the sense that all the elements of one offence are wholly included in the other ([23]). The Court considered *Ashley v Marinov* [2007] NTCA 1, and adopted the principles expressed by the High Court in *Pearce v The Queen* [1998] HCA 57 where it was held that no double prosecution arises if the offences with which the accused was charged required proof of a fact which the other did not ([33]).

Note: This case is relevant in terms of domestic and family violence matters in the NT as it considers the law surrounding double punishment.

***Fernando v Firth* [2017] NTSC 67 (25 August 2017) – Northern Territory Supreme Court**

'Breach domestic violence order' – 'Particularise breach' – 'Post-separation violence' – 'Procedural fairness' – 'Threats'

Charges: Contravention of domestic violence order x 1; aggravated unlawful assault x 1.

Appeal type: Appeal against conviction.

Facts: The appellant and complainant were in a relationship for approximately 15 years. The offences

occurred after the relationship ended ([10]). The appellant allegedly threatened to kill the complainant if she found another partner ([11]). At trial, the prosecutor did not particularise the words spoken by the appellant ([7]). The appellant denied threatening to kill her, but admitted to threatening to punch the complainant if she came near him, and telling her to stay away from him. The Magistrate accepted the defendant's evidence, and convicted him of the charge on that basis ([32]).

Issues: Whether the verdict was unsafe and unsatisfactory.

Decision and Reasoning: The appeal was allowed. The Magistrate convicted the defendant based on his admissions, which evinced less serious conduct than the threats alleged by the prosecution ([49]). The charge required the complainant to have a 'reasonable apprehension of violence' ([50]). Since the prosecution did not specify the particular words used, held that the Magistrate did not accord the defendant procedural fairness by going outside the prosecution case ([49]).

***R v Grant* [2016] NTSC 54 (31 October 2016) – Northern Territory Supreme Court**

'Relationship evidence' – 'Tendency evidence' – 'Unlawfully causing harm' – 'Unlawfully causing serious harm'

Charge/s: Unlawfully causing serious harm or unlawfully causing harm.

Hearing: *Voir dire* hearing.

Facts: The accused was charged with the offence of unlawfully causing serious harm to his female partner, the complainant, or, in the alternative, unlawfully causing harm to the complainant. The Crown sought the admission of tendency evidence related to the following fact in issue: whether the accused applied physical violence to the complainant in the early morning of 26 January 2016 and/or caused injuries to the complainant. The tendency sought to be proved was the tendency of the accused:

(a) To act in a particular way, namely engaging in verbal abuse and physically violent behaviour towards the complainant; and/or

(b) To have a particular state of mind, namely a violent and controlling disposition towards the complainant which he sometimes acted upon when he had been consuming alcohol.

If the evidence (detailed at [5]) was not admissible as tendency evidence, the Crown sought to have it admitted as relationship evidence.

Decision and Reasoning: The rulings on the *voir dire* hearing were –

1. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible in the trial as tendency evidence (see [61]-[72]).

   In order to be admitted for tendency purposes, the evidence had to satisfy the requirements in ss 97 and 101 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA'). Two questions arose in determining the admissibility of the evidence: (1) did the evidence have significant probative value? The relevant test is whether 'the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in question': *CEG v The Queen* [2012] VSCA 55 (see [30]-[60]); (2) did the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused? As per the Court, '[t]he test of a danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of unfair prejudice by reason of the admission of the evidence' *R v Lisoff* [1999] NSWCCA 364.

2. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible as 'relationship' or 'context evidence' (see [73]-[82]).

   Evidence may also be admitted for non-tendency purposes. One example of non-tendency purpose is 'relationship' or 'context' evidence that is not relied on for a tendency inference. The High Court in *HML v The Queen* is authority for the proposition that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including the following purposes (see [75]):

   (a) as affecting the plausibility of other evidence or to assess the credibility and coherence of the complainant's evidence (at [6], [155]–[156]);

   (b) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]);

   (c) to overcome a false impression that the event was an isolated one, that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence (at [500], [513]);

(d) to ensure that the jury are not required to decide issues in a vacuum (at [428], [498]); and

(e) as negativing issues raised such as accident or mistake (at [430]).

Although *HML* was a case involving sexual offences, relationship evidence may also be admissible in cases involving violence, including assault-type offences (see examples at [76]).

The admissibility of relationship evidence is governed by the general test of relevance in s 55 of the ENULA and the directions and obligations contained in Part 3.11 (especially ss 135 and 137). The Crown contended that the evidence was relevant and admissible as relationship or context evidence because it was necessary to:

(a) Avoid the circumstances of the alleged offence appearing inexplicable or being misunderstood in isolation; see *Roach v The Queen* [2011] HCA 12 at [45]

(b) Negative the defence case of self-inflicted injury; *R v Quach* [2002] NSWCCA 519; (2002) 137 A Crim R 345 at [15], [22]-[45]; *Bryant v The Queen* [2011] NSWCCA 26 at [92]; *McDonald v The Queen* [2014] VSCA 80 at [28]- [29]

(c) Show the state of mind of the accused at the time of the alleged offence. *R v Atroushi* [2001] NSWCCA 406 at [33], [45], [47]; *Boney v The Queen* [2008] NSWCCA 165 at [29]

The relationship evidence here was both relevant ([79]-[80]) and not excluded (its probative value was neither outweighed by the danger of unfair prejudice to the accused nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused) ([81]-[82]).

***Houseman v Higgins* [2015] NTSC 88 (7 December 2015) – Northern Territory Supreme Court**

'Breach of domestic violence order' – 'Domestic violence order' – 'Formalities in making domestic violence order' – 'Service'

Charge: Breach of domestic violence order

Appeal type: Appeal against acquittal, validity of domestic violence order

Facts: The respondent was served with a police domestic violence order under s 41 of the *Domestic and Family Violence Act 2007* (NT) (the Act). The order set out the reasons for making the order and conditions of

full non-contact. However, it did not provide a specified period for which the order was in force. The Court of Summary Jurisdiction confirmed and varied the order to be in force for 12 months.

After being in contact with the protected person, the respondent was subsequently arrested for breaching the domestic violence order. However, at the time of arrest the respondent had not been served with the court confirmed and varied domestic violence order. The magistrate found the respondent was not guilty on the basis that the domestic violence order made by the police ceased to be in force once confirmed by the court and the respondent had not been served with the court order.

Issues:

- Whether the domestic violence order was invalid because it did not state the period the order was to be in force.
- If the order was valid, whether the magistrate erred in finding the respondent not guilty in failing to apply s 120(2)(b)(ii) of the Act.

Decision and Reasoning: The appeal was upheld.

- Southwood J found it is not necessary for police to state the duration of a domestic violence order for it to be valid. A police domestic violence order continues in force until it is revoked. Under s 27 of the Act a domestic violence order is in force for the period stated in it. This section does not state that an order cannot be made for an unspecified or unlimited period, nor does any other provision in the Act. Further, s 42 contained in Part 2.6 of the Act, provides the police must record the reasons for making the order and the time and place for its return. Again, this provision does not require police to specify the period for which the order is to be in force. The purpose of Part 2.6 is to protect the protected person until a court can consider the matter. Consistent with this purpose, a police domestic violence order is to remain in force until further order or until the order is revoked. This is made clear by s 82 of the Act which states that at a show cause hearing the court may either confirm the order with or without variations or revoke it.
- Given the order was valid, the respondent's conduct in contacting the protected person constituted a breach of both the domestic violence order made by the police and the confirmed and varied order made by the court under s 120(1) of the Act. The fact the respondent had not received a copy of the court order at the time of arrest was not a defence under s 120(2)(a) of the Act, as the police domestic violence order was still in force: s 120(2)(b)(ii) of the Act. Therefore, the charge should not have been dismissed

and the magistrate erred in dismissing the charge and in failing to consider s 120(2)(b)(ii) of the Act.

***Gorey v O'Neill* [2015] NTSC 66 (1 October 2015) – Northern Territory Supreme Court**

'Alcohol' – 'Breach of domestic violence order' – 'Deterrence' – 'History of abuse' – 'Manifestly excessive' – 'Purpose of domestic violence order' – 'Sentencing' – 'Situational breach'

Charge: Breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order restraining him from, among other conditions, approaching, contacting or remaining in the company of his wife (the victim) when consuming or under the influence of alcohol. On the day of offending, the appellant had been drinking and travelled in the car with the victim. His blood alcohol level was 0.05 per cent. The appellant claimed he was in the car with the victim to attend to matters in the administration of the estate of the victim's father-in-law. He also denied knowing that the domestic violence order was still in force. In relation to this conduct the appellant was charged, pleaded guilty and convicted of breaching the domestic violence order.

The appellant had an extensive offending history, including 16 convictions for aggravated assault, one conviction for causing grievous bodily harm and eight convictions for breaching domestic violence orders. Of these, 22 of the offences were committed against the victim. The magistrate considered this history of domestic violence offending and the need for specific deterrence together with the mitigating factor that the victim suffered no harm. The appellant was sentenced to three months imprisonment, taking into account a discount of 25 per cent for the early guilty plea.

Issue: Whether the sentence was manifestly excessive in the circumstances.

Decision and reasoning: The appeal was dismissed.

While a starting point of four months imprisonment seemed high for a 'situational breach' in which no harm was caused, it was necessary to consider the preventative and protective role of domestic violence orders. Barr J noted that 'Given the preventative purpose of DVO, the fact that the parties may have been drinking while sitting down 'in a good way', or that the offender has on the particular occasion not been aggressive or threatening or violent to the protected person, does not necessarily result in a lenient sentencing outcome for

a recidivist offender' ([28]). The appellant's criminal history demonstrated that while no harm resulted from the breach, there was a real risk that physical or emotional injury could occur and protection was needed to prevent such harm. Further, it established that he had a 'continuing attitude of disobedience of the law' ([33]). Therefore, the magistrate's starting point of four months imprisonment, while on the high end of the range for the nature of the breach, was not outside the bounds of sentencing discretion.

***R v Stevenson* [2015] NTSC – Sentencing Remarks 21353266 (Kelly J) (14 September 2015) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Alcohol' – 'Community protection' – 'Deterrence' – 'Domestic violence order' – 'History of abuse' – 'Manslaughter' – 'Murder' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Sentencing'

Charge: Murder (sentenced for manslaughter)

Proceeding: Sentencing

Facts: The defendant was charged with the murder of his wife (the victim) after hitting her with a crate twice, kicking her in the back, and subsequently bashing her for three hours then leaving her on the sidewalk. The next morning the defendant went to find the victim to discover she was dead. This occurred after the defendant and the victim had a fight over his drinking habits. He was intoxicated at the time the assaults occurred. A domestic violence order was previously made against the defendant in order to prevent him from being with, assaulting or threatening the victim. The Crown accepted the defendant's guilty plea to manslaughter on the basis that intention to kill or cause serious harm could not be proved beyond reasonable doubt due to the defendant's intoxication at the time of the violent assaults.

Issue: What sentence should the defendant receive?

Decision and Reasoning: The defendant was sentenced to 14 years imprisonment with a non-parole period of 8 years.

The defendant had a history of domestic violence assaults against his wife. He had previously been convicted of three aggravated assault offences and one breach of a domestic violence order offence. Kelly J noted that each assault followed a similar pattern, with an argument resulting in the defendant 'savagely' bashing his wife. These attacks always involved alcohol and usually involved a weapon. These convictions meant the

defendant was not a person of good character and was not entitled to a lighter sentence for being a first offender.

The defendant is a Walpiri man who speaks Walpiri and some Gurindji. He left school in year 9 and speaks English but cannot read or write. The defendant has not worked since his first wife committed suicide in 2002. He began drinking as a teenager and was drinking heavily at the time of the offence.

In providing her reasoning for sentencing, Kelly J highlighted the prominence of alcohol related violence in the Northern Territory: 'Drunken violence is far too common in our community. It is particularly common, unfortunately, in Aboriginal communities and vulnerable Aboriginal women, vulnerable people of all kinds, deserve the fullest protection that the law can give them.' The need to punish and for specific deterrence to prevent the defendant from reoffending, as well as the need to protect the community and other women from being hurt by the defendant, were emphasised. There were also a number of aggravating factors that made the offending more serious. The defendant used several weapons when attacking his wife, rather than just losing his temper and lashing out. He also went looking for his wife, having pre-planned the attack, and did not stop bashing her even when she begged him to.

In the factually similar case of *R v Wheeler* [2005] NTSC – Sentencing Remarks 20505473 (Southwood J), the defendant (Mr Wheeler) received a sentence of 10 years and 6 months imprisonment. However, Kelly J found the defendant's conduct in the present case was more serious. Unlike Mr Wheeler, he was not provoked by his wife, showed no remorse after he finished bashing her, and did nothing to help her. He also only pleaded guilty after a preliminary hearing had already occurred with 36 witnesses, whereas Mr Wheeler pleaded guilty immediately. These circumstances taken together resulted in Kelly J finding a proper sentence of 16 years imprisonment. A reduction of about 12 percent was given as a result of the guilty plea.

***Mamarika v Rourke* [2015] NTSC 42 (23 July 2015) – Northern Territory Supreme Court**

'Aggravated assault' – 'Alcohol' – 'Deterrence' – 'History of abuse' – 'Physical violence and harm' – 'Pregnant victim' – 'Sentencing' – 'Totality'

Charge: Aggravated assault

Appeal Type: Appeal against sentence

Facts: The appellant, who was intoxicated at the time, pushed and punched his pregnant wife (the victim) in

the stomach and head. After handing himself into police, he pleaded guilty to unlawfully assaulting the victim with the aggravation of male-on-female assault (under s 188(2)(b) *Criminal Code 1983* (NT)). When asked why he assaulted the victim he said it was because his wife told him to stop drinking. The appellant was initially convicted and sentenced to a term of 10 months imprisonment, to be served cumulatively upon a restored sentence of seven months for previous offending including assaulting the same victim. This earlier assault involved the appellant striking the victim with a sword, then punching and kicking her.

In sentencing, the magistrate emphasised that the victim was pregnant at the time the assault occurred: 'Women of course deserve to be safe whether they are in Darwin, whether they are at home, and they do not deserve to be treated in this way, particularly – and it is an aggravating factor – when she was 28 weeks pregnant.' (at [7]). A reduction to the sentence was given when considering the principle of totality and the presence of the appellant's guilty plea.

Issues:

- Whether the magistrate erred in failing to properly give effect to the principle of totality.
- Whether the sentence imposed was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

- The appellant argued that the magistrate did not assess the overall sentence and consider whether any further adjustment was warranted, as required by *Mill v R* [1988] HCA 70. That is, she did not make the sentence concurrent or partially concurrent with the restored sentence. Rather, the magistrate applied the principle of totality by reducing the sentence for the fresh offending. Barr J rejected this argument in finding the magistrate clearly stated she had applied the principle of totality and whilst the method was not preferable, it was nonetheless appropriate.
- In determining whether the sentence was manifestly excessive, Barr J considered the previous offending of the appellant. In addition to a significant number of property offences, he had been convicted five times for aggravated assault and once for a breach of a domestic violence order. When considering this history of offending and the present assault, the objectives of denunciation, punishment, general deterrence and specific deterrence were relevant to the sentencing of the appellant. Barr J found when taking all these factors into consideration and characterising the offending as 'mid range' (at [16]), the appropriate starting point was 18 months. A discount of one third for the guilty plea, as given by the Magistrate, was justified in the circumstances, resulting in a sentence of 12 months. When applying the

principle of totality to this sentence, there was some basis for concurrency of three months. This hypothetical sentencing exercise resulted in a total effective sentence of 16 months. Therefore, the sentence of 10 months imprisonment was not manifestly excessive in its own right or when fully accumulated with the restored sentence of seven months imprisonment.

***Namundja v Schaefe-Lee* [2015] NTSC 36 (12 June 2015) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault' – 'Alcohol' – 'Breach of alcohol protection order' – 'Deterrence' – 'History of abuse' – 'Mitigating factors' – 'Non-parole period' – 'Physical violence and harm' – 'Rehabilitation' – 'Repeat offender'

Charges: Aggravated assault, breach of alcohol protection order

Appeal type: Appeal against sentence

Facts: The appellant, who was intoxicated at the time, had an argument with his wife (the victim). He subsequently dragged the victim outside, punched her in the face multiple times, shoved her into a shelf and punched her twice in the stomach. He was charged and pleaded guilty to one count of aggravated assault under s 188(2)(b) *Criminal Code 1983* (NT) (victim suffered harm and male-on-female assault) and one count of breaching a police issued Alcohol Protection Order. The appellant had a number of previous convictions, including three counts of aggravated assault against the victim, four counts of breach of a domestic violence order and nine counts of breaching an Alcohol Protection Order. He resided in Oenpelli and had been an artist member of Injalak Arts for around 20 years. This job would continue on the appellant's release. His counsel argued his prospects of rehabilitation would be improved if he participated in the Family Violence Program. At trial, the magistrate relied on the seriousness of the offending and his past history to conclude the appellant needed to be specifically deterred, despite any positive attributes, and the community needed to know such conduct is unacceptable. The appellant was sentenced to 12 months imprisonment after a reduction of four months for pleading guilty. A non-parole period was not fixed due to the seriousness of the offending and continued ongoing breaches of court orders.

Issues: Some issues on appeal were whether the magistrate:

- Failed to adequately consider the appellant's prospects of rehabilitation;
- Failed to adequately consider the principles outlined in *Dinsdale v R* [2000] HCA 54 that all relevant

sentencing considerations must be reconsidered in determining whether to suspend a sentence; and

- Failed to adequately consider the sentencing disposition of parole.

Decision and Reasoning: The appeal was upheld on ground 3. Grounds 1 and 2 were dismissed.

Blokland J began by noting that 'Offending of this kind, men assaulting their wives or partners, is an intractable problem in the Northern Territory. With few exceptions, imprisonment is often the appropriate punishment… In most cases, particularly with respect to repeat offenders, positive subjective features generally need to be very carefully balanced as rarely will they outweigh the significance of the gravity of offending of this kind.' ([19])

- The fact the magistrate did not specifically refer to the appellant's job history and prospective employment did not mean that he failed to adequately consider these factors. Given the severity of the offending, previous convictions, the need to protect the victim and the prevalence of domestic violence in the particular case, such factors would not have resulted in a lesser sentence.
- While the magistrate did not explain every consideration taken, he was entitled to refuse a suspended sentence due to the appellant's poor history of complying with orders.
- There was no sufficient basis to decline to set a non-parole period in accordance with s 54(1) of the *Sentencing Act 1995* (NT). Under s 53(1), a court must set a non-parole period in cases of imprisonment for 12 months or more 'unless it considers the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such period inappropriate'. The magistrate failed to consider these factors, basing his decision primarily on the previous breaches of orders. Therefore, this ground of appeal succeeded and a non-parole period of 8 months was ordered.

***Orsto v Grotherr* [2015] NTSC 18 (31 March 2015) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault' – 'Character' – 'Exceptional circumstances' – 'Exposing children' – 'Mandatory minimum sentence' – 'Sentencing' – 'Victim'

Charge: Aggravated assault

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order that restrained her from harming the victim. On the day of offending, the appellant and the victim got in an argument after the victim returned home from

work for lunch against the appellant's wishes. The appellant was upset that the victim woke up their daughter. She then forcefully struck the victim's head. In relation to this conduct the appellant was charged, pleaded guilty and convicted of aggravated assault, with the circumstance of aggravation that the victim suffered harm. The victim had a prior conviction for aggravated assault (weapon-harm) in respect to the same victim. In his victim impact statement, the victim said he did not wish the appellant serve gaol time, as she was pregnant. A character reference was also provided by aboriginal community members that outlined the appellant's positive characteristics as a mother who had suffered hardship throughout her life. The magistrate heard the appellant had previously been the victim of domestic violence in the relationship and grew up in a household with her parents who had domestic violence issues.

Section 78D of the *Sentencing Act 1995* (NT) requires a mandatory minimum sentence of three months actual imprisonment for aggravated assault, unless exceptional circumstances exist under s 78DI. The appellant's counsel submitted exceptional circumstances existed on the facts. These circumstances were constituted by a combination of factors including that the victim did not wish the victim to go to gaol; the appellant had sought counselling; she was suffering hardship having attempted suicide the previous year and losing a child two months prior to sentencing; she had previously been the victim of domestic violence herself; and she had ongoing employment within the community. After determining these factors did not amount to exceptional circumstances, the magistrate sentenced the appellant to three months imprisonment.

Issue: Whether the magistrate erred in finding the circumstances of the case were not exceptional for the purposes of s 78DI.

Decision and reasoning: The appeal was allowed and the appellant was resentenced.

Referring to the obiter comments made in *R v Duncan* [2015] NTCCA 2, Blokland J stated that exceptional circumstances do not exist unless the minimum term is greater than the term that would ordinarily be imposed ([37]). This was the case on the facts, as the magistrate noted he would have suspended the sentence but for the mandatory prescribed minimum. In determining whether exceptional circumstances exist, the court must consider the whole of the circumstances in the case. The individual factors do not need to be exceptional. Rather, the factors considered together must amount to exceptional circumstances.

The magistrate erred in his consideration of whether exceptional circumstances existed. The remarks were 'unnecessarily constrained' and the magistrate failed to consider a number of mitigating factors. In support of the magistrate's reasoning, Blokland J emphasised the need for general and specific deterrence given the

offence occurred in the vicinity of a young child. Further, the victim's wish that the appellant not be imprisoned has little weight in domestic violence cases. The fact the victim was previously a victim of domestic violence herself without additional information about the duration and extent of the abuse also carried little weight towards exceptional circumstances existing. However, Blokland J concluded that the appellant's personal circumstances of having just lost a child at the time of sentencing and attempting suicide the year prior made the case exceptional. These personal circumstances were such that being away from family and community support whilst grieving meant imprisonment would be more burdensome on the appellant than other offenders. The sentence was quashed, and the appellant was resentenced to three months imprisonment wholly suspended with an operational period of six months.

***Kassman v Dwyer & Anor* [2014] NTSC 60 (10 December 2014) – Northern Territory Supreme Court**

'Domestic violence order' – 'Procedural fairness'

Procedure: Making of domestic violence order

Appeal type: Appeal against imposition of domestic violence order

Facts: The plaintiff, an Aboriginal Community Police Officer, was in a relationship with the victim. The victim made a number of allegations of domestic violence. As a result, a police domestic violence order was imposed against the plaintiff pursuant to s 41 of the *Domestic and Family Violence Act 2007* (NT). In relation to this order, the plaintiff received a notice ordering him to appear before the court on 8 August 2014 to show cause as to why the order should not be confirmed. After the victim expressed an intention to leave Darwin, the plaintiff was informed that the order would stay in force to 'keep the peace' and would be revoked once the victim moved. The victim informed the plaintiff she would be leaving Darwin on 13 August 2014. As a result of this and advice given by the officer who made the police order, the plaintiff did not attend court on 8 August 2014 as required. The magistrate refused a short adjournment to enable the legal counsel to obtain further information to explain the absence of the plaintiff and confirmed the order for 12 months.

Issue: Was the plaintiff denied natural justice?

Decision and reasoning: Through the 'unfortunate combination of events' the plaintiff was denied natural justice. His superiors in the Police Force left him with the understanding that he was not required to attend court on 8 August 2014. As a result, the plaintiff was not given the opportunity to show cause as to why the order should not be confirmed. The magistrate confirmed the order without providing reasons for refusing the

adjournment or confirming the order for 12 months. Additionally, the magistrate failed to provide the plaintiff the opportunity to make submissions, contrary to s 82(2) *Domestic and Family Violence Act 2007* (NT). The decision was set aside and the matter was remitted to the Court of Summary Jurisdiction for determination.

***R v Ashley* [2014] NTSC 26 (15 July 2014) – Northern Territory Supreme Court**

'Admissibility of evidence' – 'Hearsay' – 'Jury' – 'Murder' – 'Presumption of innocence'

Charge: Murder

Proceeding: Reasons for rulings given during trial as to admissibility of evidence, discharge of jury member

Facts: The accused was charged with murdering his ex-partner. He denied any involvement with her death and told police he believed another man or bikies associated with him likely murdered the victim. During the course of the trial, several witnesses were asked what they knew of the other man and his association with the victim and the accused. The prosecution sought to partially exclude evidence of three witnesses about what the accused had told them about people, including the other man, behaving suspiciously around him.

During the trial Blokland J received a note from a juror that alleged three of the other jurors considered the accused guilty until convinced otherwise (*Ashley v R* [2016] NTCCA 2, [10]). The accused's Counsel requested the jury be discharged.

Issues:

- Was the evidence of the three witnesses admissible?
- Should the jury be discharged because of the juror's note?

Decision and reasoning:

- The evidence of the three witnesses was hearsay. However, it was admissible as the exception in s 66 of the *Evidence (National Uniform Legislation) Act 2011* (NT) applied. While an accused is not competent to give evidence as a witness for the prosecution, they are 'available' for the purposes of s 66 to give evidence in their own case. However, subsequent to this ruling during the trial the accused's Counsel advised the court that the accused would not give evidence. Therefore, the jury were directed to disregard the evidence initially admitted under s 66.
- Blokland J refused to discharge the jury and rather provided directions to the jury reminding them of the

presumption of innocence, the need to remain impartial and the duty to keep an open mind when hearing the evidence.

NB: The ruling not to discharge the jury was held to be an error on appeal in *Ashley v R* [2016] NTCCA 2. The conviction was quashed and a retrial was ordered.

***R v Ashley* [2014] NTSC 15 (10 July 2014) – Northern Territory Supreme Court**

'Admissibility of evidence' – 'Hearsay' – 'Motive' – 'Murder'

Charge: Murder

Proceeding: Pre-trial rulings on evidence

Facts: The accused was charged with murdering his ex-partner with whom he had two children. The prosecution sought to adduce evidence relating to the state of the accused and victim's relationship from the time of separation until the victim's death. The prosecution was attempting to argue that motive could be inferred from the nature of the relationship between the parties contained within such evidence. Some of this evidence comprised hearsay representations made by the victim to other witnesses.

Issue: Whether the evidence relating to the accused and victim's relationship was admissible.

Decision and reasoning: Evidence as to the state of the relationship is admissible if it is relevant to the accused's anger towards the victim by the use of controlling behaviours and frustration directed towards the victim. This kind of evidence is relevant at common law and within the meaning of s 55 of the *Evidence (National Uniform Legislation) Act 2011* (NT) as evidence that could rationally affect the assessment of a fact in issue. However, hearsay evidence can only be admitted under s 67 if the representations made by the deceased occurred when or shortly after the asserted fact occurred in circumstances where it was unlikely to be fabricated (s 65(2)(b)), or if it is highly probable the representations were reliable (s 65(2)(c)).

Blokland J considered whether 31 pieces of hearsay evidence were admissible. The evidence included representations made by the victim to police officers prior to her murder, to the practitioner for the Department of Children and Families who was managing the case, and to her daughter. The representations related to the accused's physical or emotional control over the victim and his history of assaulting her.

One item considered was a statement the victim made to the police describing an assault by the accused.

Representations contained within this statement regarding the assault and the accused taking the victim's car keys were admitted. Text messages and statements regarding the accused's threat to kill himself were also admitted. However, a statement made by their son was not admitted, as it was not a representation made by the victim as required by s 65. The statement also contained representations about the accused visiting the victim's brother's house and allegations that the accused was violent towards his daughter. These representations were also not admitted as evidence as their probative value outweighed the danger of prejudice against the accused.

Some other representations that were not admitted included those made to the case management practitioner that the victim attempted to leave the accused but he would not let her; that the accused was not physically but emotionally abusive towards the victim; and that the accused was harassing the victim at her brother's house.

Note: Subsequent to this ruling, the accused stood trial and was found guilty of murder. Blokland J provided additional reasoning on two procedural matters that arose during the trial in *R v Ashley* [2014] NTSC 26. The accused subsequently successfully appealed the conviction in *Ashley v R* [2016] NTCCA 2 on procedural grounds amounting to a miscarriage of justice. The conviction was quashed and a retrial ordered.

***Manakgu v Russell* [2013] NTSC 48 (14 August 2013) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Alcohol' – 'Breach of domestic violence order' – 'Manifestly excessive' – 'Sentencing' – 'Situational breach'

Charge: Breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order in favour of his wife (the protected person) that restrained him from 'approaching, entering or remaining in the company of the protected person when consuming alcohol… or when under the influence of alcohol'. After attending the Gunbalunya Sports and Social Club and drinking 13 cans of beer, the appellant went to the protected person's home. He was arrested and pleaded guilty to breaching the domestic violence order, which had been in force for nine months. The order had been complied with for the previous nine months, but the appellant had been in prison for five of them. The appellant had two prior convictions for breach of domestic violence orders. In considering this repeat offending and history of failing to comply with orders, the magistrate sentenced the appellant to 3

months imprisonment.

Issue: Whether the sentence imposed was manifestly excessive in all of the circumstances?

Decision and Reasoning: The appeal was allowed. Barr J observed: 'Generally speaking, a breach where harm or fear of harm is caused to the protected person is worse than a merely 'situational' breach. The appellant's breach was a low order 'situational' breach. No harm or fear of harm was caused' ([16]). Barr J noted that in general, 'the more egregious the conduct in terms of causing harm or fear of harm to the protected person, the greater the probable degree of contempt for the court's order or orders' ([17]). On the facts, the magistrate erred in assessing the appellant's conduct as more than a 'minor case'. While some actual imprisonment was justified for reasons of specific and general deterrence, the offending was at the low end of the scale of seriousness at [23]. The sentence of three months' imprisonment was quashed, and a sentence of 15 days' imprisonment was imposed.

***JCM v LJN* [2013] NTSC 50 (13 August 2013) – Northern Territory Supreme Court**

'Both parties in vulnerable situation' – 'Domestic violence order conditions' – 'Fresh evidence' – 'Myths and misunderstanding - not leaving violence' – 'People with mental illness' – 'Variation of domestic violence order' – 'Victim'

Appeal type: Variation of domestic violence order

Facts: A domestic violence order was taken out by police in favour of the appellant and her daughter (the protected persons). The order restrained the respondent from approaching, contacting or remaining in the company of the appellant or any place she was living, working, staying, visiting or is located. All parties consented to vary this non-contact order to a non-violence order restraining the respondent from 'causing harm or attempting or threatening to cause harm to the protected persons; causing or attempting to cause damage to the property of the protected persons; and intimidating or harassing or verbally abusing the protected persons' ([3]). At hearing, the Court of Summary Jurisdiction refused to grant the variation.

The respondent subsequently presented fresh evidence in support of the variation from a non-contact to a non-violence domestic violence order. The appellant and her daughter briefly moved to a shelter after the domestic violence order was originally taken out. They then moved back into their home, leaving the respondent to move out in order to comply with the non-contact order. This was against the wishes of the appellant and their child, who wanted to continue living with the respondent. With nowhere else to stay, the

respondent slept in his car while continuing to support the appellant and their child financially. He was unable to access tools needed for his work that were left in the house. The respondent suffered from a mental illness and had commenced treatment with the support of the appellant. In the circumstances, the police were satisfied a non-violence order was appropriate.

Issues: One relevant issue concerned whether the Court of Summary Jurisdiction failed to properly consider and give due weight to the matters to be considered in making a domestic violence order under s 19(2)(e) of the *Domestic and Family Violence Act 2007* (NT).

Decision and reasoning: The appeal was allowed.

The appellant's wish to remain in a relationship with the respondent is not in itself enough to grant a variation of the domestic violence order. Blokland J noted that 'the desire to stay in the relationship may be an indication of ongoing dependence, violence or intimation' ([9]). However, this factor had to be considered in combination with the fact the original order was made on incomplete information, the respondent had not been in breach of a domestic violence order for five years, and the fresh evidence established that the non-contact order placed the appellant, the respondent and their child in vulnerable situations. While this was a situation where there was a need for a domestic violence order, a non-violence order would be more effective than a non-contact order and would continue to provide protection for the appellant and their daughter. The non-violence order would likely result in the respondent continuing treatment for his mental illness and taking further responsibility, thereby supporting protection in the context of an ongoing family relationship.

Watson v Chambers **[2013] NTSC 7 (12 February 2013) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault' – 'Breach of domestic violence order' – 'Cumulative sentences' – 'Double jeopardy' – 'People living in regional, rural and remote communities' – 'Perpetrator intervention program' – 'Physical violence and harm' – 'Sentencing' – 'Totality'

Charges: Breach of domestic violence order (two counts), aggravated assault

Appeal type: Appeal against sentence

Facts: The appellant and the victim were in a relationship and resided together in the remote town of Maningrida. A domestic violence order was in place to protect the victim from the appellant harassing, threatening or verbally abusing her or assaulting or threatening to assault her. One afternoon the victim left

their house when the appellant became angry and demanded she stay, saying 'Don't you move, I'm going to get a hammer and smash you in the arm' (count 2). Several days later the appellant accused the victim of having an affair. He subsequently struck her in the arm with a metal cup, grabbed her hair and dragged her to their room where he threw her on the ground, punched her twice in the face and struck her with a steel mop handle (counts 4 and 6). In relation to this conduct, the appellant was charged and convicted of two counts of contravening a domestic violence order (counts 2 and 4) and one count of aggravated assault with the circumstances of aggravation under s 188(2)(b) *Criminal Code 1983* (NT) that the victim suffered harm, it was a male-on-female offence and the victim was threatened with a weapon (count 6). The effective head sentence imposed by the magistrate was 11 months' imprisonment to be suspended after the service of 6 months' imprisonment, subject to the appellant completing the Indigenous Family Violence Offender Program (IFVOP). This head sentence comprised of:

- Count 2: two months' imprisonment
- Count 6: six months' imprisonment cumulative on the sentence imposed on count 2
- Count 4: three months' imprisonment cumulative on the sentence imposed on count 6

The magistrate initially made the sentence on count 4 concurrent with count 6, making the effective sentence 8 months imprisonment. However, this was adjusted as a result of s 121(7) of the *Domestic and Family Violence Act 2007* (NT) and the effective sentence was increased to 11 months.

Issues: Some grounds of appeal were whether the magistrate:

- Erred by finding the appellant guilty on count 4 and count 6 on the same facts; and
- Erred in her application of the totality principle.

Decision and reasoning: The appeal was allowed on both grounds and the appellant was resentenced.

- Counts 4 and 6 referred to the same incident. Citing *Ashley v Marinov* [2007] NTCA 1, Blokland J noted that where the facts of the breach of the domestic violence order were the same or similar to the facts constituting the assault, the two findings cannot stand. To do so would violate the principle against double jeopardy. The conduct of the appellant in accusing the victim of having an affair did not constitute 'harassing, threatening or verbally abusing' as provided in the domestic violence order. The conduct was not particularised at trial and the magistrate erred in convicting the appellant on count 4. Blokland J ordered the quashing of the conviction and sentence in respect to count 4.
- Blokland J agreed with Barr J's remarks in *Idai v Malogorski* [2011] NTSC 102 in finding that the

mandatory accumulation of sentences does not displace the principle of totality. The conduct that constituted counts 4 and 6 was a continuation of the offending of count 2. Therefore, while the sentences had to be accumulated, there should have been an adjustment to the individual sentences when the magistrate made the correction.

The appellant was resentenced to 14 days' imprisonment on count 2 and 6 months' imprisonment on count 6. The total effective term of imprisonment of 6 months and 14 days was suspended after the service of five months and one week imprisonment. The condition of the appellant completing the IFVOP was upheld.

Palmer-Peckham v Westphal **[2012] NTSC 74 (28 September 2012) – Northern Territory Supreme Court**

'Alcohol' – 'Breach of domestic violence order' – 'Following, harassing, monitoring' – 'Manifestly excessive' – 'Sentencing'

Charge: Breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant and victim had previously been in a relationship. The appellant was the subject of a domestic violence order that restrained him from harassing or harming the victim and approaching, entering or remaining in her company or in her place of residence or work when under the influence of alcohol or another intoxicating substance. After consuming alcohol one day, the appellant went to the victim's mother's house where she was living at the time. The victim was not home. He returned later that afternoon after consuming more alcohol. When the victim arrived home, the appellant allegedly assaulted her. However, there was not enough evidence to conclude this beyond reasonable doubt. In relation to this conduct the appellant was charged, pleaded guilty and was convicted of breaching the domestic violence order. The magistrate sentenced the appellant to two months' imprisonment, suspended immediately with an operation period of 12 months.

In sentencing, the magistrate noted that the appellant had breached the domestic violence order in three respects and considered the conduct as the upper end of offending. However, the appellant had no substantial offending history and entered his guilty plea early. The magistrate accepted that while the appellant had a problem with alcohol, he had work available and had good prospects of rehabilitation. He considered the starting point of six months' imprisonment, reduced to two months' imprisonment wholly suspended when considering the mitigating and aggravating factors.

Issues: Whether the sentence imposed was manifestly excessive.

Decision and reasoning: The appeal was allowed and the appellant was resentenced.

Olsson AJ considered the general approach adopted by the magistrate in order to promote general deterrence was reasonable. However, the magistrate's starting point of six months' imprisonment was very high for a first conviction when considering the victim suffered no physical or lasting emotional harm. It is not clear from the magistrate's sentencing remarks how he arrived at the ultimate reduction from six to two months' imprisonment. A reduction of 30 per cent was given for the timely plea. Beyond this, the magistrate only noted the appellant's character and prospects for rehabilitation for the further reduction. Accordingly, the sentence was so excessive as to manifest error on the part of the magistrate. Olsson AJ resentenced the appellant to 21 days' imprisonment, suspended immediately with an operation period of 12 months.

***Blitner v Vanzella* [2012] NTSC 72 (26 September 2012) – Northern Territory Supreme Court**

'Breach of domestic violence order' – 'Lapse of domestic violence order'

Charge: Breach of domestic violence order

Appeal type: Appeal against conviction

Facts: The appellant was the subject of a police domestic violence order that restrained him from approaching, contacting or remaining in the company of the protected person when consuming alcohol or under the influence of alcohol. Subsequently, the Court of Summary Jurisdiction made restraining orders against the appellant. These orders did not include any 'non-intoxication conditions'. Four days after the restraining orders were made, the Court of Summary Jurisdiction allowed the police domestic violence order to lapse. The appellant was subsequently charged with breaching this order. He pleaded guilty to these offences and was convicted and fined.

Issue: Whether the police domestic violence order was in force and capable of being breached.

Decision and reasoning: The appeal was allowed and the conviction and sentence was quashed.

Under s 82 of the *Domestic and Family Violence Act 2007* (NT) the court must either confirm or revoke a police domestic violence order. The magistrate's order to allow the police domestic violence order to lapse

was an effective revocation under s 82. As a result, the appellant was not restrained by a domestic violence order from being or remaining in the company of the protected person when consuming alcohol or being under the influence of alcohol. Therefore, he could not be in breach of the revoked police domestic violence order.

***Carne v Wride; Carne v Nicholas* [2012] NTSC 33 (15 May 2012) – Northern Territory Supreme Court**

'Aggravated assault' – 'Breach of domestic violence order' – 'Cumulative sentences' – 'Emotional abuse' – 'Exposing children' – 'Physical violence and harm' – 'Sentencing'

Charges: Breach of domestic violence order, aggravated assault

Appeal type: Appeal against sentence

Facts: The appellant and the victim were in an 'on again off again' relationship for approximately 18 years and had four children together. One evening the appellant went to the victim's house where all four children were residing. The appellant threw the television over the balcony and forcibly took a ring off the victim's finger. The appellant was charged with aggravated assault and a domestic violence order was made restraining him from contacting, approaching, intimidating or harassing the victim and exposing the children to domestic violence. Nine days later the appellant phoned the victim and visited her at the house. When she refused to let him in, the appellant unsuccessfully attempted to hang himself from the veranda. This was witnessed by his 14 year old son. In relation to this conduct the appellant was charged and pleaded guilty to breaching the domestic violence order.

The two charges were sentenced together. After stating the need for general and specific deterrence in the circumstances, the magistrate sentenced the appellant to eight months' imprisonment for breaching the domestic violence order and two months' imprisonment for the aggravated assault. The sentences were to be served cumulatively, suspended after six months on conditions including supervision, counselling and abstinence from alcohol and drugs.

Issues: Some of the grounds of appeal included:

- Whether the magistrate had regard to irrelevant facts and circumstances in accepting the attempted suicide was within the definition of domestic violence;
- Whether the magistrate erred in cumulating the sentences; and

- Whether the sentences imposed were manifestly excessive.

Decision and reasoning: The appeal was allowed on grounds 1 and 3. The appellant was resentenced.

- Under s 5 *Domestic and Family Violence Act 2007* (NT) domestic violence includes causing harm and intimidation. Further, s 6 defines intimidation to include any conduct that has the effect of unreasonably controlling or causing mental harm. It is probable that the appellant's son suffered psychological harm as a result of witnessing his father attempting to hang himself and having to cut him down. However, no evidence was adduced to establish mental harm was actually suffered. In the absence of such evidence, Kelly J found it was not open to the magistrate to be satisfied beyond reasonable doubt that the attempted suicide was conduct that caused mental harm to the son in order to amount to domestic violence under s 6(1)(c). It was also not open to the magistrate to conclude the appellant attempted to cause mental harm under s 5(f). There was insufficient evidence to prove beyond reasonable doubt the attempted suicide was aimed at the victim and her children.
- As a general rule, cumulative penalties should not be imposed when a number of offences arise from substantially the same conduct or a series of occurrences. The appellant's two offences of aggravated assault and breach of the domestic violence orders did not arise out of such a closely related series of events. Rather, the conduct constituting the separate offences occurred on different days and were totally different acts. Therefore, the magistrate did not err in ordering the sentences to be served cumulatively rather than concurrently.
- As ground 1 of the appeal was successful, the only actions by the appellant that constituted the breach of the domestic violence order were the conduct of phoning the victim and visiting her home. In these circumstances, the sentence of eight months' imprisonment was manifestly excessive. Kelly J set aside the sentence and imposed a sentence of imprisonment for one month for the breach of the domestic violence order. The sentence was to be served cumulatively on the aggravated assault sentence, suspended after one month.

***Idai v Malogorski* [2011] NTSC 102 (14 December 2011) – Northern Territory Supreme Court**

'Aggravated assault' – 'Breach of domestic violence order' – 'Concurrent sentences' – 'Drugs' – 'Emotional and psychological abuse' – 'Manifestly excessive' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Sentencing' – 'Totality'

Charges: Breach of domestic violence order (two counts), aggravated assault (two counts), administration of a dangerous drug (cannabis)

Appeal type: Appeal against sentence

Facts: The appellant and the victim had been in a relationship for three to four years. After self-administering cannabis one afternoon (count 2), the appellant became abusive and called the victim a slut (count 4). Early the next morning the victim locked herself in the bathroom to get away from the appellant. In response, the appellant banged and kicked the door, demanding the victim come out (count 5). When she did the appellant threw the contents of a bong and a flour tin over her (count 1). Later that day the appellant shouted at the victim, grabbed her chin and squeezed her cheeks to force her to face him (count 3). In relation to this conduct, the appellant was charged and convicted of two counts of contravening a domestic violence order (counts 4 and 5), two counts of aggravated male-on-female assault (counts 1 and 3) and one count of administering a dangerous drug (count 2). The effective head sentence imposed by the magistrate was 15 months' imprisonment with a non-parole period of 10 months. This head sentence comprised of:

- Count 4: five months' imprisonment
- Count 5: five months' imprisonment cumulative on the sentence imposed on count 4
- Count 1: five months' imprisonment cumulative on the sentence imposed on count 5
- Count 3: five months' imprisonment concurrent with the sentence imposed on count 1
- Count 2: $200 fine

Issues:

- Whether the magistrate erred in the application of the totality principle.
- Whether the sentence imposed was manifestly excessive in relation to counts 4 and 5.

Decision and reasoning: The appeal was allowed on ground 2 and the appellant was resentenced.

- The conduct that constituted the breaches of the domestic violence order (counts 4 and 5) occurred very closely together in time. They could be seen as facets of the one course of conduct leading up to the aggravated assaults that occurred later that day (counts 1 and 3). Therefore, the sentences imposed for counts 4 and 5 would ordinarily have been made concurrent or substantially so under the general principle of totality. However, in a process of statutory interpretation, Barr J found s 121(7) of the *Domestic and Family Violence Act 2007* (NT) requires the court to order the term of imprisonment for a

domestic violence order offence to be served cumulatively on any other sentence. Therefore, the magistrate did not err in ordering that the sentences on both the domestic violence order offences (counts 4 and 5) had to be cumulative on one another and on the sentences on the aggravated assault offences (counts 1 and 3).

- The magistrate allowed a discount of 25 per cent for the appellant's guilty pleas, suggesting a point for each offence of approximately seven months imprisonment. Considering the offending was at the lower end of the scale, the individual sentences were manifestly excessive. Barr J found an appropriate starting point for each domestic violence offence (counts 4 and 5) was a sentence of four months, reduced to three months allowing for a 25 per cent discount for the guilty pleas. Each domestic violence order sentence (counts 4 and 5) should further be reduced to two months' imprisonment, applying the principle of totality. Barr J ordered the appellant be resentenced on counts 4 and 5 to:
- Count 4: two months' imprisonment
- Count 5: two months' imprisonment cumulative on the sentence imposed on count 4

The effective head sentence for all counts was therefore nine months' imprisonment.

***Malogorski v Peart* [2011] NTSC 86 (21 October 2011) – Northern Territory Supreme Court**

'Breach of domestic violence order' – 'External orders' – 'Registration of interstate domestic violence order' – 'Statutory interpretation'

Charge: Breach of domestic violence order

Proceeding: Question of law under s 96 *Domestic and Family Violence Act 2007* (NT)

Facts: The defendant was the subject of an interim violence restraining order made under the *Restraining Orders Act 1997* (WA) (the WA Act). The interim order was registered as an external order in the Northern Territory pursuant to the procedures in Chapter 3 of the *Domestic and Family Violence Act 2007* (NT) (the NT Act). Subsequently the interim order was made into a final order in Western Australia, however this was never registered in the Northern Territory. The defendant came into contact with the protected person in the Northern Territory, in breach of the external order. At trial, it was argued that there was no case to answer because the interim order made in Western Australia had ceased to be in force once the final order was made. Therefore, the interim order was also no longer registered in the Northern Territory as an external order under s 96 and could not be enforced.

Issue: Whether an interim order under the WA Act continues to be 'in force' within the meaning of s 96 of the NT Act after the interim order is made final.

Decision and reasoning: Kelly J answered the question in the negative.

Under the WA Act, an interim order remains in force until one of the specified events in s 16(4) occurs, including when a final order comes into force. Section 96 of the NT Act provides that an external order is registered 'for the period during which it is in force'. Therefore, on the date of the alleged offence the interim order was not 'in force' in WA; accordingly, there was no external order enforceable under the NT Act.

***Bonney v Thompson* [2011] NTSC 81 (7 October 2011) – Northern Territory Supreme Court**

'Emotional and psychological abuse' – 'Exposing children' – 'Extension of domestic violence order' – 'History of abuse'

Appeal type: Appeal against refusal to extend domestic violence order

Facts: The respondent, the appellant's ex-partner, was the subject of a non-contact domestic violence order. The order was initially to be in force for 12 months, but the appellant applied for the order to be extended for a further two years. This application was dismissed. In deciding whether to grant the extension, the magistrate refused to consider the past history of domestic violence. The magistrate did not consider that a history of domestic violence is sufficient for the court to continue an order.

The magistrate also refused to have regard to events that occurred after the making of the original order. The appellant alleged the respondent had approached her daughter, asked for money and threatened to hit her. The magistrate concluded this threat was not relevant because it related to 'a different adult, not in the company of the complainant, not living with the complainant' ([22]). The respondent also told his and the appellant's children to tell the appellant that it was dangerous staying in town, and that she was 'looking for trouble by living in town'.

Issue: Some of the grounds of appeal included whether the magistrate erred in:

- Finding that previous evidence of violence is insufficient to extend an order; and
- Failing to have regard to statement made to the appellant's family members in considering the reasonable fear of the appellant.

Decision and reasoning: The appeal was allowed and the domestic violence order was extended.

- The magistrate erred in failing to consider the history of domestic violence that led to making the original domestic violence order. In failing to do so, the magistrate made an error of law in failing to take into account relevant facts as required by s 53 and s 19(2)(d) of the *Domestic and Family Violence Act 2007* (NT). The question is whether the court is satisfied that there are reasonable grounds for the protected person to fear domestic violence. This question may be satisfied based solely on past conduct of domestic violence: 'To hold that an application to extend a DVO could never be granted solely on evidence of past domestic violence occurring before the date of the original order, would be tantamount to saying that a DVO can never be extended unless it has been breached.' ([19)].
- The magistrate also erred in failing to take into account the evidence of threats made by the respondent to the appellant's daughter and their children. The threat to the appellant's daughter was relevant to show the defendant had not reformed and was still prone to threats of violence. Further, the remarks to the children taken in context with the past history of domestic violence support that the appellant had reasonable grounds to fear the commission of domestic violence against her.

***Parnell v Verity* [2011] NTSC 47 (24 June 2011) – Northern Territory Supreme Court**

'Assaulting police' – 'Resisting arrest'

Charge: Resisting arrest, Assaulting police in the execution of duty

Appeal type: Appeal against conviction

Facts: After speaking with the victim, two police officers decided there were grounds to order a police domestic violence order against the appellant. When driving to the station, they saw the appellant outside his mother's house. After failed attempts to communicate with the appellant, one of the police officers drew his taser, but did not point it at the appellant. After the appellant was notified of his arrest for the purposes of making a domestic violence order against him, he was handcuffed. He then became aggressive, screaming to his mother for help and alleging the police were assaulting him. The appellant attempted to kick one of the police officers. As a result, the officer put his foot on the appellant's leg. The appellant screamed out in pain and his family started to approach the officers aggressively. One officer again drew his taser and pointed it at the family and the other officer took out his pepper spray. The appellant then kicked one officer in the shin, who then pepper sprayed the appellant.

In relation to this conduct, the appellant was convicted of resisting arrest and unlawfully assaulting a police officer in the execution of his duty with the circumstance of aggravation that the police officer suffered harm.

Issues:

- Whether the magistrate's findings of guilt were unsafe and unsatisfactory;
- Whether the magistrate made findings of fact that were not reasonably open on the evidence; and
- Whether the magistrate erred in the interpretation of s 84(1) of the *Domestic and Family Violence Act (2007)* NT.

Decision and reasoning: The appeal was allowed and the appellant was acquitted of both charges. In order for the police to remove and detain a person under s 84 of the Act there must be a reasonable belief that there are grounds for making a domestic violence order and it is necessary to remove the person to prevent an imminent risk of harm to another. There was no evidence before the magistrate of 'domestic violence' defined by s 5 of the Act. Therefore, the magistrate erred in finding the police officers had a reasonable belief that grounds existed for making a domestic violence order against the appellant. Further, there was no evidence that the appellant was likely to harm anyone as required by s 84(1)(a)(ii) of the Act. Therefore, the police officers did not have the power to arrest the appellant in order to impose the domestic violence order. The arrest was unlawful and the appellant was justified in resisting arrest and acted in self-defence when kicking the police officer.

***Semkin v Verity* [2011] NTSC 12 (15 February 2011) – Northern Territory Supreme Court**

'Appeal against sentence' – 'Breach of domestic violence order' – 'Deterrence' – 'History of abuse' – 'Manifestly excessive' – 'Physical violence and harm' – 'Sentencing' – 'Totality'

Charges: Breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order to protect his former partner (the victim). While serving a sentence of imprisonment for previous offences committed against the victim, the appellant breached the domestic violence order by sending the victim a letter. The content of the letter included apologising for his actions and for harming the victim. When asked why he sent the letter, the appellant

replied ‘Broken heart, saying sorry and all that’ and that he was not aware it was a contravention of the domestic violence order. The appellant was convicted and sentenced to three months’ imprisonment to commence at the end of his prior sentence.

The full no-contact domestic violence order was initially ordered after the appellant entered the victim’s house, removed all her clothes and burned them in the garden while she was not home. Following this, the appellant breached the order by texting the victim 17 times. The messages included threatening the victim, threatening self-harm and declaring his ‘undying love’. As a result of this conduct, the appellant was fined $750 and placed on a good behaviour bond. Sometime after recommencing their relationship, the appellant went to the victim’s workplace with two knives and a hammer and subsequently chased, punched and kicked the victim and threatened to kill her. The appellant was charged and convicted of aggravated assault, for which he was serving a term of imprisonment at the time of the current offending.

Issues:

- Whether the sentence was manifestly excessive.
- Whether the magistrate erred in applying the principle of totality.

Decision and reasoning: The appeal was dismissed.

- Riley CJ rejected the argument that the appellant’s moral culpability was reduced because he claimed to be unaware that sending the letter was a breach of the domestic violence order. He had repeatedly breached the domestic violence order, on one occasion for sending text messages to the victim. Therefore, he should have known the conditions of the order and that sending a letter constituted a breach of it. The fact that his offending occurred while in custody for another offence against the victim was an aggravating factor. While the appellant had made efforts to rehabilitate whilst in prison, the need for personal deterrence was still a significant factor in sentencing considering his history of offending. When considering these circumstances as a whole, the sentence imposed was not manifestly excessive.
- The magistrate did not err in applying the principle of totality. The current offending was not part of a course of offending. Sending the letter in breach of the domestic violence order was a separate incident to the aggravated assault that the appellant was in custody for. Therefore, the current offending required a separate sentence and the magistrate did not err in ordering the sentence to be served cumulatively.

***Atkinson v Eaton* [2010] NTSC 72 (17 December 2010) – Northern Territory Supreme Court**

'Alcohol' – 'Breach of domestic violence order' – 'Breach of good behaviour bond' – 'Deterrence' – 'Manifestly excessive' – 'Sentencing' – 'Totality'

Charges: Breach of domestic violence order, breach of good behaviour bond, resisting arrest

Appeal type: Appeal against sentence

Facts: The appellant and the victim were in a de facto relationship and resided together with their child and two children from the victim's previous relationships. The appellant was the subject of a good behaviour bond with a condition that he not approach the victim when consuming or under the influence of alcohol. He was also the subject of a domestic violence order that restrained the appellant from approaching, contacting or remaining in the company of the victim or her three children (the protected persons) when consuming or under the influence of alcohol or another intoxicating drug or substance.

On the day of offending, the appellant consumed alcohol whilst in the presence of all four of the protected persons. The appellant resisted arrest and attempted to escape custody. After he was arrested the police determined his blood alcohol level was 0.172 per cent. When asked his reasons for breaching the domestic violence order, the appellant replied 'it was her choice'. In relation to this conduct the appellant was charged, pleaded guilty and convicted of one count of breaching the good behaviour bond, one count of breaching the domestic violence order and one count of resisting arrest. The magistrate sentenced the appellant to 21 days' imprisonment, 21 days' imprisonment and seven days' imprisonment, respectively. All sentences were ordered to be served concurrently, with the total effective sentence of 21 days' imprisonment.

The appellant had previously breached the good behaviour bond and received a warning. He had also been convicted of breaching the domestic violence order, assault and aggravated assault.

Issue: Whether the sentences imposed were manifestly excessive in all the circumstances.

Decision and reasoning: The appeal was allowed and the appellant was resentenced.

The magistrate erred in imposing a term of imprisonment for the breach of the good behaviour bond. Although there had been two breaches of the bond, Blokland J held that without knowing additional information on the initial breach that received a warning, imprisonment could not be justified for the breach in question. The sentence of 21 days' imprisonment was therefore manifestly excessive and ordered to be set aside.

The magistrate also erred in imposing a term of 21 days' imprisonment for the breach of the domestic violence order. Blokland J recognised that this was the appellant's second breach of the domestic violence order. However, although the protected persons were placed in fear, no harm resulted from the breach. Therefore, the sentence was manifestly excessive.

The appellant was re-sentenced to seven days' imprisonment for the breach of the domestic violence order and seven days' imprisonment for resisting arrest to be served concurrently. When considering the circumstances of the offence, a short term of imprisonment was justified under s 121 *Domestic and Family Violence Act 2007* (NT). Blokland J emphasised the appellant's blood alcohol reading was significant and whilst he pleaded guilty, it was not an immediate plea ([25]). Blokland J refused to suspend the sentence when considering the appellant's history of offending and the need for personal deterrence. No further sentence was imposed for breach of the good behaviour bond, as the breach occurred out of the same conduct as the breach of domestic violence order.

***Walker v Verity* [2010] NTSC 68 (7 December 2010) – Northern Territory Supreme Court**

'Alcohol' – 'Breach of domestic violence order' – 'Deterrence' – 'Emotional abuse' – 'Exposing children' – 'Manifestly excessive' – 'Multiple breach charges' – 'Physical violence and harm' – 'Sentencing' – 'Threat to kill' – 'Victim' – 'Victim impact statement'

Charges: Breach of domestic violence order (6 counts), threatening to kill with intent to cause fear, resisting arrest, unlawfully assault of a police officer in the execution of duty, behaving in a disorderly manner, unlawfully possessing cannabis

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order in force to protect his daughter (the victim). The order restricted the appellant, among other conditions, from approaching, contacting or remaining in the company of the victim or at any place where the victim resided, worked or stayed while consuming or under the influence of alcohol or another intoxicating drug or substance. After consuming alcohol one day, the appellant sent a text to the victim (charge 1). He then resent this message four times before going to the victim's home (charge 2). The victim was not home, but the appellant waited several hours for her to return (charge 3). After the victim left her home, the appellant rang the victim and swore at her (charge 4). The appellant eventually left the victim's home after being asked several times only to return several hours later.

The appellant then scratched the victim's face (charge 5) and said 'I love you, but I want to kill you' (charge 6). He subsequently called her again and blamed the victim for his arrest (charge 8). Charge 7 was not referred to or specified.

In relation to this conduct the appellant was charged and convicted of (inter alia) 6 counts of breaching a domestic violence order (charges 1-5, 8) and threatening to kill with intent to cause fear (charge 6), resisting arrest, unlawfully assaulting a police officer in the execution of duty, behaving in a disorderly manner, and unlawfully possessing cannabis. The appellant was sentenced on charges 1 to 4, to a fine of $1000; on charges 5 and 8, to 12 weeks' imprisonment; and on charge 6, to 12 weeks' imprisonment, each to be served concurrently with the aggregate sentence on charges 5 and 8.

In the victim impact statement, the victim explained the physical and emotional injuries she suffered as a result of her father's domestic violence ([27]). However, the victim expressed her wish that the appellant be ordered into rehabilitation rather than sentenced to imprisonment. The magistrate did not mention this wish of the victim in his sentencing remarks.

Issues:

- Whether the magistrate erred in failing to take into account the victim's wishes as expressed in the victim impact statement; and
- Whether the sentences imposed for charges 5, 6 and 8 were manifestly excessive.

Decision and reasoning: The appeal was dismissed.

- The magistrate did not err by merely failing to expressly refer to the victim impact statement. The magistrate was informed that the appellant had previously unsuccessfully attempted rehabilitation in the only two rehabilitation programs available to non-Indigenous males in the Northern Territory. Further, the victim's wishes for the appellant not to be imprisoned should not have carried great weight when considering the aggravating factor of the appellant's extensive offending history, and the need for specific and general deterrence. Barr J concluded that in domestic violence cases, the importance of general deterrence likely overrides any forgiveness on the part of the victim ([40-41]).
- The effective sentence of 12 weeks' imprisonment for charges 5, 6 and 8 was not manifestly excessive in the circumstances. The magistrate was entitled to regard charges 5, 6 and 8 as serious. Further, the magistrate gave due consideration to the appellant's previous history of offending, including a previous threat to kill, offences of physical violence, and numerous breaches of domestic violence orders. The

appellant established no error by the magistrate in sentencing, nor that theeffective sentence was manifestly excessive. Therefore, both grounds failed and the appeal was dismissed.

***AB v Northern Territory of Australia* [2010] NTSC 8 (18 March 2010) – Northern Territory Supreme Court**

'Aggravated assault' – 'Compensation to victim' – 'History of abuse' – 'Physical violence and harm' – 'Rape' – 'Unlawfully causing serious harm'

Charges: Aggravated assault, unlawfully causing serious harm, rape

Appeal type: Appeal against amount of compensation ordered for victim

Facts: The appellant and the offender were living together in a domestic relationship. On the first occasion, the offender assaulted the appellant with a curtain rod, causing severe lacerations to her head, arms and body, substantial blood loss, broken teeth, and swelling and bruising to her face and lower back. In relation to this conduct, the offender was charged with aggravated assault. The appellant was again assaulted by the offender several weeks later, resulting in a fractured clavicle. The pattern of assaults continued when approximately three months later the offender followed the victim home, dragged her outside, bashed her with a stick and fists, verbally abused her and raped her twice. As a result, the victim suffered extensive injuries to her face and scalp, a fractured jaw and bruises all over her body. The offender was found guilty of unlawfully causing serious harm to the victim and two counts of sexual intercourse without consent.

The victim made an application for compensation under the *Victims of Crime Assistance Act 2006* (NT) (the Act) and was awarded $35,000 for the compensable violent act, as determined by an assessor. She subsequently appealed to the Local Court on the basis that the compensation awarded was inadequate when considering the injuries suffered. It was argued that the respondent erred in considering the three incidents constituted a single violent act and in failing to assess her psychological injuries. Alternatively, it was argued that the respondent erred in determining the award quantum under Schedule 3, Part 1(c) of the Act.

Issue: Several questions of law were reserved for the Supreme Court including:

- Were the criminal acts committed against the appellant on the three separate days a single violent act for the purposes of s 5 of the Act?
- Does s 25 of the Act prevent the appellant from obtaining an assessment for psychological injury?

Decision and reasoning: Kelly J first detailed the operation of the Act and its application to victims of domestic violence ([9]-[44]).

- Kelly J answered this question in the negative. Section 5(4) of the Act provides that a series of related criminal acts constitutes a single violent act. Whether the three assaults constituted a series of related criminal acts depended on whether they could be said to 'occur over a period of time' under s 5(3)(b(ii). For this to be the case, the criminal acts must have been continuing in the sense of forming a single episode of offending. The assaults committed by Mr Barnes occurred months apart and each resulted in separate injuries. Therefore, the three sets of criminal acts were not committed 'over a period of time' within the meaning of s 5(3)(b)(ii).
- Nothing in s 25 prevents the appellant from obtaining compensation for psychological or psychiatric injury suffered as a result of the assaults. The first two assaults are not 'compensable violent acts' within the Act however the appellant is entitled to claim an award for the 'compensable injuries' suffered as a result of those acts. As these offences are not included in Schedule 2 to the Regulations, she could only include a psychological or psychiatric injury as one of the three compensable injuries under Regulation 18 *Victims of Crime Assistance Regulations* (NT) if the recognisable psychological or psychiatric disorder was severely disabling (Reg 15(2)). The third incident involving raping the appellant is a compensable violent act and therefore she could apply for an award for the assault per se (s 10(4)(a)(i)) or an award for compensable injuries suffered as a result of the violent act. The appellant chose to do the latter, and therefore the assessor was obliged to take into account all of her injuries including any psychological or psychiatric disorders that resulted from the attack as part of the common law assessment of damages.

***Midjumbani v Moore* [2009] NTSC 27 (26 June 2009) – Northern Territory Supreme Court**

'Breach of domestic violence order' – 'Domestic violence order' – 'Emotional and psychological abuse' – 'Gender of offender' – 'Manifestly excessive' – 'Sentencing'

Charge: Breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order that restrained her from contacting or approaching her former partner (the victim) directly or indirectly while intoxicated, among other restrictions.

On the day of offending, the appellant went to the victim's home while intoxicated, verbally abused him and threatened to arrange for the victim to be harmed and killed. Approximately two hours later, the appellant returned and threatened that her family would kill the victim. She then picked up a large rock causing the victim to retreat back inside his home. In relation to this conduct the appellant was charged, pleaded guilty and convicted of two counts of breaching a domestic violence order. She was sentenced to seven days' imprisonment on each charge, to be served concurrently.

The appellant had previously been convicted of breaching a domestic violence order, possession of cannabis, and two offences involving being armed with an offensive weapon. In support of the appellant, it was submitted she occasionally cared for the victim who was suffering from cancer, she entered an early plea of guilty and she had shown remorse.

Issues: The grounds of appeal were:

- The magistrate erred in interpreting s 121(3) of the *Domestic and Family Violence Act 2007* (NT) and failed to consider whether 'particular circumstances' existed under s 121(3)(b);
- The sentence was manifestly excessive; and
- The magistrate failed to properly consider the gender of the appellant.

Decision and reasoning: The appeal was dismissed.

- Section 121 of the Act must be read altogether. Subject to s 121(3), a court must record a conviction and sentence a person to at least seven days' imprisonment if that person has previously been found guilty of breaching a domestic violence order. This mandatory minimum sentence will always apply unless no harm has been caused to the victim: s 121(3)(a). If harm is not caused, the court must consider the particular circumstances of the offence to determine if it is appropriate to record a conviction and sentence the person to at least seven days' imprisonment: s 121(3)(b). The magistrate did not err in its interpretation or application of this provision.
- The magistrate did not err in sentencing the appellant in accordance with s 121 of the Act. However, Riley J noted that even if he did find error he would not have interfered with the sentence imposed. The sentence of seven days to be served concurrently for each breach of the domestic violence order was appropriate. The appellant failed to establish that the magistrate erred in sentencing or that the sentences imposed were manifestly excessive.
- The appellant submitted that the magistrate failed to properly consider her gender as a female. Riley J

did not accept that the gender of the offender is a relevant matter that should have been taken into consideration by the magistrate.

***Norris v Sanderson* [2007] NTSC 1 (12 January 2007) – Northern Territory Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle in relation to sentencing.

'Breach of domestic violence order' – 'Emotional abuse' – 'Manifestly excessive' – 'Offending while on bail' – 'Sentencing' – 'Unlawful damage'

Charges: Unlawful damage, breach of domestic violence order

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order to protect his girlfriend (the victim) made under the repealed *Domestic Violence Act 1992* (NT). He had a history of repeatedly breaching domestic violence orders both in relation to the victim and a previous girlfriend. The offending subject to the appeal was constituted by a series of events. On the first occasion the appellant went to visit the victim. In an attempt to prevent him from entering, the victim locked the door. As a result, the appellant punched the front window causing it to shatter and kicked the security door (count 1). A few days later the appellant telephoned the victim and then approached her at a nightclub (counts 2 and 3). He was subsequently arrested and granted bail. While on bail he again breached the domestic violence order by driving with the victim (count 4). He was arrested and remanded in custody only to be released on bail again. One month later he drove to the victim's house, entered her front yard and yelled and swore at the victim (count 5). In relation to this conduct, the appellant was charged and convicted of one count of unlawful damage (count 1) and four counts of breaching a domestic violence order (counts 2-5). The effective sentence imposed by the magistrate was 140 days' imprisonment, of which 70 days' were suspended upon conditions providing for supervision. This comprised of:

- Count 1: 60 days' imprisonment
- Counts 2 and 3: 30 days' imprisonment, 20 days to be concurrent on the sentenced imposed on count 1
- Count 4: 30 days' imprisonment cumulative upon counts 1-3, wholly suspended on commencement
- Count 5: 40 days' imprisonment cumulative upon counts 1-3, wholly suspended on commencement

Issue: Whether the sentence was manifestly excessive.

Decision and reasoning: The appeal was dismissed. The magistrate did not err in his considerations and the sentence imposed was open to him to make.

The offending in relation to count 1 was made more serious when considering the surrounding circumstances of the offending. The appellant's response to being locked out by the victim was an 'immediate, frightening and explosive outburst of violence' ([19]). While the appellant did not have any prior convictions for unlawful damage, he had several convictions for offences of violence and it was the violent nature of this conduct that made the offending so serious in the circumstances.

In relation to the breaches of the domestic violence order, the submission that the magistrate placed too much weight on the appellant's criminal history was rejected. The prior convictions provided context for the offending and highlighted the culpability of the appellant. The appellant's counsel also submitted the appellant had good prospects of rehabilitating when considering, amongst other factors, his youth, willingness to undertake counselling, good employment record and the ongoing support of the victim. While the magistrate regarded the appellant's chances of rehabilitation with caution, he nonetheless considered these relevant factors and did not err in doing so.

The sentence was not manifestly excessive. The appellant had a total of 11 prior convictions for failing to comply with a domestic violence order and one prior conviction of aggravated assault. Despite this history, he continued to act in defiance of the orders with full awareness of the consequences. This conflicts with the objective that victims 'have confidence that restraining orders made are backed by penalties that will be applied in the event of a breach' ([33]). In the circumstances of this prior offending, a period of imprisonment was reasonable to deter the appellant and others from committing such offences.

***Hales v Stevens* [2000] NTSC 97 (14 December 2000) – Northern Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault' – 'Deterrence' – 'Intermediate sentence' – 'Manifestly inadequate' – 'Perpetrator intervention program' – 'Physical violence and harm' – 'Remorse' – 'Sentencing'

Charge: Aggravated assault

Appeal type: Crown appeal against sentence

Facts: The respondent and the victim had previously been in a relationship. After the relationship ended, the respondent visited the victim's home where he punched her in the head 10 times, kicked her in the ribs and chest several times and pushed her head into the floor. After the victim temporarily escaped to another room, the respondent struck her again several times and subsequently attempted to strangle her, placing one hand around her throat and the other over her mouth and nose. The attack lasted for approximately 20 minutes and involved about 30 punches. At the time of the offending, the respondent was on bail. In relation to this conduct the respondent was convicted of aggravated assault under s 188(2)(b) *Criminal Code 1983* (NT), with the circumstances of aggravation that the victim suffered harm, the assault was of male-on-female, and the victim was under the age of 16 years old.

The magistrate, in taking a 'rehabilitative course' ([5]), sentenced the respondent to 12 months' imprisonment suspended the day after imprisonment commenced for 3 years. The release of the respondent was subject to conditions including that he obey the directions of the Director of Correctional Services for 12 months, that he reside at the Council for Aboriginal Alcohol Program Services and complete the Indigenous Family Violence Program, that he then live with the Salvation Army in Darwin and complete the Bridge program, and that for a period of 12 months he supply urine or blood samples to be tested for drugs.

Issue: Whether the sentence was manifestly inadequate.

Decision and reasoning: The appeal was allowed and the appellant was resentenced.

The circumstances of the offence were very serious and resulted in severe physical and psychological harm to the victim. This was further aggravated by the fact the offending occurred while the respondent was on bail in relation to another assault.

The magistrate's consideration of the respondent's chances of rehabilitation and personal hardships was appropriate in the circumstances. The respondent had been attending alcohol and drug education programs and had enrolled in the Indigenous Family Violence Program. According to the magistrate, this was the first step along the road to rehabilitation.

However, the magistrate did not expressly address the issue of deterrence that ought to have been afforded significant weight in sentencing. Despite the guilty plea, there was no indication of remorse with the respondent telling his psychologist he believed he 'had a degree of legitimacy' ([22]) for his actions. Therefore, Riley J considered there was a need for specific deterrence. In addition there was a need for general deterrence: 'Men in the position of the respondent should be aware that if they resort to violence upon

another… in all but the most exceptional case that will be met with a period of actual imprisonment ([24]).' While the magistrate impliedly considered specific deterrence with rehabilitation, there was no consideration of general deterrence during sentencing. The magistrate's main focus was to provide the respondent every opportunity to be rehabilitated. Riley J concluded that the magistrate erred in neglecting to consider the need for general deterrence and the respondent's lack of remorse.

The sentence of 12 months' imprisonment was not in itself manifestly inadequate. However, it was manifestly inadequate to suspend the sentence from one day after commencing imprisonment. In the circumstance, a term of actual imprisonment was required. Riley J resentenced the respondent to 12 months' imprisonment to be suspended after 3 months. The respondent's release was subject to several conditions, including accepting supervision and obeying reasonable directions of the Director of Correctional Services as to reporting, residence, employment and counselling for a period of 12 months and completing the Bridge program with the Salvation Army.

Coroners Court

Inquest into the Death of HD **(Name Suppressed) [2021] NTLC 029 – Northern Territory Coroners Court**

'Coercive control' – 'Controlling and/or jealous behaviour' – 'Controlling, jealous, obsessive behaviours by the perpetrator' – 'Coroner's inquest' – 'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Following, harassing and monitoring' – 'Past domestic and family violence' – 'People affected by substance misuse' – 'People with children' – 'People with mental illness' – 'Physical violence and harm' – 'Post-traumatic stress disorder' – 'Protection order' – 'Social abuse' – 'Systems abuse' – 'Victims as (alleged) perpetrators' – 'Weapons and threats to kill'

Proceedings: Coroner's Inquest.

Facts: An inquest was conducted into the death of a 38-year-old woman, whose partner was a police officer. NT Police did not declare a crime scene in relation to the victim's death as they believed the cause of her death to be an overdose: [92]. However, there was a significant history of domestic violence, which justified further investigation. The coroner concluded that the cause of death was not substance abuse but a subdural haemorrhage that had begun bleeding three to five days prior to her death, which requires some form of trauma, likely a hit to the head: [66]–[67]. In the five years prior, seventeen complaints had been made to the police of domestic disturbances and violence in her relationship: [8].

The victim had previously been a police officer: [3]. During her relationship with another police officer, she went into labour at 21.5 weeks gestation and her baby passed away, leading to post-traumatic stress-disorder that was never resolved: [5]. After she conceived again, she became dependent on alcohol due to this PTSD: [6]. Due to her alcohol dependence, she was subsequently dismissed as a police officer: [7].

The seventeen reported instances of domestic violence demonstrate a pattern of coercive control by the police officer: [70]. His abuse of the victim was both psychological and physical. Physical violence and domestic disturbances were reported by doctors ([9], [39]), neighbours ([14]–[15], [21], [31]), the victim herself ([16],[36]), rehabilitation providers and services ([18], [37]), bystanders ([23]) and police officers ([32]), as well as the victim's cousin ([11]), friend ([13]) and coworkers ([48], [53]). These reports included explicit reports of physical violence against the victim: [13], [14], [18], [29], [31], [32], [40], [49]. Co-workers reported to police that the partner had threatened to kill the victim with a knife: [49].

In one of the earliest instances of reported abuse, a protection order was issued against the victim for the

protection of her partner and children. No protection order was taken out to protect the victim: [11]. The victim repeatedly refused to give statements or pursue action against her partner: [10], [18], [2]. She repeatedly went back and forth in relation to statements, downplaying previous reports of violence or reneging on them: [19], [22], [36]. She would refuse to explain injuries or would explain them using a fall: [29], [30], [32], [36]. She sought a protection order application but decided not to proceed within a month of initiating that request: [16]–[17]. One aspect of this was that she thought police would do nothing because her partner is a police officer: [51].

The victim's partner used the victim's alcoholism as a reason for justifying coercion. He provided stories to the police that focused on her intoxication and that explained his violence using narratives that put the blame on the victim such as using a narrative of self-defence: [14], [19], [42]. He tracked the victim's social media accounts and sought to control her through constant messaging: [70]–[71]. He repeatedly stalked her and tried to follow her when she attempted to leave him, for example, when she was visiting her father and also when she was at work: [51]. The victim's partner also used systems abuse against her. For example, he took her to the police station and demanded that she be breached for being intoxicated. At this time she had a wound to the left side of her forehead that was not noted as a potential domestic violence risk: [28].

Decision and Reasoning: The Coroner found that the cause of the victim's death was 'subdural haemmorhage in the context of chronic alcoholism due to post traumatic stress disorder after the death of her first-born child': [94]. He referred his belief that offences may have been committed in connection with the death: [99].

The Coroner also made four recommendations to improve the handling of domestic violence involving police officers: that the Assistant Commissioner responsible for the Domestic and Family Violence Unit oversee all complaints of domestic violence involving police officers ([95]), that processes and procedures be implemented to allow investigating officers to have access to all relevant history and prior matters in relation to investigation of domestic violence ([96]), that all police officers have training and information available to them allowing in the identification of 'red flags' for coercive control' ([97]) and that a risk assessment tool be developed to identify physical and non-physical aspects of domestic and family violence ([98]).

The following extract provides an example of the way in which the deceased's vulnerabilities were used by the partner to justify his controlling behaviour:

> [70] HD's partner was from time to time said to be manipulative and controlling. When questioned about

his controlling ways he generally indicated that HD was an alcoholic and he needed to know where she was to either stop her drinking or so as to assist her when she was intoxicated. It appeared to explain his tracking her phone. Her alcoholism was provided as the reason he removed her from the house or used force to keep her there. The same might be said when he escorted her to the police station and asked that her bail be breached for drinking. Perhaps it might be seen in his insistence that he pick her up from work or when he intercepted her at the bus stop.

[71] It is difficult however to see her alcoholism as the reason for him reading her texts and having access to her social media accounts. There are instances where he attempted to warn off a person he thought she was having an affair with using her own Messenger account. It also doesn't explain the constant messaging and telephone calls when she was with her father in Queensland. It appears they were more to do with his belief that she may be talking to another male.

Civil and Administrative Tribunal

***Inkamala v An Assessor under s 24 of the Victims of Crime Act* [2022] NTCAT 20 (8 December 2022) – Northern Territory Civil and Administrative Tribunal**

'Battered woman syndrome' – 'Coercive control' – 'Complex post traumatic stress disorder' – 'Consultant psychiatrist evidence' – 'Contributory negligence' – 'Financial assistance' – 'Learned helplessness' – 'People with mental illness' – 'Physical violence' – 'Post traumatic stress disorder' – 'Victims of crime'

Matter: Application for review of a decision to award the applicant financial assistance of $13,170.99 under the Victims of Crime Assistance Act 2006 (NT) arising from injuries sustained by the applicant as a result of violent acts committed by her sometime domestic partner.

Facts: The applicant is a Western Arrarnta woman who is a "deeply traumatised survivor of sustained, repeated and brutal intimate partner violence" which resulted in two children (now teenagers) and numerous incidents of violence resulting in medical or hospital treatment, numerous protection orders to protect the applicant from the offender and numerous sentences of imprisonment imposed on the offender. Many of the documented offences occurred when either or both of the offender and applicant were intoxicated. In 2010 the applicant was awarded $18,750 for physical injuries (partial loss of vision, fractured forearm, scarring to the right arm) caused by the offender between 2006 and 2009.

A second application was received on 18 December 2014 in relation to physical injuries from assaults by the offender on about 3 occasions, which was amended on 15 January 2015 to include a claim for psychological or psychiatric injuries. The claim took seven years to process, and the offender continued to assault the applicant causing the claim to continue to increase. A consultant psychiatrist provided reports and it was not in dispute that the applicant has sustained a Complex Post Traumatic Stress Disorder (CPTSD) and a Major Depressive Disorder "as a direct result of domestic violence perpetrated buy the offender between 2006 and 2020", attributing 30 per cent of the CPTSD to the assaults between 2006 and 2009 and 70 per cent to the assaults between 2009 and 2020 [12]. The initial assessment awarded the applicant $13,170.99, with the amount awarded for her physical and psychological injuries reduced by 50 per cent due to the applicant's contribution to the injuries.

Grounds:

1. The initial assessment of $35,000 for psychiatric or psychological disorder is inadequate;

2. the award of $110.99 for financial loss is inadequate; and

3. the reduction of 50% of the compensation for injuries is excessive.

Decision and reasoning:

1. The decision of the respondent to award the applicant $13,170.99 be set aside.

2. An award of $21,006.99 to the applicant be substituted.

[63] The Victorian Court of Appeal has recently described battered wife syndrome as “a learned helplessness process in which women who have been abused repeatedly within a relationship they believe they cannot escape from, learn ‘good coping skills as a trade-off for escape.’

Battered woman syndrome is a subset of PTSD. The label “battered wife syndrome” has not been applied to the applicant in this case. However, in my view the evidence supports a finding that the applicant, who has sustained CPTSD as a result of violence perpetrated against her by a coercively controlling partner over many years, is likely a person whose behaviour in repeatedly returning to live with the offender is in large part due to learned helplessness. Accordingly, this case is to be distinguished on its facts from Lankin v Northern Territory of Australia [(Local Court of the Northern Territory, unreported case number 21337307, 1 September 2015].

[64] In her written submissions on behalf of the respondent and the intervener, Ms Thompson submits that the applicant “willingly recommenced her relationship with the offender at various times”. I reject that submission. I am satisfied that the applicant recommenced her relationship with the offender reluctantly and unwillingly, and that her decisions to do so were to a significant extent a consequence of the psychological injury the offender had inflicted on her.

[65] In my opinion, a reduction of 50% of the award to which the applicant is entitled would be unfair and inequitable. The offender and the applicant are not equally culpable or responsible for the injuries she sustained. I consider that the applicant’s behaviour in resuming her relationship with the victim and engaging in the harmful consumption of liquor contributed indirectly to her injuries. In my view, a fair and equitable apportionment of responsibility for the applicant’s injuries is to attribute the offender’s responsibility as being 80%, and the applicant’s as 20%. I find accordingly.”

Queensland

Court of Appeal

***R v FBC* [2023] QCA 74 (24 April 2023) – Queensland Court of Appeal**

'Children' – 'Exposing children to domestic and family violence' – 'Firearm' – 'Manifest excess' – 'Physical abuse' – 'Protection order' – 'Separation' – 'Sexual abuse' – 'Strangulation' – 'Suicide threat' – 'Threats to children' – 'Threats to kill' – 'Weapons'

Charges: 3x common assault, 2x wilful damage, 1x strangulation in domestic setting, 2 x assault occasioning bodily harm, 1x rape, 3x dangerous conduct using a weapon (all domestic violence offences except 1 x assault occasioning bodily harm).

Proceedings: Appeal against sentence.

Grounds: The sentence was manifestly excessive.

Facts: The applicant was sentenced to nine years imprisonment for rape and lesser concurrent periods of imprisonment for the remaining charges, being eligible for parole after serving 6 years. The applicant contended that the sentence was manifestly excessive.

The majority of the offending was committed against the applicant's former partner over a 2.5-year period. During the relationship, the complainant had taken out protection orders against the applicant and he had been physically abusive, including incidents where he placed her in a headlock, choked her and punched her in the face.

The complainant left the family home after discovering that the applicant had been unfaithful. Following this, there was an incident where the applicant came to the complainant's home and violently anally raped her, causing injury. Several months later the complainant asked the police to conduct a welfare check on the applicant. He then came to her house with a gun, aiming it at their two young children and threatening to shoot her, the children and himself.

Reasoning and decision: Appeal dismissed.

Boddice JA (Mullins P and Flanagan JA agreeing) held that the sentence was not unreasonable or unjust given the 'depravity and persistence' of the offending [31], which occurred over a significant period and included serious violence, protracted rape and aiming a loaded weapon at very young children. The authorities supported the sentencing judge's observation that protracted rape would in itself attract a 10-year head sentence, using the case of *R v TAQ* [2020] QCA 200 as the most helpful yardstick but noting its distinguishing features. Boddice JA concluded that the period of actual custody reflected the criminality of the applicant, particularly the need for deterrence and denunciation in relation to the threats to the children [30].

***R v SDI* [2023] QCA 67 (18 April 2023) – Queensland Court of Appeal**

'Attempt to pervert the course of justice' – 'Circumstantial evidence' – 'Evidence' – 'Evidence of monitoring' – 'Evidence of stalking' – 'Evidence of technology-facilitated abuse' – 'False complaints' – 'Following, harassing and monitoring' – 'Inference drawn from nature of searches' – 'Judicial notice' – 'Judicial notice that mobile phones and laptops are prima facie accurate' – 'Rebuttable presumption of the accuracy of 'notorious' technical instruments' – 'Stalking' – 'Technology facilitated abuse'

Proceedings: Application to adduce further evidence, appeal against conviction for stalking.

Charges: 1x stalking, 1x attempting to pervert the course of justice.

Grounds of appeal:

1. Verdicts unreasonable or unsupported by evidence
2. Error in law in admitting documents
3. Error in law in directing that it was open to find that the appellant caused 'detriment'
4. Error in fact in finding without evidence that the appellant and complainant had been married, renewed their lease and other matters
5. Error in law by failing to rule on admissibility of two exhibits
6. Denial of fair trial in refusal to adduce evidence

Facts: The complainant woman and defendant man were married but after the relationship deteriorated the complainant left the family home with their son and her daughter from a previous relationship. The defendant was alleged to have made intimidating phone-calls to the complainant, followed her, made false complaints

and accusations, and the complainant also alleged the defendant planted drugs in her car.

(The attempt to pervert the course of justice conviction was not in question on appeal. Whilst in custody the defendant had made a number of phone calls to his brother and a friend ("Arunta calls") asking them to contact a number of people and request those people provide false statements/statutory declarations admitting responsibility for the Crime Stoppers and PoliceLink submissions in order to assist him get bail and to support his acquittal [5].)

The admissibility of Exhibits 5 and 42 were central to the appeal. Exhibit 5 was a screenshot of the daughter's computer screen showing that the respondent's iPhone was synched with her Gmail account. Exhibit 42 was a series of printouts from the search history on the daughter's Gmail account, including 'how to pay to find someone,' 'what will happen if I take my children against a court order?' and 'mobile phone locater.'

Decision: The application to adduce further evidence refused; appeal dismissed.

Morrison JA (Mullins P and Flanagan JA agreeing), held that while neither of exhibits 5 and 42 could establish that it was the appellant who synchronised the phone or conducted the searches, this did not make them inadmissible [43]. The exhibits were at least admissible as visual records of what the complainant said she saw on the screen (*R v Sitek* [1988] 2 Qd R 284) [44]. Additionally, Exhibit 5 was admissible for the purposes of showing that one device was synchronised with another [45].

The trial judge's use of Exhibit 42 was restricted to the searches where the only reasonable inference was that the appellant had conducted them [62] and that even had it been wrongly admitted there was no basis for finding a miscarriage of justice as it only affected one act of stalking [63]. While the appellant submitted that the complainant had fabricated the screenshot, this was not put to the complainant during cross-examination and in the circumstances there was a strong inference to be drawn from the nature of the searches that they were conducted by the appellant [116].

Consideration was also given to the rebuttable presumption of the accuracy of 'notorious' technical instruments, amounting to judicial notice of the fact that a device that is generally used and known to be trustworthy is prima facie accurate (*Bevan v the State of Western Australia* [2010] WASCA 101) [30]. Mobile phones and laptops were said to fall into this category and there was no evidence suggesting the complainant's computer or her daughter's iPad were other than accurate and trustworthy. The exhibits were therefore admissible as circumstantial evidence going to the question of whether the appellant had

synchronised the phone and Gmail, and whether the appellant had conducted the searches [48].

The submission that no ruling on Exhibit 5 was made was said to be a misstatement as the trial judge had proceeded on the basis that the exhibit was to be admitted as record of what the complainant had seen on the computer and noted a reservation that the defence might wish to argue what it proved [53]. The appellant was also found to be bound by the defence counsel's agreement that the admissibility of Exhibit 42 be deferred to the end of trial.

The appellant's attempts to adduce further evidence were refused as they could have sought to adduce the evidence at trial and the evidence amounted to no more than a general attack on the complainant's credit and therefore would not have affected the outcome.

***R v Robbins* [2023] QCA 18 (17 February 2023) – Queensland Court of Appeal**

'Appeal against conviction' – 'Dated allegations of historical violence' – 'History of violence to third party' – 'Murder' – 'Partial defence of killing for preservation in an abusive domestic relationship' – 'S304b criminal code (qld)' – 'Siblings' – 'Verbal abuse'

Proceedings: Appeal against murder conviction.

Grounds: The trial judge erred in not directing the jury in relation to the partial defence of killing for preservation in an abusive domestic relationship (s304B Criminal Code (Qld)).

Facts: The male appellant and homicide victim were brothers. The victim, his partner and the appellant's daughter had come to stay with the appellant and his fiancée prior to the appellant's wedding. During the course of dinner at the appellant's home, an aggressive verbal argument broke out between the appellant and victim. At one point, the victim asked the appellant's fiancé if she was really marrying the appellant and she responded that she wouldn't if he continued to behave this way.

The appellant told the victim and his partner to leave and made further abusive comments towards the victim, apparently angered by his comment to his fiancé. They broke into a physical confrontation and both parties threw punches. During the struggle, the appellant grabbed a knife and stabbed the victim seven times. He died of knife wounds the following day.

The appellant gave evidence that the victim had been an abusive family member, making allegations of witnessing 3 separate assaults against his father. He contended that the victim had been verbally abusive

towards the appellant, his father and other brother throughout his life.

Reasoning and decision: The partial defence did not arise fairly on the evidence; appeal dismissed.

A history of domestic violence in the relationship was required, necessitating a previous tendency by either party to engage in acts of serious domestic violence repeatedly or habitually against the other ([30]). The appellant's claims regarding the victim's past behaviour lacked an evidentiary basis and any available evidence did not clarify the nature of his conduct.

The age of the alleged incidents involving violence towards their father (occurring over 40 years ago) and fact that the conduct was not targeted at the appellant meant they did not support a history of an abusive relationship between the brothers. While it was possible for actual or threatened violence to a third person to be domestic violence against the second person in certain narrow circumstances, these were clearly not made out.

A 'bare statement' that verbal abuse had occurred was not enough to find family violence [39]. Repeated, habitual oral statements in certain circumstances could constitute domestic violence but this would require detail and evidence of impact. Additionally, verbal abuse was not found meet the required threshold of 'serious' domestic violence.

***R v KBB* [2022] QCA 273 (23 December 2022) (23 December 2022) – Queensland Court of Appeal**

'Allegations of infidelity' – 'Appeal against conviction' – 'Evidence' – 'Jealous behaviours' – 'Non-fatal strangulation' – 'Past domestic violence' – 'Physical violence' – 'Propensity evidence' – 'S132b of the evidence act 1977 (qld)' – 'Similar fact evidence'

Proceeding: Appeal against conviction for 1x strangulation in domestic setting.

Facts: The male appellant was charged with 1x strangulation in domestic setting, 1x suffocation in a domestic setting and 1x assault occasioning bodily harm while armed against his female partner. He was convicted on the first charge and acquitted on charges 2 and 3.

The complainant gave evidence that the appellant accused the complainant of infidelity, and the complainant slapped the appellant. The appellant he grabbed the complainant by the hair and throat, threw her onto the bed and covered her nose and mouth. When the complainant tried to leave the house, the appellant grabbed her by the throat and hit her on the head with a glass, knocking her unconscious. Medical evidence of

bruising around her neck and head was submitted and the complainant gave evidence of four previous instances of physical violence.

Grounds:

1. The verdict of the jury was unreasonable in that it was inconsistent with the verdicts of acquittal.
2. There was an error of law in the admission of evidence of prior acts of domestic violence to demonstrate his propensity to commit domestic violence (under s132B of the *Evidence Act 1977* (Qld)).

Decision and reasoning: Appeal dismissed.

Ground 1: McMurdo JA held that it was open to the jury to accept the evidence supporting the complainant's testimony for the first charge while determining that they required independent evidentiary support before being satisfied about her credibility in relation to counts 2 and 3.

Ground 2: McMurdo JA noted that s132B has a wide operation and that '[o]nce the evidence is relevant, it is admissible (under s132B) subject only to the discretion to exclude it on the ground of unfairness according to s130 {{Evidence Act 1977}} (Qld).' Propensity evidence was held to constitute a relevant use, there was no requirement to satisfy the *Pfennig* test (*Roach v The Queen* [2011] HCA 12 (4 May 2011)) and there was no argument as to unfairness under s 130 or a miscarriage of justice.

***R v CCU* [2022] QCA 92 (27 May 2022) – Queensland Court of Appeal**

'Absence of remorse' – 'Application for leave to appeal against sentence' – 'Attempt to pervert the course of justice' – 'Coercive control' – 'Manifest excess' – 'Physical violence and harm' – 'Stepchildren' – 'Strangulation' – 'Uncharged acts'

Charges: 5 x assault occasioning bodily harm; 1 x common assault; 1 x assault occasioning bodily harm, while armed; 7 x common assault (a domestic violence offence); 4 x assault occasioning bodily harm (a domestic violence offence); 1 x torture (a domestic violence offence); 2 x strangulation in a domestic setting; 1 x suffocation in a domestic setting; 1 x attempting to pervert justice (a domestic violence offence).

Case type: Application for leave to appeal sentence.

Facts: On the second day of trial, the applicant was sentenced after pleading guilty to 20 counts of violence perpetrated over eight years towards his then-partner, K, and her son. As a result of a plea bargain, three

counts were withdrawn. The learned sentencing judge imposed a head sentence of six years imprisonment, declaring 53 days as pre-sentence custody, and set a parole eligibility date at two years and four months from the date of sentence. The applicant's offending was described by the learned sentencing judge as "violent, demeaning and an appalling attempt to exercise power over K" ([34]).

Issue: Whether the learned sentencing judge erred in taking into account the applicant's uncharged acts? Whether the sentence was manifestly excessive?

Held: In sentencing the applicant, the learned sentencing judge considered his late guilty pleas, his absence of remorse and lack of relevant criminal history, his age at the time of offending, the nature of the offending, the significant effect that the conduct had on K, her son and daughter, his background, the fact that the offences were domestic violence offences and the character references. His Honour also had regard to the fact that domestic violence crimes demean society and are to be condemned and denounced ([34]).

The Court of Appeal (Mullins, Morrison and Fraser JJA) refused leave to appeal. The applicant argued that the learned sentencing judge erred in taking into account the applicant's uncharged acts, because, *inter alia,* the Crown's statement of facts included uncharged acts that were serious and should not have been included. The first ground of appeal was rejected on the basis that:

- The statement of facts tendered on the sentencing hearing was an agreed statement.
- Reference to the transcript and sentencing remarks revealed that His Honour only sentenced the applicant for the offences charged.

The second ground of appeal was rejected on the basis that:

- The offending was "protracted, violent, demeaning and controlling". It extended beyond the complainant and some of the offending was committed in view of her children. Importantly, "it involved an ultimate degradation, the threat of elimination of life itself", and was committed with a lack of insight and remorse ([58]).
- The conduct can be considered worse, given that it was broken by periods of time, because the threat was "always there" ([59]).
- The applicant attempted to pervert the course of justice to protect himself from exposure to criminal charges ([61]).

***R v GBI* [2022] QCA 28 (7 March 2022) – Queensland Court of Appeal**

'Accusations of infidelity' – 'Application for leave to appeal against sentence' – 'Jealousy' – 'Physical violence' – 'Sentencing' – 'Strangulation' – 'Threats to kill' – 'Torture' – 'Weapon'

Charges: Assault occasioning bodily harm x 1 (count 1), torture x 1 (count 2).

Proceedings: Application for leave to appeal against sentence.

Issues: Whether the sentence was manifestly excessive.

Facts: The male applicant and female victim were in an intimate relationship. The charges arose out of two separate assaults. During the first, the applicant punched the victim in the face. During the second, the applicant subjected the victim to several violent assaults over a 48-hour period. The assaults included kicking and punching in the face and stomach, stabbing with scissors, verbal abuse that included threats against the victim's life, and repeated strangulation. The victim sustained serious physical and psychological injuries. The assaults accompanied accusations of infidelity by the applicant, who expressed feelings of jealousy on both occasions. The applicant pleaded guilty to the charges and was sentenced to 18 months' imprisonment on count 1 and six and a half years imprisonment on count 2. The applicant sought leave to appeal on the ground that his sentence was manifestly excessive.

Decision and reasoning: The appeal was rejected.

Justice Morrison found that the matters raised by the applicant as demonstrating manifest excess had been considered by the sentencing judge. These matters included the applicant's 'remorse', 'good custodial behaviour', 'father's poor health', child support obligations, debts owed to his employer, 'limited use of weapons', the fact that the victim's injuries did not require ongoing treatment, and the reduction in risk by a DVO and because the relationship had ceased. His Honour affirmed the sentencing judge's conclusion that these matters did not warrant a further reduction in the sentence to be imposed, nor justify a finding that the risk of reoffending was reduced.

***R v Lewis; Ex parte Attorney-General (Qld)* [2022] QCA 14 (15 February 2022) – Queensland Court of Appeal**

'Appeal against sentence' – 'Assault' – 'Burning threat' – 'Immolation' – 'People affected by substance misuse' – 'Victim impact statement' – 'Weapon' – 'Young people'

Charges: The domestic violence charges were:

1. Common assault,
2. unlawful assault occasioning bodily harm
3. causing grievous bodily harm with intent (malicious act with intent) x 1 and
4. Causing grievous bodily harm (in the alternative to count 3).

Proceedings: Appeal against sentence by Attorney-General.

Issues: Whether sentence manifestly inadequate.

Facts: The male respondent and female victim were in a two-year relationship that was characterised as ‘troubled’ and involving physical violence [2]-[4]. Both parties were users of methylamphetamine and were aged 17 at the time of the offences. On one occasion, the respondent threw petrol on the victim and threatened to set her on fire. On another occasion, the respondent threw a screwdriver at the victim, which was embedded in her hip [3]-[4]. In May 2016, during verbal argument, the respondent used petrol to set the victim on fire [5]. The respondent fled when confronted by a neighbour [14]. The victim required surgery and was hospitalised for four weeks. She was left with ongoing pain and nerve damage [22]. In January 2021, the respondent pleaded guilty to common assault (count 1) and assault occasioning bodily harm (count 2) and was found guilty in relation to causing grievous bodily harm with intent (count 3). He successfully appealed against conviction regarding count 3 but was later resentenced to nine years and six months’ imprisonment [30]. The Attorney General of Queensland appealed on the basis that that sentence was manifestly inadequate [57].

Decision and reasoning: Appeal dismissed.

Justices Sofronoff, Morrison and Flanagan affirmed the decision and reasoning of the sentencing Judge. Their Honours endorsed the sentencing Judge’s consideration of the appellant’s plea of guilty, expressions of remorse, insight, youth and disadvantaged upbringing [67]-[70]. Their Honours agreed with the sentencing Judge’s characterisation of the offending ‘horrendous and disgraceful offending’ and ‘abominable behaviour’ [39]-[40], with ‘devastating consequences’ for the victim that included ‘significant and life-long physical, mental and emotional difficulties’ [72]. Their Honours continued that the sentencing Judge had correctly stated that ‘the sentence had to be “just having regard to all of the circumstances”, but in particular to punish,

express community denunciation, meet general and specific deterrence, provide community protection, but also, in light of the offender's youth, have regard to his prospects of rehabilitation' [73]. Their Honours concluded that there was 'no demonstrated error of principle… the sentence imposed was one derived by a careful balancing of competing requirements in an overall integrated sentencing approach' [75]. This approach 'was in accordance with what this Court said in *R v Free*; *Ex parte Attorney-General (Qld)* [2020] QCA 58 was one of the available approaches, namely to sentence towards the top of the bounds of appropriate discretion and not reduce the parole eligibility date, rather than sentence towards the bottom and impose a serious violent offence declaration' [75].

***R v EQ* [2021] QCA 257 (30 November 2021) – Queensland Court of Appeal**

'Appeal against sentence' – 'Bomb threat' – 'Breach of protection order' – 'Children' – 'Exposing children to domestic and family violence' – 'Following, harassing and monitoring' – 'Limited criminal history' – 'People affected by trauma' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Sentencing' – 'Separation' – 'Technology-facilitated abuse' – 'Weapons'

Charges: Breach of protection order x 1, assault of police officer x 1, making a bomb hoax x 1, stalking x 1, common assault x 2.

Proceedings: Application for leave to appeal against sentence and resentence.

Facts: The male defendant and female victim were married for 17 years and had two school aged daughters. The family immigrated to Australia from Egypt in 2011. After the couple separated, a domestic violence order was served on the appellant that prevented him from contacting the victim. In February 2019, the appellant repeatedly texted the victim before confronting her and their daughters at an airport. The appellant argued with the victim, before threatening her and airport staff with a knife, fake bomb, and electric shock device [12]-[17]. The appellant later admitted to police that he had been tracking the victim's movements [19]. The appellant pleaded guilty to the charges and received a sentence of 6 years' imprisonment, with a non-parole period of 2 years and 6 months.

Grounds:

1. The sentencing Judge erred in law by wrongly limiting the use to be made of evidence of the applicant's mental health;

2. The sentence was manifestly excessive; and
3. In sentencing the applicant for count 2, the learned sentencing Judge mistook the offence to which he had pleaded guilty.

Decision and Reasoning: Application for leave to appeal allowed, charge 3 dismissed, resentenced for charge 2.

Due to an administrative error the appellant was sentenced for an offence with which he had not been charged and to which he had not pleaded guilty [52]. Therefore, the proceedings had miscarried, and the appeal was allowed. As ground three was made out, the court allowed the appeal and proceeded to resentence the applicant for count 2 to 5 years imprisonment with and non-parole period of 2 years 6 months. Justices Sofronoff, Davis and Williams noted that the offending was serious, with significant impact on the commercial operations of the airport, the distress experienced by witnesses, and ongoing psychological suffering of the victim and her daughters [57]. Their Honours noted that there were mitigating circumstances, such as the appellant's limited prior convictions, cooperation with police, early guilty plea, expression of remorse and low risk of reoffending [58]. Their Honours summarised the appellant's psychological report, which included details of the applicant's diminishing symptoms of anxiety and depression, and noted the relevance of mental impairment under s 16A(2)(n) of the *Crimes Act 1914* (Cth) [59]-[61]. Their Honours found that there were no comparative sentences [64]. Their Honours considered the maximum sentence for the offence, the sentencing considerations in s 16A of the *Crimes (Aviation) Act 1991*.

***R v Hartas* [2021] QCA 178 (27 August 2021) – Queensland Court of Appeal**

'Appeal against sentence' – 'Arson' – 'Jealous behaviours' – 'People affected by substance misuse' – 'People with disability and impairment' – 'People with mental illness'

Charges: Arson x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The 27-year-old male applicant and female victim were in a 6-week relationship. Shortly after the relationship ended, the intoxicated applicant used a petrol bomb to set fire to cars owned by the victim and her partner. The cars were parked directly in front of the victim's house, where the victim, her partner, and her 6-year-old daughter were sleeping. In February 2021, the applicant was found guilty of one count of arson,

constituting a domestic violence offence, and sentenced to three years' imprisonment with a non-parole period of 12 months [1]-[8]. The applicant's psychological report detailed 'a complex medical history' and 'significant psychological problems', which included chronic pain due to a spinal condition, alcohol misuse and a 'longstanding mood disorder' [25].

Grounds:

1. The sentencing Judge failed to give sufficient weight to the applicant's personal circumstances, specifically those evidenced by his psychological report
2. The sentence was manifestly excessive [9].

Decision and Reasoning: Application for leave to appeal dismissed.

Fraser, Morrison and Applegarth JJ held the sentence imposed was not manifestly excessive. The sentencing Judge had given appropriate weight to the applicant's personal circumstances and mitigated the sentence accordingly [42]. The contents of the psychological report had not shown that the applicant's mental state at the time of the offence or at the time of sentence warranted substantial weight according to *R v Verdins* [2007] VSCA 102 (23 May 2007).The applicant's mental state did not reduce his moral culpability, nor make imprisonment more burdensome such that it 'became an inappropriate vehicle for' general deterrence and specific deterrence [40], and his physical condition did not make imprisonment 'unduly onerous' [41]. The offence was serious, as indicated by its maximum penalty of life imprisonment with the aggravating factor that it was a domestic violence offence [50]. The victim impact statement indicated serious psychological harm caused to the victim and her daughter [51]. Their Honours accepted the sentencing Judge's characterisation as 'an extremely serious act of domestic violence' due to 'its grave potential' impact on 'life and property', and the psychological harm that it has caused the victim and her six-year-old daughter [51].

***R v RBE* [2021] QCA 146 (20 July 2021) – Queensland Court of Appeal**

'Application for leave to appeal against sentence' – 'Arson' – 'Arson threats' – 'Error of fact' – 'Inference as to motive' – 'Motive' – 'People affected by trauma' – 'People with mental illness' – 'Section 132c evidence act 1977' – 'Sentence' – 'Separation' – 'Suicide threats'

Charges: Arson of a dwelling x 1 (domestic violence offence).

Proceedings: Application for leave to appeal against sentence.

Facts: As the complainant woman and applicant man were separating the applicant threatened to burn down the former matrimonial home. A protection order was granted protecting the complainant. The applicant has a history of major depression and complex post-traumatic stress disorder. On the date of the offence the applicant sent text messages to his son saying “goodbye” and that the house was alight. He also attempted to call the complainant and sent messages to a friend who went to the house, observed smoke, spoke to the appellant who was inside and called emergency services, then unsuccessfully attempted entry. The appellant’s evidence was that his intention was to commit suicide, but he fled the burning home having changed his mind after an unsuccessful attempted suicide. The sentencing judge expressed the view that the appellant’s expressed motives of suicide were not credible, despite accepting evidence of ligature marks on his neck supporting the appellant’s evidence he had attempted to hang himself during the incident. The judge found the appellant was seeking attention and acted vindictively to hurt his wife. The prosecution made no positive submission on motive and had submitted that all three motivations were open on the facts, advancing suicide or attention-seeking but not vindictiveness.

Decision and Reasoning: Leave to appeal, appeal allowed, sentence varied by:

- Substituting three (3) years imprisonment; and
- Suspending the sentence forthwith for an operational period of three (3) years.

Burns J (Morrison and McMurdo JJA concurring):

> [26] ….it was not for the sentencing judge to decide what inferences arose from the agreed facts and, having done so, her Honour erred (and in a critical way) by determining a fact that was not in issue between the parties. Indeed, the procedure for resolving disputed facts provided in s 132C of the Evidence Act was not even engaged, the prosecutor having made no positive allegation about motive.

R v FBA [2021] QCA 142 (16 July 2021) – Queensland Court of Appeal

‘Adequacy of jury directions’ – ‘Admissibility of evidence’ – ‘Allegations of infidelity’ – ‘Attempt to withdraw allegations’ – ‘Choking’ – ‘Evidence’ – ‘History of domestic and family violence’ – ‘Jury directions’ – ‘People affected by substance misuse’ – ‘Relationship evidence’ – ‘Robinson direction’ – ‘S132b(2) evidence act 1977 (qld)’ – ‘Strangulation’ – ‘Threats to kill’

Charges: Non-fatal Strangulation x 4.

Proceedings: Appeal against conviction.

Facts: The appellant and complainant were in a relationship but maintained separate residences. The complainant had been staying with the complainant for 3 days when the alleged incidents occurred. The appellant made allegations of infidelity against the complainant, and they argued about that and money, the appellant refusing to drive the complainant home despite her giving him money for fuel. The complainant gave evidence that the appellant accused the complainant of stealing from him and that in four discrete incidents of physical altercations he applied pressure to her throat so that she could not breathe. She also alleged he made multiple threats to kill her and members of her extended family, locked her in the house and that she escaped with assistance from others. She went to hospital and photographs were taken of marks on her neck which were not there prior to the incident. The complainant also gave evidence of two prior incidents of violence by the appellant towards her. The complainant admitted using methylamphetamine at the time of the incidents and to attempting to withdraw her complaints, stating the reasons given for the withdrawal were false.

Grounds:

1. The learned trial judge erred, causing the trial to miscarry, in:

   (a) failing to clearly direct the jury as to the identification, purpose, and use of relationship evidence;

   (b) admitting the evidence of the complainant's daughter that she had 'seen bruises on mum' (the year prior to the instant allegations) as relationship evidence.

2. The complainant's evidence required a 'Robinson direction' and the failure to direct in those terms caused a miscarriage of justice.

3. The complainant's evidence in chief was inaudible in parts, which in the circumstances of the trial, caused the trial to miscarry.

4. When regard is had to all the evidence, the jury verdicts are unreasonable, unsafe and unsatisfactory.

Decision and Reasoning: Appeal dismissed.

Ground 1(a) – rejected - further direction on relationship evidence would not have assisted the defence case (Sofronoff P [11], McMurdo JA agreeing, Boddice JA dissenting – the second paragraph of directions on the use of relationship evidence gave rise to a real risk of impermissible propensity reasoning).

Ground 1(b) – dismissed –the evidence was plainly admissible and relevant (Sofronoff P [13], MdMurdo JA agreeing Boddice JA dissenting – the evidence was inconsistent with the complainant's evidence the appellant was only violent towards her in 2019).

Ground 2 – dismissed – it was clear why a 'Robinson direction' (pursuant to Criminal Code, s632(3)) wasn't given, firstly the defence did not request one, and secondly "There was nothing in the present case which would have suggested to the learned judge that the jury required specific assistance in order to assess the complainant's credibility and/or to suggest that, in the absence of such assistance, there was a risk that the jury might be unable to appreciate some exculpatory factor." (Sofronoff P [14], McMurdo JA agreeing).

Ground 3 – dismissed – in absence of complaint at the trial it is impossible to conclude based on the transcript that evidence was inaudible (Sofronoff P [16], McMurdo JA agreeing).

Ground 4 – dismissed – while there was good reason for the jury to carefully scrutinise the complainant's evidence (her drug use and its affects on her mental health, inconsistencies in her evidence and her attempts to withdraw the charges) it does not follow that it was not open to the jury to find her evidence as to the allegations of choking to be credible and reliable, especially as it was supported by medical evidence of injuries consistent with the allegations and her timely complaint to police. (Boddice JA [89]-[91], Sofronoff P and McMurdo JA agreeing).

R v Blockey **[2021] QCA 77 (21 April 2021) – Queensland Court of Appeal**

'Application for leave to appeal against sentence' – 'Manifest excess' – 'Manslaughter' – 'Parole eligibility' – 'Victims as (alleged) perpetrators' – 'Weapon'

Charges: Manslaughter (domestic violence offence) x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male deceased had committed acts of domestic violence against the female applicant during their relationship. He was the subject of a domestic violence order. The applicant stabbed the deceased with a hunting knife. She pleaded guilty and was sentenced to 9 years imprisonment, with parole eligibility after 3 years and 9 months imprisonment.

Grounds of appeal: Whether refusal to give parole eligibility date at one third of the sentence rendered the sentence manifestly excessive.

Held: Leave to appeal against sentence granted. Appeal against sentence allowed. Parole eligibility date was set on 22 April 2021, rather than 22 January 2022.

The Court noted the sentencing judge's remarks, including the relevance of the applicant's history as a repeated victim of domestic violence in sentencing:

> The sentencing Judge found that: "The fact that you were such a victim of domestic violence as well as a perpetrator of domestic violence is, to my mind, sufficient to enable me to reach the conclusion that it is not reasonable in the present circumstances to treat the fact that your offending was a domestic violence offence as an aggravating feature.

Nevertheless, the sentencing judge's conclusion that "the applicant's cooperation was tempered by her failure to provide any comprehensive, reliable detail concerning the stabbing" was inconsistent with the conclusion that there was insufficient evidence to find that "the applicant 'engaged in consciously-informed obfuscation or denial' designed to minimise culpability." The applicant was under no obligation to provide a comprehensive, detailed account of the sequence of events concerning the stabbing. She accepted unlawfully causing the victim's death by stabbing him when she pleaded guilty to his manslaughter.

In these circumstances, finding that the applicant's cooperation in entering a timely plea of guilty was to be tempered by her failure to provide such an account of the stabbing was a misapplication of sentencing principles, particularly where there was an acceptance that the applicant was sincerely remorseful for her conduct. It was therefore necessary to re-sentence the applicant. Parole eligibility was fixed after having served 3 years of the sentence.

MS v Commissioner of Police **[2021] QCA 31 (2 March 2021) – Queensland Court of Appeal**

'Application for leave to appeal against conviction' – 'Breach protection order' – 'Parenting orders' – 'People with mental illness' – 'Protection order'

Charges: Contravention of a domestic violence order (aggravated offence) x 1.

Proceedings: Application for leave to appeal against conviction.

Facts: A protection order prevented the male applicant from contacting, attempting to contact, or asking someone else to contact his female former partner except under strict circumstances. A Family Court order

was also in place granting the mother sole parental responsibility for their child and restricting contact between the parties. The applicant breached the protection order by sending an email addressed to a number of people including his former partner and solicitor titled, "[The child] need to know about my mental health diagnosis." The applicant was sentenced in the Magistrates Court to 6 months imprisonment, suspended after 2 years. The applicant's appeal to the District Court was dismissed.

Grounds of appeal:

1. The primary judge erred in not allowing the appeal based on the existence of parental responsibility in the applicant's communications.
2. The primary judge erred in not applying s 24 of the *Criminal Code* (Qld).

Held: Application for leave to appeal was refused. There was no inconsistency: condition 6 of the protection order did not preclude the application of the exception in paragraph 18 of the Family Court order. The email was appropriately characterised as not for the "sole purpose of communication regarding parental responsibility," and did not fall within the condition/exception in the protection order and Family Court order. On that basis, there was no room for the operation of s 24 of the Code which could not apply to a mistake by the applicant in the interpretation of the Family Court order.

***R v Luxford* [2020] QCA 272 (4 December 2020) – Queensland Court of Appeal**

'Application for leave to appeal against sentence' – 'Choking' – 'Controlling, jealous, obsessive behaviours' – 'Damaging property' – 'Following, harassing and monitoring' – 'People affected by trauma' – 'People with disability and impairment' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Post-traumatic stress disorder' – 'Protection order' – 'Strangulation' – 'Threats to kill' – 'Weapon'

Charges: Choking, suffocation or strangulation in a domestic setting x 2; Assault occasioning bodily harm (domestic violence offence) x 8; Threat of actual bodily harm (domestic violence offence) x 1; Common assault (domestic violence offence) x 2; Wilful damage (domestic violence offence) x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant man spent 15 years in the army, with several overseas deployments. He left on medical grounds with a shoulder injury, chronic pain, tinnitus and post-traumatic stress disorder, and was awarded compensation. He had no prior criminal history (except for a failure to secure storage of weapons charge in

2017). He participated in a Men's Behavioural Change Program, and was accepted into a program to treat PTSD. The applicant pleaded guilty and was sentenced to a period of three years and six months imprisonment for the most serious offences on the indictment (choking, suffocation or strangulation in a domestic setting x 2, Counts 12 and 13), to be served concurrently with the remaining sentences. The date for parole was fixed at 29 September 2021. The expiry date for a protection order granted to the complainant in 2017 was extended to 7 October 2025.

Grounds of appeal: The sentence was manifestly excessive as the applicant was required to serve actual time in custody.

Held: The sentencing judge erred in the imposition of a sentence that required actual custody, and the applicant was re-sentenced.

The court held that the applicant's offending could not be separated from his PTSD and also his PTSD caused custody to be a greater burden on him. While the sentencing judge applied the principles in *R v Rix* [2014] QCA 278 where the reduction in moral culpability due to an offender's PTSD was taken into account, the sentencing judge failed to recognise in the sentence that a custodial sentence would have a hasher effect on him than a person not suffering PTSD. The sentence did not give sufficient weight to both factors relevant in the applicant's case due to his PTSD (at [38]).

To reflect the gravity of the offending, the most serious offence was choking causing the complainant to lose consciousness (see *R v MCW* [2018] QCA 241) (Count 13), a higher head sentence of 4 years imprisonment was imposed to accommodate a sentence structure that provided for the applicant's immediate release from actual custody. This reflected the totality of the offending, but adjusted in recognition of the effect of the PTSD as a cause of the offending. For the choking that lasted three seconds, a sentence of 2 years and 6 months imprisonment was imposed (Count 12). The effect of the applicant's PTSD was further accommodated by suspending the sentence on Count 13 after 60 days and releasing him at the same time on parole for other offences (parole for 2 years and 4 months to provide supervision in the community). Supervision on parole was to ensure the applicant continued to access counselling and other treatment for his PTSD (at [39]).

***R v Thomas* [2020] QCA 236 (30 October 2020) – Queensland Court of Appeal**

'Appeal against conviction' – 'Application to adduce further evidence' – 'Evidence' – 'Intent' – 'Murder' – 'Provocation' – 'Strangulation'

Charges: Murder x 1.

Proceedings: Appeal against conviction; application to adduce further evidence.

Facts: The appellant man was found guilty of the murder of his female partner following a trial confined to the issue of intent. On 24 October 2015, the victim was found with injuries to her neck consistent with strangulation and rib fractures consistent with resuscitation or blunt trauma. Evidence at trial included: evidence from several of the victim's former partners and her aunt; records of text messages/phone calls between the appellant and the victim commencing on 9 May 2015 (showing a volatile relationship); the appellant arranging to purchase a flight ticket overseas after the victim's death; the appellant's confession he killed the victim to a friend (that he had been humiliated and had "grabbed her and…squeezed", accompanied demonstrating use of two hands); and evidence from a forensic pathologist of the victim's injuries.

Grounds of appeal:

1. The trial judge erred in law by admitting exhibit 41, which contained six inadmissible photographs, causing a miscarriage of justice.
2. The trial judge failed to direct the jury as to how exhibit 41 could be used, thus creating the danger of impermissible reasoning by the jury.
3. The trial judge failed to direct in relation to motive.
4. The verdict was unreasonable and cannot be supported by the evidence.
5. The trial judge failed to leave the partial defence of provocation.
6. The trial judge's failure to direct the jury in relation to opinion evidence may have caused a miscarriage of justice.
7. A collation of faults caused the trial to miscarry.

Held: The appeal was dismissed.

Grounds 1 and 2: Exhibit 41 (photographs of bruising suffered by the victim in November 2014, identified by a former partner of the victim) was tendered by the prosecutor at the request of the appellant's trial counsel for a forensic purpose. The fact that the appellant's counsel abandoned the forensic purpose he had in mind for exhibit 41 did not mean that the evidence became prejudicial ([32]-[38]).

Ground 3: The trial judge did not fail to give a direction concerning motive which was requested by the appellant's counsel, stating in summing up: "Any positive evidence that the defendant lacked a motive to cause [Jane's] death or to do her grievous bodily harm is also relevant. It would be another circumstance to be taken into account in his favour in a case based on circumstantial evidence" ([39]-[42]).

Ground 5: The trial judge did not err in failing to leave open to the jury the partial defence of provocation (where the act was caused "in the heat of passion caused by sudden provocation…before there is time for the person's passion to cool"). First, the appellant's trial counsel expressly disavowed reliance on provocation, making it clear that the only live issue was intention. Second, there was no evidence of acts of provocation which might have led to loss of self-control. The evidence did not show any particular link between the alleged humiliation and strangulation. Third, there was no evidence to suggest provocation would have caused a loss of control in a reasonable person ([43]-[48]).

Ground 6: There was no merit in the appellant's contention that evidence from the victim's aunt that "whether she was an alcoholic or not…she didn't deserve…what she got" may have introduced factors of prejudice or emotion to the jury, or influenced their decision, and the trial judge should have directed the jury to disregard those claims. The jury would not have been concerned that the victim's aunt made a personal comment, and no direction was sought by the appellant's counsel ([49]-[53]).

Ground 7: None of the failures of defence counsel to object to the prosecution's case demonstrated that defence counsel's conduct denied the appellant a fair trial ([54]-[62]).

Ground 4: The principles relevant to the role of the appellate court, and pre-eminence of the jury were recently re-stated in *Pell v The Queen* and *R v Baden-Clay*. There was ample evidence (from the pathologist and the appellant's friend) to support the jury's conclusion that when the appellant squeezed the victim's neck, he did so with the intent to kill or cause grievous bodily harm. He applied pressure to her neck, and with two hands. In particular, "[t]he level of force necessary, the length of time it was applied for, the fact that the fingers moved around and the fractures to the neck all provide a foundation to infer the requisite intent". It was open to the jury to be satisfied beyond reasonable doubt of the defendant's guilt of murder ([63]-[71]).

The appellant's application to adduce fresh evidence was refused. The evidence requested to be adduced would have been in the hands of the defence counsel at the time of the trial, or it was irrelevant ([72]-[76]).

***R v TAQ* [2020] QCA 200 (15 September 2020) – Queensland Court of Appeal**

'Appeal against conviction' – 'Application for leave to appeal against sentence' – 'Miscarriage of justice' – 'Sexual abuse' – 'Tendency/relationship evidence'

Charges: Common assault x 9; Assault occasioning bodily harm x 1; Assault occasioning bodily harm while armed x 4; Rape x 1 (Charge 15).

Proceedings: Appeal against rape conviction (Charge 15); Application for leave to appeal against sentence.

Facts: The female complainant was the male appellant's former de facto partner. From 2006 the appellant became increasingly violent and controlling and committed numerous charged and uncharged assaults between 2006 and 2011. In October 2011, the appellant said to the complainant, "If you love me, darling, you'll do it [anal]. If you don't do it, I am going to turn you over and rape you". The appellant then anally raped the complainant, after which he demanded oral sex and then hit her in the head. In December 2012, the complainant left the appellant but did not report the rape and assault to police until December 2016. In 2012, the appellant said to Mr P (a witness) that "he'd raped [the complainant]" and "if he didn't get what he wanted, he'd take it".

Grounds: (1) Mr P's evidence of the conversation with the appellant should not have been admitted.

Decision and reasoning: *Appeal against conviction dismissed. Appeal against sentence allowed due to a calculation error.*

The prosecutor at trial argued that Mr P's evidence that the appellant had said he'd raped the complainant could amount to an admission. The trial judge expressed doubt as to whether the jury could infer that it was an admission to the specific incident (Charge 15). In the summing up, the trial judge explained to the jury that Mr P's evidence related more generally to "other incidents in which the [appellant] has through his actions, demonstrated a sexual interest in the complainant even when she is not consenting and was prepared to act on that interest" [28]. The respondent relies on *R v Sakail* [1993] 1 Qd R 312 as making the evidence of Mr P admissible on the basis that an admission to a rape which is not charged can be used as evidence of the nature of the relationship relevant to the charged rape:

> [32] Where the act in issue for [rape] count 15 was the act of anal intercourse without the consent of the complainant, evidence of other sexual acts between the appellant and the complainant as a result of the

appellant's threats or without the consent of the complainant was evidence that could rationally affect the assessment of the probability of the occurrence of the anal rape, as described by the complainant. The direction given by the trial judge focused on the nature of the conduct to which the appellant admitted in his conversation with Mr P which was a willingness to act on his sexual interest in the complainant in the absence of her consent. The evidence of Mr P was admissible as relationship evidence that revealed a tendency of the appellant to engage in sexual acts with the complainant without her consent.

[33] The appellant does not succeed on the ground of appeal that Mr P's evidence was inadmissible.

***R v SDJ* [2020] QCA 157 (24 July 2020) – Queensland Court of Appeal**

'Appeal against conviction' – 'Child victim' – 'Section 93a evidence act statement' – 'Stepchild in the family' – 'Strangulation' – 'Unreasonable verdict'

Charges: Common assault x 1 (DFV offence); Choking in a domestic setting x 1 (DFV offence).

Proceedings: Appeal against conviction.

Facts: The complainant (10 years old) was the male appellant's stepson. The appellant kicked the complainant and hit him on the side of the face two or three times with an open hand. The appellant then choked the complainant with 'a neck lock'. The complainant's mother and a friend of the family witnessed the assault. The appellant gave evidence that he did not assault the complainant.

Ground: Verdict was unreasonable.

Decision and reasoning: *Appeal dismissed.* There were inconsistencies between the child complainant's s93A Evidence Act statement (taken in a timely way after the incident) and the cross-examination (conducted 16 months after the incident) as during the latter the 'complainant had little recollection' of the events. However, this did not preclude the jury from relying on the s 93A statement, especially considering that the complainant's statement was supported by evidence given by his mother and the family friend, as well as consistent medical evidence. Therefore, it was not unreasonable for the jury to find the appellant guilty.

***R v Young* [2020] QCA 140 (26 June 2020) – Queensland Court of Appeal**

'Appeal against conviction' – 'Inconsistent verdicts' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Reliability' – 'Temporary protection order'

Charges: Assault occasioning bodily harm whilst armed x 1; common assault x 1; choking in a domestic setting x 1

Case type:Appeal against conviction, application to adduce evidence on appeal

Facts: The appellant man was charged on indictment with one count of assault occasioning bodily harm whilst armed (Count 1), one count of common assault (Count 2) and one count of choking in a domestic setting (Count 3). The Crown entered a nolle prosequi in respect of Count 1. All counts were domestic violence offences against the appellant's female domestic partner. The complainant's evidence at trial was that it was a mutually abusive relationship against a background of excessive drinking. A temporary protection order was made against the appellant in favour of the complainant in 2017. In relation to Count 2, it was alleged that the appellant kicked the complainant on the legs, causing her to fall. With respect to Count 3, it was argued that he grabbed the complainant around the throat. A jury found the appellant not guilty of Count 2, but guilty of Count 3. He was sentenced to 2 years' imprisonment, with the conviction recorded as a domestic violence offence.

Issue: The appellant sought leave to adduce further evidence and appealed his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the entirety of the evidence. He also submitted that the evidence against him was unreliable, inconsistent and not capable of supporting a verdict of guilty on Count 3, and that there was no corroborative evidence in relation to the complainant's allegations as to how the strangulation occurred. The Crown argued that whilst there were weaknesses in the complainant's evidence in terms of her reliability, those factors were fairly outlined by the trial judge in the summing up, and that the complainant's evidence was able to be supported by other evidence.

Held: The application for leave to adduce further evidence was refused, and the appeal against conviction was dismissed. The Court found that the jury was undoubtedly fully aware of the inconsistencies in the evidence ([99]). Taking into account all of the appellant's arguments, there was nothing which led the Court to doubt the appellant's guilt. It was open to the jury, on the whole of the evidence, to be satisfied of his guilt beyond reasonable doubt. The complainant's account of the choking after a sustained argument in the kitchen was compelling ([102]). That account of the attack and the pressure she felt was substantiated by the medical evidence, which also indicated that the injuries were consistent with choking ([103]). Further, the evidence of witnesses was substantially consistent with the complainant's account. Whilst there is "no requirement that a complainant's evidence be corroborated before a jury may return a verdict of guilty upon it"

(Pell v The Queen [2020] HCA 12 (7 April 2020), there was in fact strong corroborative evidence here. Despite some inconsistencies, particularly in relation to the time of the choking, the Court was satisfied that the jury acting rationally would not have entertained a reasonable doubt as to proof of guilt. Given the complainant's level of distress at the time and her acceptance during the course of her evidence that her memory of some events of that day were unclear, a mistake as to the time the choking event occurred was understandable ([104]-[105]).

***R v Castel* [2020] QCA 91 (6 May 2020) – Queensland Court of Appeal**

'Application for leave to appeal against sentence' – 'Female perpetrator' – 'Manifestly excessive' – 'Mitigating factors' – 'Physical violence and harm' – 'Remorse' – 'Weapon'

Offences: Manslaughter (domestic violence offence)

Proceedings: Application for leave to appeal against sentence

Issue: Whether the sentence was manifestly excessive.

Facts: The woman applicant and her husband and victim had been married since 2010. Throughout this time, they argued occasionally, particularly about the husband arriving home from work after 6pm. On the day of the offending, the husband arrived home after 8pm and an argument developed while the couple were in the kitchen. The applicant threw the husband's laptop at him, then picked up a 20.5cm long kitchen knife and threw it at him from 2-3m away. It landed in his chest region and either he pulled it out or it fell out. The applicant immediately said she was sorry, used a towel to cover the wound and called 000. Despite medical intervention, the husband died. The applicant was sentenced to nine years' imprisonment, with no fixed date for parole eligibility. She appealed against her sentence.

Judgment: The majority (Sofronoff P and Mullins JA) held that the head sentence of nine years' imprisonment was not inappropriate, but that failing to fix an eligibility date for parole was "unreasonable or plainly unjust" and was manifestly excessive [38]. They emphasised that the applicant had no criminal history, showed immediate remorse for her conduct, entered an early plea of guilty and was not at high risk of reoffending, and therefore ordered that her sentence be mitigated by including a date for eligibility for parole that was one-third of the sentence in custody [38].

Mullins JA (with whom Sofranoff P agreed) further provided that "section 9(10A) of the [Penalties and

Sentences Act 1992 (Qld)] is a legislatively prescribed aggravating factor that must be taken into account in arriving at the appropriate sentence for the offence of manslaughter that is a domestic violence offence, unless the exception within the provision due to the exceptional circumstances of the case applies" [35]. Section 9(10A) refers to offenders convicted of domestic violence offences. In such cases, the fact that the offence is a domestic violence offence is an aggravating factor that is added to the other aggravating factors and balanced with any mitigating factors [35].

Boddice J (dissenting) dismissed the appeal, holding that the applicant's offending was "an extraordinary act of violence" and was a "very dangerous action" [42] that occurred in circumstances where the applicant was sober, sane, not provoked and not acting in self-defence [43]. He considered the applicant's offending to be a very serious example of a domestic violence offence, making the circumstance of aggravation a very relevant factor in sentencing [44]. He contended that the aggravating factors outweighed any mitigating features [45] and that the sentence "fell within a sound exercise of the sentencing discretion" [46].

***R v HBZ* [2020] QCA 73(17 April 2020) – Queensland Court of Appeal**

'Animal abuse' – 'Appeal against conviction' – 'Application for leave to appeal against sentence' – 'Choking' – 'Non-fatal strangulation' – 'Step-children'

Facts: The appellant man was convicted of choking the female complainant in a domestic setting (domestic violence offence) (count 1) and common assault (domestic violence offence) (count 2) after trial before a jury in the District Court. He was sentenced to imprisonment for two years and six months on count 1 to be suspended after serving 15 months' imprisonment for an operational period of three years. He was sentenced to three months' imprisonment for count 2.

The appellant often stayed at the complainant's home where she lived with her five children; the appellant was the father of the youngest child. The appellant and his dog were staying at the complainant's home when the appellant's dog urinated on the floor and the complainant asked her son to tell the appellant.

The complainant's evidence in chief was that:

- The appellant hit the dog on the floor, rubbed it's face in the urine and told the complainant his abuse of the dog was her fault. She asked him to leave, locked him out and went into a bedroom. He let himself back in with a spare key.

Re Count 1:

- She dialled 000 and then: "[The appellant] moved the camp beds and he grabbed me, and he grabbed the phone, and then he put his hands around my neck – his right hand, and then he pushed on my shoulder at the same time to knock me onto the bed, and then he pinned me to the bed with his hand to stop me from speaking. So when I first started speaking, I could ask for help, but then the words wouldn't come out, and I struggled to breathe."
- The appellant grabbed the phone and smashed it. The appellant's right hand was almost in a "V" around her throat and "instead of squeezing, he just was on top of me and used his body weight as the force to stop me from speaking". She couldn't speak, felt pains in her chest and had black spots in her vision. She asked him to stop 3 or 4 times before she ran out of breath. She could not breathe for probably 70 seconds. She asked him to call an ambulance because she couldn't breathe. [5]

Re Count 2:

- "He grabbed my shoulders. When I was having difficulty breathing before he left, he grabbed my shoulders and shaked me and…. he shook me so hard that I was just flicking back and forth, and I could feel my neck – like, the back of my head hitting the back of my shoulders…."
- He gave her "a really, really tight hug" and grabbed her by the shoulders. She told him to leave and he left.
- She made a video diary of the incident and her injuries.

In cross-examination:

- "The complainant denied, when it was put to her, that after the incident she was having trouble breathing due to a panic attack."
- When it was put to the complainant that the appellant did not have his hand on her neck or throat "that much" she disagreed; "He pushed the air out of me and I thought I was going to die." [10]
- She recorded in her video diary: "I'm finding it hard to breathe. I think it's just a panic attack. Because he didn't have his hand around my neck and throat that much." [11]
- She did not call the ambulance immediately: "I was still having trouble breathing, which is why, on the video, I said I felt like I was having a panic attack during the video. Because I couldn't understand, after his hand had been removed, why I was still having difficulty breathing.""[11]
- She denied moving the camp beds into the bedroom after he left. [12]

Medical records included a note: "the patient states her partner pushed her onto the bed and strangled her

with both hand pushing downwards then made multiple blows with fists to the shoulder and head. Patient unsure if knocked out."

In the complainant's video record of interview he said there was a struggle for the phone. "He then sat down, gave her a big hug and got her to calm down. He denied choking her or trying to do that. He thought his thumb may have made contact with her during the struggle for the phone."[20]

Against the objection of defence counsel [21] the jury were given both a handout and direction in the terms: "'Choked' is an English word that bears its ordinary, everyday meaning – that is – 'to hinder or stop the breathing of a person'."[20] Defence counsel argued there was only one definition given to the jury whereas dictionaries gave various definitions. [23]

Grounds: The grounds of appeal against conviction were:

1. the learned trial judge erred in the direction given to the jury on the definition of choking;
2. the appellant was deprived of a fair trial, because of the manner in which the allegations of fact in count 1 were particularised;
3. the verdicts on counts 1 and 2 were unreasonable and cannot be supported, having regarded to the evidence.

The sole ground of the application for leave to appeal against sentence was that the sentences were manifestly excessive.

Held:

1. Appeal against conviction dismissed.

Ground 1: Mullins JA considered the construction of s 315A *Criminal Code* (Qld) in light of s14A Acts Interpretation Act 1954 (Qld) and the purpose given for the introduction of the offence in the relevant Bill Explanatory Notes referring to recommendation 120 of the Special Taskforce on Domestic and Family Violence (Queensland) in its Report *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland.*

"In order to amount to choking, there must be some pressure that results at least in the restriction of the victim's breathing. As the evidence in this trial illustrated, there were overt signs in the consequences the

complainant described of her struggle to breathe, her inability to speak, the black dots in her vision, the pain in her chest, and her feeling disoriented from which it could be inferred there was some restriction of her breathing, as a result of the appellant's hand around her neck. The consequence of the restriction of the complainant's breathing was not a separate element of the offence, but the evidence required to prove the act of choking."

The direction given by the trial judge on the meaning of "choked" was correct. It was a direction on the law. The meaning of the word "choked" for the purpose of count 1 was a matter of legal interpretation and it was appropriate that the judge directed the jury to apply the meaning "to hinder or stop the breathing of a person"." [58]-[59]

Ground 2: The appellant's argument was that as the particulars specified alternative conduct for each count they failed to sufficiently inform him of the case against him (Count 1: "stopped and/or hindered [the complainant's] breathing and, in doing so, choked her"; Count 2: "shook and/or applied force to [the complainant's] shoulders and, in doing so, he unlawfully assaulted her" [60]). The complaint re Count 1 was resolved by the conclusion as to meaning of "choke" re ground 1; it was sufficient that the jury be satisfied the complainant putting his hand around her neck hindered her breathing [62]. There was no substance to the complaint re Count 2 [63].

Ground 3: The jury were given extensive and appropriate directions that they could not convict unless satisfied beyond reasonable doubt that the complainant was "a reliable and truthful witness"… "that she was choked by the [appellant] by him placing his right hand around her throat and squeezed in the way that she described" and similar directions were given re Count 2 [65]. The jury's verdicts were not unreasonable [66].

2. Application for leave to appeal against sentence granted.

3. Appeal against sentence allowed.

The trial judge considered the sentencing decisions in R v MCW [2018] QCA 241 and R v MDB [2018] QCA 283. Mullins JA said: "Objectively, the appellant's offending was less serious than the offending in MCW and MDB. The appellant also was younger than those offenders and without the relevant prior criminal history. It was therefore surprising that the prosecutor at the trial submitted to the trial judge that a sentence in the order of three years and six months or four years' imprisonment was appropriate. It does not assist a sentencing judge, when the prosecutor's submissions propose a sentence that is outside the proper exercise of the sentencing discretion for the offending committed by the particular offender." [71]

4. Set aside the sentence imposed at first instance for count 1 and, in lieu, the appellant is sentenced to imprisonment for a period of two years with the parole release date fixed at 5 June 2020.

5. The declaration as to pre-sentence custody and other orders made at first instance are confirmed.

***R v Ridgeway* [2020] QCA 38 (10 March 2020) – Queensland Court of Appeal**

'Alternative hypothesis' – 'Attempted murder' – 'Children' – 'Evidence' – 'History of abuse' – 'Jury directions' – 'Miscarriage of justice' – 'Misdirection or non-direction' – 'Motive' – 'Post-offence conduct as evidence of consciousness of guilt' – 'Separation' – 'Verdict unreasonable or insupportable having regard to evidence'

Charges: Attempted murder x 1 (aggravating circumstance of being a domestic violence offence).

Case type: Appeal against conviction

Facts: The appellant man was convicted of one count of attempted murder (domestic violence offence) and was sentenced to 10 years' imprisonment with a non-parole period of 8 years. The appellant, an electronics engineer, was alleged to have attempted to murder his wife (the victim) by connecting a garden hose to a nitrogen gas cylinder which was then attached to the inside of the caravan where the victim slept. There was evidence that the appellant had motive to kill the victim because she was taking preliminary steps to divorce him and had demanded that he leave the matrimonial home. She had also left a will making him her beneficiary. In his police interview, the appellant denied knowledge of the contraption. At trial, however, he admitted that he constructed the contraption as a drainage system ([74]). Further, the appellant acknowledged his relationship difficulties with the victim and told police that they had an argument concerning their daughter. According to the victim, that argument led to the appellant pushing her against a wall while threatening to punch her. As a result, she called the Domestic Violence Hotline.

In summary, the appellant's case was that the Crown had failed to exclude the hypothesis that the victim had constructed the apparatus, because there was evidence that:

- She had a motive to implicate her husband falsely in a murder attempt.
- The appellant must have appreciated that the apparatus could not have killed his wife.
- The contraption was ineffective to kill.

Issue: The appellant appealed against conviction. He submitted that the guilty verdict could not be supported

by the evidence or was unreasonable ([52]) (Ground 1). He also claimed that the trial judge failed to direct the jury that an essential step in the chain of reasoning was that the appellant believed that introducing nitrogen into the caravan would kill his wife ([97]) (Ground 2), and complained about the trial judge directions as to the use of post-offence conduct as proof of his intention ([107]) (Ground 3). His appeal also included the claim that there was a failure to distinguish attempted murder from other offending based on the same physical acts, but with different mental elements, which might have explained the post-offence conduct ([114]) (Ground 4).

Held: All four grounds of appeal were dismissed. Sofronoff P (with Philippides JA and Flanagan J agreeing) noted that it was open to the jury to reject the appellant's explanation for constructing the contraption. His credit was impaired by his failure to offer this explanation when first interviewed by police. Further, the verisimilitude of his explanation was reduced by the uselessness of the contraption as a drainage system, and the inconsistencies in his reasons for erecting the drainage system. The jury was therefore entitled to accept the victim's evidence and be satisfied beyond reasonable doubt that the appellant constructed the apparatus to deliver gas into the caravan in which his wife was sleeping ([81]-[82]). The evidence that the victim had informed the appellant that she wanted a divorce, together with the evidence of lies to police, supported a conclusion that the appellant believed that he had built a system that would be effective to kill ([88]). His Honour therefore held that the jury could be satisfied beyond reasonable doubt of the appellant's guilt.

As to the second ground of appeal, the appellant was unable to establish a miscarriage of justice by merely asserting that the trial judge miscarried through a lack of proper directions about proof of the appellant's intention ([106]). A redirection was not sought ([101]). Whilst the trial judge did not identify the series of evidentiary steps that the jury could take to find guilty intent, doing so would have assisted the prosecution, not the defence ([106]).

Further, the appellant submitted that there was an alternative hypothesis that he had set up the apparatus to harass his wife, and therefore, his post-offence conduct was indicative of his sense of guilt for trying to harass her ([109]). This submission failed because harassment by the use of nitrogen, as an alternative hypothesis, did not arise as an issue in the case ([110]).

Ground 4 was also rejected. Citing R v Baden-Clay, the Court stated that "it is not necessary for a jury to consider a hypothesis which was not put to it for tactical reasons, which is directly contrary to the evidence

that the accused gave at the trial and which is directly contrary to the way in which the accused's counsel conducted the defence". Any intention on the appellant's part to do anything other than kill his wife or drain water did not arise on the evidence and did not have to be considered ([120]).

***R v Toweel* [2019] QCA 303 (20 December 2019) – Queensland Court of Appeal**

'Children' – 'Evidence issues' – 'Jury directions' – 'Physical violence and harm' – 'Prior acts of domestic violence' – 'Propensity evidence' – 'Strangulation'

Charges: 1 x unlawful strangulation; 1 x unlawful assault

Case type: Appeal against conviction

Facts: The appellant was charged with 2 offences, committed on the same day against a woman (the complainant) with whom he was in a domestic relationship and had a child. Count 1 involved the appellant strangling the complainant 'really tight' for a period of about 15 seconds, stopping only when their son fell from a couch. Count 2 occurred shortly afterwards. The appellant grabbed the complainant's hair and repeatedly said 'bitch' while she held their son. The appellant then destroyed her phone ([4]-[5]). The complainant also gave evidence of 5 previous incidents of domestic violence ([11]-[17]); however, the appellant did not give or call evidence ([18]). The jury convicted the appellant on both counts.

Issue: The issue for the Court was whether the appeal against the convictions should be allowed. The appellant appealed against each conviction on the ground that the trial judge wrongly admitted evidence of prior acts of domestic violence by him against the complainant. He also appealed against the conviction on the strangulation charge on the ground that the verdict was unreasonable.

Held: The Court dismissed the appeal. The evidence summarised at [4]-[18] was admitted under s 132B(2) of the Evidence Act 1977 (Qld). The question for the Court was whether the admission of the evidence resulted in a miscarriage of justice ([34]). The Court held that the evidence of prior events was relevant to establish that the alleged offending did not occur randomly and to demonstrate the nature of the relationship between the appellant and complainant. To minimise any risk of the jury engaging in propensity reasoning, the trial judge warned them that they were not to use the evidence as demonstrating the appellant's propensity to commit similar offences ([37]-[38]). Overall, the jury directions avoided the misuse of the evidence, and no miscarriage of justice was caused by its admission ([40]).

***Vital v DPP (Qld)* [2019] QCA 290 (6 December 2019) – Queensland Court of Appeal**

'Appeal' – 'Assault' – 'Bail' – 'Physical harm and violence' – 'Separation' – 'Weapon'

Charges: Murder x 1; assault occasioning bodily harm while armed and in company x 1; burglary at night x 1; common assault x 1; and robbery with personal violence as a domestic violence offence x 1.

Proceedings: Appeal against refusal to grant bail.

Facts: The accused was a 19-year-old male with no prior criminal history. He was in an abusive relationship with the daughter of a man he was charged with murdering at the time of offending.

On the day of the offending, the daughter told the accused their relationship was over. That night, the appellant was in the daughter's bedroom when she came home but was asked to leave by her flatmate. After leaving the apartment he began to make a nuisance of himself, causing the flatmate to call the daughter's father (the victim) who soon arrived with another man. The appellant fled by car with his companion and was followed by the victim and the other man. The appellant eventually stopped the car and his companion went onto the road and took out a pistol which he pointed at the victim's car. The victim's companion approached the appellant, who was still in the car, and began to punch the window.

The appellant's companion hit the victim with his pistol and knocked him unconscious. This blow ultimately killed the victim. The appellant and his companion then took off, briefly returning to the daughter's home and punching her two or three times in the face before fleeing again.

The appellant submitted that the judge who refused his bail application 'must not have given consideration to the appellant's youth, his lack of criminal history and, as the appellant asserts, the weakness of the Crown case against him, the weight that these matters deserved'. He submits that it should be inferred that Justice Davis made an error, and in oral argument, he has also submitted, that Justice Davis must have overlooked the extraordinary delay of about 18 months until there can be a trial in this matter. (per Soffronoff P at [7-8]).

Issue: Whether to grant leave to appeal.

Decision and reasoning: Sofronoff P stated that 'in an appeal against a discretionary decision, it is not a valid ground of appeal to contend that the judge did not give sufficient weight to a relevant factor or gave too much weight to a factor. Weight is a matter for the decision-maker alone' [7]. His Honour thus dismissed the appellant's related claims.

The submission that the judge must have overlooked the delay was not accepted as a delay of that order was to be expected [12]. Furthermore, regarding the appellant's claim of error, Sofronoff P concluded that '[i]n an application for bail, the appellant's actions after he returned to Jane's house could, on their own, justify a refusal of bail. When they are taken into account in a case in which the applicant is also awaiting trial for murder, refusal of bail can hardly be regarded as so unreasonable that an error of some kind in the judge's reasoning has to be inferred. Yet that is what the appellant must show in order to persuade this Curt to disturb the decision of Justice Davis. In my view, he has failed to do so, and the appeal should be dismissed' [13].

***R v O'Malley* [2019] QCA 130 (28 June 2019) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Domestic violence offence' – 'Dysfunctional upbringing' – 'People with disability and impairment' – 'Physical violence and harm'

Charges: 1 x manslaughter

Case type: Appeal against sentence

Facts: The applicant pleaded guilty to manslaughter by unlawfully killing the deceased, with whom he was in a domestic relationship for some 18 months. The applicant was sentenced to 11 years' imprisonment. The conviction was declared to be a domestic violence offence and a serious violent offence.

The applicant told ambulance offices that the deceased fell off the toilet shortly before he had called them, and that she had also fallen in the shower the night before ([11]). However, a post-mortem of the deceased's body revealed that the most likely cause of death was multiple injuries, including multiple rib fractures and liver lacerations. Such injuries were inconsistent with a fall in a shower, and were most likely to have resulted from a 'focused and severe force, such as kicking or stomping' ([14]). Although the applicant disagreed with the pathology report ([21]), his mobile phone records demonstrated that he knew the deceased had broken ribs ([22]). The agreed statement of facts recorded that the applicant was to be sentenced on the basis that he (1) unlawfully assaulted the deceased causing the injuries which led to her death; (2) kneed her to the stomach and to the back; (3) caused head and facial injuries; and (4) assaulted her in the past as evidenced by the facial bruising previously observed by witnesses and the healing fractures, which demonstrate that this was not an isolated violent incident ([24]).

Issue: The applicant filed an application for leave to appeal against his sentence on the ground that it was

manifestly excessive, and wished to add an additional ground of appeal, namely, 'that the learned sentencing judge erred in finding that his post-offence conduct demonstrated a complete disregard for the deceased and did not demonstrate remorse or concern for the deceased' ([48]).

Held: The applicant's antecedents and criminal history is discussed at [25]-[36]). The applicant has Aboriginal heritage. He also had a history of criminal offending, including convictions for breaking and entering, and property damage, and, most importantly, for offences against his former partner for property damage, common assault, contravention of a prohibition or restriction in an apprehended violence order, and use of a carriage service to menace, harass or offend. He claimed to have had a 'socially deprived upbringing' - his father was a 'professional and serial criminal' and his step-mother was emotionally abusive. His biological mother was not involved in his care due to very heavy alcohol dependency and abuse. He also claimed to have been sexually abused when he was 11 years old. Psychological testing suggested that the applicant's intellectual level likely fell in the intellectually disabled range. A psychologist observed that his dysfunctional and abusive upbringing likely significantly influenced his offending behaviour.

The Court distinguished the present case from DeSalvo, Murray, West and Heazlewood where the courts did not consider a domestic violence offence ([89]). The applicant had a relevant prior criminal history, including convictions for prior domestic violence episodes, which distinguished him from the offenders in Sebo, Baggott, Pringle and Hutchinson ([91]). Given the 'seriousness of the offending manifested by the brutality of the applicant's assault and the relative defencelessness of the deceased, the applicant's remorse after the assault, his timely plea of guilty, his antecedents, his deprived social upbringing, his intellectual disability and the state of his mental health, and bearing in mind the need for some personal deterrence due to his past domestic violence offences and his moderate risk of reoffending, the related need for community protection, and the importance of denunciation of domestic violence offences causing death', the sentence imposed by the trial judge was just in all the circumstances, and thus stood as 'the appropriate sentence for the offender and the offence' ([95]-[96]). Consequently, leave to appeal against sentence was dismissed on both grounds.

R v Sprott; Ex parte Attorney-General (Qld) **[2019] QCA 116 (14 June 2019) – Queensland Court of Appeal**

'Attempted murder' – 'Leniency' – 'Mitigating factors' – 'Sentencing'

Charges: Attempted murder x 2.

Case type: Appeal against sentence.

Facts: The respondent and his partner had an argument after the respondent came home from the pub. The respondent later walked to his mother's house, where his mother lived with her partner, and violently assaulted them. The respondent's mother suffered multiple injuries, including a fracture to her eye socket, while her partner suffered fractures, 2 broken ribs and an injured liver. The respondent pleaded guilty to 2 counts of attempted murder. Crow J, the sentencing judge, sentenced the respondent to 2 concurrent sentences of 9 and a half years imprisonment.

Issue: The Attorney-General appealed against the 2 sentences on the ground of manifest inadequacy. Key questions included whether Crow J gave appropriate weight to the mitigating and aggravating factors of the offence and the respondent's personal circumstances, and whether a sentence below 10 years imprisonment for 2 counts of attempted murder was manifestly inadequate.

Held: The Court dismissed the appeal. Appellate intervention is not justified simply because the result is markedly different from other sentences that have been imposed in other cases ([15]). Rather, the Attorney-General was required to demonstrate actual error with Crow J's reasoning.

The Attorney-General's submissions included that the attacks were premeditated, that the respondent lacked remorse, that his guilty pleas were late, and that he carried out the offending while he was subject to a Domestic Violence Order ([20]). The respondent had previously assaulted his mother. It was submitted that the Crow J did not give these matters appropriate weight ([21]).

The Court noted that the case involved substantial mitigating factors that were personal to the respondent ([23]). The respondent's current state of health was partly caused by his mother's lifelong neglect of him, and was significantly exacerbated by both of his victims' irresponsibility over the respondent's son's death, and by their callousness afterwards ([40]).

It was in these circumstances that Crow J viewed the respondent's case as 'far from general.' The most relevant circumstance was the killing of the respondent's son by the victims' dog ([37]). The offending was motivated by the son's death 'in a most violent fashion' ([35]). The Court held that it was open for Crow J to give substantial weight to the mitigating factors and, subsequently, impose a somewhat 'lenient' sentence. It was not for the Court of Appeal to substitute its own views about these matters ([41]).

R v Black **[2019] QCA 114 (11 June 2019)– Queensland Court of Appeal**

'Children' – 'Evidence' – 'Physical violence and harm' – 'Rape'

Charges: Assaults occasioning bodily harm x 3; Rape x 1.

Case type: Appeal against conviction.

Facts: The appellant was found guilty of 2 counts of assault occasioning bodily harm and one count of rape. He was acquitted of another charge of assault. For the offence of rape, the appellant was sentenced to 5 years' imprisonment, suspended after 27 months with an operational period of 5 years. He was sentenced to concurrent terms of 12 months' imprisonment on the other counts.

The appellant and complainant were married and had 2 children when the offending allegedly occurred. They separated around one year later. The first count of assault occasioning bodily harm involved allegations that the appellant pushed the complainant against a staircase, verbally abused her, ripped off her clothes and grabbed her breasts. The complainant said that she suffered bruising as a result of this event. The second count involved allegations that the appellant unlawfully assaulted and caused bodily harm to the complainant by slamming a door closed, hitting her fingers. The appellant also allegedly raped the complainant. It was alleged that the appellant and complainant were on good terms for many years after the couple had divorced. The complaint was made to the police over 8 years after the alleged events occurred and at a time when the complainant and the appellant were in litigation about their children.

Issue: The appellant appealed against the convictions on the ground that the jury's verdict was unreasonable having regard to the evidence.

Held: The appellant submitted that the complainant's attitude towards the appellant after separation was not that which would be expected of someone who had suffered the conduct alleged ([24]). The Court held that the cordial relationship between the parties provided a substantial basis for challenging her testimony, and may have justified a reasonable doubt in the minds of the jury in relation to the count of rape ([35]).

However the question for the Court was whether it was open, on the whole of the evidence, for the jury to be satisfied of the appellant's guilt, having regard to the advantage enjoyed by the jury over the Court, which had not seen or heard the complainant's evidence being given ([36]).

Their Honours noted the importance of the timing of the complaint to police. While it strongly indicated that it

was affected by the litigation between the couple about their children, it did not require the jury to have a doubt about the credibility of the complainant's complaints. It was open to the jury to accept the complainant's evidence, and the Court ordered the appeals against conviction to be dismissed ([37]-[38]).

***R v ABE* [2019] QCA 83 (14 May 2019) – Queensland Court of Appeal**

'Children' – 'History of abuse of accused' – 'People with disability and impairment' – 'Physical violence and harm' – 'Primary carer' – 'Stalking'

Charges: Stalking x 1 (Count 1); malicious act with intent x 1 (Count 2); grievous bodily harm x 1 (Count 3).

Case type: Sentence application and appeal.

Facts: The applicant experienced domestic violence from her husband (the complainant) from 2005. Cross-protection orders prohibited them from living together. The applicant arrived at the matrimonial residence with two children of the marriage. Her husband was residing at that residence. That night, the complainant sustained 4 stab wounds at the hands of the applicant. He also suffered 2 lacerations to the right hand that caused tendon and nerve damage. These events constituted Counts 2 and 3. The applicant and complainant were separated, and their severely disabled daughter, AA, was in hospital at the time of the offending. The applicant is her primary carer. The complainant for Count 1 was a family friend who was having an affair with the complainant.

The applicant pleaded guilty to the charges. She was sentenced to four months' imprisonment for Count 1, and six years' imprisonment with a parole eligibility date fixed after serving 15 months in custody for each of the other counts.

As the sentence for the stalking was already served, the purpose of the application was to review the sentence imposed for the other counts. The applicant applied for leave to appeal against her sentence on the basis that it was manifestly excessive and that the sentencing judge erred in failing to find that the circumstances of AA were exceptional and therefore justified a non-custodial sentence. The applicant also applied for leave to adduce further evidence, namely an affidavit from her adult daughter which detailed the care arrangements for AA since the applicant went into custody.

Issue: Whether the sentence was manifestly excessive; Whether the sentencing judge erred in failing to take into account the applicant's disabled daughter's needs.

Held: The appeal against the sentence was allowed, and the sentence was varied. Mullins J noted that the offences were committed in circumstances where the applicant was AA's primary carer. When imposing an appropriate sentence, a balancing exercise needs to be undertaken which fulfils the purposes of 'sentencing for serious offending involving premeditated use of a weapon to inflict injury in a domestic setting, but also [to] allow for the mitigating circumstances and particularly the applicant's role in relation to the special needs of AA'. The period served in custody should be sufficiently long to reflect appropriate punishment for the crime, without separating the applicant from AA for any longer than is necessary ([47]). Her Honour held that, in light of AA's needs, the custodial component of the sentence should have been reduced by a further period of 6 months. Therefore, the sentence was manifestly excessive to the extent of fixing the parole eligibility date after 15 months in custody rather than after a period of 9 months ([48]). Davis J and Sofronoff P agreed with the reasons of Mullins J. Citing *R v Chong; ex parte Attorney-General (Qld)* [2008] QCA 22, Davis J noted that although hardship to an offender's family resulting from the offender's imprisonment cannot override all other sentencing considerations, there will be some cases where family hardship results in a substantial reduction either in the sentence, or the period to be served before parole eligibility even where the offending is serious ([52]).

The Court also refused the application for leave to adduce further evidence because it was neither necessary nor expedient, in the interests of justice, to receive further affidavits of the adult daughter ([37]).

***R v Lan* [2019] QCA 76 (7 May 2019) – Queensland Court of Appeal**

'Attempted murder' – 'People with mental illness' – 'Physical violence and harm' – 'Self-serving statements' – 'Strangulation'

Charges: 1 x attempted murder

Case type: Appeal against sentence

Facts: The applicant was convicted on his plea of guilty of attempted murder (domestic violence offence) and sentenced to 9 years' imprisonment with no further order ([1]). The applicant and complainant were involved in a relationship for approximately one year prior to separating, but remained friends. The offending conduct took place when the applicant attended the complainant's unit. He made unwanted advances towards her, punched her and threatened to kill her. The complainant lost consciousness for a period and, upon regaining consciousness, saw the applicant standing over her with his pants and underwear down. He also strangled

the complainant. The applicant later provided self-serving statements to the police which sought to blame the complainant for violent behaviour towards him ([3]-[13]).

Issue: The applicant sought leave to appeal against his sentence on the basis that it was manifestly excessive.

Held: The applicant made a number of written submissions in support of his application ([22]). He maintained that she had burned his face with a lighter ([23]), which was not part of the agreed statement of facts. He also asserted that the complainant suffered from a mental illness ([24]), and sought to minimise the seriousness of his conduct, which demonstrated a lack of remorse or insight ([25]).

The application for leave to appeal against the sentence for attempted murder was refused. Philippides and McMurdo JJA and Mullins J found that the applicant's assertions conflicted with the agreed facts and partly reiterated the self-serving statements he made to police ([26]). Their Honours agreed with the respondent's submissions that the sentence imposed was within the sentencing discretion and supported by authorities such as R v Sauvao, R v Ali, R v Seijbel-Chocmingkwan and R v Kerwin. After analysing these authorities at [28]-[31], their Honours found that they demonstrated that the 9 year sentence was within the sound exercise of the sentencing discretion ([32]).

***R v Kau* [2019] QCA 73 (3 May 2019) – Queensland Court of Appeal**

'Corroborative evidence' – 'Domestic violence offence' – 'Mistake direction' – 'Rape -sexual and reproductive abuse'

Charges: 2 x rape (domestic violence offence)

Case type: Appeal against conviction

Facts: The appellant was charged with 4 counts of rape, and convicted on 2 counts as a domestic violence offence. He was sentenced to 5 years' imprisonment, suspended after 2 and a half years in custody. The complainant was the appellant's wife. Counts 1 and 3 (subjects of the guilty verdicts) were particularised as vaginal rapes, while Counts 2 and 4 (subjects of the not guilty verdicts) were alleged anal rapes ([4]).

Issue: The appellant appealed against his conviction on 2 grounds ([5]):

- 'The convictions should be set aside as unreasonable because the guilty verdicts were inconsistent with the not guilty verdicts on the other counts';

- ‘There was a miscarriage of justice because the…trial judge ought to have directed the jury to consider whether they were satisfied beyond reasonable doubt that the appellant did not act under a mistake of fact as to the complainant’s consent on the two counts the subject of the guilty verdicts’.

Held: To succeed on the first appeal ground, the appellant must prove the verdicts were inconsistent as a matter of logic and reasonableness. The test is that ‘no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion’ ([6]). There were 3 differences in the quality of the evidence considered by the jury ([9]), namely, the difference in what the complainant told her confidantes before she reported to the police ([10]), the difference in her report to the police ([11]), and a recording of a conversation between the complainant and appellant in which she made no mention to anal penetration ([12]). There was also evidence that might have corroborated Counts 1 and 3 ([15]), but there was no such evidence about Count 2 or 4 ([20]). The Court held that it was open for the jury to be satisfied beyond reasonable doubt of the appellant’s guilt on Counts 1 and 3. The differences in the quality of the complainant’s evidence and appellant’s corroborative evidence provided a logical and reasonable basis for the jury to arrive at different conclusions and return different verdicts for Counts 1 and 3 and Counts 2 and 4 ([23]).

The second appeal ground argued that the jury ought to have been directed to consider whether the Crown had satisfied them beyond reasonable doubt that the appellant had not acted under an honest and reasonable, but mistaken, belief that the complainant had consented to the vaginal penetrations. To succeed on this proposed ground, the appellant must demonstrate that the trial judge should have given a mistake direction and that it is reasonably possible that the failure to do so may have affected the verdict ([24]). In light of the evidence, there was a negligible prospect of the jury, having accepted the occurrence of the vaginal penetrations, having a reasonable doubt whether the appellant acted under an honest and reasonable, but mistaken, belief as to the complainant’s consent. In the circumstances, the trial judge was under no duty to give such a direction ([39]). The appellant was therefore not deprived of a real chance of an acquittal by the failure of the trial judge to give a mistake direction to the jury.

Consequently, the appeal was dismissed.

***R v ABB* [2019] QCA 22 (19 February 2019) – Queensland Court of Appeal**

‘Evidence’ – ‘Evidence issues’ – ‘Expert or opinion evidence’ – ‘Physical violence and harm’ – ‘Propensity evidence’

– ‘Self-represented litigants’

Charges: Assault, constituting a domestic offence x 4.

Case type: Appeal against conviction. Application for extension of time.

Facts: The applicant was convicted on four counts of assault, each of which constituted a domestic offence. All four counts were committed against the applicant’s wife on the same day. The applicant grabbed the complainant’s hair and pulled her to the ground, put his hands around her throat and choked her, and punched her on the jaw with both fists, which resulted in a fracture and required her teeth to be wired together and the fracture closed with a plate and screws ([4]). At the trial, Dr Webster gave evidence, based on the complainant’s medical records, that the injury had been caused by a blunt force trauma to a significant extent ([30]). The applicant lodged a notice of appeal against his conviction when the time for lodging an appeal had expired over three weeks prior. As a result, the applicant also filed an application for extension of time within which to appeal.

The applicant appealed on the ground that the verdicts were unsafe and unsatisfactory ([32]). He also raised a number of specific grounds, including that

- The prosecution led propensity evidence, the prejudicial effect of which outweighed any probative force, and created an unfair trial ([33]-[36]);
- The evidence of Dr Webster was fabricated, causing a miscarriage of justice ([37]-[43]);
- The complainant at trial had previously practiced her evidence and amended the part of the evidence that would have been harmful to the prosecution case ([44]-[45]);
- A prejudicial answer was given by the complainant during the trial and there was no direction given to the jury to disregard it ([46]-[51]);
- There was discrepancy in the complainant’s evidence as to how she was punched;
- Dr Webster was not qualified to give an opinion that the injury constituted grievous bodily harm as he was merely a trainee as an oral and maxillofacial surgeon ([54]).

Issues: Whether the grounds of the applicant’s proposed appeal had reasonable prospects of success to justify granting an extension of time.

Decision and reasoning: When considering an application for extension of time, the court will examine whether there is good reason for the delay and whether it is in the interests of justice to grant the extension.

Length of delay is also a relevant consideration ([7]). Although the length of the delay was not significant, the applicant was well aware of the time limit for filing and allowed the time to pass without taking steps to file a notice of appeal. The Court was inclined to grant the extension of time if the matter had been confined to these considerations; however as the merits of the proposed appeal could not be substantiated, the court refused the application ([22]-[23]).

The applicant's grounds of appeal failed for several reasons. First, the jury was expressly directed that the evidence was not led as propensity evidence and therefore the trial did not miscarry on the basis that the prosecution led such evidence ([36]). Second, the applicant's contention that Dr Webster's alteration of his opinion constituted some sort of fabrication of his evidence, causing a miscarriage of justice, was misconceived ([37]). Third, any suggestion that the complainant was able to rehearse or practice her evidence at the first trial was simply the result of the fact that the first trial was aborted. Whatever benefit she got from giving evidence on that occasion was balanced by the fact that the defence counsel had the opportunity to cross-examine her more than once, and so no prejudice was caused ([45]). Fourth, the Court found that an answer by the complainant, which the applicant argued caused him prejudice as it revealed his infidelity, was unlikely to have carried much weight with the jury and did not deprive the applicant of a fair chance of acquittal ([51]). Fifth, the applicant contended that there were discrepancies in the complainant's evidence because in her evidence in chief, she said that she was punched after she fell; however in cross-examination, she said she did not scream when she was punched, but when she fell. The Court held that there was no real inconsistency as the first piece of evidence related to when she was punched and the second to when she screamed ([52])-([53]). Sixth, it was admitted at the trial that the injury constituted grievous bodily harm. The fact that Dr Webster was a trainee did not mean that he was not a relevant expert ([54]-[58]).

In reviewing the evidence ([94]-[107]), the Court held that it was open to the jury to be satisfied of the applicant's guilt. As all the grounds of the applicant's appeal lacked merit, the appeal had no reasonable prospect of succeeding and the application for an extension of time was refused ([108]). The Court also took into account the fact that the applicant was self-represented ([59]).

R v Sollitt [2019] QCA 44 (19 February 2019) – Queensland Court of Appeal

'Breach protection order' – 'Children' – 'Evidence' – 'Evidence issues' – 'Factors affecting risk' – 'Physical violence and harm' – 'Protection order' – 'Sexual and reproductive abuse'

Charges: Assault occasioning bodily harm x 2; contravention of a domestic violence order; rape.

Case type: Appeal against conviction. Application for an extension of time.

Facts: The appellant was charged with a number of offences against the complainant, his then de facto partner. The complainant's daughter and son gave evidence of the events ([33]-[40]). The complainant herself gave evidence asserting that she was in a 'domestic violence cycle' ([23]). After a trial, the appellant was convicted of two counts of assault occasioning bodily harm (domestic violence offence) and contravention of a domestic violence order. The jury acquitted the appellant of a charge of torture and was unable to reach a verdict in relation to a charge of rape. After a retrial on the charge of rape, the appellant was convicted and sentenced to seven years' imprisonment ([1]-[4]). The appellant submitted that consent was given by the complainant and that sexual intercourse in the context of the violent circumstances was not a departure from the usual dynamics of the relationship. The Crown contended that if there was any ostensible consent by the complainant, it was induced by force and invalid at law, and that the appellant could not have held a mistake of fact as to consent ([46]). The appellant appealed against his conviction of rape on the grounds that the jury's verdict was unreasonable and unsafe, and there was a miscarriage of justice, resulting from the trial judge's misdirection of the jury on the defence of mistake of fact ([5]).

Further, the appellant sought an extension of time in which to appeal his sentence ([6]). The applicant's explanation for delay in filing the application for leave to appeal against sentence was that his lawyer did not provide him with any information about appealing his sentence and that he thought he would be able to get more time ([69]).

Issues: Whether the verdict was unreasonable or insupportable. Whether the appeal should be allowed. The predominant issue at trial was the issue of consent, including a mistake of fact as to the complainant's consent.

Decision and reasoning: The appeal against conviction was dismissed and the application for an extension of time was refused.

Appeal against conviction:

In relation to the appellant's contention that the jury's verdict was unreasonable or cannot be supported by the evidence, the Court considered whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty based on the whole of the evidence. In determining this question, the Court undertook

its own independent assessment of the evidence, assessing its sufficiency and quality ([45]). As to the issue of consent, the Court held that it was entirely open to a jury to find that the complainant gave an honest and reliable account, and it was not surprising that the jury were satisfied that the prosecution had negatived any mistake of fact as to consent on the part of the appellant. There was no evidence from the appellant that he held an honest but mistaken belief as to voluntary consent. Moreover, the appellant's conduct immediately following the offence and his admission to the complainant's daughter undermined any assertion that the appellant honestly and reasonably believed that the complainant consented ([51]-[52]). It was also appropriate for the jury to have regard to the 'ongoing domestic violence in the relationship' and the complainant's continuation of the relationship in considering the issues raised by the case ([53]).

The appellant also made a number of complaints about the trial judge's directions, such as the fact that his Honour used a number of terms interchangeably regarding consent ([58]) and, in giving his final direction on mistake of fact, failed to give a repeat direction on the standard of proof required of the prosecution to negate the defence of mistake of fact beyond reasonable doubt ([64]). The trial judge's use of the words other than 'consent' was not found to constitute a miscarriage of justice ([60]). Further, there was no error in failing to specifically mention the standard of proof in the final redirection, as it was given in conjunction with the aide memoire, which itself identified the requisite standard of proof ([66]).

Extension of time:

In considering whether an extension of time should be granted, the court examined whether there was any good reason to account for the delay and considered whether it was in the interests of justice to grant the extension ([68]). The Court was not persuaded that there was any good reason for the delay to grant an extension ([69]). Moreover, the applicant was 43 years old at the time of the sentence and had repeatedly been convicted of offences of violence, particularly in a domestic setting. These factors supported the sentence imposed and indicated that the sentence was not manifestly excessive ([70]).

R v MDB **[2018] QCA 283 (19 October 2018) – Queensland Court of Appeal**

'Aggravating feature' – 'Appeal against sentence' – 'Breach protection order' – 'Domestic violence offences' – 'Strangulation'

Charges: 1x common assault, 1x threatening violence, 1x assault occasioning bodily harm, 1x choking in a domestic setting, and 1x wilful damage.

Appeal type: application for leave to appeal against sentence.

Facts: The applicant was in a relationship with the complainant from August 2016. On 22 December 2016, a protection order requiring that the applicant be of good behaviour and not commit acts of domestic violence against the complainant was issued pursuant to the *Domestic and Family Protection Act* 2012 (Qld) (DFVPA). On 17 February 2017, the applicant attacked the complainant. Consequently, the applicant was charged with five offences (common assault, threatening violence, assault occasioning actual bodily harm, choking in a domestic setting, wilful damage) and three summary offences (deprivation of liberty, breach protection order, unlawful possession of a weapon). On 15 February 2018, the applicant was convicted and sentenced on the five indicted offences and convicted of the three summary offences without any further punishment.

Issues: there were four grounds of the applicant's appeal:

- Four-year sentence imposed for the offence of choking was manifestly excessive
- The sentencing judge erred by relying upon the protection order as evidence that the offending was not isolated.
- The sentencing judge erred by finding that the applicant had made a threat to kill.
- The sentencing judge erred by finding that the applicant was generally not credible because he told police it wasn't illegal to possess a "flick knife" in a private place in circumstances where he was previously convicted of possessing a knife in a public place.

Decision and reasoning: application for leave to appeal against the sentence refused.

Whether the sentence was manifestly excessive was determined by Gotterson JA through a consideration of relevant authority, the nature and purpose of the offence of choking, and the circumstances of the case at hand. Both *R v MCW* [2018] QCA 241 and *Bennet* were referred to by his Honour to illustrate the seriousness of the offence and the factors relevant to sentencing offenders under the offence (see [44]-[50]). His Honour then noted there were five material facts that warranted the severity of the punishment; these factors included, among others, the disturbing circumstances of the offending, the physical, emotional and financial impact it had on the complainant, and the applicant's concerning criminal history (see [52]).

As to the second ground of appeal, his Honour initially notes that the order was part of the agreed facts which formed the basis of the sentence proceedings. Gotterson JA then refers to s 9(3)(g) and s 9(10A) of the *Penalties and Sentences Act* 1992 in asserting that the existence and contravention of an order is a key consideration for the sentencing judge and forms an aggravating feature respectively. In doing so, his Honour

dismisses the foundation of this contention that the order cannot be referred to as evidence. In addressing the applicant's specific contention, his Honour observes that orders are only made on the basis of evidence of previous difficulties in a relationship and that accordingly, the sentencing judge's inference that the order was a result of previous relationship difficulties was a reasonable one. Taking this into account, his Honour then affirms that it was correct for the sentencing judge to state that the offences committed on 17 February 2017 were not "an isolated and exceptional incident" (see [26]).

Gotterson JA rejected the third ground of appeal on the basis that the applicant's contention mis-interpreted the sentencing judge's remarks in coming to the finding that the applicant threatened to kill her (see [27]). Having regard to the seriousness and criminality of the applicant's conduct, his Honour perceives the sentencing judge's finding as reflecting no error at all (see [28]).

Similarly, his Honour also rejected the fourth ground of appeal on the basis that it was a misconstruction of the sentencing judge's comments. Gotterson JA was of the view the judge made no error in his assessment of the reliability of the matters at hand on the basis of the applicant's instructions (see [33]).

***R v MCW* [2018] QCA 241 (28 September 2018) – Queensland Court of Appeal**

'Breach of protection orders' – 'Fair hearing and safety' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Sentencing considerations' – 'Strangulation'

Charges: Assault occasioning bodily harm x 2; Choking, suffocation or strangulation in a domestic setting x 1; Contravention of domestic violence order x 1

Appeal type: Appeal against sentence

Facts: The applicant pleaded guilty to two counts of assault occasioning bodily harm, one count of choking, suffocation or strangulation in a domestic setting and one summary charge of contravention of domestic violence order ([4]). The prosecutor, relying on *R v West* [2006] QCA 252, *R v King* [2006] QCA 466 and *R v RAP* [2014] QCA 228, submitted to the sentencing judge that three years' imprisonment was appropriate. A variation of the protection order was also sought so as to extend its operation and add a further 'no contact' condition.

The sentencing judge held that the offences were 'cowardly, prolonged and particularly violent' ([23]) and that the offender posed a genuine threat to the community and particularly, to the complainant ([25]). In respect of

each of the assault occasioning bodily harm counts, the applicant was sentenced to imprisonment for two years and six months. Sentences of imprisonment for three years and six months was imposed for the offence of choking, suffocation or strangulation in a domestic setting, and three months for the summary charge. All sentences were concurrent. No date for eligibility for parole was specified. The applicant was therefore ineligible to apply for parole prior to having served half of the effective sentence of imprisonment of three and a half years ([4]).

The applicant appealed on the basis that the sentencing judge had denied him procedural fairness by failing to forewarn the parties of his intention to reduce the head sentence slightly to reflect the guilty plea, and to provide him with an opportunity for a parole at earlier than half the sentence. He also appealed on the basis that the sentence was manifestly excessive.

Issues: Whether the sentence was manifestly excessive; Whether there was a denial of procedural fairness.

Decision and reasoning: Application was refused on the basis that no procedural unfairness arose on the facts and the sentence was not manifestly excessive.

- Manifestly excessive sentence

The applicant submitted that the sentence imposed was manifestly excessive and that the notional starting point of four years' imprisonment for the offence against s 315A of the *Criminal Code 1899* (Qld) (the 'Code') was too high ([33]). Conversely, the respondent contended that consideration must not only be given to the particular circumstances of the applicant's case, but also to the legislative intention for enacting s 315A to provide for specific liability, and a potentially increased maximum penalty, for offences involving choking (and similar conduct) committed in a domestic setting ([34]). Prior to the sentencing, the Code was amended to create a specific offence of strangulation in a domestic setting (see s 315A). That section prescribes a maximum penalty of seven years to deter the increasing frequency of such behaviour. The Court referred to the *Explanatory Notes for the Criminal Law (Domestic Violence) Amendment Bill (No 2*) 2015 at [39] –

> *'The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide…'*

The Court was cautious to apply authorities for sentences for offences constituted by conduct comparable to choking, suffocation or strangulation in a domestic setting, prior to the enactment of s 315A. *R v West* [2006]

QCA 252, *R v King* [2006] QCA 466 and *R v RAP* [2014] QCA 228 involved assaults occasioning bodily harm, the maximum penalty for which was seven years' imprisonment. The Court found that it was not useful to consider the sentences in those cases as comparable authorities for an offence of strangulation in a domestic setting, having regard to the legislature's intention for enacting s 315A and the seriousness of that offence.

The test of manifest excessiveness depends on whether the sentence is unreasonable or unjust, in light of all the factors relevant to the sentence (see *Hili v The Queen* [2010] HCA 45). The fact that the complainant lost consciousness, and that the offending occurred only 18 days after his release from custody for breach of a previous domestic violence order, increased the severity of the offence. The applicant's criminality was also increased by the fact that the choking incident was preceded, and then followed, by an assault occasioning bodily harm. Further, the applicant showed no remorse for the offending and refused to undergo counselling. Boddice J concluded that the circumstances indicated that the applicant's offending amounted to 'an episode of sustained violence undertaken by a recidivist who expressed no remorse' ([47]). Therefore, the Court found that the sentencing judge did not err in sentencing the offender to three years and six months without any further mitigation, and that the sentence was not manifestly excessive in the circumstances ([44]).

***R v Ellis* [2018] QCA 70 (17 April 2018) – Queensland Court of Appeal**

'Appeal against sentence' – 'Emotional and psychological abuse' – 'Physical violence and harm' – 'Post-separation violence' – 'Risk factors - controlling, jealous, obsessive behaviours' – 'Self-represented litigant' – 'Women'

Charges: Torture x 1; Assault occasioning bodily harm x 1; Malicious act with intent x 1.

Appeal type: Appeal against sentence.

Facts: The complainant and the applicant had been in a relationship for two months ([4]). The complainant ended the relationship. The next day, the applicant attended at her home and she let him inside. He accused her of being unfaithful to him ([4]). Over the next four hours, the applicant did the following acts to the complainant: slapped her; ripped an earring from her ear; punched her; struck her with a garden trowel; locked her in a cupboard; heated the trowel and a butter knife over the flame of a gas stove and struck her on the legs and near her vulva, causing burns; and forced her to shower, exacerbating the burns ([5]).

The applicant was sentenced to six and a half years' imprisonment for the torture charge, 18 months' imprisonment for the assault occasioning bodily harm charge, and 6 years' imprisonment for the malicious act

with intent charge. A serious violent offence declaration was made in respect of the torture charge.

Issues: Whether the sentence of six and a half years' imprisonment for the torture charge was manifestly excessive.

Decision and Reasoning: The application for leave to appeal against the sentence was refused. It was within the trial judge's discretion to sentence the applicant and also make a serious violent offence declaration ([19]). The trial judge appropriately balanced the applicant's personal circumstances, including the fact that he was subject to domestic violence as a child, with the fact that he had a criminal history including domestic violence ([12]).

***Harvey v Queensland Police Service* [2018] QCA 64 (6 April 2018) – Queensland Court of Appeal**

'Protection orders' – 'Related family law proceedings' – 'Self-represented litigants' – 'Systems abuse'

Charges: Contravention of temporary protection order x 9; Public nuisance x 1; Using a carriage service to menace, harass or cause offence x 1; Failure to surrender into custody in accordance with an undertaking x 1.

Appeal type: Application for leave to appeal against refusal to grant extension of time to appeal against conviction.

Facts: The applicant had been in a parenting dispute with the mother of his son. There were 5 proceedings in which the applicant sought extensions of time to appeal against his conviction:

1. Six contraventions of temporary protection orders, involving sending threatening emails to the aggrieved.
2. Public nuisance, involving swearing at police officers outside a police station.
3. Two contraventions of domestic violence order, involving emailing the aggrieved.
4. One contravention of domestic violence order and one charge of using a carriage service to menace, harass or cause offence, involving emailing and telephoning the aggrieved.
5. Failure to surrender into custody in accordance with an undertaking.

The applicant sought to justify the breaches of domestic violence orders on the basis that they were justified

under an order of the Family Court (which allowed the applicant to contact the aggrieved for the purpose of communicating in relation to contact with the child of the relationship) ([11]).

Issues: Whether the appeal should be allowed. The applicant sought leave to appeal on the basis that the District Court Judge erred in:

- not having regard to exculpatory evidence of the applicant's mental health issues;
- not allowing exculpatory new evidence;
- stating that the emails were not relevant to s 286 *Criminal Code Act 1899* (Qld);
- not following Supreme Court authority ([25]).

Decision and Reasoning: The application for leave was dismissed. Sofronoff JA held that none of the grounds were supported by evidence or could justify granted leave to appeal ([26]-[29]).

***R v Hutchinson* [2018] QCA 29 (9 March 2018) – Queensland Court of Appeal**

'Domestic violence as an aggravating factor' – 'Imprisonment' – 'Murder' – 'Retrospective operation of sentencing considerations' – 'Sentencing'

Charges: Murder x 1; Fraud x 1;

Appeal type: Appeal against sentence.

Facts: The deceased and the appellant had been married for a lengthy period. The fraud charge occurred when the appellant mortgaged the family home by using a third party to pretend to be the deceased ([5]). The deceased disappeared, and the appellant was charged with her murder. The appellant deceived the deceased's family and friends in the days after she disappeared and never revealed how she died or the whereabouts of her body ([6]-[12]). At trial, the appellant was acquitted of murder, but convicted of manslaughter. He pleaded guilty to the fraud charge on the first day of the trial ([3]). The appellant was sentenced to 15 years and six months, and the manslaughter offence was declared a serious violence offence and a domestic violence offence under s 9(10A) of the *Penalties and Sentences Act 1992* (Qld) ('the Act').

Issues: Whether the sentencing judge erred in retrospectively applying s 9(10A) of the Act or whether the sentence was otherwise manifestly excessive.

Decision and Reasoning: The appellant argued that s 9(10A) of the Act, which has the effect that a context of domestic violence is an aggravating factor in sentencing, should not apply because it should not have retrospective operation ([24]). The Court held that the section is a procedural provision and does not attract the common law presumption against retrospectivity. Therefore, the section applies to all sentencing from its commencement ([43]).

Justice Mullins, Fraser and Morrison JJA agreeing, stated that the sentence was not manifestly excessive, taking into account the context of domestic violence, the appellant's deceit in impersonating the deceased and failing to disclose the whereabouts of the deceased's body, his lack of plea of guilty, his lack of remorse and the unchallenged finding that the deceased died a violent death ([53]).

***R v Maxwell* [2018] QCA 17 (27 February 2018) – Queensland Court of Appeal**

'Following, harassing and monitoring' – 'Post-separation violence' – 'Revenge porn' – 'Sexual and reproductive abuse' – 'Systems abuse'

Charges: Stalking x 1; Attempting to pervert the course of justice x 1.

Appeal type: Appeal against conviction and sentence.

Facts: The applicant and the complainant had been in a relationship for 18 months. There were 2 instances of violence ([2]). After the relationship ended, the applicant followed the complainant and sent her a total of 77 text messages, 5 emails and phone calls by which the complainant felt threatened and harassed ([7]). After the complainant made a complaint to the police, the applicant sent further emails to her threatening to release recordings and videos of them having sex if she did not withdraw the charge ([9]).

The appellant was sentenced to a head sentence of 18 months' imprisonment, with a parole release date after 3 months ([12]).

Issues: Whether the conviction should be set aside and whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

In relation to the appeal against conviction, the appellant had argued that he was not provided with proper legal advice ([30]). Justice Morrison (Sofronoff P and Phillip McMurdo JA agreeing) dismissed this argument as having 'no merit' ([44]).

In relation to the appeal against sentence, the appellant relied on the impact of the sentence on his ability to obtain licences to work in the financial services industry ([45]). Justice Morrison dismissed this argument because it could only be relevant to whether a conviction is recorded ([48]).

***R v Stephens* [2017] QCA 173 (15 August 2017) – Queensland Court of Appeal**

'Attempted murder' – 'Children present' – 'Deterrence' – 'Domestic violence order' – 'Firearms' – 'Moral culpability' – 'People with mental illness' – 'Post-separation violence' – 'Stalking' – 'Strangulation'

Charges: Attempted murder x 1.

Appeal type: Application for leave to appeal against sentence.

Facts: The applicant and complainant were separated ([6]). After they separated, the complainant obtained a domestic violence order against the applicant because he had sent her text messages threatening to kill her. On the date of the offence, the applicant followed the complainant and her children to a shopping centre, armed with a rifle and 13 rounds of ammunition ([7]). He shot her in the temple at close range, then attempted to strangle her. The four children in the car saw every detail of what had occurred ([8]-[9]). He was sentenced to 15 years' imprisonment.

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

Justice Douglas, Holmes CJ and Gotterson J agreeing, found that the sentencing judge properly weighed the relevant factors. The applicant's mental health disorders did not bear on his moral culpability ([43]). This was a 'horrific example of the crime of attempted murder'. The victim continues to suffer severely. There was a strong need for protection and general and specific deterrence. The appropriate range would have been 13 to 17 years ([44]).

***SCT v Director of Public Prosecutions (Qld)* [2017] QCA 31 (13 June 2017) – Queensland Court of Appeal**

'Bail' – 'Choke hold' – 'Contravention of domestic violence order' – 'Strangulation'

Charges: Contravening domestic violence order x 2; Choking, suffocation or strangulation in a domestic

relationship x 1.

Case type: Renewed application for bail.

Facts: The applicant and complainant had been in a domestic relationship. A domestic violence order had been granted ([7]). The complainant made the following allegations: the applicant went to the complainant's house and punched her in the leg ([7]); he threw a pillow at the complainant; and put her in a choke hold ([8]). Bail was originally refused ([9]). Since then, new evidence of a demonstrated that a trial in the District Court would be more than a year away ([10]).

Issues: Whether the evidence of a new trial date justified a grant of bail.

Decision and Reasoning: Bail was granted with conditions that he not have contact with the complainant, that he reside at a specified address, and that he report to the police daily.

Under s 16(3)(g) *Bail Act 1980* (Qld), for which the new offence of strangulation is a 'relevant offence', the onus was on the applicant to show cause why bail should be granted ([13]). The Court explained that on one hand, there was a real risk that he would reoffend because the applicant and complainant lived in the same town, and they may contact each other ([14]). On the other hand, he had accommodation with family members available, an offer of employment ([15]), and there was a real prospect that he would spend longer on remand than he would serve in custody ([16]). On balance, the risk of reoffending was not unacceptable (s 16).

***Ackland v Director of Public Prosecutions (Qld)* [2017] QCA 75 (28 April 2017) – Queensland Court of Appeal**

'Assault' – 'Bail' – 'Risk of re-offending'

Charges: 1 x Assault occasioning bodily harm; 1 x Choking.

Appeal type: Defendant's appeal against denial of bail application.

Facts: The victim alleged that, during an argument, the appellant: threatened to knock her out; grabbed her by the throat; punched her in the face; and, when she indicated that she was going to call the police, destroyed photographs in the house (see [8]-[10]).

The trial judge refused bail on the basis that:

- 12 months earlier, the appellant had committed a breach of a domestic violence order against a former girlfriend (see [12]);
- the Crown case appeared to be strong, by evidence of photographs of cuts and abrasions (see [14]); and
- there was a danger to female victims in such domestic violence situations (see [18]).

His Honour referred to, but did not place weight on, a handwritten note from the victim indicating that she wanted to withdraw the charges (see [15]-[16]).

Issues: Whether the trial judge erred in denying bail to the defendant.

Decision and Reasoning: The appeal was dismissed.

Atkinson J, with whom Morrison JA and Douglas J agreed, considered that the trial judge's discretion had not been improperly exercised (see [27]). The appellant had submitted that the trial judge based the risk of re-offending on an irrelevant ground, namely a generalised risk to victims of repeated offences. However, Atkinson J considered that the trial judge properly considered the particular risk to the victim, evidenced by two assaults being committed 10 hours apart, the victim's concern, and the previous breach of domestic violence order (see [28]-[29])

At the time of the bail application, amendments to the Bail Act which reversed the presumption of bail for domestic violence offences had not come into effect (see [30]). By the time of the appeal against bail, the amendments had come into effect. Giving effect to the reversed onus, Atkinson J considered that the appellant had not satisfied the court that he did not represent an unacceptable risk of re-offending (particularly against the victim) while on bail (see [35]).

***R v KAP* [2016] QCA 349 (23 December 2016) – Queensland Court of Appeal**

'Expert evidence' – 'Rape' – 'Visible injury'

Charges: Rape x 1.

Appeal type: Appeal against conviction.

Facts: The accused and the complainant were married, but separated. The accused went to the home of the deceased, and sexual intercourse took place. The complainant said that the accused had held her down and threatened her, but the accused said that the intercourse was consensual ([1]).

Issues: Whether the conviction should be overturned on the grounds that expert evidence about the frequency of visible injury in sexual assault cases should not have been adduced, and the jury should have been given directions as to how to use that evidence ([2]-[3]).

Decision and Reasoning: The expert witness gave evidence that, according to cohort studies and his own personal experience, the absence of visible injury to genitalia is not determinative of whether sexual assault has occurred ([22]-[29]). Morrison JA (with whom Philip McMurdo JA and Mullins J agreed) held that the evidence:

- was relevant ([31]-[32]);
- was based on admissible data ([33]-[34]);
- fell within the scope of expert evidence because injury arising out of sexual assault is accepted as being part "of a body of knowledge or experience" which ordinary lay people would not have (citing *Osland v The Queen* (1998) 197 CLR 316 ([35]-[37]);
- was necessary to dispel a common fallacy that physical injury normally follows rape ([41]).

***ZXA v Commissioner of Police* [2016] QCA 295 (15 November 2016) – Queensland Court of Appeal**

'Domestic violence protection order' – 'Rights of appeal'

Appeal Type: Appeal against domestic violence protection order.

Facts: The applicant was named as the respondent in a domestic violence protection order under s 37 of the *Domestic and Family Violence Protection Act 2012* (Qld). He filed an appeal to the District Court under s 164 of the Act. The appeal was dismissed. The applicant then attended the Supreme Court registry to file an application for leave to appeal under s 118 of the *District Court of Queensland Act 1967* (Qld). Despite being told that there was no right of appeal, the applicant persisted until the registry acceded to his demands.

Issue/s: Whether the Court of Appeal had jurisdiction under s 169(2) of the *Domestic and Family Violence Protection Act 2012* (Qld) to hear the appeal?

Decision and Reasoning: The appeal was dismissed. Under s 169(2) of the Act, the decision from which the applicant seeks leave to appeal 'shall be final and conclusive'. While s 118(3) of the *District Court of Queensland Act* allows a party to appeal, it does not apply to a decision of the District Court in its appellate

jurisdiction under s 169(1): see *CAO v HAT & Ors* [2014] QCA 61 [25] – [27]. The President concluded:

'The scheme under the Act contemplates that domestic violence protection orders can be made by a wide variety of courts with a right of appeal from such orders…The scheme does, however, clearly contemplate only one level of appeal. The plain words of s 169(2) that such an appeal is "final and conclusive" indicate that the legislature intended that there be no further appeal. The applicant has exhausted his single right of appeal from the Magistrates Court to the District Court. He can, of course, apply to vary the domestic violence protection order under s 86 of the Act, including to vary the duration of the order: see s 86(3)(b) of the Act'.

***R v Williams* [2015] QCA 276 (18 December 2015) – Queensland Court of Appeal**

'Aggravating factor' – 'Attempted murder' – 'Breach of domestic violence order' – 'Burglary' – 'Impact on children' – 'Physical violence and harm' – 'Sentencing' – 'Separation'

Charge/s: Attempted murder, burglary.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant had separated from his wife, and had recently found out that she was in a new relationship. He broke into her home, stabbed her while she was sleeping on her back next to her two year old daughter and then ran off. She immediately awoke to find a knife sticking out of her chest, which she removed, at which point she collapsed. He was sentenced to 15 years imprisonment and declared to be a serious violent offender.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: Leave to appeal was refused. The applicant submitted that the trend of sentences for attempted murder cases shows that the appropriate range is 10 to 17 years, and that 15 years is excessive compared with analogous cases. This argument was rejected. Bond J (with whom Jackson J and Philip McMurdo JA agreed) at [17]-[30] provided a useful summary of previous attempted murder cases involving domestic violence. The Court acknowledged that the offence of attempted murder attracts a wide variety of punishments. However, consistent with the approach articulated by the High Court in *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2, where comparable sentences can provide assistance, but do not set a range of permissible sentences, the Court held that the original sentence was within the discretion open to the trial judge.

***R v Johnson* [2015] QCA 270 (11 December 2015) – Queensland Court of Appeal**

'Consent' – 'Rape' – 'Sexual and reproductive abuse'

Charge/s: Rape.

Appeal Type: Appeal against conviction.

Facts: The appellant met the complainant on Facebook and was in a relationship with her for seven weeks. During sexual intercourse, the complainant withdrew her consent and alleged she was then raped by the appellant. The appellant was convicted of rape following a trial.

Issue/s: One issue concerned whether the verdict was unreasonable and unsupportable having regard to the evidence.

Decision and Reasoning: The appeal was dismissed. Morrison JA (with whom Gotterson JA and Philippides JA agreed) held that it was open to the jury to be satisfied beyond reasonable doubt that by the complainant saying 'no' and 'stop' multiple times, he was not under any mistake as to whether she had consented to sex.

***R v Leedie* [2015] QCA 216 (6 November 2015) – Queensland Court of Appeal**

'Deprivation of liberty' – 'Evidence' – 'Physical violence and harm' – 'Pre-recorded evidence' – 'Rape' – 'Sexual and reproductive abuse' – 'Support person' – 'Torture'

Charge/s: Rape, deprivation of liberty, torture.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted of eight offences including rape, deprivation of liberty and torture. The appellant had been in an 'off and on' romantic relationship with the complainant. It is unclear whether at the time of the offences, there was a current or lapsed protection order against the appellant in favour of the complainant or other parties. There was no history of violence in the relationship. The offending arose after the appellant asked the complainant to visit his house to have sex. Consensual sex then occurred. However, following the appellant seeing a message from his brother on the complainant's phone, he became angry, proceeded to become extremely violent, and raped the complainant multiple times across the night. He did not let her out of the house, and tortured her. The complainant was deemed a 'special witness', and gave pre-

recorded evidence two days before trial, with her mother present as a support person (pursuant to s 21AK of the *Evidence Act 1977).* Her mother was made aware by the judge during the recording that she was not to have any participation in the proceedings other than as a support person. The mother then made comments to the complainant which reminded her about the details of one of the rape offences. It was accepted at [55] that her mother's conduct was 'inappropriate'. However, the trial judge, in response to defence counsel's application for a mistrial, made detailed warnings to the jury about the caution they needed to apply when considering the complainant's evidence.

Issue/s: One ground of appeal concerned whether the trial judge erred by failing to discharge the jury after the complainant's mother suggested to the complainant what she might say in her evidence.

Decision and Reasoning: The appeal was dismissed. The Court held that these directions were sufficient to warn the jury that the reliability of the complainant's evidence may have been undermined by her mother's reminder of the details of the appellant's offending. Furthermore, at trial, the judge offered to order a further pre-recording of the complainant's evidence, which was declined by the appellant.

***R v Andres* [2015] QCA 167 (11 September 2015) – Queensland Court of Appeal**

'Circumstantial evidence' – 'Intent' – 'Murder' – 'Physical violence and harm' – 'Self-defence' – 'Whether guilty verdict unreasonable'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted by a jury of the murder of his wife. His version of events included, (among other things) the contention that the deceased had injured him with a fork and he was placed in fear of his life. (See at [4]-[113]). It is unclear whether at the time of the offence, there was a current or lapsed protection order against the appellant in favour of his wife.

Issue/s: The appellant admitted that he had caused his wife's death, but maintained that he did not have the requisite intention to prove murder. As such, the question for the Court was whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. More specifically, the issue was whether the accused had the requisite intention to prove murder. Also at issue was whether he had killed his wife by accident or in self-defence.

Decision and Reasoning:

The appeal was dismissed, with the Court finding that a guilty verdict was open to the jury on the evidence. Boddice J, (with whom Morrison JA and Carmody J agreed), found that the only evidence to support the conclusion that the death occurred by accident or in self-defence was the appellant's own evidence, which lacked probative force. This was because, among other things, the appellant admitted he had deliberately lied and changed his story, and he had dissolved the deceased's body in acid, which made it difficult to determine the cause of death. While the case was wholly circumstantial, it was noted that intent can be proved by inference, by considering the probative value of the evidence as a whole.

***R v Jones* [2015] QCA 161 (1 September 2015) – Queensland Court of Appeal**

'Evidence' – 'Expert testimony' – 'Killing for preservation in an abusive relationship' – 'Murder' – 'Physical violence and harm' – 'Relationship evidence'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted for the murder of his mother. It is unclear whether at the time of the offence, there was a current or lapsed protection order against the appellant in favour of the victim or other parties. The issues at trial related substantially to self-defence and provocation. Evidence of the history of the relationship was admitted in the context of the defence under s 304B of the *Queensland Criminal Code* of killing in an abusive domestic relationship (See further at [3]-[13]).

Issue/s: Whether the trial judge erred by not admitting expert psychiatric evidence.

Decision and Reasoning: The appeal was dismissed. North J (with whom Holmes JA and Henry J agreed) held firstly that this evidence was not admissible under s 132B of the *Evidence Act 1977*. It was not relationship evidence. The Court also held that the matters that the psychiatrist spoke of were not complex in a scientific sense, and the jury, properly instructed, were able to understand them without needing to hear the expert evidence itself. The psychiatrist did not identify that the appellant was suffering from any recognised psychiatric illness. Rather, he only spoke generally that the appellant had developed coping strategies in response to his mother's violent and difficult behaviour. The jury, in applying common sense, would have been able to reach this conclusion themselves. North J, comparing the 'battered wife defence', noted that

there is no 'battered child defence' in law. That is, there is no defence where, 'insults and abuse may be relied upon by a child by way of excuse for a fatal attack upon an abusive parent' (See at [19]).

***R v Pearson* [2015] QCA 157 (28 August 2015) – Queensland Court of Appeal**

'Directions and warnings for/to jury' – 'Evidence' – 'Intent' – 'Murder' – 'Physical violence and harm' – 'Propensity evidence' – 'Relationship evidence'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted of the murder of his wife (See further at [2]-[5]). It is unclear whether at the time of the offence, there was a current or lapsed protection order against the appellant in favour of his wife. The issues at trial concerned whether he had the requisite intent to kill or do grievous bodily harm, and whether the defence of provocation arose.

Issue/s: One issue on appeal was whether the trial judge misdirected the jury in regards to the relevance of evidence of prior acts of domestic violence and discreditable conduct. In particular, the appellant submitted that the jury were misdirected about how they could use the evidence when deciding whether the appellant had the requisite intent for murder.

Decision and Reasoning: The appeal was dismissed. At trial, the jury was directed to the effect that the evidence was relevant to explain the nature and animosity of the relationship between the appellant and the deceased. They were specifically directed that if they were to use that evidence to assist in determining the appellant's state of mind at the time of the offence, they must be satisfied beyond reasonable doubt that the past acts occurred. Holmes JA (Morrison JA and Henry J agreeing) held that s 132B of the *Evidence Act 1977* can be used to show a particular propensity of the accused to commit acts of a similar nature, as well for specific issues like intent. Her Honour, applying the approach of the High Court in *Roach v The Queen* [2011] HCA 12, noted that these two uses are distinct. In this case, the domestic violence evidence was only relevant as relationship evidence to prove intent. Propensity was not relevant because it was not in dispute that the appellant had caused the death of his wife. The jury were directed to this effect. A general propensity warning was not needed for the same reasons.

***R v Piper* [2015] QCA 129 (17 July 2015) – Queensland Court of Appeal**

'Aggravating factor' – 'Breach of domestic violence order' – 'Grievous bodily harm with intent' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Grievous bodily harm with intent, breach of domestic violence order.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant's wife attended a hotel with a male friend. He falsely believed his wife to be in a romantic relationship with the friend. In an unprovoked attack, he stabbed the friend forcefully multiple times. The victim sustained six stab wounds, including one to his neck. The victim suffers lasting psychological difficulties as a result of the attack. There was a domestic violence order in place which prevented the applicant from coming within five metres of his wife. The attack breached this order, which became an aggravating feature in sentencing. He had no criminal history. He was sentenced to seven years' imprisonment, becoming eligible for parole after three years.

Issue/s: One issue concerned whether the sentence was manifestly excessive.

Decision and Reasoning: Leave to appeal was granted. The offending was very serious. It was 'a sustained, severe and premeditated attack, whilst armed with a knife, on a victim who had done nothing by way of provocation' (See at [36]). It was committed in the context of a domestic violence order being in place. As such, the head sentence, whilst at the upper end of the scale, was within range, taking into account his lack of criminal history and plea of guilty. However, the Court concluded that the parole eligibility date should be brought forward. The applicant's guilty plea, while late, ensured that witnesses did not have to give evidence, which was particularly important for the victim. The parole eligibility date was close to the 'half-way mark' in the sentence. This did not reflect the significance of his guilty plea, remorse and cooperation and lack of criminal history. As such, the parole eligibility date was changed and set at the one-third mark in the sentence.

***R v Wallace* [2015] QCA 62 (21 April 2015) – Queensland Court of Appeal**

'Emotional abuse' – 'Following harassing, monitoring' – 'Fraud' – 'Fresh evidence' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Verbal abuse' – 'Where the offender is also a victim'

Charge/s: Six counts of fraud.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant pleaded guilty at trial to six counts of fraud. See at [3]-[11]. It is unclear whether at the time of the offences, there was a current or lapsed protection order in place against the applicant's ex-husband in favour of the applicant or other parties.

Issue/s: Whether the applicant could adduce fresh evidence not led at the original sentencing hearing.

Decision and Reasoning: The fresh evidence involved long term domestic violence that the applicant suffered from her ex-husband, including controlling behaviour such as taking the applicant's phone and keys to prevent her from seeking help, threatening her children, stealing money from her business, and severe physical violence. It also included evidence from a psychiatrist detailing the effect of the abuse on her, to the extent that she did not fully understand the repercussions of her offending. This was found to be consistent with what has come to be known as the 'battered person's syndrome'. The appeal was allowed and the evidence was admitted. The head sentence was reduced by one year.

McMurdo P, (with whom Gotterson JA and Douglas J agreed) noted that lawyers acting for clients charged with criminal offences who claim to be the victim of domestic violence should take such claims very seriously to determine the relevance to their client's alleged offending. They should then put such evidence before the primary court either as a defence, or in sentence mitigation.

See in particular the following remarks of McMurdo P at [37] -

'… The further evidence led in this application established that at the time of the offending the applicant was in an abusive, exploitive relationship which impaired her capacity to realise the full repercussions of her fraudulent behaviour and her ability to formulate a mature response to her financial and personal difficulties as she continued to take more and more money from the nursing home in the impossible hope that she would eventually repay it. As Dr Schramm (a psychiatrist) *explained, she was not acting completely rationally. She was exhibiting behavioural disturbances following her prolonged and significant physical and emotional abuse, commonly known as "battered persons syndrome." This took her offending behaviour out of the worst category of fraudulent offending in which the sentencing judge placed it. The further evidence raises the possibility that some other sentence than that imposed may be warranted; if so, its exclusion would result in a miscarriage of justice. '*

***R v Davidson* [2014] QCA 348 (19 December 2014) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Grievous bodily harm' – 'Physical violence and harm' – 'Sentencing' – 'Victim credibility'

Charge/s: Assault occasioning bodily harm, grievous bodily harm.

Appeal Type: Appeal against conviction and sentence.

Facts: The offending involved an incident where the appellant asked the complainant to perform a sexual act on his male friend. The appellant also engaged in sexual activity with the friend. The case at trial was based on the complainant's version of events, which included that the appellant kicked and punched the complainant (the appellant's partner) for a long period. There was a history of domestic violence in the relationship. A domestic violence order was made some six years prior. The appellant had a long criminal history of similar offences, including a breach of a domestic violence order. However, there was no associated breach of a domestic violence order in this matter. The appellant was sentenced to five years imprisonment with parole eligibility set at 2.5 years.

Issue/s: Whether the failure to call new evidence from witnesses who challenged the complainant's credibility established a miscarriage of justice.

Decision and Reasoning: The appeal was dismissed. The appellant contended specifically that the failure to call a particular witness established a miscarriage of justice and noted that his defence counsel did not explore the detail of the evidence in cross-examination. The Court rejected that argument – the failure of counsel to adduce this new evidence was justifiable as a strategic decision in the trial context to not risk other unfavourable evidence being admitted. The appeal against sentence was also dismissed.

***R v Aplin* [2014] QCA 332 (16 December 2014) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Community protection' – 'General deterrence' – 'Grievous bodily harm' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Serious violent offence declaration'

Charge/s: Grievous Bodily Harm.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant, an Aboriginal and Torres Strait Islander man, caused catastrophic harm to the 21 year

old complainant, with whom he had recently commenced a relationship. She was in a 'vegetative state' at the time of trial. He made full admissions to police. He sought to have evidence of these admissions excluded, which was refused. He then pleaded guilty. The applicant had a long history of domestic violence including multiple breaches of domestic violence orders. The sentencing judge mentioned the need to have regard to this history, as well as the extent of the injuries and the need for deterrence (see at [12]). He was sentenced to 9 years' imprisonment and a 'serious violent offence' declaration was made.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The applicant submitted that various mitigating factors applied including that no weapon was involved, there was no premeditation, he attempted to administer aid, requested that an ambulance be called and there was a degree of provocation. He also submitted that the sentencing judge was in error in using a 10 year head sentence as a starting point. Fraser JA (with whom McMurdo P and Morrison JA agreed) held that there was nothing to indicate the primary judge overlooked these factors or the applicant's disadvantaged background. Indeed, given the 'seriousness of the offence, the catastrophic consequences for the complainant, and the applicant's bad history of violent offending in broadly similar circumstances' (See at [16]), it was open to the primary judge to attach relatively light weight to the mitigating factors. Furthermore, the trial judge was correct in using a previous decision with a head sentence of 10 years for 'guidance'. While the Court acknowledged that this sentence was severe given the maximum penalty, the guilty plea, the offender's age and other mitigating circumstances, it was justified for this 'extreme example of domestic violence by a repeat offender',([26]) where general deterrence and community protection were very relevant.

***R v Warradoo* [2014] QCA 299 (25 November 2014) – Queensland Court of Appeal**

'Directions and warnings for/to jury' – 'Evidence' – 'Hearsay' – 'Murder' – 'Physical violence and harm' – 'Relationship evidence'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted of the murder of his girlfriend. (See further at [3]-[7]). It is unclear whether at the time of the offence, there was a current or lapsed protection order against the appellant in favour of the victim. At trial, evidence relating to conversations with the deceased's niece and mother which detailed

instances of prior violence committed by the appellant was admitted. No warning was given by the trial judge as to the potential unreliability of this evidence as hearsay.

Issue/s: Whether the trial judge erred by not giving adequate warnings with respect to evidence admitted under section 93B of the *Evidence Act 1977*.

Decision and Reasoning: The appeal was dismissed. Holmes JA stated (at [8]) that section 93B operates to, *'(render) the hearsay rule inapplicable to evidence of a representation of fact made by a person who is dead, if the representation was made shortly after the asserted fact happened and in circumstances making it unlikely to be a fabrication, or was made in circumstances making it highly probable it was reliable.'* It was held that a direction from the trial judge about the unreliability of the evidence as hearsay would not have been particularly helpful, and may have even been disadvantageous to the appellant. Also, the evidence was admissible under s 132B of the *Evidence Act 1977* as evidence of the history of a domestic relationship.

***R v RAP* [2014] QCA 228 (11 September 2014) – Queensland Court of Appeal**

'Damaging property' – 'Deterrence' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful assault causing bodily harm'

Charge/s: Unlawful assault causing bodily harm, unlawfully damaging property.

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty to unlawfully assaulting his wife, causing her bodily harm and unlawfully damaging property. The appellant had a relevant criminal history involving a breach of a domestic violence order. However, this was effectively ignored by the sentencing judge. It is unclear whether at the time of the offences, there was a current or lapsed protection order against the appellant in favour of his wife. In mitigation, the sentencing judge considered a psychiatrist's report indicating that at the time of the incident, the appellant was likely suffering from, 'a major depressive episode and, probably, a form of alcohol dependence'. There was also a report from a psychologist who had treated the appellant before the offences and diagnosed him with, 'an acute, moderate to severe adjustment disorder with mixed anxiety depressed moods at that time.' A later review by that psychologist indicated he suffered a 'chronic and mild adjustment disorder with anxiety' and a year later 'a mild borderline adjustment disorder' was diagnosed. He was sentenced for the assault charge to two years imprisonment, suspended after eight months with an operational period of 2.5 years. He was sentenced to two months imprisonment for the property damage

charge to be served concurrently.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The couple had previously separated, and the incident arose when the appellant returned to the matrimonial home. The complainant's injuries were significant and she was in fear of her life during the attack. Wilson J (with whom McMurdo P and Fraser JA agreed) at [39] – [46] provided a useful summary of comparable cases. The Court held that a serious assault in the domestic context warrants imprisonment for two years or more. The suspension imposed was a correct application of the mitigating factors, and the serious nature of the violence.

***R v Foster* [2014] QCA 226 (9 September 2014) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Deprivation of liberty' – 'Following, harassing, monitoring' – 'Preliminary complaint' – 'Rape' – 'Sexual and reproductive abuse' – 'Victim disclosure and consent'

Charge/s: Rape, Assault occasioning bodily harm, deprivation of liberty.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted at trial of two counts of the rape of his partner, after he was found to have penetrated the complainant with a hairbrush, an aerosol can and a water bottle. He pleaded guilty to other charges including assault occasioning bodily harm and deprivation of liberty. There was no domestic violence order in place.

Issue/s: Whether evidence of the complainant's response in a state of distress, to the question of 'Had you been raped?' amounted to an admissible preliminary complaint of rape. The complainant had not directly answered the question but 'looked sad' and 'slumped her shoulders, to look as if she was about to burst into tears and to look beaten'. (See at [33]).

Decision and Reasoning: The Court found that this amounted to a complaint, within the meaning of Section 4A of the *Criminal Law (Sexual Offences) Act 1978*. Importantly, Gotterson JA (with whom McMurdo P Morrison JA agreed) noted that an admissible complaint need not require a verbal response. In particular, 'A meaningful response may be signalled by conduct other than speech. That conduct may include the absence of a verbal rejection of the proposition'. However, Gotterson JA noted that the acceptance could have been

clearer, and this was a 'borderline' example of a complaint. Furthermore, it is not necessary for a preliminary complaint of rape to refer to any specific incidence of penetration. Simply stating, 'I was raped' is sufficient to amount to a preliminary complaint.

R v Reed **[2014] QCA 207 (26 August 2014) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Directions and warnings for/to jury' – 'Evidence' – 'Murder' – 'Physical violence and harm' – 'Propensity evidence' – 'Purpose of evidence' – 'Relationship evidence'

Charges: Assault occasioning bodily harm, murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted of the assault occasioning bodily harm and murder of his partner's 16 month old child. See further at [6]-[17].

Issue: Whether the trial judge erred in admitting evidence of prior facial grazing injuries suffered by the child.

Decision and Reasoning: Henry J (with whom Gotterson JA and McMurdo P agreed) firstly held that this evidence was not inadmissible purely because of a possible innocent explanation for the injuries. His Honour considered all the non-fatal injuries on the child in their totality, and found that the probability that they occurred accidentally became too remote. The evidence was capable of supporting an inference (in combination with the other evidence) that the non-fatal injuries were the result of deliberate violence by the appellant. This evidence, of itself, was not indispensable to a finding of guilt – it assisted as 'strands of a cable rather than as indispensable links in a chain' (See at [39]). The evidence was also relevant to the proof of the charges as relationship evidence pursuant to 132B of the *Evidence Act 1977*. The trial judge correctly found that injuries can be probative of the history of a domestic relationship. It also potentially showed a propensity of the appellant to commit similar violence. However, the trial judge did not rule on this and in fact gave a warning against propensity reasoning. Notwithstanding, the trial judge did make an error of law in failing to sufficiently instruct the jury about the purpose of the evidence of the uncharged injuries, applying the High Court decision in *Roach v The Queen* [2011] HCA 12. The trial judge did tell the jury that the evidence could be used to show that the nature of the relationship was violent, but he did not go further to explain that the purpose of putting this history of violence before the jury was to provide an 'informed context' (See at [69] – [70]) for the jury's consideration of the charges. Notwithstanding, the appeal was dismissed pursuant to the proviso.

***R v HBL* [2014] QCA 270 (24 October 2014) – Queensland Court of Appeal**

'Abduction' – 'Breach of domestic violence order' – 'Deterrence' – 'Domestic violence order' – 'Family law orders' – 'Mitigating factors' – 'Sentencing'

Charge/s: Abduction, breach of domestic violence order.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was in a long-term, intermittent relationship and had one child. His partner sought and obtained a domestic violence order (DVO) in 2011. In 2012, an order in the Federal Magistrates' Court was made that the child was to live with the mother. Limited contact was allowed with the mother's consent. The mother left the child at a friend's house, whereupon the applicant arrived unannounced and took the child, drove away, and held the child for a period of time, in breach of the DVO. He made repeated calls stating he would not return the child if the child was to be handed back to the mother or her friend. The applicant had a long criminal history of over fourteen court appearances, including a previous breach of a child protection order (albeit towards the lower end of seriousness). The applicant pleaded guilty to the abduction and breach offences and was sentenced in the District Court to 4 years' imprisonment for abduction. He was convicted but not further punished for the breach. The primary judge implicitly accepted the Crown's submission that this conduct was in the worst category of offending.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. While the applicant had a long criminal history, Fraser JA (with whom Mullins J and Gotterson JA agreed), compared analogous decisions and highlighted factors which made them distinguishable. His Honour noted that the child was not unrelated or unknown, there was no sexual motivation and the taking was non-violent. As such, the Court held that this was not within the worst category of offending. Notwithstanding, the Court noted that such conduct (including the fact that the appellant was motivated to be with his son and breaching court orders) cannot be condoned and deterrence is important. As such, a custodial sentence was imposed but was reduced to 18 months' imprisonment with immediate parole eligibility.

***R v Francis* [2014] QCA 258 (14 October 2014) – Queensland Court of Appeal**

'Arson' – 'Breach of domestic violence order' – 'Damaging property' – 'Deterrence' – 'Fresh evidence' – 'Mitigating factors' – 'Sentencing' – 'Separation'

Charge/s: Arson.

Appeal Type: Appeal against conviction and sentence.

Facts: The arson was targeted at the appellant's ex-wife's new partner's mother's car. The offence constituted a breach of a domestic violence order (See further at [3]-[18]).

Issue/s: *Appeal against conviction:* Whether the verdict was unreasonable and not supported by the evidence, and whether the appellant could adduce further evidence not led at trial.

Appeal against sentence: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal against conviction was dismissed. McMurdo P noted that while the case was circumstantial, it was strong, and a guilty verdict was open to the jury. The application to adduce further evidence was also dismissed. The court held that while an affidavit from the appellant's former partner was somewhat inconsistent with her evidence at trial, there was no significant possibility that the jury would have acquitted him on this basis. However, the appeal against sentence was allowed, reducing the head sentence from 4.5 to 4 years. Defence counsel submitted that the sentence was excessive for arson of a car rather than a house, while the prosecution submitted that it was a flagrant breach of a domestic violence order and general deterrence was necessary for an arson committed as a jealous rage due to a relationship breakdown. McMurdo P held that the sentence was manifestly excessive. The trial judge did not take into account pre-sentence custody, and the appellant only had a minor criminal history prior to this offending.

***R v Murray* [2014] QCA 160 (18 July 2014) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Community protection' – 'Damaging property' – 'Deterrence' – 'Grievous bodily harm' – 'Mitigating factors' – 'Physical violence and harm' – 'Recidivism' – 'Sentencing' – 'Victim' – 'Weapons'

Charge/s: Grievous bodily harm.

Appeal Type: Application for an extension of time to appeal against conviction.

Facts: The applicant, an aboriginal man with a dysfunctional background, pleaded guilty to the grievous bodily harm of his girlfriend. It is unclear whether at the time of the offence, there was a current or lapsed protection order against the applicant in favour of the victim. He ripped off a door handle with which he struck her on the head, then punched her and struck her with a frying pan, causing severe injuries.

Issue/s: Whether an extension of time should be granted on the basis that the applicant only pleaded guilty due to the strong urging of his lawyers, and that he was denied the right to present his defence.

Decision and Reasoning: The application was refused - the applicant was an adult, of sound mind who understood the charge and entered a guilty plea after obtaining legal advice. An application for leave to appeal against sentence was also refused. McMurdo P (Fraser JA and Morrison JA agreeing) held that notwithstanding that he told the complainant to go to hospital, he had failed to demonstrate compassion or insight into the injury that he had caused. He had a substantial history of domestic violence and this recidivism made the protection of future intimate partners important. This was a serious example of grievous bodily harm in the context of domestic violence. General deterrence and denunciation were key considerations. McMurdo P described his girlfriend as a 'reluctant complainant'. However, this was not a mitigating factor. The only mitigating factors were his guilty plea and dysfunctional background.

***R v Seijbel-Chocmingkwan* [2014] QCA 119 (27 May 2014) – Queensland Court of Appeal**

'Attempted murder' – 'Attempted strangulation' – 'Dangerous operation of motor vehicle' – 'Denunciation' – 'General deterrence' – 'Impact of offence on victim' – 'Mitigating factors' – 'People with mental illness' – 'Sentencing' – 'Serious violent offender'

Charge/s: Attempted murder, dangerous operation of a motor vehicle.

Appeal Type: Appeal against sentence.

Facts: While on parole for assault offences committed against her daughter, the applicant drove into her former husband's car twice. She then stabbed her husband's new partner in the shoulder and attempted to strangle her. There was no domestic violence order in place. She pleaded guilty to attempted murder and dangerous operation of a motor vehicle, for which she was sentenced to ten years' and 12 months' imprisonment respectively.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Morrison JA (with whom Gotterson JA and Martin J agreed) at [41] – [79] provided a useful summary of past Court of Appeal authority regarding sentencing of attempted murder offences which have an element of domestic violence. The Court considered factors such as premeditation, cooperation with authorities, remorse, the gravity of the attack and prior convictions. (See full list at [79]). The applicant was also suffering from a mental disorder, namely an 'adjustment disorder with anxious and depressed mood'. While this was a mitigating factor, the Court held that the original sentence did adequately recognise this and other mitigating features such as her efforts at rehabilitation by enrolling in study and other courses, which were correctly balanced with the need for denunciation and general deterrence.

***R v Martin* [2014] QCA 80 (14 April 2014) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Breach of domestic violence order' – 'Consistency of sentence with other orders' – 'Costs' – 'Following, harassing, monitoring' – 'Stalking' – 'Systems abuse' – 'Using carriage service'

Charge/s: 41 offences, including stalking, 26 counts of breaches of domestic violence orders, two counts of assault occasioning bodily harm, five counts of using a carriage service to make a threat to kill and six counts of using a carriage service to menace or harass.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant pleaded guilty in the Magistrates' Court to all offences. The stalking was committed against the applicant's ex-partner. A head sentence of two years imprisonment was imposed in the Magistrates' Court, with all sentences to be served concurrently. The applicant was also placed on a domestic violence order in favour of his ex-partner for 5 years. The Magistrate made adverse findings in relation to the applicant's offending, his lack of remorse and the real risk of him re-offending. Mitigating factors included pleas of guilty and completion of a domestic abuse program while in custody. His parole release date was set after he had served one third of the head sentence, taking into account pre-sentence custody.

Issue/s: Whether the remaining period on parole should be substituted with a suspended sentence, due to the comparative administrative ease of a suspended sentence in obtaining permission to leave the state.

Decision and Reasoning: Leave to appeal was refused. A previous appeal to the District Court was struck out

due to the applicant's uncooperative nature, and the many opportunities that were given to him through adjournments to allow him to appear personally in Court, as well as the primary judge's finding of fact that he had misled the Court. The Court found that the primary judge acted appropriately.

***R v MBY* [2014] QCA 17 (18 February 2014) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Mitigating factors' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape, maintaining a sexual relationship with a child under 16.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant, an Aboriginal man committed the offences against his daughter. It is unclear whether at the time of the offences, there was a current or lapsed protection order against the applicant in favour of the victim or other parties. (See further at [6]-[20]).

Issue/s: Whether the primary judge failed to give appropriate weight to circumstances of deprivation in his upbringing, including the social and economic disadvantage associated with his Aboriginality and the physical, sexual and emotional abuse that he had suffered as a child. Another issue was whether the primary judge failed to have regard to the applicant's rehabilitative prospects.

Decision and Reasoning: In dismissing the appeal, Morrison JA (Muir JA and Daubney J agreeing) discussed the relevance of the applicant's Aboriginality in sentencing. See in particular at [60]-[73] where his Honour provides a detailed summary of relevant authority including the High Court decision of *Munda v Western Australia* [2013] HCA 38. Essentially, his Honour accepted that social, economic and other disadvantages (including alcohol and drug abuse) which may be related to an offender's Aboriginality, should be taken into account as a mitigating factor in sentencing. Indeed, there is authority to suggest that when an Aboriginal offender is being sentenced, the Court should, 'sentence (the offender) as leniently as the circumstances of his offence admitted'. (See *R v Bell* [1994] QCA 220). However, this cannot undermine individualised justice. That is, the deprived background of an Aboriginal and Torres Strait Islander offender may be given appropriate weight in sentence mitigation, but it cannot be given undue primacy. It cannot result in a punishment being imposed that does not reflect the gravity of the offending, or which does not pay sufficient regard to considerations such as specific and general deterrence, which are particularly important in domestic violence cases. The second ground of appeal, that the applicant's rehabilitative prospects were not given

enough weight was also dismissed.

R v Dibble; ex parte Attorney-General (Qld) **[2014] QCA 8 (11 February 2014) – Queensland Court of Appeal**

'Abuse of process' – 'Breach of domestic violence order' – 'Concurrent criminal proceeding' – 'Double punishment' – 'Grievous bodily harm' – 'Permanent stay'

Charge/s: Grievous bodily harm.

Appeal Type: Appeal against a permanent stay of proceedings.

Facts: This decision was not directly related to domestic violence. However, it is relevant to situations where the Court is dealing with a breach of a domestic violence order and another criminal offence concurrently. The respondent was originally charged with public nuisance, which was dealt with summarily. However, following a formal statement made by the complainant to police and a medical opinion received, he was charged with grievous bodily harm (GBH). At trial, an application was made for a permanent stay on the basis of Section 16 of the *Queensland Criminal Code,* which provides that a person cannot be punished twice for the same act or omission. The application was granted, with the primary judge holding that the act which formed the basis of the GBH charge was the same act which formed the basis of the public nuisance charge.

Issue/s: Whether the trial judge was correct in granting the permanent stay based on the rule against double punishment.

Decision and Reasoning: The appeal was dismissed, with the Court applying the approach previously articulated in *R v Gordon* where Hanger CJ stated - *"Section 16, in saying that a person cannot be twice punished for the same act or omission, must be referring to punishable acts or omissions; and the prohibition applies though the acts or omission would constitute two different offences. It is to these cases that the section is directed."* Hanger CJ held that a punishable act of being in charge of a motor vehicle while under the influence of a substance was not the same as the punishable act of dangerous driving causing GBH with which the offender in that case was subsequently charged. In the present matter, the Court held that the punishable acts for which the respondent was convicted in the Magistrates Court included punches which landed on the complainant, causing harm. It therefore followed that s 16 would be violated if the respondent was to be punished a second time for those acts.

Prima facie, the same test would apply when considering whether a breach of a DVO constitutes the same act for which another criminal charge is based. However, it should be noted that there is uncertainty about the application of Section 138 of the *Domestic and Family Violence Protection Act 2012* (Qld) in this context, particularly as to whether Section 138 allows double punishment. For further information, see pages 111-113 of the Queensland *Domestic and Family Violence Protection Act (2012)* Bench Book, which considers various District and Magistrates' Court decisions and the summary of *R v MKW* [2014] QDC 300 (18 June 2014).

***R v Bartram* [2013] QCA 361 (6 December 2013) – Queensland Court of Appeal**

'Defence of dwelling' – 'Physical violence and harm' – 'Self-defence' – 'Unlawful wounding' – 'Where the offender is also a victim'

Charge/s: Unlawful wounding.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted for unlawful wounding. The offence was committed in the following circumstances: the appellant had obtained a domestic violence order against the complainant; the complainant had previously been convicted for breaches of that order; according to evidence at trial, the complainant kicked down a door in breach of the DVO and, on the appellant's evidence, the complainant had threatened violence towards her on the previous evening. The jury was directed about self-defence, but was not directed about the possibility of the 'defence of a dwelling defence' under s 267 of the *Queensland Criminal Code*.

Issue/s: Whether the appellant was denied the possibility of an acquittal under 267 of the *Queensland Criminal Code*.

Decision and Reasoning: The appeal was upheld – Muir JA (with whom Gotterson JA and Daubney J agreed) held that there was 'ample evidence' that the complainant unlawfully entered and remained in the dwelling, which could support the elements of the defence. The offending occurred under the house, but his Honour held that the definition of 'dwelling' in s 1 of the Code was broad enough to encompass underneath the house. As such, a retrial was ordered.

***R v Brennan* [2013] QCA 316 (25 October 2013) – Queensland Court of Appeal**

'Breach of domestic violence order' – 'Denunciation' – 'Murder' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Murder (two counts).

Appeal Type: Application for leave to appeal against sentence and appeal against conviction.

Facts: The appellant was convicted of murdering his estranged wife and her daughter in their home. Prior to the killings, the appellant made threats to his wife and to witnesses. These threats occurred in person and over the phone, resulting in a domestic violence order being served and two charges of using a carriage service to make threats. Several witnesses testified that the appellant made threatening remarks to his wife at the hearing for these charges. He was sentenced to life imprisonment on both counts of murder, with a 22 year non-parole period ordered, which was two years above the statutory minimum. The crime was also in breach of a domestic violence order in place to safeguard his wife.

Issue/s: Whether the circumstances of the killings warranted the non-parole period to be extended beyond the 20 year statutory minimum, so as to make the sentence manifestly excessive.

Decision and Reasoning: Leave to appeal was refused. In the appellant's favour, the killing was not drawn out, there was no prolonged suffering and there was minimal planning involved. On the other hand, he killed not only his estranged wife, but a defenceless 14 year old girl in defiance of a domestic violence order which was intended for his wife's protection. Also, the appellant displayed no remorse and pleaded not guilty which had made the process agonising for those affected. These factors warranted a strong element of denunciation and vindication for the victims in the sentence. The appeal against conviction was also dismissed.

***R v Postchild* [2013] QCA 227 (20 August 2013) – Queensland Court of Appeal**

'Mitigating factors' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape

Appeal Type: Appeal against sentence.

Facts: The applicant was convicted of the rape of his girlfriend and was sentenced to six years' imprisonment.

It is unclear whether at the time of the offence, there was a current or lapsed protection order against the applicant in favour of the victim. The applicant had an extensive criminal history, consisting of street and property offences, as well as a previous conviction for carnal knowledge of a 13 year old girl. He had previously breached a reporting condition associated with this conviction. He committed the rape while on parole for unrelated offending. The primary judge described the rape as a 'brutal act', and that the applicant had treated his girlfriend as, 'an object for his own sexual gratification and had had no regard for her feelings' (See at [15]).

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed by majority. The Chief Justice, (with whom Gotterson JA agreed) held that the sentence was appropriate, and upheld the trial judge's findings in relation to the brutality of the act.

However, Holmes JA dissented and was of the view that the sentence should be reduced to 5 years with the non-parole period shortened. Her Honour's judgment contains very useful summaries of all comparable cases, (see [17]-[32]). Holmes JA noted factors including that this was a single incident of a short duration, and was not a 'protracted exercise in humiliation' (at [33]). There was no forced entry or weapons used. Her Honour also noted that the, 'offence did not occur in a context of fear or intimidation', as the relationship was still on foot. Holmes JA was of the view that the nature of the relationship made these circumstances distinguishable from rapes performed by strangers (See at [34]). It was also noted that the victim was, 'a strong minded young woman who was left humiliated and angry by what occurred, but not terrified' and, 'There was no evidence of lasting psychological harm'.

***R v Susec* [2013] QCA 77 (12 April 2013) – Queensland Court of Appeal**

'Evidence' – 'Hearsay evidence' – 'Murder' – 'Physical violence and harm' – 'Post-offence conduct' – 'Probative value' – 'Relationship evidence' – 'Separation'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted by a jury for the murder of his wife, and sentenced to life imprisonment (see further at [5]-[25]). It is unclear whether at the time of the offence, there was a current or lapsed

protection order against the appellant in favour of his wife.

Issue/s:

1. Whether the trial judge should have admitted evidence of a previous incident of the appellant sharpening a knife in the presence of the deceased and two witnesses.
2. Whether evidence of the victim's statement that she believed her husband was going to kill her was admissible.
3. Whether evidence of a conversation between the deceased and a co-worker, which was initially held to be hearsay evidence because it was too vague and unreliable but later inadvertently admitted during the questioning of the co-worker at trial resulted in a miscarriage of justice.
4. Whether a conclusion that the appellant's post-offence conduct involved inflicting wounds on himself, putting pepper in his own eyes and exaggerating the seriousness of his condition was open on the evidence.

Decision and Reasoning:

1. Gotterson JA (with whom McMurdo P and Muir JA agreed) held that such evidence was admissible under s 132B of the *Evidence Act 1977*. Its probative force was not outweighed by its potential prejudice to the accused. It was relevant to the state of the relationship, as well as to self-defence and provocation. It did have subjective elements, (such as the witnesses' descriptions of their emotions during the incident), but this was not such as to enliven the s 130 discretion to exclude it, and the trial judge gave a sufficiently clear warning against its use as propensity evidence.
2. The Court held that this evidence was admissible. The deceased's fear of the appellant was relevant to the jury's consideration of whether the deceased initiated an assault or provoked the attack.
3. While the Court held that this evidence should not have been admitted, it did not amount to a miscarriage of justice so this ground was dismissed.
4. The Court held that this conclusion was clearly open on the evidence (see at [70]).

***R v Murgha* [2012] QCA 255 (24 September 2012) – Queensland Court of Appeal**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of

principle.

‘Breach of domestic violence order’ – ‘Deterrence’ – ‘Grievous bodily harm’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Victim’

Charge/s: Grievous bodily harm, breach of domestic violence order.

Appeal Type: Appeal against sentence.

Facts: The applicant pleaded guilty to doing grievous bodily harm (GBH) to his de facto partner and breaching a domestic violence order. The offending was committed during the operational period of six suspended sentences. It involved the applicant throwing a knife at his partner who was pregnant. The knife became embedded in her skull. He was sentenced to three years’ imprisonment for the GBH offence and was convicted but not further punished for the breach offence.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: McMurdo P (Holmes JA and Henry J agreeing) dismissed the appeal and held that the sentence was appropriate. Mitigating factors included his remorse and corporation with police, his lack of similar criminal history, good rehabilitation prospects and his good standing in the community. The complainant also tendered a letter stating that: she wanted their child to grow up knowing their father; they planned to reconcile and that she found it hard to cope as a single parent. Notwithstanding, the sentencing judge correctly imposed a deterrent sentence. The primary judge noted that ‘the use of knives in domestic disputes on Palm Island was all too common’, which required a deterrent sentence. Other relevant factors included the fact the offence constituted a breach of a DVO and occurred while the applicant was subject to suspended prison sentences.

***R v James* [2012] QCA 256 (24 September2012) – Queensland Court of Appeal**

‘Breach of domestic violence order’ – ‘Deterrence’ – ‘Physical violence and harm’ – ‘Plea of guilty’ – ‘Sentencing’

Charge/s: Breach of domestic violence order.

Appeal Type: Application for leave to appeal against sentence.

Facts: The complainant (the appellant’s de facto partner) was receiving treatment at a hospital necessitated by an earlier assault by the appellant. The appellant then waited outside a toilet door at the hospital and

punched her in the face which caused pain, discomfort and swelling. He was sentenced to 9 months imprisonment for contravening a domestic violence order. He had a long criminal history including six prior breaches of domestic violence orders and convictions for other offences.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: Leave to appeal was refused, with the Court upholding the 9 month sentence. The maximum penalty for breaching a domestic violence order applicable at the time was 12 months imprisonment. This was later increased to two years (three years if the accused has prior convictions). Also, Henry J observed that there ought not exist an expectation that a one third discount to the head sentence will be applied where there is a plea of guilty, although such an outcome may be common (Holmes JA and McMurdo P agreed). McMurdo P (Holmes JA agreed) found that a further exacerbating feature was that the offence occurred in a hospital where the victim and other patients should be entitled to freedom from exposure to such violence.

***R v Pringle; ex parte Attorney-General (Qld)* [2012] QCA 223 (24 August 2012) – Queensland Court of Appeal**

'Exposing a child' – 'Manslaughter' – 'Physical violence and harm' – 'Sentencing' – 'Serious violent offence declaration'

Charge/s: Manslaughter.

Appeal type: Appeal against sentence.

Facts: The respondent pleaded guilty to the manslaughter of his partner. He was in a long term relationship with the deceased, with whom he had three young children. He was a heavy cannabis user. In the weeks leading up to the killing, the deceased had confided to others about problems in the relationship. The respondent believed the deceased was having an affair and was upset as the deceased's sister owed him $15 000. He was concerned the deceased was preparing to leave him and take his children – he claimed that she was 'messing with my head' (See at [10]). On the day of the killing, the respondent spoke to his parents who both encouraged him to seek help from a counsellor or psychiatrist. He then strangled the deceased until she was unconscious in the presence of the children. After moving the children to another room, he stabbed the deceased twice in the chest, killing her. He also stabbed himself but the injuries were not life threatening. After being declared fit to stand trial, but of diminished responsibility (under section 304A of the *Queensland*

Criminal Code) by the Mental Health Court, he pleaded guilty to manslaughter. The psychiatrist stated that the respondent, 'suffered from a personality disorder with paranoid traits.' This, as well as his drug abuse and the viciousness of the killing suggested that his condition was likely to endure after being released from custody (see at [29]). However, gradual improvement may be expected with regular treatment (See at [15]). He had no relevant criminal history. He was sentenced to nine years' imprisonment. Parole release would depend on his illness and progress of rehabilitation while in prison.

Issue/s: Whether the sentence was manifestly inadequate and whether the sentencing judge should have made a 'serious violent offence' declaration.

Decision and Reasoning: The appeal was dismissed. McMurdo P (with whom Muir JA and Gotterson JA agreed) held that as deterrence and denunciation were of less importance in this case due to the limited moral culpability of the respondent (because of his mental illness), the primary purposes of sentencing were the protection of the Queensland community and punishment of the offender. However, the Court found that a nine year sentence with no serious violent offence declaration and no parole eligibility date was within range for a spousal manslaughter based on diminished responsibility. There was a plea of guilty, no evidence of further danger to the community and evidence of remorse. A recovery was not certain, but the respondent was responding positively to medication and treatment. Also, the fact that he strangled the deceased in front of the children was an aggravating feature, but this had to be considered in the context of diminished responsibility which reduced his moral culpability for the crime.

***R v Hughes* [2012] QCA 208 (14 August 2012) – Queensland Court of Appeal**

'Evidence' – 'Hearsay evidence' – 'Murder' – 'Physical violence and harm' – 'Relationship evidence'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: The appellant was convicted by a jury of murdering her de facto partner. There was a history of domestic violence between the appellant and the deceased and multiple domestic violence orders were taken out against each other on separate occasions. (See further at [5]-[49]).

Issue/s: Whether the primary judge erred by admitting evidence of statements made by the deceased to various witnesses that he suspected the appellant had drugged him and whether the verdict was

unreasonable having regard to the evidence.

Decision and Reasoning: Both grounds of appeal were dismissed. The appellant submitted that the statements made by the deceased were not admissible because no relevant inference could be drawn from them, so they were hearsay statements and therefore inadmissible. This submission was rejected – the Court held that unlike in *R v Lester* [2008] QCA 354, the statements were not 'reports of statements made to (the deceased) by others'. Instead, they were statements about the deceased's own physical sensations after falling asleep in an unusual manner, and came after an episode of domestic violence between the appellant and the deceased. Such evidence was relevant to the 'deceased's relationship with the appellant, their mutual dealings and their attitudes for each other', and to whether the appellant drugged the deceased (See at [64]). As such, it was admissible under section 93B of the *Evidence Act 1977* as an exception to the hearsay rule. The other ground of appeal that the verdict was unreasonable having regard to the evidence was also dismissed.

***R v Amery* [2011] QCA 383 (23 December 2011) – Queensland Court of Appeal**

'Malicious act with intent' – 'Non-parole period' – 'Physical violence and harm' – 'Pre-sentence custody' – 'Sentencing'

Charge/s: Malicious act with intent.

Appeal Type: Appeal against sentence.

Facts: In breach of a domestic violence order made that morning, the appellant returned to his de facto partner's house and hit her head twice with a sledgehammer while she was sleeping, causing substantial injuries. The applicant pleaded guilty to a malicious act with intent and was sentenced to 8 years' imprisonment, with no parole eligibility date set. No adjustment of the sentence was made for time already served in pre-sentence custody.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The Court noted that the head sentence was not outside the permissible range. The offending was very serious, was not a spontaneous response, and was committed in breach of the DVO. Also, he had a serious criminal history, including a similar breach of a domestic violence order. However, the trial judge erred in not adjusting the sentence for pre-sentence custody and not

imposing a parole eligibility date. As such, also taking into account the (albeit late) plea of guilty, the sentence was reduced to seven years, seven months' imprisonment, with the appellant becoming eligible for parole after three years.

***R v Rowe* [2011] QCA 372 (16 December 2011) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Burglary with violence' – 'Common assault' – 'Damaging property' – 'Exposing a child' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Sentencing' – 'Stalking' – 'Wilful damage'

Charge/s: Stalking with violence, burglary with violence, assault occasioning bodily harm, common assault and wilful damage.

Appeal Type: Application for leave to appeal against sentence.

Facts: The appellant had been in a relationship with the complainant for 6 years and had one child. The relationship ended, at which point the stalking began via telephone and text messages. There had been some conflict in the relationship about the care of the child. He broke into her home, demanded to see her phone and punched her on the head multiple times. He pushed a lighted cigarette on her leg, causing burns. He threatened to kill her. He tackled her to the ground to prevent her from seeking help and punched her again multiple times. He drove her to the hospital after she had cleaned up at his request. He yelled and threatened her while in the car, drove dangerously, and backhanded her to the side of her face. All of this occurred in front of their two year old child. Once the complainant was released from hospital he attended her workplace and caused significant damage to her car. He had a criminal history, including previous break and enter and assault occasioning bodily harm offences. The sentencing judge noted that the stalking was not prolonged, but it was very intense and violent. It was also noted that the child and the complainant must have been terrified.

The applicant pleaded guilty to the above offences, and was sentenced to three years' imprisonment for stalking with violence, two years' imprisonment for burglary with violence and assault occasioning bodily harm and 12 months' imprisonment for common assault and wilful damage. The sentences were to be served concurrently. He was on parole at the time for a prior violent offence. This resulted in a head sentence of three years which was cumulative on an existing term of three years imprisonment, with parole eligibility set at one year after the cumulative term had been served.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: Leave to appeal was refused. The applicant submitted that as the head sentence was reduced for the totality principle, the sentencing judge must have used a starting point of over three years which was not consistent with the comparable authorities. This was rejected. While the offending was short, it was intense, and was accompanied by actual and threatened violence, in the presence of a terrified child. The applicant's stalking was more serious than in any of the relevant comparable authorities, and a head sentence of three years was appropriate given the circumstances of the offending and the appellant's history, including that he was on parole for prior offences. The parole eligibility date was also found to be appropriate, given the offender was already subject to an existing term of imprisonment.

R v. Major; ex parte Attorney-General (Qld) **[2011] QCA 210 (30 August 2011) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Breach of domestic violence order' – 'Denunciation' – 'Deterrence' – 'Impact on children' – 'Physical violence and harm' – 'Sentencing' – 'Social abuse' – 'Verbal abuse' – 'Wounding'

Charge/s: Seven counts of assault occasioning bodily harm, threatening violence at night, wounding, assault occasioning bodily harm while armed and various summary offences.

Appeal Type: Appeal against sentence.

Facts: The respondent pleaded guilty to the above charges. The offending included 8 episodes of domestic violence over a three year period, involving severe physical abuse such as punching, cutting off the tip of the victim's finger, choking, wrestling, smashing objects on the victim's head and verbal abuse. There were lasting physical impacts on the victim including nerve injuries, loss of sensation to her finger-tip and depression and anxiety. He was sentenced for the unlawful wounding offence to 3 years' imprisonment, suspended after 741 days (the period already served) with an operational period of 5 years. He was sentenced to 2 years imprisonment for the remaining counts.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld, with the Court holding that the original sentence was manifestly inadequate. The Court noted that when concurrent sentences are imposed, it is important to ensure that the primary term adequately reflects the nature of each individual feature of the offending. This was not reflected in the trial judge's sentence. The mitigating factors were not particularly powerful. For

example, the absence of any prior history of violence was outweighed by the prolonged duration of the offences. The fact that the respondent was not subject to a domestic violence order was not a mitigating factor but merely a distinguishing feature from analogous cases. The Court noted that the original sentence should have been in the range of six to eight years. However, given that the defendant had commenced rehabilitation, it was deemed that imposing such a sentence on appeal would be inappropriate. Also, the respondent had no prior history of violence, and was not subject to any court order at the time of the offending. Nevertheless, the sentence was increased to 5 years with the same suspension period. Probation was added for another count.

See in particular the useful remarks of McMurdo P at [53], regarding the considerations the courts should take into account for sentencing domestic violence offences – *'The dreadful effects of prolonged episodes of domestic violence are notorious…Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems.'*

***R v McMullen* [2011] QCA 153 (1 July 2011) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Deprivation of liberty' – 'Directions and warnings for/to jury' – 'Evidence' – 'Physical violence and harm' – 'Propensity evidence' – 'Rape' – 'Relationship evidence' – 'Threatening violence'

Charge/s: Assault occasioning bodily harm, deprivation of liberty, rape and threatening violence.

Appeal Type: Appeal against conviction.

Facts: The offences were committed against the appellant's de facto partner. There was a current domestic violence order in place. The complainant alleged the appellant breached that order the night before he raped her.

Issue/s: Whether the primary judge erred in admitting evidence of the appellant's previous history of domestic violence and drug use, as well as other discreditable conduct.

Decision and Reasoning: McMurdo P (with whom Cullinane J and Jones J agreed) held that the evidence of

prior domestic violence was admissible to assist the jury in understanding the nature of their relationship, and was particularly relevant to the rape charges, where the lack of consent was the critical issue. However, her Honour noted that its admissibility remained 'extraordinary and exceptional' (at [83]) and warranted careful directions from the trial judge to warn the jury against propensity reasoning, applying the High Court decision of *Roach v The Queen* [2011] HCA 12. See in particular at [84], where her Honour referenced a model direction from the *Queensland Supreme and District Court Bench Book*. In this case, while the trial judge went 'part way' in warning the jury about the limits of the use of the evidence, he did not specifically give a warning against propensity reasoning. This amounted to an error of law. However, the appeal was dismissed pursuant to the proviso, with McMurdo P taking into account the 'discerning' verdicts of the jury on each count and the fact that defence counsel did not ask for a redirection during the trial.

***R v Harold* [2011] QCA 99 (17 May 2011) – Queensland Court of Appeal**

'Character' – 'Criminal history' – 'Cumulation of sentence' – 'Manslaughter' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Manslaughter, assault occasioning bodily harm, various summary offences.

Appeal Type: Application for leave to appeal against sentence.

Facts: The circumstances of the offending included the applicant stabbing his de facto partner multiple times and striking her with a cricket bat (See further at [3]-[9]). The applicant had a substantial and relevant criminal history of violence against the deceased committed over a 10 year period. He was convicted a number of times for severe assaults (both common assaults and assaults occasioning bodily harm) on the deceased, including punching her and hitting her over the head with an iron bar. He had previously been the subject of multiple domestic violence orders in her favour, which he had often breached. The applicant was convicted for the manslaughter of the deceased and was sentenced to 14 years' imprisonment, including 12 years for manslaughter. The extra two years took into account 9 summary offences and two counts of assault occasioning bodily harm to which he had pleaded guilty.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Martin J (with whom Chesterman JA and White JA agreed) held that the sentencing judge correctly made the 2 year sentence for the two charges of assault occasioning bodily harm cumulative because they were separate offences committed at different times, even

though they were committed in a 10 year course of conduct. The total effective sentence was appropriate and within range. The sentencing judge observed this was a repetitive and prolonged attack with a knife making it a serious case of manslaughter.

***R v Murray* [2010] QCA 266 (8 October 2010) – Queensland Court of Appeal**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated stalking' – 'Assault occasioning bodily harm' – 'Breach of domestic violence order' – 'Following, harassing, monitoring' – 'Grievous bodily harm with intent' – 'Physical violence and harm' – 'Serious violent offence declaration' – 'Stealing' – 'Threatening to enter premises with intent to intimidate'

Charge/s: Aggravated stalking (two counts), assault occasioning bodily harm, stealing, grievous bodily harm with intent, breach of domestic violence order (two counts).

Appeal Type: Application for leave to appeal against sentence.

Facts: The offending involved continued harassment of the complainant (the former partner of the applicant), culminating in the charge of grievous bodily harm with intent. The applicant broke into the complainant's home which she shared with her new partner and children. He hit her on the head with a frying pan, causing her to fall to the ground. He held a knife against her throat, tied her wrists and ankles and dragged her into the car. She then threw herself out of the car, at which point the applicant stabbed her in the left side then on her right side. He had a relevant criminal history, including prior offences of violence as well as a breach of a domestic violence order. Two of these offences involved violence against his mother as well as a former partner. Two psychiatric reports detailing the mental issues suffered by the applicant were put before the sentencing judge. The total effective sentence imposed at trial was 8 years' imprisonment. A 'serious violent offence' declaration was made.

Issue/s:

1. Whether the sentencing judge erred in not giving reasons for making a 'serious violent offence' declaration.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: Leave to appeal was refused.

1. In relation to the serious violence offence declaration, the applicant's counsel at trial conceded that it would be impossible to submit that the declaration should not be made. The sentencing judge referred to this concession, in applying the 'integrated approach to sentencing' which is required in cases where a serious violent offence declaration is appropriate (See at [22]-[23]).
2. Counsel for the applicant contended that 8 years' imprisonment was manifestly excessive, as it was outside of the range established by comparable authorities and it did not have regard to the psychiatric problems suffered by the applicant. This argument was dismissed, with Cullinane J (Fraser JA and Chesterman JA agreeing) finding that eight years was not outside the permissible range. The mental health issues were considered at trial, as the sentencing judge expressly referred to them.

***R v Clark* [2009] QCA 2 (6 February 2009) – Queensland Court of Appeal**

'Attempted murder' – 'Circumstantial evidence' – 'Damaging property' – 'Directions and warnings for/to jury' – 'Impact on children' – 'Physical violence and harm' – 'Propensity evidence' – 'Relationship evidence' – 'Separation'

Charge/s: Attempted Murder.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant was convicted for the attempted murder of his former wife. There were cross domestic violence orders in place against each other. He was sentenced at trial to 16 years' imprisonment. The case turned on purely circumstantial evidence. See further at [3]-[38].

Issue/s: Whether the trial judge made errors by -

1. Not issuing a *Shepherd v R* [1990] HCA 56 direction which deals with the how the jury must use pieces of evidence individually.
2. Allowing the jury to consider evidence of the history of the relationship between the parties.

The other issue was whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal against conviction was dismissed. The Court noted that in a case turning on circumstantial evidence alone, it is not necessary that every intermediate conclusion of fact made by the jury be proven beyond reasonable doubt. There may be some instances, as McMurdo P observed (at

[40]) if it is necessary to 'reach a conclusion of fact as an indispensable intermediate step in the reasoning process towards an inference of guilt, that conclusion must be established beyond reasonable doubt'. However, generally, only the offence as a whole needs to be proven beyond reasonable doubt. In regards to the relationship evidence, the primary judge directed the jury to the effect that such evidence was not directly relevant to the alleged offence, but only to put the relationship between the parties in context. The Court held that this direction was adequate. The Court also refused leave to appeal against sentence, finding that the premediated nature of the offending and the lack of mitigating factors meant that this was at the highest end of the scale of attempted murders.

***R v Chong; ex parte Attorney-General of Queensland* [2008] QCA 22 (22 February 2008) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Breastfeeding mother' – 'Exceptional circumstances' – 'Hardship on children' – 'Mitigating factors' – 'Orders affecting children' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Unlawful wounding'

Charge/s: Unlawful wounding, breach of intensive correction order.

Appeal Type: Appeal against sentence.

Facts: The complainant was the respondent's mother. They lived on the Aboriginal and Torres Strait Islander community of Mornington Island. Following an argument, the respondent stabbed the complainant three times, causing no lasting injuries. The respondent was sentenced to two and a half years' imprisonment with immediate court ordered parole for the wounding offence.

Issue/s: Whether the sentence was manifestly inadequate, particularly in relation to the order of immediate parole.

Decision and Reasoning: The appeal was dismissed. The respondent had a substantial and relevant criminal history. In mitigation, the respondent had performed well on the intensive correction order, had pleaded guilty and was committed to looking after her seven children, including breastfeeding a baby and ensuring that those of school age attend school. She was an Aboriginal and Torres Strait Islander woman who had suffered abuse as a child. Atkinson J (with whom Keane JA and Fraser JA agreed) held that the head sentence was not manifestly inadequate. In considering whether the immediate parole order was appropriate, her Honour considered various factors, including the respondent's disadvantage associated with her Aboriginality. Her

Honour observed that, 'The fact that the respondent is an Aboriginal and Torres Strait Islander woman living on Mornington Island is relevant to the question of the effect on her family'. (See at [36]). While the Court noted that the effect on an offender's children can only be one relevant circumstance in determining sentence, the Court considered that exceptional circumstances were present. The respondent was a breastfeeding mother. Imprisonment would necessitate moving to the mainland, which would remove any practical means of maintaining the breastfeeding of the baby and personal contact with her other children. Her Honour quoted various secondary sources which discuss the substantial effect of incarceration on families, particularly on Aboriginal and Torres Strait Islander families. (See at [37] – [42]). The original sentence sufficiently incorporated deterrent and punitive elements, while the immediate parole allowed for rehabilitation.

***R v Sauvao* [2006] QCA 331 (1 September 2006) – Queensland Court of Appeal**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Attempted murder' – 'Breach of domestic violence order' – 'Community protection' – 'Mitigating factors' – 'Physical violence and harm' – 'Separation' – 'Serious violent offence declaration'

Charge/s: Attempted murder, breach of domestic violence order.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant pleaded guilty to the attempted murder of his de facto wife and to a breach of a domestic violence order. The couple had separated. The complainant initially obtained an apprehended violence order in 2003 in New South Wales, which was then registered in Queensland upon moving to that state. In May 2005, at a railway station, the applicant attempted to stab the complainant with a small knife. The knife snapped on the complainant's jacket, causing her no harm. He continued to punch and kick her, and hit her head into a chair and a pole. He was then stopped by bystanders. He admitted that if they had not intervened he would have persevered. He surrendered to police and made full admissions. He gave a full account and added details to his disadvantage. It is unlikely without his interview that anyone would have known about the use of the knife (the complainant herself was not aware of it), or about the applicant's intention to kill as opposed to assault the complainant. The applicant's only relevant criminal history was a breach of the domestic violence order in the preceding year, when he attended the house of the complainant. The applicant was sentenced to nine years' imprisonment. A 'serious violent offence' (SVO) declaration was made.

Issue/s: Whether the ‘serious violent offence’ declaration should have been made.

Decision and Reasoning: Firstly, the Court held that the head sentence was ‘unremarkable’. However, Holmes JA (with whom McPherson JA and Douglas J agreed) upheld the appeal. The applicant showed profound and sincere remorse and the case involved ‘unusual’ mitigating factors. The Court found the SVO declaration should not have been made for two reasons. Firstly, there was nothing in the offence itself in terms of, ‘duration, its force or its consequences which took it out of the ordinary run of cases’. The offender had almost no criminal history. There was no element of community protection as the likelihood of repetition was remote. Secondly, he had cooperated utterly. However, the only sentence reduction he received for this cooperation and remorse was 9 and a half months (the difference between the nine year sentence with an SVO declaration, and a 10 year sentence). This was a minor reduction in the circumstances and made the SVO declaration manifestly excessive.

***R v HAC* [2006] QCA 291 (11 August 2006) – Queensland Court of Appeal**

‘Assault occasioning bodily harm’ – ‘Emotional and psychological abuse’ – ‘Physical violence and harm’ – ‘Rape’ – ‘Sexual and reproductive abuse’ – ‘Torture’ – ‘Verbal abuse’

Charge/s: Torture, assault occasioning bodily harm, rape.

Appeal Type: Appeal against conviction.

Facts: The appellant held a longstanding belief in his wife’s infidelity. The acts relied on to constitute the offence of torture included abusive and humiliating acts such as: insisting that the children refer to the complainant as a slut or a whore rather than Mum, not allowing the children to show physical or verbal affection to her; forcing her to chew and swallow chillies in the appellant’s presence and forcing her to lick her vomit up; insisting that she perform sexual acts on his friends for money; insisting that she sleep outside the house without amenities; demanding that she drink his urine and attempting to persuade her to engage in a sexual act with a dog. The assault occasioning bodily harm conviction occurred when the appellant broke the complainant’s arm after she denied having sexual dealings with a neighbour. The rape conviction involved the appellant inserting the wooden handle of a ‘gaff hook’ into the complainant’s vagina. He was sentenced to 10 years’ imprisonment for torture, two years’ imprisonment for assault occasioning bodily harm and five years’ imprisonment for rape. A ‘serious violent offence’ declaration was made.

Issue/s:

1. Whether the directions given by the trial judge in respect of torture were inadequate.
2. Whether the proviso should be applied.

Decision and Reasoning: The appeal was dismissed in respect of issue 2.

1. It was accepted that the directions given by the trial judge were not consistent with McMurdo P's judgment in *R v LM* [2004] QCA 192 which requires that when more than one act in a series is relied upon to prove the elements of torture, the jury must be unanimously satisfied beyond reasonable doubt that the appellant committed at least one of the particularised acts. In this case, the trial judge's directions, 'effectively permitted the jury to convict of torture even though the jury might not have been unanimously satisfied as to which act or series of acts were intentionally inflicted to cause severe pain or suffering' (see at [2]).
2. The Court held that notwithstanding this error, no substantial miscarriage of justice occurred and the proviso should be applied. Jerrard JA (Holmes JA agreeing) held that it was clear which acts amounted to torture and this evidence was substantiated by unchallenged evidence from the complainant's daughters. Williams JA (Holmes JA agreeing) held (despite some initial concerns with applying the proviso) – '*The offence of torture was clearly established beyond reasonable doubt by the evidence; the relevant particulars being the conduct sworn to by the complainant, supported by the evidence of her daughters, and admitted by the appellant*' (see at [11]).

***R v Friday* [2005] QCA 440 (30 November 2005) – Queensland Court of Appeal**

'Physical violence and harm' – 'Sentencing' – 'Wounding'

Charge/s: Wounding.

Appeal Type: Appeal against sentence.

Facts: The applicant and the complainant were in a de facto relationship. While intoxicated early in the morning, an argument started after the applicant alleged that she was seeing other men. The applicant got off the bed then stabbed her through the upper arm and side of the chest. The wound did not damage internal organs, but required deep and superficial stiches. He had a criminal history, consisting of various violent

offences, and one offence of breaking and entering and committing an indictable offence. He pleaded guilty to wounding and was sentenced to three years' imprisonment with no recommendation for post-prison community based released. This sentence was made cumulative upon an existing six month sentence that he was already serving. The sentencing judge referred to the need to deter others from obtaining a knife and stabbing someone just because of an argument. This conduct was prevalent on Palm Island, where the offence occurred. He was also sentenced for breaches of an intensive correction order and a domestic violence order.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The applicant submitted that if the sentencing judge had moderated the sentence for the mitigating factors (such as the guilty plea, the applicant's age and an apology made to the complainant), then the starting point must have been four years, which is outside the permissible range of sentences for this type of offence. The Court agreed and suspended the three year sentence after nine months, with an operational period of three years.

***R v Collins* [2005] QCA 172 (27 May 2005) – Queensland Court of Appeal**

'Breach of domestic violence order' – 'Deterrence' – 'Grievous bodily harm' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Grievous bodily harm.

Appeal type: Application for leave to appeal against sentence and appeal against conviction.

Facts: The applicant was convicted by a jury for the grievous bodily harm of his then partner. The applicant beat his then partner so severely that she suffered a 'life-threatening subdural haematoma' (See further at [2]). He was severely intoxicated at the time of the offence. The offence was committed in breach of a domestic violence order. The appellant also pleaded guilty to several other violent offences. These offences demonstrated a history of domestic violence committed against his then partner. He was sentenced to four years' imprisonment, suspended after two years with an operational period of five years. This sentence for grievous bodily harm was 'intended to reflect the applicant's criminality for all the offences to which he had pleaded guilty' (See at [27]).

Issue/s:

1. Whether the guilty verdict was unreasonable.

2. Whether the sentence was manifestly excessive.

Decision and reasoning:

1. The appeal against conviction was dismissed – see at [21]-[25].

   Leave to appeal was refused. The applicant did not take his partner to hospital for treatment until one day after the injuries were sustained, which showed a complete disregard for her welfare. The fact that the offence was committed in breach of a domestic violence order was described as a 'matter of concern' (see at [31]). The applicant showed no remorse for the life-threatening injuries he inflicted on his partner, who is the mother of at least one of his children. Even though he had no memory of inflicting the injuries as a result of his intoxication, the Court stated that with 'sober hindsight' he ought to have been shocked at the injuries he caused (See at [31]). Deterrence was an important factor for the safety of the complainant as well as the interests of the community. The Court held at [37] that the applicant's small prospects of rehabilitation were not such as to warrant a more lenient approach. The sentence for grievous bodily harm, when considered in isolation was not excessive. Therefore, considering the fact that it was a sentence intended to take into account all of the offending behaviour, it was actually at the lower end of the range of appropriate sentences.

***R v Fairbrother; ex parte AG (Qld)* [2005] QCA 105 (15 April 2005) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Denunciation' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against sentence.

Facts: Following being released from police custody subject to conditions imposed under the then *Domestic Violence (Family Protection) Act 1989* that the respondent not have contact with the complainant (his domestic partner) and that he not go to her residence , the respondent returned to her home and threw boiling water onto her twice. It is unclear whether at the time of the offence, there was a current or lapsed protection order against the respondent in favour of the complainant. He pleaded guilty on the second day of trial and was sentenced to 2.5 years imprisonment for assault occasioning bodily harm, wholly suspended with an

operational period of four years.

Issue/s: Whether the full suspension of the sentence made it manifestly inadequate.

Decision and Reasoning: The appeal was dismissed. The injuries caused the complainant severe pain over a long period and also caused some mental health issues. The respondent had some history of domestic violence. This was a 'reasonably bad' (at [21]) example of the offence which occurred hours after the appellant had been removed from the complainant's home by police. However, mitigating factors included his guilty plea, his good work history and his efforts at rehabilitation. Furthermore, the respondent was not sentenced at trial for deliberately pouring boiling water on the complainant. If it had been deliberate, he would have been sentenced to actual imprisonment of at least 12 months before suspension. This was nevertheless a 'serious example of domestic violence' with the sentence imposed at trial being a correspondingly 'substantial penalty' (See at [24]).

See in particular McMurdo P's (Jerrard JA and Cullinane J agreeing) comments on the impacts of domestic violence and the approach to sentencing at [23] –

'Domestic violence is an insidious, prevalent and serious problem in our society. Victims are often too ashamed to publicly complain, partly because of misguided feelings of guilt and responsibility for the perpetrator's actions. Members of the community are often reluctant to become involved in the personal relationships of others where domestic violence is concerned. Perpetrators of domestic violence often fail to have insight into the seriousness of their offending, claiming an entitlement to behave in that way or at least to be forgiven by the victim and to evade punishment by society. Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment. The cost to the community in terms of lost income and productivity, medical and psychological treatment and on-going social problems is immense. Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders but also others who might otherwise think they can commit such acts with near impunity.'

***R v Gill; ex parte Attorney-General of Queensland* [2004] QCA 139 (30 April 2004) – Queensland Court of Appeal**

'Attempted rape' – 'Following, harassing, monitoring' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Stalking'

Charge/s: Aggravated stalking, attempted rape.

Appeal Type: Appeal against sentence.

Facts: The respondent pleaded guilty to aggravated stalking and attempted rape and was sentenced to two years and three years' imprisonment respectively, to be served concurrently. There was no domestic violence order in place at the time of the offence. The Court recommended consideration of post-prison community based release after 12 months (See further at [2]-[3]).

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was dismissed by majority. Holmes J (with whom Davies JA agreed) discussed *R v Stephens* [1994] QCA 507 and noted that it is not correct to approach rapes occurring in an existing relationship more leniently. However, this is not to say that that in the circumstances of a particular case, a sexual assault committed by a current or former partner will necessarily be equivalent to a sexual assault committed by a stranger. In comparing this case to *R v McNamara,* her Honour stated at [16], '*I do not think that the traumatic effect of sexual assault in a case such as this, where the complainant had, albeit without enthusiasm, admitted the respondent to the house and gone to sleep with him present, is readily equated with the likely shock and fear of a woman sleeping in her home who without warning is assaulted by an intruder; as happened in McNamara.'* As such, also taking into account the respondent's plea of guilty and comparable cases, her Honour held that the sentence, while 'lenient' ([21]), was adequate. However, de Jersey CJ dissented. His Honour also discussed *Stephens.* His view was that the statement in *Stephens* about an 'honest but unreasonable' mistake as to consent in the relationship context as a mitigating factor did not apply. The complainant had made her lack of consent clearly known and had previously shown reluctance to let the respondent into the house. His Honour stated, 'This is a case where the circumstance of the prior relationship should in no degree have led to more lenient treatment than would otherwise be accorded' (See at [5]). His Honour then went onto consider the respondent's serious and relevant criminal history, including stalking offences as well as breaches of domestic violence orders (on four occasions over an eight year period with other partners). As such, having regard to this context, his view was that the sentence for attempted rape should be increased to four and a half years and that the order for community release should be removed. Nevertheless, he was in dissent and the appeal was dismissed.

***R v AN* [2003] QCA 349 (11 August 2003) – Queensland Court of Appeal**

'Cumulative sentencing' – 'Following, harassing, monitoring' – 'Sentencing' – 'Stalking' – 'Totality'

Charge/s: Stalking with circumstances of aggravation.

Appeal Type: Appeal against sentence.

Facts: The applicant met the complainant while on remand and they lived together for a short period until the relationship broke down. The stalking occurred over the phone and included death threats and threats to the complainant's children. There was a psychologist's report before the trial judge, indicating that the applicant presented with a borderline personality disorder and would not be able to alter his behaviour without counselling. The applicant had a long criminal history of stalking, stealing, breaches of domestic violence orders and other offences. The applicant pleaded guilty to the stalking of the complainant with circumstances of aggravation and was sentenced to three years' imprisonment.

Issue/s: Whether the three year sentence offended the totality principle and was therefore manifestly excessive.

Decision and Reasoning: The Court allowed the appeal, reducing the sentence to two years. The effect of the conviction was that an existing suspended sentence for other offences was activated. The applicant had also been sentenced previously for common assault and wilful damage charges. The effect of this was that the applicant was liable to four years and two months imprisonment, becoming eligible for parole at eighteen months. There was no error in the cumulative term being imposed. However, the Court did conclude that the three year term offended the totality principle. In citing comparable cases, the Court found that a three year sentence is at the top of the range for offending of this nature. Lesser sentences were imposed in comparable cases which involved more serious stalking in the domestic context, such as surveillance, letters and attempts to run the victim off the road. Such conduct was not present in this case.

***R v Foodey* [2003] QCA 310 (25 July 2003) – Queensland Court of Appeal**

'Aggravated stalking' – 'Damaging property' – 'Deterrence' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Sentencing' – 'Wilful damage'

Charge/s: Stalking with circumstance of aggravation (violence), wilful damage.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant separated from his wife after an eight year marriage and fourteen year relationship. Temporary protection orders were in place against the applicant in favour of his ex-wife. In breach of those orders, he stalked her on a number of separate occasions by assaulting her, driving his car at her, making threats against her and their children and following her car. His criminal history involved drug offences committed a considerable time ago. He pleaded guilty. The sentencing judge noted that the applicant showed no remorse and his conduct was of such seriousness that a deterrent sentence was more important than is normally the case. He was sentenced to 12 and a half months imprisonment, suspended for five years.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: Leave was refused. Jerrard JA (with whom Davies JA and Helman J agreed) stated at [11] that, *'The applicant's behaviour towards Jennifer Foodey in the two and a half months between their separation and his incarceration was persistently cruel and aggressive. At different times he insulted, degraded, and terrified her. His conduct throughout was in breach of court orders intended to give her protection. Considered in isolation, the sentence imposed by the learned judge does not appear manifestly excessive, and indeed far from it. The same result occurs if regard is had to other sentences for unlawful stalking imposed or approved by this court.'* The sentence was upheld.

***R v Layfield* [2003] QCA 3 (29 January 2003) – Queensland Court of Appeal**

'Following, harassing, monitoring' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Stalking'

Charge/s: Stalking with a circumstance of aggravation (threats of violence).

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was convicted of stalking his former fiancee with the aggravating circumstance that he threatened to use violence against her. A previous domestic violence order was obtained by the complainant and the relationship deteriorated about a year after this. The stalking occurred over a period of less than one year. It occurred over the telephone, as well as by following and loitering outside of her place of employment. He was sentenced to two years imprisonment.

Issue/s: Whether the trial judge should have exercised the option of suspending the sentence after twelve months, on the basis of several factors including the applicant's youth, lack of criminal history and a strong

support network.

Decision and Reasoning: Davies JA (with whom McPherson JA and Mullins J agreed), refused the application, holding that while the trial judge could have imposed the lesser sentence, it was not argued for at trial, and the sentence that was imposed did not demonstrate any error. Davies JA also noted the applicant's lack of remorse as a relevant factor.

***R v Millar* [2002] QCA 382 (25 September 2002) – Queensland Court of Appeal**

'Following, harassing, monitoring' – 'Irrelevant considerations' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Stalking' – 'Verbal abuse'

Charge/s: Stalking with circumstances of aggravation, common assault, and dangerous operation of a motor vehicle.

Appeal type: Application for leave to appeal against sentence.

Facts: The applicant was in a relationship with the complainant for nine months. They then lived together as a married couple for two weeks until the complainant moved out due to physical and verbal abuse by the applicant. The complainant indicated that she wished to cease all contact with the applicant. There was a domestic violence order in place, which was subsequently breached by the applicant. The stalking (committed when the order was in place) 'involved menacing telephone calls, banging on her door, threats and letters and other items left at her residence culminating in the applicant's attempting to run the complainant off the road during the day'. This caused the complainant to veer to the wrong side of a busy rode. He then drove his car into hers and assaulted an off duty police officer who was trying to help the complainant. The applicant's criminal history was comprised of dishonesty offences which had resulted in prison terms. Concurrent sentences of two years imprisonment (with the full activation of an unrelated nine month suspended sentence) were imposed. The complainant indicated that she was still in fear for her safety.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: Leave was refused. The applicant submitted, *inter alia* that his criminal history was confined to dishonesty offences, he was young and a psychological report indicated he was remorseful. He stressed that the comparable decisions before the Court concerned situations where there was no emotional relationship between the complainant and the offender, so that in his case, a more lenient penalty should

have been imposed. This argument was rejected. de Jersey CJ (with whom Helman J and Jones J agreed) held – 'I would say for my part that that (the presence of an emotional relationship between the offender and the victim) is not a feature which should necessarily lead to a lower penalty being imposed, where the stalking follows the break-up of an emotional relationship.'

***R v M* [2001] QCA 166 (1 May 2001) – Queensland Court of Appeal**

'Assault' – 'Assault occasioning bodily harm' – 'Breach of domestic violence order' – 'Burglary' – 'Circumstantial evidence' – 'Deprivation of liberty' – 'Directions and warnings for/to jury' – 'Evidence' – 'Indecent assault' – 'Intent' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Separation' – 'Sexual and reproductive abuse'

Charge/s: Burglary, rape, assault occasioning bodily harm, deprivation of liberty, two counts of aggravated indecent assault and assault.

Appeal Type: Appeal against conviction and sentence.

Facts: One week prior to the offences the victim had removed her former partner's name from their joint lease, terminating his right to enter. He (the appellant) then broke into the victim's house, after cutting the telephone wires. He then pulled her into the bedroom, punched her, tied her up and forced her to perform oral sex on him at knife point on two separate occasions. He waved his knife at her and said that if the police were called, he would cut off her breasts and have anal sex with her. He then raped her. The appellant was the subject of a domestic violence order obtained by the complainant a month before the offences were committed. He was sentenced to 9 years' imprisonment.

Issue/s:

1. Whether the sentence was manifestly excessive.
2. Whether the trial judge erred in allowing the jury to infer that it was the appellant who cut the telephone lines.
3. Whether the trial judge erred by failing to direct the jury that they needed to be satisfied that the appellant cut the phone lines beyond reasonable doubt.
4. Whether evidence of a domestic violence order being in place could be a relevant factor in determining whether the appellant had the requisite intent to commit an offence when he entered the house.

5. Whether the appellant could rely on the defence of an honest and mistaken belief for the purposes of consent.

Decision and Reasoning:

1. McPherson JA noted that a sentence of less than seven years could not have been expected – the appellant had a substantial history of domestic violence (including against the complainant's mother) and breaches of these orders.
2. McPherson JA held that the judge was correct in allowing the jury to infer that the appellant had caused the damage. There was uncontradicted circumstantial evidence to this effect.
3. This argument was dismissed. Only each element of the offence needs to be proven beyond reasonable doubt, not every piece of circumstantial evidence.
4. The Court held that evidence of a domestic violence order being in place could be a relevant factor for the jury to determine intent for the purposes of the burglary charge.
5. This argument was dismissed. In fact, the trial judge had omitted the requirement of a 'reasonable' belief, which was favourable to the appellant.

R v Matamua; ex parte Attorney-General (Qld) **[2000] QCA 400 (28 September 2000) – Queensland Court of Appeal**

'Assault' – 'Deterrence' – 'Going armed in public in such a manner as to cause fear' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful assault causing bodily harm while armed'

Charge/s: Unlawful assault, unlawful assault causing bodily harm while armed, going armed in public in such a manner as to cause fear.

Appeal Type: Appeal against sentence.

Facts: The respondent became involved in an argument with the complainant, with whom he was in a de facto relationship. The respondent smashed a stubby of beer on his forehead which broke. He then pushed the complainant onto the bonnet of a car and held the broken bottle on her throat and threatened to slice her with it. Another argument ensued, at which point the respondent swung an axe at the complainant. He hit her on the back of the head with the handle while yelling abuse at her. She was knocked to the ground. Then, he

swung the axe to the ground so that the axe head became stuck in the ground next to the complainant's head. After a struggle, he winded the complainant and held the axe to her throat, while threatening to kill her. He was severely intoxicated. The relationship ended after the offences. The complainant experienced severe pain, but suffered no permanent physical injury. However, she suffered lasting psychological injuries. The respondent's criminal history consisted of drug and traffic offences, as well as one offence of behaving in a threatening manner. He was sentenced to a total effective sentence of 18 months' imprisonment, wholly suspended with an operational period of two and a half years. A $1000 fine and $1000 compensation was also ordered.

Issue/s: Whether the sentence was manifestly inadequate. In particular, whether a custodial sentence was required.

Decision and Reasoning: The appeal was upheld. Pincus JA (with whom Thomas JA and de Jersey CJ agreed) held that the degree of violence was such as to warrant a term of actual imprisonment. A deterrent sentence was needed. His conduct was prolonged. The axe could quite easily have gone through someone's head. It involved other people as well as his partner. The sentence was increased on the principal charge of assault occasioning bodily harm to 18 months' imprisonment with a recommendation for parole after six months. It was recommended that the respondent receive counselling for his alcohol problems.

***R v MacKenzie* [2000] QCA 324 (11 August 2000) – Queensland Court of Appeal**

'Battered wife syndrome' – 'Manslaughter' – 'Negligent manslaughter' – 'Physical violence and harm' – 'Sentencing' – 'Where the offender is also a victim'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction and sentence.

Facts: The applicant was married to her husband for 39 years and was subjected to severe domestic violence during that time. She pleaded guilty to the manslaughter of her husband. She was sentenced to 8 years imprisonment with a non-parole period of 3 years. (See further at [26]-[30]).

Issue/s:

1. Whether a miscarriage of justice occurred because of advice the appellant was given to plead guilty to manslaughter, instead of pleading not guilty to murder and seeking an acquittal on the basis of self-

defence.

2. Whether the sentence was manifestly excessive.

Decision and Reasoning:

1. This argument was dismissed – the applicant never claimed she was acting in self-defence, and there was minimal evidence to that effect. However, McPherson JA did note that evidence of 'battered wife's syndrome', can be relevant as expert evidence for the purposes of self-defence (or provocation), as demonstrating the heightened awareness and arousal which may be experienced by 'battered women', which would be relevant to whether they had reasonable grounds to use the level of force they did.

2. The appeal against sentence was upheld. McMurdo P (Dutney J concurring as to the orders made) held that notwithstanding that the applicant's conduct was negligent and not a willed act, a substantial period of imprisonment was required to deter people from handling guns negligently, particularly in the context of domestic violence. Such conduct was not excused by the 'grim history' of domestic violence the appellant suffered. Nevertheless, this history did impact upon the appellant in that it contributed to (as a psychologist who interviewed her put it at [21]), 'ineffective problem solving behaviour and a perception by [the applicant] of the narrowing of her options over time. A perception of narrowed options can often result in decisions made by the abused woman that from the outside look like poor judgment.' This grave history of abuse was therefore an additional mitigating factor which partly explains how her behaviour came about. As such, taking into account all of the unusual circumstances, the sentence was reduced to 5 years, with a non-parole period of 1 year. McPherson JA agreed that the sentence should be reduced but proposed a slightly longer term.

***R v Lane* [1998] QCA 167 (8 May 1998) – Queensland Court of Appeal**

'Assault occasioning bodily harm' – 'Deterrence' – 'Emotional and psychological abuse' – 'Good behaviour bond' – 'Physical violence and harm' – 'Recording a conviction' – 'Self-defence' – 'Where the offender is also a victim'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against the recording of a conviction.

Facts: The applicant was convicted of assault occasioning bodily harm. She was released and placed on a good behaviour bond for two years. For a number of years, the applicant had been the subject of severe

physical and emotional abuse by her de facto partner. It is unclear whether at the time of the offence, there was a current or lapsed protection order in place between the applicant and her de facto partner. The incident involved the applicant hitting her de facto partner on the head with a heavy mortar bowl when he was sleeping. She later shot him, after a struggle for the gun. She was acquitted of the shooting charges on the basis that the jury found there was a reasonable doubt as to whether self-defence was available due to a reasonable fear of serious attack. However, she was convicted for the striking incident, with self-defence being excluded beyond reasonable doubt. The sentencing judge commented on the need for a 'deterrent aspect in the element of sentencing in a case such as this' (and noted) 'Little point…would be served at this stage by not recording a conviction' (See at page 6).

Issue/s: Whether the conviction should have been recorded.

Decision and Reasoning: The application was refused. Derrington J noted at [4] that the '(trial judge) made full allowance for the applicant's suffering at the hands of the complainant and for all other features favourable to her. With this approach I agree unreservedly.'

***R v Stephens & Attorney-General of Queensland* [1994] QCA 507 (28 November 1994) – Queensland Court of Appeal**

'Consent' – 'Indecent assault' – 'Mitigating factors' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape, indecent assault.

Appeal Type: Appeal against sentence.

Facts: The respondent was convicted of two counts of rape and one count of indecent assault of his de facto partner. It is unclear whether at the time of the offences, there was a current or lapsed protection order against the respondent in favour of the victim. He was sentenced to three years imprisonment with a recommendation for parole eligibility after six months. The context of the relationship was one of intimidation and fear.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The Court upheld the appeal, holding that while the trial judge was correct to take

into account the respondent's youth, irrelevant considerations were taken into account. The sentence was increased to five years imprisonment with a recommendation for parole eligibility after two years. The Court found that the primary judge erred by approaching rapes occurring within an existing relationship in a more lenient way. The Court stated that generally, it is not correct to approach rapes occurring in existing relationships more leniently. There may be circumstances where the existence of such a relationship may be relevant to the sentence imposed due to the offender's state of mind, in that, 'there may be greater scope for a genuine belief on the part of the man that the woman has or is likely to consent to sexual intercourse. And where that mistake is honest but unreasonable, it may be relevant to take it into account in sentencing the offender.' (Note: This statement has been both distinguished and applied in subsequent Court of Appeal decisions - In *R v Conway* [2012] QCA 142 , Henry J (with whom Muir JA and McMurdo P agreed) stated in obiter that *Stephens* is 'of limited utility given its age'. However, the case has been discussed after *Conway* such as in *R v Postchild* [2013] QCA 227.) In *Stephens* itself, the Court of Appeal found that the circumstances of the relationship in that case did not give reason to distinguish it from a rape between strangers. There was a high degree of violence and the complainant made it clear through her protests and tears that she was not consenting.

***R v Bell & Anor; ex parte Attorney-General (Qld)* [1994] QCA 220 (20 June 1994) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Mitigating factors' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful wounding' – 'Victim'

Charge/s: Unlawful Wounding.

Appeal Type: Appeal against sentence.

Facts: The respondent, an Aboriginal man, was intoxicated and following an argument with the complainant (his de facto partner), stabbed her in the thigh, punched her in the mouth twice and continued to shout and threaten her. He pleaded guilty to unlawful wounding and was sentenced to two years' probation and ordered to perform 120 hours of community service, with no conviction recorded. It is unclear whether at the time of the offence, there was a current or lapsed protection order against the respondent in favour of the complainant. The complainant was supportive of the respondent, but did not wish to see him in prison.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. The respondent was re-sentenced to a suspended period of imprisonment for one year, with an operational period of two years. A conviction was recorded. The Court of Appeal imposed a sentence of imprisonment of 1 year despite the wishes of the complainant, the fact that the relationship had resumed and the fact the respondent had returned to his community and returned to work. However, the operational period of the sentence was suspended. Fitzgerald P (at 6) made the following comments relating to how social and economic disadvantage (both generally and in remote Aboriginal and Torres Strait Islander communities) is relevant when sentencing domestic violence offenders –

"It was right for (the trial judge) to have regard to the respondent's disadvantages and open to him, as a result, to sentence the respondent as leniently as the circumstances of his offence admitted. However, such disadvantages do not justify or excuse violence against women or, to take another example, abuse of children. Women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. A proposition that such offences should not be adequately penalised because of disadvantages experienced by a group of which the offender is a member is not one which is acceptable to the general community or one which we would expect to be accepted by the particular community of which an offender and complainant are members."

***R v Kina* [1993] QCA 480 (29 November 1993) – Queensland Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Battered woman syndrome' – 'Expert evidence - social worker' – 'Fresh evidence' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: In September 1988, after a trial which lasted less than a day, the female appellant, an Aboriginal woman, was convicted of murder for killing her abusive male partner of three years and was sentenced to life imprisonment. The appellant did not give or call evidence at her trial. It was only five years later, after the appellant had spent years speaking to a particular social worker (Mr Berry) in prison, that evidence of the abuse she suffered emerged. Kina applied to the Governor in Council for the exercise in her favour of the royal prerogative of mercy. Section 672A of the *Criminal Code* preserves the pardoning power of the Governor, adding in para. (a) 'that the Crown Law Officer may refer the whole case to the Court of Appeal, to be heard and determined as in the case of an appeal by a person convicted.' Under this provision on 24 May

1993 the Attorney General referred to the Court of Appeal 'the whole case with respect to the conviction of … Robyn Bella Kina on the charge of murder …' of Anthony David Black.

Issue/s:

1. The appellant did not receive a fair trial and a miscarriage of justice occurred because of problems of communication between the appellant and her lawyers which led to fundamental errors at trial.
2. There was fresh evidence of such a nature that, had it been placed before the jury who decided the case, there was a substantial possibility of acquittal.
3. The fresh evidence was of such a nature that refusal of it would lead to a miscarriage of justice.

Decision and Reasoning: The appeal was allowed, the conviction and verdict set aside and a new trial ordered. Evidence of Mr Berry, the social worker, was important in this case. Mr Berry first saw the appellant before her trial in April 1988. Over the following months, the appellant slowly disclosed her story to Mr Berry – that the deceased had continually beaten her up, forced her to have anal sex with him and that he tied her up. Mr Berry tried to communicate with the appellant's lawyers before the trial but was advised that her legal representatives wished that he 'would not interfere with proceedings'. After the trial, the social worker saw the appellant in a counselling capacity. The appellant's self-esteem improved and in 1991 she was able to give evidence about the deceased's threat to anally rape her 14 year old niece.

In finding there was a miscarriage of justice, Fitzgerald P and Davis JA held that:

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice".

Supreme Court

Gardiner v Doer [2022] QSC 188 (11 November 2022) – Queensland Supreme Court

'Civil claim for post-traumatic stress disorder' – 'Defendant acquitted at criminal trial' – 'Interference with the person' – 'Post traumatic stress disorder' – 'Tort law' – 'Trespass to the person' – 'What constitutes assault and/or battery'

Matter: civil claim for damages for assault/and or battery and post- traumatic stress disorder.

Facts: The defendant was found not guilty at a criminal trial. The plaintiff then sued him in tort.

The plaintiff and defendant had been married for 15 years and had two children together. The defendant had been verbally and physically abusive to the plaintiff. They had recently separated when the defendant told the plaintiff he would send someone to rape and sodomise her. That night, he broke into the house dressed in black including a black balaclava. He jumped on top of her, sat on her chest, covered her mouth, held her nose and started shoving the fingers of latex gloves into her mouth. She struggled and he forced her head off the couch and bumped her head on the tiled floor. He put cloth in her mouth and tape over it then did the same with her eyes. He started to tie her hands together with plastic bags. She struggled more and managed to pull off his mask. When he said that he would come for her family, he would burn down her mother's house, he would come for her sister and that her family was evil, she recognised him as her husband the defendant. She called him by his name and after that the violence diminished.

Held: Judgment for the plaintiff in the sum of $967,113.40

Cooper J found the elements of the tort of battery made out [287]. Most of his judgment addressed the question of damages. His Honour included the following heads of damage in his assessment: General damages: $8,410; Past economic loss: $358,123; Interest on past economic loss: $58,302; Future economic loss: $343,081; Gratuitous services: $35,560; Special damages: $13,412.40; Interest on special damages: $1,899; Future special damages: $13,126, Aggravated damages: $50,000; Interest on aggravated damages: $17,600; Exemplary damages: $50,000: Interest on exemplary damages: $17,600 [389].

R v Peniamina (No 2) [2021] QSC 282 (25 October 2021) – Queensland Supreme Court

'Allegations of infidelity' – 'Children' – 'Manslaughter' – 'No prior convictions' – 'Partial defence of provocation' – 'Provocation' – 'Reasonable belief' – 'Sentencing' – 'Weapon'

Charges: Manslaughter x 1, Murder x 1.

Proceedings: Sentencing.

Facts: The male defendant was found guilty of manslaughter following jury retrial (his conviction for murder having been set aside by the High Court in *Peniamina v The Queen* [2020] HCA 47 (9 December 2020)). The defendant was in a relationship with the female victim for 16 years and the couple shared four school aged children. In 2020, the defendant confronted the victim with allegations of infidelity. When the victim denied these allegations, the defendant struck her, before stabbing her 29 times and hitting her head with a cement bollard which resulted in her death [14], [11]. During the assault, the victim had armed herself with a kitchen knife and cut the defendant's hand when he attempted to disarm her. The jury found that this act provoked the defendant's murderous intention [10], accepting the partial defence of provocation. The jury had also found that the defendant's belief about the victim's infidelity was reasonable [7].

Decision and Reasoning: The defendant was sentenced to 16 years imprisonment, becoming eligible for parole after serving 80% of the sentence. Justice Davis declared that the offence was a serious violence offence and a domestic violence offence]. In sentencing, His Honour was guided by s 9 of the *Penalties and Sentences Act* 1992 ('the Act') and comparative cases [35]-[39]. His Honour noted the defendant's early plea of guilty and genuine remorse [23], [25]. Due to the defendant's lack of prior convictions, His Honour placed less importance on personal deterrence as a sentencing purpose [26]. His Honour took evidence of the defendant's intention to kill his wife into account as a relevant sentencing consideration [40]-[41] and emphasised that domestic violence was an aggravating factor under s 10A of the Act.

***Attorney-General for the State of Qld v Sagiba* [2020] QSC 254 (21 August 2020) – Queensland Supreme Court**

'Contravention of supervision order' – 'Sentencing orders'

Charges: Contravening supervision order x 5; Assault occasioning bodily harm x 1 (DFV offence); Deprivation of liberty x 1 (DFV offence).

Proceedings: Contravention of supervision order.

Facts: The respondent was subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act* (DPSOA). The applicant alleged the respondent contravened a supervision order and sought

to extend the period of the supervision order. In early 2020, the respondent was reported to police for allegedly committing domestic violence. The respondent put his female domestic partner in a headlock, strangled and punched her, attempted to prevent her leaving the house and threatened to rape her. The respondent claimed he 'did not commit an offence of a sexual nature' on the basis that there was a sexual element to the latest offences, but they were not sexual offences. The psychiatric evidence was that the risk factors that were present when the original supervision order was made remain present.

Issues: Whether adequate protection of the community can be ensured by the release of the respondent subject to a supervision order.

Decision and reasoning: *Supervision order extended for a further five years.*

The respondent has not demonstrated that the adequate protection of the community – specifically from the commission by the respondent of a 'serious sexual offence' – can be ensured by his release without him being subject to supervision.

***Johnson v Parole Board of Queensland* [2020] QSC 108 (11 May 2020) – Queensland Supreme Court**

'Application for judicial review' – 'Attempted murder' – 'Good behaviour' – 'Improper exercise of power' – 'Murder' – 'Natural justice' – 'Parole application' – 'Physical violence and harm' – 'Rape' – 'Rehabilitation programs' – 'Stepchildren in the family' – 'Weapon'

Offences: Murder x 4; Attempted murder x 1; Rape x 1

Proceedings: Application for judicial review

Issue: Whether parole should be granted.

Facts: The male applicant plead guilty to murdering his female partner and three of her four children from her earlier marriage. He also plead guilty to the attempted murder and the rape of the fourth child of that marriage. The applicant had used a hammer to inflict head injuries on the victims, and scalded the fourth child with boiling water. The fourth child was not found for five days and suffered permanent injuries. The applicant was convicted on all counts and sentenced to life imprisonment for the murder charges and 14 years' imprisonment for the rape charge.

After serving 13 years in custody, the applicant became eligible for parole. He made several applications for a

parole order, but all were refused. The applicant applied for judicial review of the latest decision refusing parole, contending that the decision was affected by an improper exercise of power because: the refusal was unreasonable, the Parole Board failed to take relevant considerations into account, and the Board applied a rule or policy without regard to the merits of the case. The applicant also contended that there was a breach of the rules of natural justice.

Held: The judge dismissed the applicant's application for judicial review of the Parole Board's decision. His Honour held that the Board's decision, as evidenced by its statement of reasons, did not lack an evident and intelligible justification when all the relevant matters were considered, and therefore the decision was not unreasonable [35]. His Honour noted that "the Board is not compelled to grant parole to a prisoner who has served any particular length of timer in custody or in residential accommodation, who has completed any particular number (or all) of the available recommended rehabilitation programs or who has been of good behaviour for any particular length of time" [32] – what is important is whether the offender shows "internal change, in the sense of the development of an understanding by the offender of the pathways to offending, the triggers that lead along that path and the steps the offender can take …" [33]. In this case, the applicant had not, and still posed a risk to the community.

His Honour also held that the Board did not fail to take a relevant consideration into account, namely a program completion report, as the Board expressly referred to extracts from this report in its statement of reasons [39]-[40]. Nor did the Board apply the policy asserted by the applicant (that the Board followed the commissioned psychiatric opinion without considering alternate views by other experts) inflexibly as the Board's statement of reasons demonstrated that it considered alternate views of a range of other experts [42], [48].

The judge further held that the Board's decision was not affected by any breach of the rules of natural justice [55]. The applicant was invited to make submissions to the Board on multiple occasions, and no complaint was made that the applicant had inadequate time to effectively prepare [54].

***R v Coman* [2020] QSC 60 (3 April 2020) – Queensland Supreme Court**

'Dangerous operation of a vehicle' – 'Female perpetrator' – 'History of abuse' – 'History of emotional abuse' – 'Judge only trial' – 'Manslaughter' – 'People affected by substance misuse' – 'People living in regional, rural and remote communities' – 'Perceived position of danger' – 'Victims as (alleged) perpetrators'

Offences: Manslaughter x 1; Dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance x 1.

Case type: Judge only trial

Facts: The female accused pleaded not guilty to manslaughter and the dangerous operation of a vehicle causing death whilst adversely affected by an intoxicating substance. The victim, her male fiancè, died of traumatic asphyxiation after the accused drove her motor vehicle over him as he lay on the ground. It was uncontroversial that the incident was preceded by an alcohol-fueled argument between the two parties. The accused felt threatened and decided to remove herself from what she believed to be a position of danger by attempting to drive away to a place of safety ([11]). The Crown alleged that the accused knew that the deceased was on the ground and deliberately drove her motor vehicle over the deceased, albeit without any intention to cause death or grievous bodily harm.

At the close of the Crown case, the accused's counsel made a no case submission with respect to the count of manslaughter. In particular, it was submitted that there was no evidence from which an inference of knowledge or intention could be made. Given the fact that there had been an unexplained deviation of the accused's car from the driveway to the position where the victim's body was found, the no case submission was unsuccessful. The accused then elected to give evidence, and claimed that the victim ran into her car as she was driving away from the house. Two defences were raised, namely, unforeseen consequence and one of extraordinary emergency or compulsion.

Issue: Whether the accused was guilty of the offences charged.

Held: Burns J considered the significant body of evidence regarding the victim's relationship with his former wife, his subsequent partner and the accused. The accused and victim lived in a semi-rural town and had been in a relationship for approximately 2 years. Like the victim's prior relationships, his relationship with the accused was marred by frequent and excessive alcohol consumption. As a result of his "chronic drinking problem", there were regular outbursts of anger, emotional abuse (including belittling accusations, vile language and intimidation), and, on occasion, actual violence ([18]).

The accused was acquitted on the count of manslaughter. His Honour accepted the accused's evidence as it was entirely consistent with the physical evidence found at the scene, as well as the nature and extent of the victim's injuries ([36]), and found that she did not deliberately drive over the victim's body ([52]). His Honour was also not satisfied beyond reasonable doubt that the accused substantially or significantly caused the

victim's death. The real and effective cause of his death was his decision to place himself in front of the accused's moving car ([54]). The accused was also acquitted on the alternative count of dangerous operation of a vehicle ([65]).

R v Arumugam **[2018] QSC 312 (14 December 2018) – Queensland Supreme Court**

'Arranged marriage' – 'Domestic violence' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm'

Charges: Murder x 1

Facts: The offender met the victim, a Singaporean national living in Australia, through an arranged marriage website. The victim had reservations and formed another relationship. The offender threatened to kill himself if she did not marry him. The offender travelled to Australia from South Africa with the intention of killing the victim if she did not proceed with the arranged marriage. This was evidenced by a statement he made in South Africa to that effect. The offender stabbed the victim 32 times in a hotel room, and claimed that she asked him to kill her. The offender pleaded guilty to the charges. By doing so, he cooperated with the administration of justice because he saved the deceased's family the trauma of a trial, as well as substantial court time and resources.

Issues: Sentencing

Decision and Reasoning: The offender was convicted of one count of murder, being a domestic violence offence, and was sentenced to life imprisonment. His Honour found that his conduct was planned and persistent ([20]), and involved a high degree of brutality and ferocity. Following his arrest, medical examinations found that, during his incarceration, he experienced periods of active psychosis, auditory hallucinations and paranoid and grandiose beliefs. Although the offender was diagnosed with schizotypal personality disorder, narcissistic personality disorder and borderline personality disorder, his Honour held that he was neither deprived nor impaired of full capacity at the relevant time.

R v Storie **[2018] QSC 298 (30 November 2018) – Queensland Supreme Court**

'Damaging property' – 'Physical violence and harm' – 'Protection orders'

Charges: Murder x 1; Burglary by breaking, in the night, whilst armed x 1; Entering premises, doing wilful

damage x 1

Facts: In the early hours of the morning, the offender drove to his ex-partner's house. No one was home. He broke into the garage, slashed the front tyres of her car, stole a child's bicycle and returned home. He later returned, entered her house and sliced her throat with a knife.

Issues: Sentencing

Decision and Reasoning: The offender was found guilty of 'premeditated conduct of the very worst kind' by taking the life of his former partner in a 'brutal' manner in circumstances where he was subject to a protection order ([4]). Eleven years prior he had been convicted of breaching a protection order that the victim had taken out. Premeditation was evidenced by numerous statements to the effect that his ex-partner would be 'a dead woman' and that the protection order would not stop him. The offender took active steps to dispose of the evidence of the murder, however later made admissions of his involvement in the victim's death. Boddice J found that, by pleading guilty, he cooperated with the administration of justice because he saved the community the cost of a lengthy trial. He also facilitated the administration of justice by making extensive admissions to police after the discovery of the deceased's body, which preserved police resources. He was convicted and sentenced to six years' imprisonment for entering the premises and doing wilful damage, and to 10 years' imprisonment for burglary by breaking, in the night, whilst armed.

R v Ney **[2011] QSC Indictment No 597 of 2008 (8 March 2011) sentence - unreported – Queensland Supreme Court**

'Diminished responsibility' – 'Expert evidence - psychiatrist - psychologist' – 'Manslaughter' – 'Post traumatic stress disorder'

Charge: Manslaughter

Proceeding: Sentencing

Facts: Ney killed her partner, Haynes, striking him in the head and face with an axe. Haynes was hospitalised and died two days later. Initially charged with murder she pleaded guilty to manslaughter. She was sentenced to nine years imprisonment - eligible for release on parole after serving three years. In sentencing Ney, Dick AJ referred to the reports of a psychologist (Dr Sundin) and a psychiatrist (Associate Professor Carolyn Quadrio):

‘As you know, I have been given a number of psychiatric and psychological reports. The prosecution tendered the report of Dr Josephine Sundin. Dr Sundin has come to the opinion that as a result of the multiple traumas you have suffered in your life since your young teenage years and the series of violent intimate relationships that you have endured since that time, and the fact that you have suffered physical, sexual and psychological abuse over a long period of time, you suffer chronic post-traumatic stress disorder and borderline personality disorder.

The connection between those two matters is explained in her report and in other reports. Associate Professor Carolyn Quadrio, spells it out in her addendum report. She said, "Trauma and abuse have profound effects on mental processes and on psycho-social and psychological functions so that a disorganisation of personality occurs and leads to lasting disorder. Similarly, substance abuse which commonly develops in the context of adolescent trauma, also has a profound effect on mental and psycho-social processes and secondly, incapacitates the person so they are rendered highly vulnerable to further traumas and abuse thus creating a vicious cycle…

I have been assisted by the addendum report of Associate Professor Quadrio where she says that, "At times, however, she returned when she may have been able to escape because she experienced him as someone who loved her. This is explained as traumatic attachment relationship. Further it is also the case that in chronic or complex post-traumatic stress disorder there is both paralysis of initiative whereby the person is greatly compromised in her capacity to take action and there are alterations in perception so they have difficulty perceiving themselves accurately or others and thus in perceiving the true nature of the relationship with an abuser."

Later on she says, "If this psycho physiological disturbance is sustained over time and especially when it occurs in the crucial development years of childhood and adolescence, it eventually leads to disorganisation of personality, sustained hyper vigilance and hyper reactivity become chronic and irreversible."

Further on, "The inability to leave can be explained, partly, as a manifestation of personality disturbance but it is also the case that in domestic violence a woman feels trapped and unable to leave and knows it is not safe to leave so she remains captive and experiences more abuse and trauma and undergoes more personality disorganisation."

I have also noted from the report of Associate Professor Quadrio that those matters which are described as chronic or complex PTSD personality disorder with poly substance dependence or abuse, she says, "These

disturbances reflected a lifetime of trauma, a highly chaotic and unsustainable lifestyle and both past and present intimate partner violence."

R v Falls, Coupe, Cummings-Creed & Hoare **[2010] QSC (3 June 2010) summing up - unreported – Queensland Supreme Court**

'Abused person' – 'Battered woman syndrome' – 'Expert evidence - psychiatrist' – 'Murder' – 'Self defence'

Charge: Murder.

Result: Acquitted.

Facts: In May 2006, the accused, Susan Falls, shot and killed her husband, Rodney Falls. Throughout their relationship, Susan Falls was subject to significant physical and emotional abuse. This included: numerous incidents of physical violence, beating one of the family's dogs to death; numerous incidents of sexual violence and rape; threatening to kill her or harm the couple's children. Susan Falls drugged the deceased and shot him twice as he dozed in a chair. She was charged with murder. Both self-defence, ss 271(2), 273 *Criminal Code 1899* (Qld) and the defence of killing for preservation in an abusive domestic relationship, s 304B Criminal Code 1899 (Qld) were raised at trial. Two forensic psychiatrists (Dr Lawrence and Associate Professor Quadrio) were called by the defence and gave evidence about the history of violence and its effect on the offender. (Note *Coupe, Cumming-Creed and Hoare* were charged with being accessories to the murder but were also acquitted).

Applegarth J, summing up (3 June 2010):

'Evidence of what, for want of a better expression, is referred to as "battered woman syndrome", is admitted, not because battered woman syndrome is a disorder, or because battered woman syndrome is a defence. Battered woman syndrome isn't a defence. The fact that someone is battered for years doesn't automatically give them a defence. Whether they have a defence depends on whether they acted as they did in circumstances that the law provides is a defence.

However, what is conveniently, and perhaps somewhat inaccurately, described as "battered woman syndrome" is relevant to legal defences.

It doesn't have to be a psychological disorder to be relevant to behaviour and to the defences in this case. It's relevant to the mental state of Ms Falls, and whether she exhibited hyperarousal and other symptoms that are

recognised in such cases.

I won't repeat it. You will remember the evidence of Dr Lawrence and Associate Professor Quadrio about the mental state of persons who are subjected to prolonged abuse, their vigilance and so on. Associate Professor Quadrio summed it up pretty simply in saying they're "revved up all the time".

The behaviour of people, be they soldiers or civilians who are subjected to trauma, has been the subject of organised study. It's not every form of behaviour that is or needs to be the subject of expert evidence. Someone's grief reaction when a loved one dies, or the anxiety that most of us feel when we talk in public, or the anxiety that most people experience when they sit exams, these are things that are familiar to us because we might remember sitting exams or we've had children who sit exams. So we don't need expert evidence to tell us about how people become anxious in certain circumstances, when they're going for an exam or a driver's licence or something of that kind, that we all know about or most of us know about. But because battered wife syndrome is relatively rare it is a legitimate matter for expert evidence and it is the proper subject for expert evidence because, without the assistance of expert evidence, ordinary people who don't know or study these things, might find the behaviour perplexing, counterintuitive or unreasonable.

It might seem odd why there would be a bond between the abuser and the abused. Why there might be, what Dr Lawrence referred to as, an ambivalent relationship, or what Associate Professor Quadrio referred to as a traumatic attachment. The behaviour of someone with a vulnerability because of past abuse who remains with their abuser.

Dr Lawrence and Associate Professor Quadrio, who are experts in their field, were able to address what was described as the "cycle of violence". How, over time the situation worsens. How often it's the case that the abuser isolates the partner. The common symptoms of a variation in mental state. The loss of self-esteem. The belief that the person who is being abused is somehow at fault. The shame they feel when they return, contrary to the advice of police. The belief that in those circumstances the police won't help them again. The reasons they don't leave: children; lack of support; lack of financial support; threats to the woman; threats to people they love; threats over the custody of children.

And apart from giving you evidence about those characteristics and observed behaviours, Dr Lawrence and Associate Professor Quadrio gave you evidence about the fact that victims of prolonged abuse can have quite correct perceptions as to the risks that are posed to them if they try to leave….

Battered wife syndrome isn't a psychological disorder. As Dr Lawrence and Dr Quadrio explained it's a

pattern of behaviours. It's been the subject of research, and it's a field of study by practitioners and scholars whose research and reports are open to contest, as you'd expect scientific inquiry and research to be in a proper field of scientific study.

Dr Quadrio described how there is what she described as a "learned helplessness". How abused women are afraid to leave because they correctly assess that they're at risk. That there may have been past attempts to leave. She referred to the triggers that occur for a violent response. That the level of risk is perceived to increase or has in fact increased. Often there are threats to harm children, and the threats become specific in terms of how, when and where they will be carried out.

District Court

SK (A Child) v Commissioner of Queensland Police & Anor [2023] QDC 65 (17 April 2023) – Queensland District Court

'Aboriginal and torres strait islander person' – 'Appeal against protection order made after childrens court sentencing' – 'Child perpetrator' – 'Child victim' – 'Choking' – 'Couple relationship' – 'Couple relationship between children' – 'Necessary or desirable' – 'Physical violence' – 'Protection order' – 'Relevant relationship' – 'Section 37 domestic and family violence protection act 2012 (qld)' – 'Threats' – 'Weapon'

Proceedings: Appeal against temporary protection order.

Grounds:

1. The magistrate did not have jurisdiction to make a protection order.
2. The appellant was not afforded procedural fairness in terms of representation and an opportunity to be heard.
3. The learned magistrate did not provide adequate reasons for the decision.
4. The children are not in a "relevant relationship" being a "couple relationship" within the meaning of the Act.
5. A domestic violence protection order was not necessary or desirable.

Facts: The appellant was a 12-year-old boy who had been found to be in a 'couple relationship' with his 12-year-old 'girlfriend.'

After sentencing the appellant in the Childrens Court in relation to a series of offences for assaulting the aggrieved, including choking her, striking her with a broom handle and threatening her the learned Magistrate heard and determined the protection order application on a final basis, when it had only been listed for mention.

The Commissioner conceded that the learned Magistrate failed to give proper reasoned consideration to the s 37 *Domestic and Family Violence Protection Act 2012* (Qld) factors pre-requisite to the making of the order.

Reasoning and decision: Appeal allowed, application for protection order dismissed.

Morzone KC, DCJ observed:

[7] However, in my respectful opinion that hearing, and determination was premature and deeply flawed in several ways.

[8] Firstly, the proceeding was only set for “mention” on that day and was neither intended nor ready for a final hearing and orders. The material consisted of the initiating application with some narrative of the circumstances attested to by the investigating police. Nevertheless, the hearing morphed into final orders without adequate reasons.

[9] Secondly, the appellant child was not afforded procedural fairness due to inadequate representation absent a guardian and not being afforded any reasonable opportunity to be heard. I do not accept that the child can be said to have retained the duty lawyer, instead the representation was effectively appointed by the court *ad hoc* and in the nature of *amicus curiae*. After taking account of court procedures, I estimate that the child had barely 5 minutes with the duty lawyer via the video-link between the courtroom and the youth detention centre. The appellant child did not have the benefit of a guardian or parent. The learned magistrate proceeded as if the appellant consented to final orders, despite both parties urging the court to adjourn the hearing pending completion of the probation order. The duty lawyer’s submissions fell well short of informed consent, and any final orders were premature and ill-founded.

[10] Thirdly, the reasons for the decision below were inadequate.

[11] Fourthly, and in any event, there was and is insufficient and inadequate evidence to establish a requisite “couple relationship” between the two children. At best, the immature relationship between the children could be colloquially described as ‘puppy love’ and falling well short of the characteristic maturity of a ‘couple relationship’ caught by the Act.

[12] Fifthly, a domestic violence protection order is neither necessary nor desirable under the Act. Instead, “necessary or desirable” orders were, and remain, available under the *Youth Justice Act* 1992, which provides appropriate safeguards and considerations pursuant to the youth justice principles. The Childrens Court sentence proceedings may be re-opened to amend the conditions of the appellant’s probation order, but that is beyond the remit of this appellate court.

[13] Sixthly, in the absence of any proper and sufficient evidentiary basis for the making of a protection order – neither the temporary nor final order (as amended) should have been made, nor should the application be

entertained where the *Youth Justice Act* 1992 caters for the circumstances. All orders should be set aside, and the application should be dismissed.

***Queensland Police Service v KBH* [2023] QDC 26 (16 February 2023) – Queensland District Court**

'Allegations of infidelity' – 'Breach of protection order' – 'Children' – 'Coercive control' – 'Controlling behaviour' – 'History of domestic and family violence' – 'Manifestly inadequate' – 'Protection order' – 'Sentencing' – 'Separation' – 'Use of children in abuse'

Charges: 4x breaches of protection order.

Proceedings: Sentencing appeal pursuant to section 222 *Justices Act 1886*.

Grounds: The penalty of $300 for the first two counts, and $200 for the remaining charges, was manifestly inadequate.

Facts: The respondent man and aggrieved woman had been in a relationship but had separated. The offending involved multiple breaches/contraventions of a protection order, where the aggrieved was the person protected. On the first occasion, the respondent approached the aggrieved at a football match and used derogatory language before later letting himself into her house and refusing to leave until police were called. On another occasion he called their child and asked to speak to the aggrieved, accusing her of drinking and seeing other men. The final incident was when he was invited to the aggrieved's home on the condition he leave after dinner and then refused to do so until police were again called.

The respondent had previously been sentenced to a term of imprisonment for contravention of a protection order.

Decision: The original sentence was set aside as an erroneous exercise of sentencing discretion and the respondent was resentenced to three months imprisonment.

Coker DJC found that the Magistrate had erroneously misconstrued the offending as minor breaches, evidencing a 'total misunderstanding of the nature of domestic violence and the nature of control and dominion exercised in relation to a former intimate partner' [25]. Where the respondent knew of his obligation not to approach the aggrieved and continued to do so, attending her home when he had been specifically directed not to, accusing her of seeing other men and refusing to leave her house when asked, the breaches were not inconsequential [25], [27], [29].

Coker DJC characterised the breaches as controlling and coercive, being 'significant indications of a lack of appreciation or respect by the respondent of the orders previously made, and of the opportunities given to change the direction of his ways,' particularly given the repetition of conduct for which he had previously been sentenced [28], [30].

The 'lenient' fine was manifestly inadequate and unreasonable in all of the circumstances [31]. Coker DJC emphasised the need to impose penalties reflecting the importance of ensuring that controlling domestic violence behaviours do not continue [32] and that while not a serious act of domestic violence, the repeated conduct of the respondent and 10 previous domestic violence convictions justified significant penalty [34].

Coker DJC stated: 'Again, these are by no means minor matters that arise in relation to the breaches. They are controlling. They are coercive and, most importantly, they are significant indications of a lack of appreciation or respect by the respondent of the orders previously made, and of the opportunities given to change the direction of his ways.' [28]

Wylie v AMN **[2022] QDC 241 (26 October 2022) (26 October 2022) – Queensland District Court**

'Appeal' – 'Civil' – 'Court's own motion' – 'Failure to give reasonable opportunity to consider and respond to summary dismissal' – 'Police officer alleged perpetrator' – 'Protection order sought against serving police officer' – 'Summary dismissal of application for protection order' – 'Whether magistrate has jurisdiction to hear protection order application by police protection notice if notice not filed in the district'

Proceedings: Appeal against summary dismissal of application for protection order.

Facts: Senior Constable Wylie filed an application for a Police Protection Order under the *Domestic and Family Violence Protection Act 2012* (*DFVP Act*). Notice was served at the Caboolture police station but filed in the Pine Rivers Magistrate's Court. The *DFVP Act* s 111(1) states that Notice must be filed in the local Magistrate's Court. The respondent argued that the case had been commenced in the wrong court so proceedings were a nullity.

The magistrate dismissed the proceedings summarily without either party raising this or having an opportunity to make submissions on this [14]. The Magistrate was concerned that the matter be decided quickly as the respondent was a serving police officer and referred repeatedly to the potential for the proceedings to waste the court's time [17].

The aggrieved had been married to the respondent for 2.5 years and they had one son. The aggrieved applied for a protection order on the basis that the respondent had threatened to jump in front of a truck holding the child; had told her to remember that he carried a gun all day at work; and had said that no one would believe her over him, among other things.

Grounds

(a) Jurisdiction: Whether the learned Magistrate had erred in assuming she had jurisdiction to hear the application where the Police Protection Notice initiating the proceeding was served at the Caboolture Police Station, but was filed in the Pine Rivers Magistrates Court; and

(b) summary dismissal: Whether the Magistrate erred in dismissing the application summarily, without giving the appellant/applicant the opportunity to cross examine witnesses for the respondent.

Decision and Reasoning: Appeal upheld; order for summary dismissal set aside; matter remitted for rehearing by a different magistrate.

On jurisdiction, Porter KC DCJ held that jurisdiction should be interpreted broadly [40] and resolved a conflict between ss 136 and 111 of the *DFVP Act* by upholding the precedence of s136 which gives courts jurisdiction to 'hear and decide any application made to the court under this Act' (s136(1)(a)).

On summary dismissal, his Honour found that the Magistrate had erred in three ways:

1. Her Honour should have declined to consider the application for summary dismissal until the evidence before her was tested at trial [76].
2. She erred in placing weight on the fact that the respondent was a serving police officer when deciding to dismiss the application [78].
3. She initiated the dismissal of the application of her own volition. The one day's notice given failed to accord procedural fairness [79].

He referred to the *Domestic and Family Violence Protection Rules 2014*, Rule 22, which gives plenary power to determine applications. This is subject to Rule 23, which sets out a list of conditions to which this power is subject. Relevant here are that 'each party is entitled to a fair hearing' (Rule 23 (2)(b)) and 'each party must be given a reasonable opportunity to lead evidence and cross examine witnesses' (Rule 23 (2)(i)). [60]

His Honour continued at [61]:

> Turning to the Act itself, apart from s. 51, there does not appear to be any statutory provision which expressly, or by necessary implication, authorises hearing and determination of an application for a (final) protection order other than by "trial" of the application. It is to be noted of course that the Act does not expressly say that a protection order is to be determined by trial. However, where the Act creates a right and confers civil jurisdiction on a court to hear and decide an application to enforce that right, it must necessarily imply that the application be determined by procedurally fair process apposite to a hearing which results in a final order. At the least, that must include a reasonable opportunity to lead evidence, cross examine and otherwise test another party's evidence and address the Court on the findings of fact that the Court should make on the evidentiary record and the law that applies to those facts.

He held that the Magistrate did not have an express statutory power summarily to dismiss the application [66]. While statutory courts do not have inherent jurisdiction, they have implied powers to do whatever is necessary to perform their function [67]. While a court would have jurisdiction summarily to dismiss frivolous or vexatious cases that amount to an abuse of process, this power does not extend to cases 'where there is a real question of fact to be determined' [72].

***LJV v Commissioner of Police* [2022] QDC 220 (13 September 2022) – Queensland District Court**

'Appeal' – 'Appeal against conviction and sentence' – 'Appeal against conviction dismissed' – 'Appeal against sentence upheld' – 'Appellant convicted of contravening a domestic violence order' – 'Criminal law' – 'Whether magistrate interfered with evidence of a witness' – 'Whether magistrate's involvement in conduct of trial went beyond their role as trial judge' – 'Whether the appellant received a fair trial'

Matter: appeal against conviction and sentence.

Facts: The applicant was subject to a domestic violence order and due to attend court for a breach thereof when he sent the following text to the respondent:

> You will need to pick up the kids from school today as I need to prepare for court tomorrow morning to contest the bogus claims you have laid against their father in yet another alienation attempt. I will pick up the children as normal from school on Friday depening [a typographical error, I infer] on the decision from the judge.

The prosecution argued that the text breached the requirement for the applicant to be of good behaviour and not commit domestic violence and the requirement not to contact the respondent except concerning parental or contact issues.

Grounds:

1. The Magistrate's examination of the aggrieved was a miscarriage of justice as it led evidence on her behalf on which the accused had no notice [15]. His Honour's examination of the applicant relied on knowledge of previous actions before the court and risked his being identified with one of the parties [20]. The trial was unfair and the conviction should not stand.
2. The sentence was manifestly excessive.

Held: Appeal against conviction dismissed; appeal against sentence upheld; sentence set aside; order that the offender be convicted but that no conviction be recorded and the offender not be further punished.

Porter QC DCJ found that a portion of the text message breached the requirement in the domestic violence order not to contact the respondent except concerning parental or contact issues [22]. His Honour deliberately did not make a finding as to whether the requirement to be of good behaviour was breached due to the unfairness of the trial on that issue [21]. He agreed with the prosecution submission that the sentence of one month's imprisonment suspended after serving 5 days was manifestly excessive [23].

***HFL v PLL* [2022] QDC 219 (5 August 2022)- Queensland District Court**

'Appeal against variation of protection order to include named persons' – 'Appeal and new trial' – 'Appeal pursuant to s222 of the justices act 1886 (qld)' – 'Appeal unopposed' – 'Application to vary domestic violence order' – 'Costs' – 'Criminal law' – 'Grounds for interference' – 'Protection order' – 'Whether the magistrate erred by varying a protection order to include two named persons where parties had agreed that aspect of the proceedings would not proceed'

Case type: Appeal pursuant to s222 of the Justices Act 1886 (Qld).

Facts: The applicant appealed against an order by a magistrate under s 52 of the *Domestic and Family Violence Protection Act 2012* (Qld) including two named persons as protected persons in a domestic violence protection order where the respondent (to the current action) had withdrawn the issue. The respondent did not attend the appeal hearing in order to save costs.

Grounds:

1. The learned magistrate erred by varying a 2019 domestic violence order to include two named persons where the respondent indicated she was no longer seeking to have the two named persons included; no evidence was given by them about a complaint about the appellant; the court proceedings were conducted without addressing the issue; and there was no other basis to vary the 2019 order to include them;
2. The magistrate failed to give adequate reasons for including the two named persons; and
3. The magistrate failed to afford procedural fairness, particularly to the appellant, by failing to allow opportunity to address his Honour about whether the order ought to have been varied.

Held: Appeal allowed.

Deardon DCJ held that the lack of reasons given and the failure to afford procedural fairness were legal errors [10]. The errors should be remedied in light of the consequences of the Magistrate varying the order: the appellant was at risk of being charged with a criminal offence if he tried to contact the named persons or approached within 100 m of where they live, work or are [13]-[14]. His Honour further ordered that the respondent pay a fixed amount of costs and granted her an indemnity certificate.

***DLM v WER & The Commissioner of Police* [2022] QDC 79 (6 April 2022) – Queensland District Court**

'Child custody' – 'Coercive control' – 'Credibility' – 'Protection order' – 'Technology facilitated abuse'

Proceedings: Appeal against protection order.

Facts: The appellant man and first respondent woman separated after living together with their child for several years [9]. In September 2020, a Magistrate granted a protection order with non-contact conditions in the first respondent's favour and dismissed a temporary protection order that had been granted in the appellant's favour in July 2019. In October 2020, the appellant appealed the decision and applied to adduce 'fresh' evidence to establish that the first respondent had perpetrated acts of domestic violence [1]-[2].

Decision and Reasoning: Appeal dismissed.

Justice Cash considered the evidence adduced at trial and affirmed the Magistrate's findings that 'there had been no acts of domestic violence by the first respondent' and that 'there had been acts of domestic violence

by the appellant' [80]. Accordingly, His Honour affirmed the Magistrate's decision to award a protection order in the first respondent's favour and dismissed the appellants application to adduce evidence.

His Honour affirmed the Magistrate's findings as to the appellant's lack of credibility. The Magistrate had not accepted the appellant's evidence, having found that the appellant's claim that the first respondent deliberately had nightmares to antagonise him 'seriously undermined [his] credibility', which did not improve during cross-examination [36], [70]. His Honour affirmed the Magistrate's finding that the appellant had engaged in acts of domestic violence. Firstly, the appellant had limited the first respondent's access to their child in a manner that was manipulative and controlling [42], [70]-[72]. Secondly, the appellant had taken sexually explicit photographs of the first respondent without her knowledge or consent [38]. His Honour stated that this was an act of domestic violence that was sexually abusive and done in an attempt to 'dominate', 'control' and 'punish' the first respondent by causing her to fear that the images would be released during court proceedings, as the appellant had previously done [38], [42]. His Honour continued: 'The appellant had by his conduct demonstrated a pattern of domestic violence. There was the real prospect of future domestic violence, especially where the parties shared a child, and it was likely they would have to maintain some contact' [72]. Therefore, 'there was no error in the Magistrate's conclusion that a protection order should be made in favour of the first respondent' [72].

***FLC v MRT* [2021] QDC 264 (1 November 2021) – Queensland District Court**

'Adverse inference' – 'Emotional abuse' – 'Failure to provide adequate reasons' – 'Protection order appeal' – 'Rule in jones v dunkel'

Proceedings: Appeal pursuant to s 164 of Domestic Violence and Family Protection Act 2012 (Qld) against the making of a protection order.

Facts: The appellant man is the respondent man's uncle. The 29 year-old respondent gave evidence he was diagnosed with autism in 2017. The respondent's mother (the appellant's sister) has a lengthy history of serious mental illness and alcoholism and the respondent resided with the appellant and his partner for a time when he was a child. In the circumstances the appellant has provided a degree of support to the respondent from time to time. There was vague evidence in relation to ongoing Supreme Court proceedings in relation to trusts and the estate of the appellant's father/respondent's grandfather between the respondent and his siblings.

The respondent gave evidence of what he said were multiple incidents over a number of years where the appellant was emotionally and psychologically abusive towards him. The appellant's evidence disputed many of the respondent's allegations. There were submissions made by the respondent's counsel at trial that it would be inappropriate to draw *Jones v Dunkel* ((1959) 101 CLR 298) inferences in relation to the failure to call the respondent's mother and sister and the magistrate did not indicate a decision in that respect. The trial magistrate seemed to make findings on the basis of the demeanour of the respondent's sister in circumstances where she was not called as a witness.

Issue: Whether the learned Magistrate failed to give sufficient reasons for the decision to grant the application for a protection order; whether the learned Magistrate took into account extraneous matters including the demeanour of the respondent's support person; whether the learned Magistrate failed to properly consider or direct himself in line with the principle from Jones v Dunkel; whether the learned Magistrate erred in failing to make sufficient findings of fact and in failing to explain how he concluded that the requirements for making a protection order had been established.

Decision and Reasoning: Orders set aside, matter remitted for rehearing by a different Magistrate.

The trial Magistrate's reasons failed to sufficiently address any of the conflicting versions of the appellant and respondent, the legal issues as to whether domestic violence arose and if so what kind and whether an order was necessary.

Porter QC DCJ observed:

[58] ….[W]here there are contested facts, and the circumstances are such as to make both the identification of acts of domestic violence and the need for an order open to serious question, it is necessary for properly considered reasons to be given. Those reasons must, at a minimum, cover the following matters:

(a) The Court must make findings of fact on the principal contested factual issues with some explanation of the basis for the finding by reference to the evidence;

(b) The Court must identify expressly what acts are found to comprise acts of domestic violence and why;

(c) The Court must explain the basis for concluding that an order is necessary and desirable in the light of the acts found and the other relevant circumstances;

(d) The Court must explain why the principal submissions made by the unsuccessful party on these issues have been rejected.

[59] The reasons in this case failed to address any of those matters.

***SHW v ABC* [2021] QDC 151 (13 August 2021) – Queensland District Court**

'Coercive control' – 'Credibility' – 'Cross-applications' – 'Emotional abuse' – 'Failure to report' – 'Police officer victim' – 'Protection order'

Matter: Appeal against dismissal of application for protection order.

Ground: The Magistrate erred in determining that no act of domestic violence had been committed by the respondent against the appellant.

Facts: The appellant police officer woman and respondent man were in a relationship which had broken down. The appellant usually had access to assets and records of the respondent's company. The appellant's evidence included several alleged incidents:

- The respondent did not talk to the appellant after the appellant's sister died;
- The respondent had taken the appellant's Mercedes Benz, which was company property;
- The respondent did not allow the appellant access to the company finances;
- The respondent attended a joint property in Paluma at a time they had agreed only she would access the property and disconnected solar panels and gas bottles;
- The respondent refused to hand over the appellant's furniture (despite police being present), and handed over the wrong keys to his solicitors so that when the appellant did attend Paluma, she would be unable to enter the cabin.

The appellant was a police officer. Her failure to report any abuse despite her occupation was considered by the Magistrate as evidence that the alleged domestic abuse had not occurred.

Decision and reasoning: Appeal allowed, protection order issued. The Magistrate erred in finding that it was not necessary or desirable to protect the appellant from future domestic violence, and the appeal was allowed.

While the respondent's behaviour in relation to the appellant's sister's death, the company Mercedes Benz, and the company finances were all explicable by innocent reasons, his conduct in relation to the Paluma property, the furniture, and the keys were all evidence of 'controlling and emotionally abusive behaviour that

has the potential to be repeated during the course of the property settlement', during which 'contact [between the parties] is inevitable'. [37]

***QKL v Queensland Police Service* [2021] QDC 195 (18 June 2021) – Queensland District Court**

'Cross-examination' – 'Denial of natural justice' – 'Evidence' – 'Natural justice' – 'Necessary or desirable'

Charges: Assault occasioning bodily harm whilst armed x 1; common assault x 1.

Proceedings: Appeal pursuant to s 164 of Domestic Violence and Family Protection Act 2012 (Qld) against the making of a protection order.

Facts: The appellant (respondent) and aggrieved were sisters. The Magistrate hearing the application, pursued by police, did not allow the appellant sister a hearing or opportunity to cross-examine witnesses, in particular the aggrieved sister and both the appellant and aggrieved had submitted that they did not believe a protection order was necessary. The decision was made upon the papers and the appellant was not afforded the opportunity to give evidence as to her insight and the need for the orders. The appellant's solicitor sought a listing for half-day hearing on counsel's instructions, but the Magistrate proceeded to hear the matter on the papers. The Magistrate in his decision acknowledged that in the absence of evidence he was unable to make a determination as to whether the aggrieved was a particularly vulnerable person requiring extra consideration, or give weight to the aggrieved's request an order not be made without explanation why the aggrieved did not see the order as necessary or desirable. The Magistrate made adverse findings against the appellant, finding the extensive differences between the appellant and aggrieved's affidavit evidence indicated a lack of insight in the appellant, which suggestion the appellant was not given any opportunity to respond to. Adverse findings were made which seemed to have no basis in evidence, but if there was evidence of those matters they were not put to the appellant and she did not have an opportunity to respond to them.

Grounds:

1. The magistrate erred in finding the matter without a hearing resulting in a denial of natural justice; and
2. The magistrate erred in finding a domestic and family violence protection order was desirable in the circumstances.

Decision and Reasoning:

1. Appeal allowed;
2. Order of the Magistrate of 10 September 2020 set aside;
3. Application remitted for hearing to the Brisbane Magistrates Court;

Burnett AM DCJ held that the ruling was made before the appellant's solicitor was able to obtain instructions from counsel, and at the very least the matter ought to have been stood down to obtain instructions from counsel. The appellant has been denied natural justice as there were critical disputed matters going to the only issue in the matter, whether a protection order was necessary or desirable, which cross-examination of the parties could have resolved. The appellant was also denied the opportunity to put relevant evidence before the court.

Bailey (a pseudonym) v Bailey (a pseudonym) **[2021] QDC 99 (9 June 2021) – Queensland District Court**

'Appeal' – 'Orders made by consent' – 'Protection order' – 'Protection order appeal' – 'Solicitor party' – 'Systems abuse'

Proceedings: Appeal pursuant to s 164 of the *Domestic & Family Violence Protection Act 2012* (the Act) against the making of a protection order.

Facts: The respondent husband (a solicitor) appealed against the making of a protection order which the Magistrate purported to make by consent, arguing he had not consented to the making of the order. He was represented at the hearing by a barrister on a direct brief and it was apparent his counsel understood the nature of the proceedings and matters before the court. The appellant argued that nothing in the hearing transcript indicated the appellant's personal consent to the orders, and he was silent throughout the hearing, although his counsel did engage in discussion in relation to what is understood to be a standard set of orders.

Issue: Whether the Magistrate complied with the requirement of s84(2) *Domestic & Family Violence Protection Act 2012* that a Magistrate about to make an order where the respondent is present "must ensure" the respondent understands the listed matters.

Decision and Reasoning: Decision appealed from confirmed, appeal dismissed.

Dick SC DCJ was satisfied that the Magistrate ensured the appellant consented or did not object to the orders

because he was present in court, the Magistrate engaged in discussion with counsel and Dick SC DCJ did not believe the appellant's counsel would not have obtained instructions on the orders handed down from the bench to counsel.

Dick SC DCJ noted:

> [41] In this case the following points must be recognised.

- The Act does not require that the Magistrate engage personally with the respondent.
- Sub-section 84(4) of the Act provides that a court can use services or help from other persons to assist the court in discharging its obligations under s 84. Some examples are provided and for the most part, if not all, the person giving the explanation is not a legally qualified person.
- The Appellant is a qualified solicitor.
- The Appellant was represented in court by competent counsel.
- The Appellant was in court at the time the order was made.
- There was a discussion between the bench and the two barristers concerning the order.
- The order was made by consent or without objection.
- Section 85 of the Act provides the court must include with a copy of the orders served on the respondent, a written explanation containing the relevant material that is referred to in s 85.

***NJB v Commissioner of Police* [2021] QDC 42 (4 March 2021) – Queensland District Court**

'Appeal against conviction and sentence' – 'Breach of protection order' – 'Credibility' – 'People with disability and impairment' – 'Physical violence and harm' – 'Protection order' – 'Victim experience of court processes'

Charges: Contravening a domestic violence order.

Proceedings: Appeal against conviction and appeal against sentence.

Facts: The critical issues that had to be determined by the magistrate below were whether the male appellant, as stated by the female respondent, punched her to the side of her head after a series of arguments or, whether because of her lengthy and serious history of seizures, the court could not be satisfied beyond reasonable doubt that the injury was not the consequence of the respondent having a seizure, falling and thereby injuring herself. The appellant was found guilty and sentenced to four months imprisonment, with a

parole release date set after two months.

Grounds of appeal:

Appeal against conviction:

1. The magistrate's findings of the respondent's credibility or reliability were unreasonable or could not be supported by the evidence (Grounds 1 and 2).
2. The magistrate erred in permitting the appellant to be asked about bad character without leave being sought and granted, and against objection (Ground 3).

Appeal against sentence: The sentence was manifestly excessive.

Held:

Appeal against conviction dismissed.

Grounds 1 and 2 were dismissed. Contrary to the appellant's submission that the respondent was intoxicated on the night of the offending, the evidence supported the fact that she was no more than 'tipsy'. The argument that the respondent had a motive to lie about the assault was also unclear and implausible.

The appellant further submitted that the magistrate failed to give sufficient weight to the respondent's evidence minimising the frequency of her seizures. In dismissing this argument, his Honour said:

> "It can be accepted that at times, the respondent did tend to downplay the frequency of those seizures. That, of course, is not to her credit. That said, the nature and extent of the seizures were clearly distressing to her and, quite likely, a source of embarrassment. That the respondent might tend to downplay her condition does not, in my view, materially damage her credit. Further, the cross-examination of the respondent on this topic was not only distressing for the respondent, it was also, at times, quite confusing. That may also be another reason which goes some way to explaining the conflicting evidence on this issue."

There was no room for a reasonable doubt that the injury suffered by the respondent was the result of the respondent having a seizure and falling or otherwise sustaining the injury as a result thereof. It followed that the court was satisfied beyond reasonable doubt that the appellant was guilty of committing the offence charged.

Ground 3 was also dismissed. The cross-examination of the respondent and the evidence led from the appellant by his solicitor clearly left it open for the prosecutor to raise an alleged prior incident and put it to the appellant. In any event, the appellant denied the matter and the magistrate observed that that was as far as the matter could go.

Appeal against sentence allowed.

His Honour recognised that the cross-examination of the respondent about her medical history was prolonged and distressing, however this had to be seen in light of her somewhat confusing evidence. His Honour recognised that: “I have no doubt that the cross-examination could have been carried out much more efficiently and greatly shortened both the length of the cross-examination and the distress caused to the respondent.” That said, it was wrong to describe the cross-examination as largely unnecessary and irrelevant.

None of the appellant’s favourable antecedents were mentioned or given weight by the magistrate (appellant’s strong work ethic, employment, character references, and relationships with his mother and children). This was an error in the exercise of the sentencing discretion. The sentence imposed was manifestly excessive and the appellant re-sentenced to 30 days imprisonment.

***PRH v LPL* [2021] QDC 17 (3 February 2021) – Queensland District Court**

‘Appeal against orders made in a domestic violence proceeding’ – ‘Ouster condition’ – ‘Protection orders’

Proceedings: Appeal against orders made in a domestic violence proceeding.

Facts: The appellant was prohibited from entering, remaining, approaching etc within 500 metres of the first respondent’s (aggrieved) usual place of residence and from following or approaching within 500 metres of the aggrieved. The appellant was also prohibited from entering, remaining, approaching etc to within 200 metres of premises where the named person usually lived, worked or frequented. The magistrate further ordered that the first respondent have sole right of occupancy of the Buddina residence.

Grounds of appeal: 15 grounds of appeal centred around the court below denying procedural fairness to the appellant by refusing to permit evidence to be led and wrongfully accepting false and misleading evidence given by the first respondent.

Held: Appeal dismissed, subject to a number of variations.

In particular, the imposition of a seven-year ouster condition was neither necessary to protect the first respondent nor desirable. The first respondent did not want to move as the property "was her home, she felt safe there". However, the appellant was the registered proprietor of the property. The first respondent had had the benefit of the ouster condition for two years and three months. She also had the financial capacity to purchase alternative premises/rent.

***MB v Queensland Police Service* [2020] QDC 325 (18 December 2020) – Queensland District Court**

'Appeal against sentence' – 'Breach bail conditions' – 'Breach protection orders' – 'Emotional and psychological abuse' – 'Following, harassing and monitoring' – 'Protection order' – 'Wilful damage'

Charges: Contravention of a police protection notice x 1; Wilful damage (domestic violence offence) x 1; Breach of bail condition x 7; Contravention of a domestic violence order x 4.

Proceedings: Appeal against sentence.

Facts: The male appellant repeatedly breached orders protecting his former female partner and her son. The appellant pleaded guilty and was sentenced to 2 years' probation and ordered to pay $611.70. Convictions were recorded on all counts.

Grounds of appeal: Fresh evidence was sought to be admitted arguing that recording a conviction would have a significant effect on the appellant's employment overseas, and the sentence was manifestly excessive.

Held: Application to admit fresh evidence was refused and the appeal dismissed.

It was appropriate to record convictions in light of the number of convictions and their serious nature (prolonged over 4 months, including more serious examples, continuation after release from custody). As at [57]: "When one considers s 12 of the *Penalties and Sentences Act*, the seriousness of the offences in combination outweighed any economic effect or wellbeing effect of the recording of convictions."

The sentence could not be said to be manifestly excessive. Despite being given many chances, the appellant had "continued to 'thumb his nose' at the bail conditions and the domestic violence order". Aggravating features included that these were instances of domestic violence and "the emotional harm done to the victims and the damage, loss and injury caused." Voluntary intoxication was no excuse. The guilty pleas were sufficiently taken into account (at [59]-[61]).

It was noted at [22], [26]-[28]:

> "Charge 12 occurred on 27 August 2020 which was a contravention of domestic violence order. The appellant updated his profile status making threatening comments about the complainant, SH. The post named SH and contained threats and disclosed her sexual preferences to several friends. This had a significant emotional impact on the complainant SH. The appellant was interviewed on 29 August 2020 and said he didn't remember posting the comment but went on to say it was true.
>
> "A victim impact statement was tendered as Exhibit 4. The offending caused distress and inconvenience to the complainant SH. She had to move regularly as a result of the conduct of the appellant and suffered defamation to her character. She alleged that total out of pocket expenses was $16,748.84."

***GRP v ABQ* [2020] QDC 272 (28 October 2020) – Queensland District Court**

'Appeal against order not to grant a temporary protection order' – 'Emotional and psychological abuse' – 'Physical violence and harm' – 'Protection orders' – 'Step-children' – 'Strangulation' – 'Systems abuse'

Proceedings: Appeal against order not to grant a Temporary Protection Order (TPO).

Facts: The appellant man and respondent woman were in a domestic relationship, and each had children from previous relationships. There was a prior history of protection orders ordered against the appellant, with the respondent as the aggrieved. In June 2019, a protection order was made against the appellant to protect the respondent with mandatory conditions and no contact conditions except with the respondent's written consent. The parties continued to have contact. In August 2019, following a complaint by the respondent to police, the appellant was charged with breach of a domestic violence order, common assault and choking/suffocation/strangulation x 2 (domestic violence offences). He was released on bail. This appeal concerned the appellant's cross-application for a TPO. In November 2019, the appellant filed a private application for a protection order against the respondent. Four incidents of emotional abuse and one incident of physical abuse (scratches from August 2019) were alleged. The Magistrate declined to make a TPO.

Grounds of appeal:

1. The Magistrate wrongly decided and erred in law by not granting a TPO.
2. The Magistrate wrongly decided and erred in fact and law by determining that the appellant's allegations of domestic violence against the respondent did not satisfy the definition under the Act.

3. The Magistrate erred by failing to give adequate reasons for not granting the TPO.
4. The Magistrate erred in fact and law in that he allowed extraneous or irrelevant matters to guide or affect his decision; mistook the facts; and did not take into account material considerations.

Held: An error of law occurred as the Magistrate did not provide adequate reasons namely, the Magistrate's reasons only referred to the four incidents of alleged verbal abuse, but did not refer to the incident of physical violence alleged in the appellant's application of November 2019 ([26], [30]). Further, the Magistrate erred when he stated he heard from both the appellant and the respondent in June 2019, as the appellant was not present ([31]). Her Honour set aside the Magistrate's order.

There was sufficient evidence to warrant granting a TPO in favour of the appellant. Having regard to the temporary nature of the order, her Honour considered that the evidence of alleged physical violence was sufficient to be satisfied of the respondent committing domestic violence against the appellant (at [38]-[40]). A date for the hearing of whether a protection order should be made was already set in the Magistrates' Court.

***ARTE v Nugent & Anor* [2020] QDC 268 (23 October 2020) – Queensland District Court**

'Appeal against grant of protection order' – 'Miscarriage of justice' – 'No prior history of domestic or family violence' – 'Ouster condition' – 'Protection order' – 'Suicide threat'

Proceedings: Appeal against making of a protection order; whether the protection order was necessary or desirable; whether the Magistrate erred in imposing an ouster condition; whether the Magistrate's conduct amounted to a miscarriage of justice.

Facts: A protection order was made on 3 February 2020 against the male appellant after a contested hearing, including an ouster condition in relation to his female former partner's usual place of residence.

The first respondent (the police prosecutor applicant for the order at first instance) opposes the appeal but concedes (1) the Magistrate's reasons for judgment disclose a *House v The King* (1936) 55 CLR 499 error and (2) it is appropriate for the order to be varied such that the ouster condition is removed.

The second respondent (protected person) is supportive of the appeal and the relief sought. The appellant and protected person were married for 32 years. Prior to 11 October 2019, there had been no previous incidences of domestic violence. The parties were in financial stress after the collapse of a business. On 11 October 2019 the protected person called 000, telling the operator: 'My husband has gone to the gun cabinet

to do a murder suicide…He's got a gun to kill us.' The second respondent locked herself in a bathroom. The operator heard the second respondent yell: 'Get away, get away'. A Police Protection Notice was issued on 11 October 2019, with a condition that the appellant surrender his weapons licence and firearms. An application for a protection order to benefit the protected person was made by the first respondent on 11 October 2019. No ouster condition was sought in the application. On 15 October 2019, the application was adjourned; a temporary protection order was made in the favour of the protected person with the standard conditions.

A protection order was made on 3 February 2020 against the appellant after a contested hearing, including an ouster condition in relation to the protected person's usual place of residence.

The appellant contended:-

- The appellant's conduct did not meet the definition of domestic violence - there was no threat of violence; rather the second respondent was intoxicated, stressed and emotional which resulted in her overacting to a bad joke made by the appellant; and
- In the alternative, a protection order is not necessary or desirable (i) appellant and protected person lived in the same residence during the term of the TPO and no domestic violence had occurred; (ii) prior to 11 October 2019, there had never been any other act of domestic violence in 32 years of the relationship; (iii) the risk of future domestic violence was remote and not sufficient to establish a need for protection.

On 3 February 2020, the Magistrate heard the application and made the order, delivering ex tempore reasons revealing that each limb of section 37(1) was satisfied and it was appropriate to impose an ouster condition. Central to the Magistrate's reasoning were three findings:-

1. the appellant was engaging in victim shaming;
2. the appellant had not taken any steps to address the underlying reasons for the incident on 11 October 2019; and
3. the relationship between the appellant and second respondent involved a power imbalance such that the later would subjugate her wellbeing to that of the former.

Grounds of appeal

1. Did the Magistrate err in holding that it was necessary or desirable to protect the second respondent

from domestic violence? Error 1

2. Did the Magistrate err in imposing an ouster condition under s.63? Error 2
3. Whether there were irregularities in the conduct of the trial that occasioned a substantial miscarriage of justice? Miscarriage of justice

Held: Order set aside; application remitted to the Magistrate's Court for a new trial before a different Magistrate.

Error 1 – Did the Magistrate err in finding a protection order was necessary or desirable?

Observing Horneman-Wren SC DCJ in *ACP v McAulliffe* [2017] QDC 294, s.37(1)(c) invokes a very wide and general power and is to be construed liberally, having regard to s.37(2) and the s.4 principles of the Act. This required the Magistrate to have regard to the wishes and views of the people who fear or experience domestic violence to the extent appropriate and practicable (s.4(2)(b)) [at 27].

At [29], His Honour reflected on the reasons for judgment and stated that the Magistrate was satisfied s.37(1)(c) was engaged because the second respondent was not adversely affected by alcohol and the 11 October 2019 incident was a very distressing one. His Honour noted the reasons did not disclose if the considerations mandated by section 37(2) were taken into account. His Honour found this to be an error of law and warrants the order being set aside.

His Honour also found the Magistrate's assertion of the existence of the power imbalance and reference to the Duluth model and the power and control wheel had no application to this case and amounted to an error of law.

The first respondent submitted, despite the errors in the reasons for judgment that there was in any event sufficient evidence to find the order was necessary or desirable in the circumstances. His Honour did not agree, finding, at [34], that the evidence going to this very issue is incomplete (see [65] to [85] – no sworn affidavit of the second respondent and there was no application to lead fresh evidence in this appeal).

Therefore, this should be determined in a new trial.

Error 2 – Did the Magistrate err in imposing an ouster condition?

In finding an error had been made by the Magistrate, His Honour noted that an ouster condition had not been sought by the first respondent in the initial application and that the views and wishes of the "aggrieved" had

not been sought, as was required by s.64(1).

His Honour considered s.57(1)(a) and s.63 and the mandatory considerations in s.64(1)(a) and (b) regarding whether the aggrieved can safely live in the residence if the ouster is not made and any views or wishes of the aggrieved.

His Honour, at [40], did not accept the Magistrate correctly assessed the risk of future violence occurring and the need for an ouster condition because:

1. The Magistrate's earlier finding in relation to the significant power imbalance, in the absence of evidence (an irrelevant consideration); and
2. The second respondent was not afforded the opportunity to express her wishes by way of sworn evidence (a mandatory consideration).

The exercise of discretion to impose an ouster order miscarried [at 41]. Both errors represent a proper basis for interfering with the exercise of discretion in the manner contemplated by *House v The King* (this was conceded by the first respondent in relation to (1) above).

Miscarriage of Justice

His Honour agreed there were five irregularities in the conduct of the trial at first instance such to establish a substantial miscarriage of justice:-

1. The Magistrate spoke about, and directly to, the appellant in terms that were pejorative, and unnecessary, having regard to the evidence in proper context, (at [46] eg accusing the appellant of "bad manners", calling him the respondent's "gun-toting husband");
2. The Magistrate permitted unfair cross-examination of the appellant, (at [47] not allowing the recording to be replayed at the appellant's request to clarify his understanding of the question and then describing this as being demonstrative of an uncooperative witness);
3. The Magistrate was unnecessarily aggressive towards the appellant's legal representative which adversely impacted upon the proper presentation of the appellant's case, (at [54] accusing the appellant's solicitor of professional discourtesy which was not borne out in the transcript);
4. The Magistrate materially interfered with the conduct of the second respondent's case, (at [65] by refusing the second respondent leave to file an affidavit on the day of the hearing);

5. An exchange between the solicitor for the first respondent and the Magistrate regarding a domestic violence stakeholders group meeting, taken with the other irregularities, is indicative of a reasonable apprehension of bias on the part of the Magistrate.

Osborne v Commissioner of Police **[2020] QDC 249 (30 September 2020) – Queensland District Court**

'Appeal against sentence' – 'Appellant's belief that his girlfriend and her children were victims of domestic violence perpetrated by the complainant' – 'Effect of deportation / visa cancellation on sentencing' – 'Non-fatal strangulation' – 'Vigilantism'

Charges: Forcible entry x 1; Wilful damage x 1; Assault occasioning bodily harm x 1.

Proceedings: Appeal against conviction and sentence (appeal against conviction abandoned).

Facts: The appellant believed that Ms MB was his girlfriend. Ms MB was in fact in a relationship with the complainant. On the date of the offence the complainant telephoned the appellant and told him that he (the complainant) was in a relationship with Ms MB. The appellant then went to the complainant's house. He banged on the front door and said, "I'm going to kill you, cunt"; "You want war, brother? You got war." The complainant approached his front door holding a knife which he had been using to prepare food. A verbal argument ensued, the appellant became enraged and ripped the screen door off the hinges. He lunged at the complainant grabbing him around the shirt. Both the appellant and complainant were cut with the knife during the struggle. The appellant put his left elbow and forearm around the complainant's neck and pressed it into the complainant's neck, choking him. The appellant continued to threaten the complainant saying, "I will kill you, cunt". He did not stop his attack until police arrived. Prior to the incident, Ms MB and her children had told the appellant that there had been episodes of domestic violence committed by the complainant towards her. The appellant said that he went to the complainant's house to talk to him about his behaviour and to protect the children. The appellant made full admissions to the police. The appellant was admitting to a mental health unit following the incident.

Issues: (1) Whether the sentence was excessive; (2) Whether the magistrate failed to take into account the appellant's guilty plea and mitigating factors.

Decision and reasoning: *Appeal allowed. Appellant resentenced.*

The respondent concedes that the magistrate failed to take into account a number of relevant mitigating factors including: the appellant's mental health condition, the appellant's physical health, his mistaken belief and the likely consequence of the appellant's conviction on his visa (see [39]-[41]). The respondent further concedes that the sentence imposed was excessive. There was no reference to any mitigating factors in the reasons of the magistrate, which tends to suggest that he failed to take those factors into account.

***ATD v TBC* [2020] QDC 236 (17 September 2020) – Queensland District Court**

'Appeal against protection order' – 'Domestic violence' – 'Female partner respondent subject to protection order' – 'Male partner aggrieved party under protection order'

Proceedings: Appeal against protection order.

Facts: The appellant (wife) filed a private application for a protection order against her husband. The respondent (husband) filed a cross application against his wife. In September 2018, a temporary protection order (TPO) was made naming the respondent (husband) as the aggrieved and the appellant (wife) as the respondent. In February 2019, the appellant was described as 'paranoid, delusional, denigrating towards the respondent, and neglectful of the children'. The appellant also published a number of Facebook posts accusing the respondent of abducting the children and accusing him of being abusive and corrupt. In February 2019, the TPO was amended to prevent the appellant from attending the respondent's home. In March 2019, the Federal Circuit Court made orders requiring the children live with the respondent, the appellant have two hours of supervised visitation per week, and the appellant commence therapeutic care with a Consultant Psychiatrist. In March 2019, the TPO was amended to prevent the appellant from contacting the respondent or publishing adverse comments about him online. In March 2019, the police referred the appellant to the Acute Care Team due to concerns they held regarding her mental health after she made over 100 unsubstantiated police complaints accusing the respondent of protection order breaches and other criminal behaviour. In May 2019, the appellant breached the TPO by publishing a post on Facebook which suggested the respondent broke into her house and placed a water pistol in her cupboard 'as a threat that [she] will be killed'. In June 2019, the appellant pleaded guilty to breaches of the TPO. A full list of the appellant's abusive communications and unsubstantiated allegations are set out in para [15]-[16] of the judgment.

Issues: Whether the magistrate's decisions making a protection order naming the male former partner as the aggrieved and the female partner as the respondent and dismissing the appellant's application for a

protection order should be upheld.

Decision and reasoning: *Appeal dismissed.*

There was a proper basis for the Magistrate finding that a protection order was necessary and desirable to protect the respondent from domestic violence.

> [74] The appellant has committed numerous acts constituting domestic violence against the respondent over the relevant period. Section 8 of the Act defines domestic violence for the purposes of the Act. It includes behaviour by a person towards another person which is emotionally or psychologically abusive, and behaviour that torments, harasses or is offensive. During the relevant period, the appellant sent abusive and intimidating messages to the respondent, published abusive and malicious Facebook posts, and sent numerous messages denigrating the respondent to others. The email and text communications between the appellant and the respondent clearly show a pattern of the appellant harassing and denigrating the respondent. I have summarized some of examples of these earlier in this judgment. The appellant did not and could not challenge that she had sent the relevant material to the respondent and others. The appellant sent some of this material in breach of a Temporary Protection Order and after being convicted of earlier breaches of the Temporary Protection Order.
>
> …
>
> It is clear from reading the transcript of the original hearing that the appellant continued to express resentment and animosity towards the respondent. Under cross-examination, the appellant refused to accept that she was in any way at fault for sending or posting the abusive and false material. The appellant's state of mind at the time of the original hearing was relevant as to whether it was necessary or desirable to make a protection order.
>
> [75] At the appeal hearing, the appellant continued to have little if any insight into the fact her behaviour has been unacceptable. She made clear her intention was to pursue the respondent further through the courts. I am satisfied a protection order was and is clearly necessary and desirable to protect the respondent from further domestic violence.
>
> [76] With respect to the appellant's application for a protection order against the respondent, the appellant has failed to show the Magistrate erred by concluding she could not be satisfied that the respondent had committed any act of domestic violence … other than some verbal abuse during the

incident of 29 January 2018. It was open on the evidence for the Magistrate to prefer the respondent's evidence over the appellant's evidence. The evidence supported her conclusion that the respondent's behaviour on that one occasion was out of character. In my view, although the respondent's verbal outburst on 29 January 2018 may well have constituted emotional or psychological abuse under section 8(1)(b) of the Act, there was no credible or reliable evidence that, prior to or since that date, the respondent behaved in any way which could satisfy a court that it was necessary or desirable to make a protection order against him. The uncontested evidence was that the respondent had made no contact, directly or indirectly, with the appellant except in compliance with Family Court orders.

***SRV v Commissioner of the Queensland Police Service & Anor* [2020] QDC 208 (1 September 2020) – Queensland District Court**

'Appeal against making of protection order' – 'Appeal against refusal to grant protection order (cross application)' – 'Breach of protection order' – 'Person most in need of protection' – 'Protection order' – 'S. 4 of the domestic and family violence protection act 2012' – 'Threats to kill'

Proceedings: Appeal against making of protection order and refusal to grant protection order (cross application).

Facts: The appellant and the second respondent were in an intimate relationship for a period of three months between October 2018 and January 2019. Following an incident on 21 January 2019, a Police Protection Notice (PPN) was issued and on 23 January 2019 a temporary protection order (TPO) was made against the appellant. On 29 January 2019, the appellant pleaded guilty to two charges of contravening the PPN.

At the mention of the police application on 17 June 2019, the appellant made a number of serious allegations against the respondent to the effect that she has conspired to have him murdered. The appellant then made an application for a protection order and temporary protection orders were made in each application. At the hearing of the applications on 19 August 2019, the police commissioner was legally represented in relation to the application for the benefit of the second respondent; the appellant was self-represented; and the second respondent did not appear. The Magistrate made an order, pursuant to s.151(2) that the appellant may not cross-examine the second respondent and that this would be the rules of engagement for the resumed hearing on 2 December 2019.

At the resumed hearing on 2 December 2019, the appellant tendered affidavits containing screen shots of

various Facebook messages as evidence of his allegations against the second respondent that she had conspired to have him murdered. The second respondent gave short oral evidence by phone, being questioned solely by the magistrate. The magistrate granted the protection order in favour of the second respondent and refused the appellant's cross application. In making the decision, the magistrate was not satisfied the second respondent was responsible for the threats and accepted the second respondent's version of events over the appellant's version.

Issues: Whether the magistrate was correct in determining that, upon identification of the person most in need of protection, it followed that a protection order could not then also be made against that person; whether the cross-applications should be granted.

Held: Appeal against making of protection order dismissed; appeal against refusal to grant protection order (cross application allowed).

The case clarifies the interpretation of s. 4 of the *Domestic and Family Violence Protection Act 2012* (the Act). The Act does not exclude orders being made in both cross applications. Cross applications require the consideration of the matters referred to in s.37 and should not be decided on the basis of the principle in s.4(2)(e) (the identification of the person most in need of protection).

Decision on cross applications:

Her Honour considered the evidence and found it clear there was an event of domestic violence perpetrated towards the second respondent by the appellant and was satisfied the circumstances justified a protection order was necessary against the appellant, even when accepting the second respondent was not a reliable witness and prone to exaggeration. This appeal against the making of the protection order was dismissed.

Her Honour then considered the appellant's application for a protection order against the second respondent, namely the allegations of the threats contained in Facebook messages. Her Honour stated she had no reason to doubt that the messages alleged to have been sent by the second respondent were in fact sent by her. In any event, their authenticity was not challenged. Her Honour found the messages satisfied the requirements of the definition of domestic violence in s.8(1) and s.37(1)(b). In her view, the magistrate should have found it necessary or desirable to protect the appellant from domestic violence and should have made a protection order. The second respondent did not swear any affidavit in response to the appellant's affidavit alleging serious matters.

***EKL v Commissioner of Police & PEL* [2020] QDC 194 (12 August 2020) – Queensland District Court**

'Complainant a protected witness' – 'Procedural fairness' – 'Trial proceeded without the appellant present'

Matter: Protection order appeal.

Facts: Discussion between the magistrate and the prosecutor about the protection order took place in the absence of the appellant and/or his legal representative. The prosecution made an application for the complainant to be a protected witness under the *Domestic and Family Violence Protection Act* (DFVP Act). The appellant's legal representative informed the court that they did not have instructions in relation to any matter other than to request an adjournment, which application was refused by the magistrate. The appellant's representative sought leave to withdraw. The magistrate granted the protected witness application.

Issues: (1) The appellant was not afforded procedural fairness; (2) the Magistrate erred in failing to comply with the DFVP Act; (3) the Magistrate erred in finding that the protection order was 'necessary or desirable' in the circumstances.

Decision and reasoning: *Appeal allowed, protection order set aside. Application for protection order remitted to magistrate's court before a different magistrate.*

(1) The discussion of substantive matters by the magistrate in the absence of the appellant is a 'clear breach of the obligation of procedural fairness' [20]. (2) In prohibiting the appellant from cross-examining the complainant, the magistrate did not comply with the pre-conditions in s 151 of the DFVP Act which include 'requiring the court to inform the respondent that he could not cross-examine the aggrieved' [33]. (3) Unnecessary to consider.

***R v RT (No 2)* [2020] QDC 158 (13 July 2020) – Queensland District Court**

'Assault' – 'Judge-only trial' – 'Strangulation' – 'Weapon'

Charges: Choking x 1.

Proceedings: Judge-only trial.

Facts: The defendant man was charged with unlawfully choking without consent while he and the female complainant were in a domestic relationship.

The complainant's daughter's partner intervened. Later, the complainant attempted to pursue a DFV protection order but 'none of the police to whom she spoke did anything'. The complainant and defendant later reconciled. In December 2017, the defendant is alleged to have 'put his right forearm across her neck and applied pressure', pinning down the complainant so that she could not breathe. After the incident, the police attended the house.

1. During the complainant's initial conversation with police, she 'did not describe being choked by the defendant'. The defendant stated that he did not choke her but had held her by her arms/shoulders to 'settle her down'.
2. When meeting with a doctor after the incident, the complainant told the doctor she felt safe at home. The doctor gave expert evidence that the complainant's injuries were consistent with the alleged choking.
3. The relevant Constable testified that it was not until May 2020 that they were made aware of any allegation of domestic violence prior to December 2017. When asked about allegations of earlier violence, the complainant said that she had raised this with police on numerous occasions. The police were not able to get in contact with the complainant's daughter's partner who witnessed the January 2015 incident.

Issues: Whether the evidence of the complainant can be accepted beyond reasonable doubt.

Decision and reasoning: *Not guilty.*

The defendant argued that there were:

> [39] a constellation of features inconsistent with [the complainant's] account being truthful. These included her demeanour when speaking to police that night, her failure to immediately mention being choked and her preparedness to remain living at the house and tell the Doctor she felt safe.

The judge held that:

> [39] The first and last of these matters do not in my view undermine the credit of the complainant. We are far past the days where the law expected an immediate and uncontrolled emotional reaction to an assault, and adversely viewed the credit of those who did not behave as expected. And, as noted above, staying in the house is understandable for other reasons.

However, the judge was not satisfied beyond reasonable doubt that the defendant choked the complainant in December 2017 as alleged. The fact that the complainant did not mention choking at that time raised doubts about the accuracy of her evidence.

> [41] … it seems to me to be very surprising that if the complaint had been choked she did not mention that in her first interactions with police on the night. This is especially so if she had been violently assaulted by the defendant in the past, including by being choked or strangled … it seems to me unlikely that a person in the position of the complainant would have failed to mention being choked to the extent and for the duration alleged when first asked to give an account of the events … There is no reason apparent to me why she could not have mentioned or demonstrated the alleged choking at this point.
>
> [42] I do not mean by what I have written to imply there can be any universal judgement as to how alleged victims of domestic violence should behave.
>
> [45] It is impossible to think that an experienced police officer investigating an allegation of choking in 2018 would ignore a claim that a similar event occurred, in front of witnesses, less than three years before … [It is] unlikely that the absence of reference to the earlier incidents was the product of deliberate choice by the police officer, rather than omission by the complainant. It is reasonable to conclude that, having realised failing to refer to the other incidents at an earlier time was to her disadvantage, the complainant sought to deflect this by suggesting it was the fault of the police. That she was prepared to do so substantially damages her credit.

***MNT v MEE* [2020] QDC 126 (20 May 2020) – Queensland District Court**

'Animal abuse' – 'Appeal' – 'Coercive control' – 'Necessary or desirable' – 'Ouster order' – 'Protection order'

Matter: Appeal against making of protection order.

Grounds:

1. A finding of economic abuse was not open on the evidence.
2. The learned Magistrate failed to properly consider whether it was necessary or desirable to make a domestic violence order.
3. The learned Magistrate erred in law by making an ouster order.

4. The learned Magistrate erred in law by failing to provide adequate reasons.

Facts: There was evidence that the respondent's property had been misused and misappropriated by the appellant since she left the home to live with her son. Examples include removing the respondent's go-cart from the home and placing it in the weather, telling the respondent which chairs she could sit on, moving the respondent's clothing and other property from the residence to the garage and into the weather; and having work done on the house without approval from the respondent.

Further, the appellant got into a bed already occupied by the respondent at a time after they had commenced living apart on the one property. The appellant also unilaterally forgave a debt owed by the appellant's son and the respondent alleged he applied unnecessary force to a horse.

Decision and Reasoning: Appeal dismissed. The way in which the appellant dealt with the respondent's property, including his failure to rectify damage to the respondent's property, was considered controlling behaviour in the overall context of the relationship and contributed to the respondent's fear for her own wellbeing and safety. The various behaviours were aspects of "controlling behaviour or emotional or psychological abuse". [75-79] The respondent's account of the incident with the horse was accepted but the court was not satisfied that it constituted violence directed at the respondent.

***HDI v HJQ* [2020] QDC 83 (14 May 2020) – Queensland District Court**

'Abuse of Process' – 'Appeal' – 'Non-fatal strangulation' – 'Parenting proceedings' – 'Physical violence and harm' – 'Separation' – 'Systems abuse' – 'Variation of protection order'

Proceedings: Appeal of a decision to order a permanent stay of an application to vary a protection order.

Issues:

- Does a Magistrate have power under the Domestic and Family Violence Protection Act 2012 (Qld) (DFVP Act) to order a stay of an application under the Act as an abuse of process?
- Should the application to vary the protection order be allowed, dismissed or referred back to the Magistrates Court for further hearing?

Facts: The male appellant respondent (appellant) and female respondent aggrieved (respondent) were married for 23 years and had two children together. They separated after an alleged incident of choking, the

respondent applying for a Protection Order under the DFVP Act. A Temporary Protection Order, including the children as named persons, was granted and the matter was set down for a hearing. The respondent then applied to vary its terms, seeking an order ousting the appellant from the former matrimonial home (this was later dismissed). The appellant then filed a cross application seeking a Protection Order against the respondent, but this was later withdrawn. At the hearing, the Magistrate accepted the respondent's evidence and rejected the applicant's version of events regarding the choking incident, making a two-year Final Protection Order. Two applications were then made to vary the Final Order, one by the appellant (to set aside the Order) and one by the respondent after the appellant breached the Order, in response to which a Magistrate made a Second Temporary Order against the appellant. The appellant then made a second application for a Protection Order against the respondent.

At the hearing of these last three applications, the Magistrate ordered that: the appellant was guilty of breaching the Final Order, the appellant's application to vary be dismissed, the Second Temporary Order be revoked and replaced with a Varied Order, and the appellant's Second Application for a Protection Order be adjourned. The appellant appealed these orders. At the hearing for the appellant's Second Application for a Protection Order, the respondent sought that the application be estopped or stayed for abuse of process. The Magistrate agreed that the application constituted an abuse of process and it was permanently stayed.

The appellant further applied to vary the Varied Order. The Magistrate granted a permanent stay of this application on the ground that it was an abuse of process. The appellant appealed this decision on numerous grounds, including that the Magistrate erred in: a) allowing an oral application to permanently stay the application to vary on the basis it was an abuse of process, and b) not allowing the application to vary to proceed to full hearing.

Judgment: The judge held that the Magistrate had no jurisdiction to order a permanent stay and therefore that the order to stay had to be set aside as a nullity. Her Honour found that the DFVP Act and Rules provide expressly or by implication for applications that are an abuse of its process to be summarily dismissed by the Magistrates Court, but there is no express reference to a power to stay such proceedings on these bases [75], [77], [83]. After examining several pieces of legislation, Her Honour also found that there was no explicit power to order a stay of an application under the DFVP Act [91], and that such a power did not need to be implied for the effective exercise of the jurisdiction to summarily dismiss applications that are an abuse of court process [94].

However, Her Honour noted that, as an appellate court, it had the power to allow, dismiss or refer the

application to vary back to the Magistrates Court [99]. Reviewing all the material before her, Her Honour held that, while there was no basis to allow the application in full, two variations ought to be made to the Varied Order, both minor [103].

***HBY v WBI and Anor* [2020] QDC 81 (14 May 2020) – Queensland District Court**

'Application to set aside interlocutory order' – 'Availability of documents at trial' – 'Judicial discretion' – 'Order that appeal be heard afresh in whole' – 'Protection order' – 'Unjust order'

Proceedings: Second respondent's application to set aside interlocutory order that the appellant's appeal be heard afresh in whole.

Facts: The male appellant and female first respondent (LAP) were in a domestic relationship. The second respondent (WBI), a police officer, issued a protection notice to the appellant in favour of LAP and a protection order was subsequently issued by a Magistrate. The appellant filed a notice of appeal and also applied for an order that the appeal be heard afresh in whole, contending that certain documents were not available at trial that showed that statements made by LAP regarding her financial position were not true (a matter going to her credit). The appellate judge allowed the application. WBI subsequently applied to the Court of Appeal for leave to appeal that order, contending that the documents were in the possession of the appellant at the time of the trial, could have been obtained with reasonable diligence or would not have had an important influence on the rest of the case. The Court of Appeal struck out the application for want of jurisdiction (WBI v HBY and Anor [2020] QCA 24). WBI then made an application for an order that the order that the appeal be heard afresh in whole be discharged and in substitution thereof it be ordered that the appeal be decided on the evidence and proceedings before the court that made the decision being appealed.

Held: Moynihan QC DCJ allowed the application, setting aside the interlocutory order that the appellant's appeal be heard afresh in whole with the result that the appeal has to be decided on the evidence and proceedings before the court that made the decision. His Honour held that he had jurisdiction to review and set aside an interlocutory order concerning a procedural matter where there was a mistake or irregularity and it would be unjust not to set it aside [12]. In this case, the exercise of the Judge's discretion (to issue the interlocutory order) miscarried because he took into account facts which were in part erroneous (that is, the Judge was mistaken as to the availability of the documents at trial and the appellant's opportunity to obtain disclosure of them) [12]. It would be unjust not to set aside the order where the mistake was material and led to such an extraordinary order [12].

His Honour further held that there was "no good reason" (see R v A2 (2019) 373 ALR 214) to order that the appeal be heard afresh in part [21]. The documents would have been available to the appellant at the time of the trial with reasonable diligence, or he was in fact in possession of the documents at the time of the trial [22]-[23].

***DYN v Queensland Police Service* [2020] QDC 47 (27 March 2020) – Queensland District Court**

'Appeal against sentence' – 'Breach of protection order' – 'Children' – 'Controlling, jealous, obsessive behaviours' – 'Error of law' – 'Guilty plea' – 'History of abuse' – 'Manifestly excessive' – 'Persistent menacing conduct' – 'Sentencing considerations' – 'Separation' – 'Threat to kill'

Charges: Contravening a domestic violence order (aggravated offence) x 2.

Case type: Appeal against sentence

Facts: The appellant man pleaded guilty to 2 charges of contravening a domestic violence order (aggravated offence) and was sentenced to 18 months and 12 months imprisonment respectively, to be served concurrently with each other, but cumulative on a term of imprisonment that he was already serving. At the time of the offending, he was separated from the complainant, and was subject to a protection order which required him to be of good behaviour, not to approach the complainant woman within 50m and not to contact her. During their 8-year relationship, they had a child.

Issue: The issues on appeal were whether the sentence imposed was manifestly excessive because the learned magistrate erred by:

- Placing too much weight on the appellant's criminal history;
- Failing to properly take into account the appellant's plea of guilty by not setting a parole eligibility date at a point sooner than one half;
- Miscalculating the setting of the parole eligibility date; and
- Failing to take into account the principles of totality such that the sentence imposed was proportionate to his offending.

Held: Morzone QC DJC allowed the appeal and substituted the terms of imprisonment with 12 months for Charge 1 and 15 months for Charge 2. The appellant contravened the domestic violence order by texting and

calling the complainant excessively, and by engaging in physically intimidatory and aggressive behaviour by going to the complainant's home at night, rushing at her, bashing the window and later making a death threat over the telephone despite police interest. Whilst the offending did not involve physical violence, it was serious in that it involved "persistent menacing conduct in serious breach of the no contact and geographical limiting conditions" of the protection order. His Honour acknowledged the prevalence of domestic violence in the community, and was particularly concerned about the continuation of violence despite police or court intervention by protection orders ([22]-[23]). Further, the appellant's previous convictions for like offences, especially against the complainant, were found to be an aggravating factor as it showed that his attitude of disobeying the law was not isolated ([26]). His Honour therefore held that imprisonment was the necessary punishment, and that 12 and 15 months imprisonment would provide "appropriate moderation according to the sentencing considerations and balancing aspects of specific deterrence, and further rehabilitative processes serving out the sentence within the community under the auspices of parole" ([31]).

***Rathbone v Commissioner of Police* [2020] QDC 76 (30 April 2020) – Queensland District Court**

'Appeal against sentence' – 'Manifestly excessive' – 'Mitigating factor' – 'People with mental illness' – 'Rehabilitation' – 'Separation' – 'Threats of suicide'

Offences: Contravention of DVO x 7; Wilful damage; Obstruct police officer; Serious assault; Attempted stealing

Proceedings: Appeal against sentence

Issue: Whether the appellant's sentence was manifestly excessive.

Facts: The appellant man committed a series of offences in the course of an attempt to commit suicide by having police officers shoot him. The offences occurred in the context of the recent and highly distressing breakdown of his marriage. The appellant approached a police officer and assaulted her from behind, restraining her, pushing her against the police vehicle and attempting to remove her firearm from her holster (Attempted stealing). Other police officers intervened and restrained the appellant. He was arrested and later released on bail. After his release, he attended the police station and provided a personal apology and a gift, recognising the distress he caused to the officers.

While the appellant was in custody, his wife obtained a Temporary Protection Order which included a condition that he have no contact with her. He contravened this order and sent his wife short emails or text

messages expressing affection for her and his desire to continue their relationship.

The appellant further applied to vary the Varied Order. The Magistrate granted a permanent stay of this application on the ground that it was an abuse of process. The appellant appealed this decision on numerous grounds, including that the Magistrate erred in: a) allowing an oThe appellant entered early pleas of guilty to all charges, was convicted and received the following sentences:

- Contravention of a domestic violence order offences – fined $750 and no conviction was recorded
- Wilful damage – convicted but no further penalty imposed
- Obstruct police officer – fined $500 and no conviction was recorded
- Serious assault – 2 months' imprisonment, wholly suspended, for an operational period of 9 months and the conviction was recorded
- Attempted stealing – 3 months' imprisonment, wholly suspended, for an operational period of 9 months and the conviction was recorded.

The appellant appealed the sentences for Serious Assault and Attempted stealing on grounds that they were manifestly excessive, and the sentencing judge erred by not giving sufficient weight to the sentencing principle of rehabilitation.

Held: The judge allowed the appeal and referred the matter back for re-sentencing, holding that the imposition of a period of imprisonment was manifestly excessive. His Honour accepted that rehabilitation was a significant consideration in this case and the sentencing judge did not appropriately include it in his determination of a proper sentence [68]. Rather, the sentencing judge, by imposing a custodial sentence, "negatived [the rehabilitation considerations], in that they were excluded specifically with regard to their value" [69] and therefore the judge did not "fully consider and balance the issue of rehabilitation, in relation to the penalty imposed" [70].

In considering whether the appeal should be allowed, His Honour accepted a psychiatrist's report that confirmed a "causal relationship between the appellant's acute adjustment disorder with suicidal ideation upon the sudden breakdown of his marriage which led to the commission of the offences" [12]. His Honour also accepted that the appellant had exemplary antecedents and there was a negligible need for deterrence and punishment. The appellant further had a reduced moral culpability (having regard to the principles in R v Yarwood [2011] QCA 367).

His Honour ultimately accepted that the appellant's rehabilitation and employment were likely to be adversely affected by a sentence of imprisonment and the recording of a conviction due to his inability to travel internationally to complete his PhD studies, and his vulnerable psychological state would be adversely impacted by such a sentence [13]. His Honour further concluded that "It was significant that [his two step-daughters – ie: children of his former wife] constituted part of the appellant's support network available to the appellant" [32].

***R v Skey* [2020] QDC 27 (9 March 2020) – Queensland District Court**

'Choking' – 'Evidence' – 'Evidence by video-link' – 'Pre-recording evidence' – 'Special witness declaration' – 'Strangulation' – 'Support person' – 'Victim experience of court processes'

Proceedings: Application for orders to permit the complainant to give evidence over video-link, for her to be supported by another person when she testified, and to have her evidence recorded before the commencement of the trial.

Issue: The correct interpretation of s21A of the Evidence Act 1977 (Qld)

Facts: Defendant man was charged with choking his female partner without consent and was convicted and sentenced to imprisonment. A week before trial, the prosecution made an application for orders to permit the complainant to give evidence over video-link, for her to be supported by another person when she testified, and to have her evidence recorded before commencement of the trial. The defendant opposed the victim giving evidence over video-link and the pre-recording of her evidence.

Judgment: Cash DCJ made orders permitting the complainant to testify at the trial over video-link and with a support person.

The Court rejected the Prosecution's submission that "by not enacting a requirement to show likely disadvantage or trauma in section 21A(1)(d), parliament intended there to be a presumption of disadvantage which is itself sufficient to warrant departure from normal procedures". This submission was rejected for two reasons. First, the common law principle "that the defendant in a criminal trial should be confronted by their accuser in order to challenge their evidence was not displaced by s12A". Second, "there is nothing in s21A which compels the conclusion that any of the measures permitted by section 21A(2) are to be adopted automatically for any special witness" [9].

Regarding the order to permit giving evidence via video-link, the judge was satisfied that the capacity of the complainant to give evidence would be improved if she did not give the evidence in the defendant's presence. The Court rejected the defendant's submission that the defendant would suffer 'impermissible disadvantage' if evidence was given over video-link and provided that there is research to suggest that an average person's ability to detect lies based on 'demeanour' is little better than chance.

The judge rejected the Crown's request to pre-record the evidence as His Honour "not prepared to assume that a retrial would be such a likely outcome as to justify the order sought" [20].

EPN v Queensland Police Service [2020] QDC 34 (4 March 2020) – Queensland District Court

'Appeal against sentence' – 'Contravening domestic violence order' – 'Female offender' – 'People affected by substance misuse' – 'People from culturally and linguistically diverse backgrounds' – 'People with poor literacy skills' – 'Plea of guilty' – 'Property damage' – 'Separation'

Charges: Contravening domestic violence order x 1; dangerously operating a motor vehicle x 1

Case type: Appeal against sentence

Facts: The appellant wife offended by contravening a domestic violence order and dangerously operating a motor vehicle, whilst being adversely affected by an intoxicating substance. Both offences arose out of the same incident at the residence of the complainant, the appellant's estranged husband. The appellant migrated from Thailand and could not read or write in English. On the date of the incident, the appellant attended the complainant's residence in contravention of the protection order and caused extensive damage to the property by driving her car into the front wall of the house. The appellant pleaded guilty and was ultimately sentenced to 18 months' imprisonment and 18 months driving disqualification.

Issue: The appellant appealed the sentence on the grounds that it was manifestly excessive because:

- The learned Magistrate mischaracterised the nature and extent of the offending conduct;
- The learned Magistrate misdirected himself by considering that appellant offending fell within in the same broad category of the comparative cases; and
- Taking into account the period of pre-sentence custody, the period of time to be served in actual custody was excessive.

Held: Morzone QC DCJ found that the learned Magistrate mischaracterised the offending as falling in the most serious of categories. Although the appellant used the vehicle as a weapon, it did not fall within 'the most serious of categories where an offender weaponises a vehicle in a direct personal attack with potential serious injury of an unprotected victim'. The offending occurred in the context of a volatile marriage breakdown, where she moved out of the matrimonial home and went on 'a rage of wilful destruction of matrimonial assets whilst intoxicated'. The appellant willingly caused extensive damage, with the potential of indirectly causing injury to the complainant. Morzone QC DCJ held that the offending was aggravated by her intoxicated state, domestic violence and contravention of the protection order ([33]).

Further, the learned Magistrate referred to 5 cases in his decision as to the appropriate penalty. Morzone QC DCJ considered each case in light of the appellant's offending ([40]-[50]. The cited cases were distinguishable from the appellant's offending as they involved the serious feature of a direct personal attack with a vehicle being used as a weapon on an unprotected victim. As the applicant's offending did not fall within the same serious category, such cases could not provide any comparative guidance ([50]).

Morzone QC DCJ also held that the learned Magistrate erred by failing to take into account some material considerations and the suitability of a suspended sentence ([64]). His Honour considered the nature and extent of the offending and mitigating factors, such as lack of criminal history, good character, guilty plea, demonstrated remorse, and cooperation with police. Whilst the appellant clearly 'deserved' a prison sentence, which would further the sentencing principles of punishment, and personal and general deterrence, the learned Magistrate ought to have considered the possibility of a suspended sentence. The appellant's conduct was contextual and situational, she did not require close supervision upon release into the community, and she actively took steps to self-rehabilitate and refrain from alcohol ([63], [71]).

Consequently, Morzone QC DCJ allowed the appeal and varied the sentence by making the prison term partly suspended after the appellant serves 60 days imprisonment.

***BKA v Commissioner of Police* [2020] QDC 10 (19 February 2020) – Queensland District Court**

'Breaches of protection orders' – 'Guilty plea' – 'History of domestic and family violence' – 'Lengthy criminal history' – 'Protection order' – 'Sentencing considerations'

Charges: 1 x contravention of a Domestic Violence Order (DVO)

Case type: Appeal against sentence

Facts: The appellant man was convicted, on his own plea of guilty, of one offence of contravention of a DVO, and was sentenced to a term of 6 months' imprisonment, cumulative on the terms of imprisonment he was then serving relating to domestic violence offences against the same woman. The contravention in question was attending the home of his former partner (the protected person) when subject to a protection order. She was clearly scared, being found by attending police hiding in a manhole in the ceiling. The present offending occurred whilst on parole and very shortly after being granted parole ([16]).

The appellant had an 'unenviable criminal history' and had been imprisoned for drug and violent offences, and had been re-sentenced on numerous occasions for breaches of bail, suspended sentences and an intensive correction order ([8]).

Issue: The sentence was manifestly excessive. Three specific errors were alleged:

- The learned Magistrate erred by not inviting submissions on a cumulative sentence
- The learned Magistrate failed to take into account the totality when setting the parole eligibility date; and
- The learned Magistrate erred by setting a parole eligibility date at the full-time date of the appellant's current sentence.

Although the submissions largely focused on the parole eligibility date, it was also contended that the head sentence should have been ordered to be served concurrently ([2]-[4]).

Held:

Byrne DCJ allowed the appeal, set aside the order of the sentencing Magistrate insofar as it related to the appellant's parole eligibility, and ordered that the appellant be eligible for parole on the date of the delivery of the judgment instead ([27]). Byrne DCJ accepted that it was an error to impose the cumulative sentence without first inviting submissions as to that possibility. It was noted at [18] that the Magistrate raised concerns about imposing another suspended sentence given the appellant's past history of breaching such orders, but did not raise the possibility of ordering that the term be served cumulatively on the current period of imprisonment. According to Byrne DCJ, if the Magistrate did this, it would inevitably have elicited submissions as to the appropriate point for parole eligibility. It could not be said that this was an 'error without consequence'.

The offending clearly affected the aggrieved's safety and welfare, although the appellant did not inflict any actual physical violence on her on that occasion. Given that the offending occurred so soon after the

appellant had been released on parole for offending involving the same woman, and in light of the need for specific deterrence given the appellant's history for breaching court orders, Byrne DCJ held that a head sentence of 6 months cumulative on the period of imprisonment the appellant was already serving was appropriate ([19]). However, the extension of the parole release date was excessive, especially in light of the head sentence of 6 months. His Honour considered that this in itself would be sufficient grounds to allow the appeal ([21]). The lengthy deferral of the parole eligibility date failed to reflect the appellant's guilty plea, that he did not inflict any physical violence and that he had served about 3 months of pre-sentence custody that could not be declared as time already served under the sentence ([24]).

***Baker v Queensland Police Service* [2019] QDC 258 (17 December 2019) – Queensland District Court**

'Animal abuse' – 'Domestic violence order' – 'History of contravention' – 'Mitigating factors'

Charges: Contravention of a domestic violence order (aggravated offence) x 1; Possessing dangerous drugs x 4; Failure to appear in accordance with an undertaking x 1.

Case type: Appeal against sentence

Facts: The appellant was convicted and sentenced for contravening a domestic violence order during the operational period of a suspended sentence. He was also sentenced in relation to other drug and violence offences. The appellant hit the aggrieved (whom the order was made in favour of) during an argument. The strike caused a small cut to her lip. The appellant then left the address but shortly returned holding a crate and threatened to bash her dog. The couple had another argument later in the evening before the aggrieved escaped and called police. The appellant denied being at the address and hitting the aggrieved when later questioned.

The appellant filed his notice of appeal five weeks late. The delay was not significant and was caused by the appellant's attempts to seek legal advice.

Issue: Whether the sentence imposed was excessive.

Decision and reasoning: The court found that the sentence was not excessive and dismissed the appeal.

The appellant relevantly argued that the contravention offence was his first breach of a domestic violence order against this particular complainant however, Fantin DCJ observed at [41] 'The fact that this was the

appellant's first contravention against this particular woman is not a matter in his favour. What is relevant is that he had previously been convicted on earlier occasions of breaching domestic violence orders and of domestic violence offences, but continued to reoffend.'

***CTC v Commissioner of Police* [2019] QDC 250 (29 November 2019) – Queensland District Court**

'Domestic violence order' – 'Following, harassing and monitoring' – 'Manifestly excessive' – 'Mitigating factors' – 'Physical harm and violence' – 'Pregnant people' – 'Separation' – 'Sexual and reproductive abuse'

Charges: Contravention of a domestic violence order

Case type: Appeal against sentence

Facts: The complainant and applicant were married but did not live together. The complainant was pregnant with their second child at the time of offending and there was a domestic violence order in place preventing the applicant from engaging with the complainant in any way without her consent. On the day of the offending, the applicant had become enraged and assaulted the complainant after finding communications between her and another male on her phone. The attack left the complainant with a swollen and cut lip.

The applicant pleaded guilty to the charge and was originally sentenced to three months imprisonment wholly suspended for two years with the conviction recorded.

- The sentence was manifestly excessive;
- The learned magistrate erred in failing to have proper regard to the principles of 'parsimony'; and
- The learned magistrate failed to give due weight to the appellant's mitigating circumstances.

Issues: Whether the sentence was manifestly excessive and whether the magistrate erred in his reasoning.

Decision and reasoning: Jarro DCJ concluded that the sentence imposed was not excessive.

Ground 1: 'The applicant came before the court with a relevant criminal history. He is a mature man. He used actual violence and a physical injury was sustained by the complainant, albeit of a limited nature. The offending was aggravated as the complainant was 23 weeks pregnant at the time and the violence was unprovoked' (pg 5). In considering these aggravating features and the need for general deterrence to be reflected in the sentence given the prevalence of domestic violence in the community, Jarro DCJ considered the sentence imposed to be within the appropriate range.

Ground 2: Jarro DCJ provided that 'the principle of "parsimony" is not a governing principle used in the exercise of discretion in sentencing and therefore the sentencing judge was not in error by not having regard to the principle.

Ground 3: Jarro DCJ found that the magistrate appropriately balanced the applicant's mitigating circumstances against the applicant's aggravating factors and the need for deterrence.

***AMB v TMP & Anor* [2019] QDC 100 (21 June 2019) – Queensland District Court**

'Children' – 'Emotional and psychological abuse' – 'Insults' – 'Protection order'

Charges: Domestic violence charges, resulting in a Domestic and Family Violence Protection Order

Case type: Appeal against making of order pursuant to the Domestic and Family Violence Protection Act 2012 (Qld)

Facts: The appellant challenged a decision made pursuant to s 37 Domestic and Family Violence Protection Act 2012, granting the aggrieved a protection order for 5 years. The order was made after a contested hearing. The aggrieved claimed that she was not in a relationship with the appellant, but that they had a daughter. Her affidavit provided details about her contact with the appellant, which involved insults by him and several unpleasant interactions, including via text ([16]).

Issue: The appellant appealed the decision on the ground that the learned magistrate erred in finding that 1) the appellant committed domestic violence against the aggrieved within the meaning of Part 2, Division 2 of the Act; and 2) the protection order was necessary or desirable to protect the aggrieved from domestic violence pursuant to s 37 of the Act.

Held: The appellant submitted that the evidence did not support a finding of domestic violence, and that the magistrate erred in relying on the evidence as the credit of the aggrieved was fatally damaged ([23]-[24]), [35]).

Kent DCJ dismissed the appeal. The magistrate's analysis relied on uncontentious matters. Given the fact that the appellant did not deny sending the various text messages and that they clearly showed insulting language, the credit of the aggrieved was not central to the analysis and result ([35]). It was somewhat difficult to assess whether the events constituted domestic violence in the form of emotional abuse because

there appeared to be a mutual exchange of insults between the parties ([36]). Where the communication between the parties involves the 'trading' of insults, it is more difficult to conclude that mere insults amount to 'emotional abuse'. In his Honour's opinion, insults 'fall on a continuum of seriousness, from completely trivial to very serious; and at a certain point on the continuum it becomes clear that emotional abuse is involved' ([37]).

The Court held that there was no appealable error by the magistrate. There was no error demonstrated in any step set out in MBE v MLG in that: 1) there was a risk of future domestic violence, which was more than a mere possibility; 2) there was a need to protect the aggrieved from that risk; and 3) an order was necessary or desirable, particularly considering the factors in s 4(1) ([41]).

***CSN v The Queensland Police Service* [2019] QDC 43 (3 April 2019) – Queensland District Court**

'Imprisonment' – 'Obstruct police' – 'Protection orders' – 'Sentencing'

Charges: Obstruction of a police officer x 1.

Case type: Appeal against sentence.

Facts: The appellant pleaded guilty to one charge of obstructing a police officer, for which he was sentenced to 4 months' imprisonment with immediate parole release. It was alleged that the appellant made previous threats to kill his ex-wife and daughter. When the police came to his house to serve him with a police protection notice, he became aggressive and verbally abusive. The police feared a risk of serious injury, even though the appellant was not armed. He fled the property, maintaining that 'he was not going to be served with anything and was throwing his phone away'. When he returned to the property, he continued to be abusive towards the officers. He was restrained and arrested for obstructing police ([5]-[9]). The Magistrate regarded the offence to be 'amongst the most serious of obstruct police charges, given the facts presented here and the escalation of the situation', and sentenced the appellant to 4 months' imprisonment with an immediate parole release ([20]-[21]). The appellant appealed against the sentence on the ground that it was manifestly excessive and that the Magistrate had overestimated the seriousness of his offending behaviour.

Issue: The issue is whether the sentence that the Magistrate imposed was excessive having regard to the circumstances of the offending, the appellant's antecedents, his prior criminal history, his mental health issues, his endeavours to rehabilitate and other relevant sentencing principles and guidelines ([29]).

Held: McGinness DCJ noted the appellant's extensive criminal history, which commenced when he was a child and included breaching domestic violence orders, common assault and stalking ([10]). The offence was found to have serious features, including the nature of the appellant's verbal abuse, his actions of leaving the property and saying he would continue to refuse service of the protection order. However, the Magistrate's finding that the offence was 'amongst the most serious of obstruct police charges' was an error which led to the sentence imposed being excessive ([31]). The appellant did not physically struggle with the police, and complied with police directions once he returned to the house. He also was not armed. His Honour noted that the offending must be viewed against the appellant's mental health issues at the time of offending, and childhood histories of sexual abuse at the hands of authoritative figures in a custodial setting. Other relevant factors include his genuine efforts to receive treatment and rehabilitate ([32]). Therefore, because of his criminal history, financial circumstances and his continuing efforts to rehabilitate, a probation or community service order would have been within range. His Honour allowed the appeal, and varied the sentence to 2 months' imprisonment suspended forthwith for operational period of 2 months. Even though, at first glance, this order could be mistaken for 'tinkering', his Honour maintained that reducing the sentence to 2 months was substantial ([33]).

***JWD v The Commissioner of Police* [2019] QDC 29 (8 March 2019) – Queensland District Court**

'Bail' – 'Breach protection order' – 'Double jeopardy' – 'Double punishment' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Sentencing considerations' – 'Technology facilitated abuse'

Charges: Four charges including stalking and using a listening device in breach of a domestic violence protection order, and breach of a bail condition.

Case type: Appeal against conviction. Application for extension of time.

Facts: The applicant and complainant had previously been in a relationship. The first charge related to the use of a listening device to record a private conversation, which the applicant installed in the complainant's vehicle during the course of their relationship. The final three charges occurred when the relationship had apparently ended. As the complainant prepared to go to sleep one night, she noticed the applicant standing on her patio, peering through a bedroom window. The behaviour was in breach of a domestic violence protection order and constituted stalking. Further, it was aggravated by being in breach of court orders ([9]-[12]).

The Magistrate took into account the fact that the applicant was 47 years old, had no relevant criminal history and was a New Zealand native. He obtained a tertiary qualification and stable employment. He also had a number of positive references attesting to his good character and sought counselling while in custody. Her Honour placed the applicant on three years' probation. No conviction was recorded, except for the offence of unlawful stalking, as it was the most serious charge ([14]-[16]).

The applicant sought an extension of time within which to appeal, arguing that the delay was attributable to administrative error and was relatively short ([5]). It was argued that the three concurrent probation orders in relation to the stalking, contravention of the domestic violence order and breach of bail, amounted to double punishment contrary to s 16 of the *Criminal Code (Qld).*

Issues: Whether the sentence was manifestly excessive and offended the prohibition on double punishment for the same act.

Decision and reasoning: The Court allowed the appeal and granted the extension of time. The Court held that the Magistrate's conclusion as to recording of a conviction was free from appealable error. The probation orders for the contravention of a domestic violence order and breach of bail condition were set aside as double punishment. The applicant was convicted and not further punished. Moreover, the sentencing discretion was found to have miscarried in relation to the offence of using a listening device – an offence with a maximum penalty of only two years' imprisonment and which was relatively minor in the circumstances. The sentence imposed for that offence was reduced from three years' probation to two years' probation, with no conviction recorded ([22]-[25]).

CBC v Queensland Police Service **[2019] QDC 3 (30 January 2019) – Queensland District Court**

'Aboriginal and Torres Strait Islander people' – 'Appeal against sentence' – 'Female perpetrator' – 'History of domestic violence' – 'Parole eligibility date' – 'Parole release date' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Victim as (alleged) perpetrator'

Charges: 1 x grievous bodily harm, 1 x assault occasioning bodily harm, 1 x contravention of a Domestic Violence Order (DVO), and a further contravention of a DVO (aggravated)

Case type: Appeal against sentence

Facts: In 2016, the appellant, an Aboriginal woman, was convicted on her guilty plea to domestic violence

related offences, namely, grievous bodily harm, assault occasioning bodily harm, contravention of a DVO and a further contravention of a DVO (aggravated offence). When the appellant was released from parole, she formed an intimate relationship with the aggrieved. Their relationship was characterised by alcohol-fuelled domestic violence, which led to its termination ([5]-[7]).

A protection order was issued in 2018, prohibiting the appellant from "following or approaching the aggrieved". The appellant breached this order by attending the aggrieved's home while he was inside ([9]). The Magistrate sentenced the appellant to 1 month imprisonment to be served cumulatively upon a pre-existing 3 year sentence, with immediate release on parole. The prosecution applied to reopen the sentence on the basis that a parole eligibility date was required by s 160C Penalty and Sentences Act 1992 (Qld). The sentence was reopened in the appellant's absence and without hearing further substantive submissions about the offending conduct and mitigating circumstances. The Magistrate amended the sentence by fixing a parole eligibility date in lieu of a parole release date ([12]). The appellant was arrested and returned to custody ([13]).

Issue: The appellant appealed the sentence on the grounds of manifest excessiveness. Other grounds were raised in her submissions, such as breach of natural justice and jurisdiction to reopen the sentence ([14]-[15]).

Held:

In Morzone DCJ's view, the Magistrate 'erred in exercising the sentencing discretion by initially mistaking the facts, then allowing erroneous or irrelevant matters to guide or affect him in re-opening the sentence without regard to matters of totality, and failing to take into account some material considerations as to the nature and extent of the offending'. The sentence was therefore unreasonable and plainly unjust ([37]). While the appellant had previous convictions for serious violent offences, and had reoffended while on parole for those offences, her offending was comparatively trivial and did not involve actual contact with, or any violence towards, the aggrieved ([42]). However, she has found herself in prison as a result of her ongoing alcohol mismanagement. The current offending was at the lowest end of the range, and imprisonment was found to be disproportionate to the seriousness of the offending and 'too crushing' on the appellant ([44]). Consequently, the appeal was allowed and the Magistrate's orders were set aside. The appellant was convicted, but not further punished for the offence ([45]).

***ODE v AME* [2018] QDC 277 (13 December 2018) – Queensland District Court**

'Application for a stay of judgment' – 'Principles as to grant or refusal' – 'Stay of proceedings' – 'Systems abuse'

Appeal type: application for a stay of a judgment given in the Magistrates Court.

Facts: On 20 September 2018, Magistrate Strofield declined to grant a protection order for the benefit of the applicant (ODE) against the respondent (AME) on the basis that his Honour wasn't satisfied that it was necessary or desirable to make one, as required under s 37(1)(c) of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA) (see [3]). ODE appealed that decision to the Queensland District Court; she filed a notice of appeal on 9 November 2018 and within it outlined seven grounds of her appeal (see [5]). On that same date, a stay application was brought in the form of an application for a temporary protection order pending hearing of the other appeal. Judge Richards stayed the decision of Magistrate Strofield on 9 November until 23 November 2018 at which time Judge Koppenol dissolved the stay order (see [6]-[7]). This was likely due to the fact he wasn't satisfied the appeal was of any merit (see [6]-[7]). A further stay application was filed on 6 December 2018 with the aim of extending the temporary protection order until the appeal by staying Magistrate Strofield's decision to refuse to make a final protection order ([8]).

Issues: The applicant sought a stay on two main grounds. First, her affidavit (filed on 6 December 2018) extended on the points raised in her notice of appeal concerning the merits of her appeal. Second, the respondent had perjured himself in the proceedings before the Magistrate.

Decision and reasoning: application dismissed, appellant restrained from making any application in relation to the proceeding without leave from the court, and the appellant was ordered to pay the respondent's costs of the application.

As to the first ground of appeal, Porter QC DCJ explained to the applicant that where a party has applied for a stay but failed and then applies again, it is usually required that the party establish some new matter that has emerged since the last refusal to "justify a second bite at the cherry" ([11]). The applicant accordingly pointed to two matters. The first was that since the judgment on 23 November 2018, the respondent had committed further acts of domestic violence by not returning certain belongings to her (see [8]). Porter QC DCJ dispensed with that matter in stating that the respondent's conduct didn't comprise acts of domestic violence and noting the respondent's actual willingness to return the belongings (see [13]). The second point was that the emails relating to the couple's daughter and her recent experience in hospital indicate the respondent was

involved in acts of domestic violence. After examining the relevant extracts in the circumstances of the case, Porter QC DCJ could see no way in which they would amount to domestic violence on the respondent's part as defined in the DFVPA.

Finally, his Honour couldn't see a way in which it could be concluded there was perjury arising out of the proceedings before the Magistrate.

***CPD v Ivamy & Anor* [2018] QDC 244 (5 December 2018) – Queensland District Court**

'Appeal against protection order' – 'Family law' – 'Necessary or desirable test'

Appeal type: appeal against a protection order.

Facts: On 28 October 2015, in seeking parenting and property orders, the second respondent brought Family Court proceedings against the appellant. An incident on 1 November 2015 led to the making of a temporary protection order on 3 November 2015; the second respondent and the couple's two children were named as the aggrieved. The order included the respective usual conditions: a "no contact" condition and an "ouster" condition under ss 56, 57 and 63 of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA) (see [21]). There was, however, an exception that allowed for communication via text between the appellant and second respondent with the appellant's mother acting as the conduit between them (see [21]). The appellant soon applied to vary the order to remove the children's names ([22]). The application was heard by the Magistrate on 9 December 2015; the second respondent consented to the variation but the police prosecutor denied ([24]). On 18 February 2016, following a mediation in the Family Court proceedings, a resolution as to the parenting and property orders was reached. 11 days later, final consent orders were made by the Family Court to the effect that the original exception to the order was removed and replaced with an allowance for direct communication via email. Both parties also agreed to try to remove the protection order. However, the police prosecution refused the second respondent's application to remove the order. On 11 March 2016, the domestic violence hearing listed to commence on 14 March 2016 was adjourned so as to provide the appellant with the opportunity to make submissions for the discontinuance of the order. After a four-day summary trial, extending over March and April 2017, the Magistrate gave *ex tempore* reasons on 10 November 2017 and ultimately granted a five-year protection order against the appellant (see [34]-[47]).

Issues: the appellant's grounds of appeal were two-fold. First, the Magistrate erred in finding that the emails sent by the appellant's mother and the conduct of the trial by his counsel constituted further acts of domestic

violence. Second, the protection order was not necessary or desirable to protect the second respondent and the children from the appellant.

Decision and reasoning: appeal allowed and the protection order was therefore set aside and the matter was remitted to another Magistrate for re-hearing.

His Honour, after reviewing the exchange of emails between the appellant's mother and second respondent, concluded that the Magistrate's finding that the appellant was behind the tone and wording of the emails was based on speculation and not open on the evidence (see [50]-[57]). As to the second part of this ground of appeal, his Honour expressed the view that counsel is entitled to exercise their discretion on how to handle a matter and the Magistrate's characterisation of the appellant's counsel's cross-examination of the second respondent as an act of domestic violence was erroneous. The first ground of appeal was therefore allowed.

The second ground of appeal was allowed. His Honour felt that the Magistrate, in coming to their finding on the necessary or desirable condition, failed to consider the material matters such as the fact that the tension between the Magistrate's courts undertakings and the Family Court had resolved in April 2017 and the appellant's mother was no longer acting as a conduit and thereby no longer "inflaming" the relationship (see [66]). Accordingly, his Honour concluded that the Magistrate erred in granting the protection order.

***NVZ v Queensland Police Service* [2018] QDC 216 (12 November 2018) – Queensland District Court**

'Breach of domestic violence order while in custody' – 'Factors affecting risk' – 'People with mental illness' – 'Sentencing' – 'Threat to kill'

Charges: Contravening a domestic violence order x 1.

Appeal type: Appeal against sentence.

Facts: During proceedings before the Magistrates Court in which a temporary protection order was made, the appellant threatened to kill the aggrieved and her children. The appellant pleaded guilty to one charge of contravening a domestic violence order. He was sentenced to nine months' imprisonment with an immediate parole eligibility date and 36 days of pre-sentence custody declared as time served. The appellant appealed against the sentence on the basis that it was manifestly excessive.

Issues: The appellant submitted that the sentence was excessive having regard to his psychiatric condition, the principles of totality and the comparable case tendered by defence which, in combination with his

personal circumstances, supported a shorter head sentence.

Decision and reasoning: The appellant relied on *R v Goodger* [2009] QCA 377 as justification for a reduction in sentence because of his reduced moral culpability. However, that case was not authority for the proposition that the sentence must be reduced by reason of a psychiatric condition [50]. Kefford DCJ held that there was no compelling evidence that the appellant's condition at the date of sentencing meant that continued incarceration would have more of an impact on the offender than it would on a person of normal health. There was nothing to suggest that there was a serious risk that imprisonment would have adverse effects on the appellant's mental health. Accordingly, the sentence imposed was not excessive in the circumstances, even though the offending occurred at a time when the appellant could not act on the threats made (as he was in custody) ([71]).

The appellant's criminal history illustrated his general disregard for the law and court orders. An aggravating circumstance was the fact that he offended whilst in the confines of a court room, demonstrating disrespect not only for the complainant but also the Court ([72]). The sentencing principle of protection to the Queensland community from the offender was significant, given the appellant's vulgar and bold threats to the aggrieved in the presence of the Court. No submissions were made that indicated that the appellant had taken steps towards rehabilitation. The Court made reference to *Singh v Queensland Police Service* [2013] QDC 037, but did not regard that the decision was evidence that the sentence in the present case was excessive. That case was distinguishable because there were no prior convictions for violence or contraventions of a domestic violence order. It also did not involve the aggravating feature of a threat to kill delivered to the aggrieved and her children in the presence of the court.

***Caddies v Birchell* [2018] QDC 180 (4 September 2018) – Queensland District Court**

'Assault' – 'Bail' – 'Extra-curial punishment' – 'Physical violence and harm' – 'Sentencing'

Charges: Assault occasioning bodily harm x 1.

Appeal type: Appeal against sentence.

Facts: The appellant was convicted of assault occasioning bodily harm (domestic violence offence), following a two-day trial. Prior to sentencing, he lodged an appeal against conviction. Subsequently, the Magistrate sentenced the appellant to 18 months' imprisonment on the basis that the appellant serve one half of that term in prison. The appellant appealed against this sentence and was granted bail pending the hearing. The

grounds of appeal included that the sentence was manifestly excessive and that the Magistrate failed to (1) identify whether he took into account the extra-curial punishment the appellant received during the offence, in particular the broken foot caused by the complainant; (2) indicate how that extra-curial punishment was taken into account in the sentencing process (if he did take it into account); and (3) consider the appellant's offer of compensation.

Issues: Whether the sentence was manifestly excessive; Whether the sentencing discretion should be re-exercised to take into account the appellant's injuries; Whether the appellant's injuries are capable of constituting extra-curial punishment; Whether the sentencing discretion should be re-exercised to take into account the offer of compensation.

Decision and reasoning: The Court was satisfied that the errors identified vitiated the sentence imposed by the Magistrate. There was no explanation as to the Magistrate's consideration of extra-curial punishment and how it was taken into consideration with regard to the penalty that was imposed. There was also no explanation as to the basis upon which the Magistrate found that there was a complete lack of remorse. The Court concluded that the Magistrate fell into error when he determined that a sentence of 18 months' imprisonment was the appropriate penalty. Having referred to comparable cases, such as *R v RAP* [2014] QCA 228, the Court held that the imprisonment term of 18 months was manifestly excessive. In *R v RAP*, Justice Wilson held that, in the case of a serious assault in a domestic setting, a sentence of imprisonment for two years or more is, 'plainly within the proper sentencing range' and 'far from excessive'. Similarities between the two cases include the ages of the appellants, their prior criminal records and their otherwise good character ([47]). Although the complainants in both cases suffered physical and psychological injuries, the injuries sustained by the complainant in *RAP* were more significant. *RAP* also involved a plea of guilty, whilst this was a matter determined following two days of hearing. Reference was also made to a considerable number of cases with regard to the range that should be considered in relation to a penalty to be imposed, such as *R v Pierpoint* [2001] QCA 493, *R v Johnson* [2002] QCA 283, *R v Von Pein* [2001] QCA 385, *R v Fairbrother; ex parte Attorney-General* [2005] QCA 105, *R v King* [2006] QCA 466, *R v George* [2006] QCA 1 and *R v Roach* [2009] QCA 360. These cases clearly showed the considerable range of penalties and the need for an independent exercise of discretion. In light of the circumstances of this case, the appeal was allowed, the sentences set aside, the hearing adjourned for sentence on a date to be fixed and the bail enlarged.

***RCK v MK* [2018] QDC 181 (6 August 2018) – Queensland District Court**

'Adjournment of application for protection order' – 'Costs' – 'Procedural fairness' – 'Protection order' – 'Sufficient evidence to justify protection order'

Appeal type: appeal against a protection order.

Facts: At the first hearing of the proceeding, on 9 November 2017, the Magistrate considered it unnecessary to grant a temporary protection order and therefore remanded the matter to 16 November 2017. On that later date, the matter was listed for further mention and management on 18 January 2018. At this hearing, neither the parties nor their representatives were present with the exception of the aggrieved's representative. Ultimately, the magistrate made a protection order for a period of five years in identical terms to an order made for a separate but related family matter involving the aggrieved and her brother (see [27]).

Issues: the significant grounds of the appeal, which turned upon matters of procedure, were two-fold. First, the Magistrate erred in not adjourning the application under s 39(2)(b) of the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA). Second, the Magistrate erred in finding that there was sufficient evidence to justify that the appellant had committed domestic violence against the respondent or that a protection order was necessary or desirable under s 37(1)(c) of DFVPA.

Decision and reasoning: the appeal was allowed. The protection order was set aside, the proceeding was remitted to the Domestic and Family Violence Court to be heard and determined according to law, and each party was ordered to bear their own costs in the appeal.

As to the first ground, the material question posed by Morzone QC DCJ was whether the respondent was denied the opportunity to be heard by the application proceedings in circumstances where it had been previously set for mention only. Applying the relevant authority on this particular issue of procedural fairness (see [37]), Morzone noted there was no adequate and reasonable explanation for the respondent's absence. Furthermore, Morzone QC DCJ outlined six material elements of the case that his Honour believed the Magistrate ought to have considered in deciding whether to proceed to hearing or grant an adjournment (see [40]). In failing to consider these features of the case, the Magistrate was said to have misdirected herself in proceeding to hearing with the consequence that the orders ultimately made were unreasonable (see [41]).

Given the conclusion Morzone QC DCJ reached as to the above ground of appeal, his Honour considered it unnecessary to consider the second ground of appeal (see [43]).

Recognising that it would be inequitable for the respondent to bear the costs of the appellant's success, Morzone QC DCJ ordered that each party ought to bear their own costs in the appeal (see [53]).

***ECW v ECW* [2018] QDC 166 (3 August 2018) – Queensland District Court**

'Child welfare' – 'Family law issues' – 'Hearing of the variation application according to law' – 'Lack of preparation' – 'Protection order' – 'Variation of a temporary protection order'

Appeal type: appeal against variation to temporary protection order.

Facts: A temporary protection order was issued against the applicant (Mr ECW) for the benefit of the respondent (Ms ECW) and the couple's three children. A protection order was later made before Mr ECW applied to remove two of the children as named persons protected under the order and vary, among others, orders 3 and 8. The acting Magistrate made variations to orders 3 and 8 while dismissing the variation to the persons named in the order. Mr ECW appealed against this decision.

Issues: did the acting Magistrate fail to hear and determine Mr ECW's application for a variation to the protection order according to law?

Decision and reasoning: the appeal was allowed and the matter was remitted to the Magistrate's Court, to be heard and determined, according to law.

Horneman-Wren SC DCJ revealed a number of issues with the way in which the acting Magistrate heard and determined Mr ECW's application.

As observed by his Honour, s 91(2)(a) of DFVPA provides that before a Court can vary a protection order, the court must consider the grounds set out in the application for the protection order. However, his Honour recognises that the opening remark of the Magistrate – "Okay. So, whose application is this?" – demonstrates that the Magistrate hadn't read the grounds for the application or the materials filed by each party prior to the hearing. His Honour further noted that a plain reading of the transcript would highlight that the Magistrate didn't read the application or affidavit materials at any stage during the hearing.

Horneman-Wren SC DCJ also recognises that the Magistrate erred in dismissing the proposal to remove the two children from the order on the basis that they were matters for the Family Court and not for her Honour (see [32]). His Honour clarifies that the matter was not a matter for the Family Court but for her Honour (see

[33]).

The matter was remitted to the Magistrate's court, as opposed to Horneman-Wren SC DCJ conducting the appeal as a fresh hearing, since his Honour was of the opinion that Mr ECW was entitled to have his application heard and determined in the Magistrates Court and to have appeal rights. Conducting the appeal as a fresh hearing would mean, by virtue of s 169(2) of the DFVPA, that Mr ECW would not have any such appeal rights (see [38]-[39]).

His Honour did not set aside the Magistrate's variation of orders 3 and 8 since the parties agreed that those variations ought to remain in the interim ([41]).

***JMM v Commissioner of Police* [2018] QDC 130 (6 July 2018) – Queensland District Court**

'Appeal against sentence' – 'Breach domestic violence order' – 'Breach of procedural fairness' – 'Emotional and psychological abuse' – 'Manifestly excessive sentence'

Appeal type: appeal against sentence.

Facts: On 4 August 2016, a protection order was made under the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA) against the appellant for the benefit of the aggrieved, her de facto partner, and her three children. The order only contained the standard conditions pursuant to 56 of DFVPA including a condition that the appellant must be of good behaviour towards the child, must not commit associated domestic violence against the child and must not expose the child to domestic violence. On 8 November 2018, one of the appellant's children verbally provoked the intoxicated appellant and pointed a knife at her. The aggrieved disarmed the child, kicked him in the bottom and chased him across the street. Two witnesses recount the aggrieved and appellant hurling verbal abuse at the child. The appellant's conduct fell within the definition of "domestic violence" under s 8 of the DFVPA since it could be classified as "emotionally or psychologically abusive" (see [45]). Accordingly, the appellant was later charged and convicted of contravention of the protection order in the Magistrate's court. She was sentenced to 3 months imprisonment. The appellant appealed against this sentence.

Issues: the grounds of the appeal were two-fold: sentence was manifestly excessive and there was a breach of procedural fairness in the magistrate not inviting submissions on imprisonment.

Decision and reasoning: appeal allowed and the sentence was therefore set aside.

The second ground of appeal was allowed. His Honour stated that the magistrate erred in denying the appellant's solicitor the opportunity to address her on the appropriateness of the sentence of imprisonment. Denying this opportunity and imposing the sentence nonetheless constituted a breach of the rule of natural justice (see [50]). This error, amongst other errors in the Magistrate's exercise of the sentencing discretion, lead his Honour to set aside the sentence. Accordingly, it was necessary for the appellate court to exercise the sentencing discretion afresh, unless doing so lead to the conclusion that no different sentence should be passed (see [14]).

On the basis of the Court's independent exercise of discretion and analysis of relevant cases, the sentence imposed was considered excessive. The respondent relied upon *PFM v Queensland Police Service* [2017] QDC 210 and *TZL v Commissioner of Police* [2015] QDC 171 in their submission that the sentence was appropriate since the offending in question was more serious than in each of those cases that yielded similar sentences (see [53]). In response, his Honour stated that the offending was not objectively more serious than in *PFM* and *TZL* and is not truly comparable and therefore of little assistance (see [54]-[58]). At the discretion of his Honour, two recent analogous cases were then considered. Taking into account those decisions and the material facts of the case, namely that the contravention involved no violence and was limited to a single instance of provoked verbal abuse, his Honour concluded that the sentence was outside the permissible sentencing range for the offender (see [64]-[65]) and ordered a sentence of probation for six months.

***Queensland Police Service v JSB* [2018] QDC 120 (28 June 2018) – Queensland District Court**

'Evidence' – 'Fines' – 'Following, harassing and monitoring' – 'Sentencing' – 'Sentencing options'

Charges: Contravention of a domestic violence order x 1; Possession of a dangerous drug x 1; Breach of a bail condition x 1

Appeal type: Appeal against sentence; Appeal by way of rehearing on the record

Facts: The respondent and appellant were in a relationship. The respondent pleaded guilty to three charges, one of which was contravention of a domestic violence order. He was fined $1,000.

Issues: Whether the fine of $1,000 was manifestly inadequate.

Decision and Reasoning: Fantin DCJ dismissed the appeal. Her Honour considered the respondent's personal circumstances and criminal history, which included 28 breaches of domestic violence orders, 18

breaches of bail conditions and other court orders ([20]). Whilst the respondent's previous breaches of domestic violence orders were clearly relevant and increased the need for personal and general deterrence, her Honour found that it should not outweigh the low level of gravity of the offence. Taking into account the relationship between the respondent and appellant, the fact that the contravention of the domestic violence order did not involve violence and was limited to one instance of verbal abuse, that the respondent was not charged with any other offence arising from the contravention, the respondent's early plea and cooperation with police, that the respondent had spent three days in pre-sentence custody, the activation in full of a suspended sentence of two months' imprisonment, it was open to the Magistrate to impose the fine of $1,000 for the contravention offence ([73]). She did, however, consider that the sentence may be regarded as generous and another judicial officer may have structured the sentences differently.

***ATJ v SLK* [2018] QDC 191 (23 April 2018) – Queensland District Court**

'Evidence' – 'Protection order'

Charges: Imposition of a domestic violence order x 1.

Appeal type: Appeal against imposition of a domestic violence order.

Facts: The respondent applied for a domestic violence order based on the appellant's alleged behaviours, dating back several years and including a time prior to which a previous order was made. The application was served on the appellant two days prior to the hearing and the appellant did not attend the hearing. The only material placed before the Magistrate was the application itself. No oral evidence was given. The order was made. The appellant appealed against the decision to make the domestic violence order.

Issues: Whether the decision to make a domestic violence order could be set aside.

Decision and reasoning: Farr SC DCJ allowed the appeal, set aside the decision, and remitted the matter to the Magistrates Court. Whilst it appeared unlikely that the behaviour that occurred since the cessation of the previous order could justify and satisfy the test of domestic violence, even if that was the case, the Magistrate would need to take account of that prior behaviour to determine whether that might constitute domestic violence of a continuing nature, such that it is appropriate to make a second order based upon the same evidence. This was a question for that court to determine after hearing all of the appropriate evidence and submissions, and his Honour found that the present court was not in the position to make that decision ([19]).

***S v T* [2018] QDC 49 (29 March 2018) – Queensland District Court**

'Fair hearing and safety' – 'Management of application proceedings' – 'Protection order' – 'Systems abuse'

Case type: Application for costs after an appeal against a domestic violence order.

Facts: A protection order was made naming the respondent (T) as the aggrieved and the appellant (S) as the respondent. S successfully appealed against the order. S sought an order for T to pay her costs of the original hearing and the appeal ([1]).

Issues:

1. Whether s 157(2) *Domestic and Family Violence Protection Act 2012* (Qld) ('*DFVPA*') applies to an award of costs after an appeal against a domestic violence order.
2. Whether a costs order should be made in favour of S.

Decision and Reasoning: Richards DCJ made no order as to costs.

In relation to the first issue, the usual position is that each party to a proceeding for a domestic violence order bears their own costs unless the application for the protection order is 'malicious, deliberately false, frivolous or vexatious' (s 157(2) *DFVPA*). There is no equivalent section in the *DVFPA* in relation to appeals. However, r 142(2) *DFVPA* provides that the *Uniform Civil Procedure Rules 1999* (Qld) ('*UCPR*') applies to appeals. Rule 681 *UCPR* states that costs follow the event unless the court orders otherwise. Richards DCJ held, applying *GKE v EUT* [2014] QDC 248, that the discretion to award costs should be exercised in light of s 157(2) *DVFPA* ([5]).

In relation to the second issue, Richards DCJ noted that there was some suspicion that T made the application for a domestic violence order in retaliation for S complaining to the police about him or to have some sort of leverage over her. However, his Honour was unable to find that the application was malicious, deliberately false, frivolous or vexatious ([6]).

***MKA v WKT* [2018] QDC 73(28 March 2018) – Queensland District Court**

'Change of venue' – 'Fair hearing and safety' – 'Legal representation and self-represented litigants' – 'Management of application proceedings' – 'People with mental illness' – 'Protection order' – 'Victim experience of court processes'

Appeal type: Appeal against domestic violence order.

Facts: A domestic violence order was made naming the respondent (WKT) as the aggrieved and the appellant (MKA) as the respondent ([2]). MKA appealed against the decision to grant the protection order ([3]). WKT applied to change the venue of the appeal from Cairns to Southport.

Issues: Whether the application for change of venue should be granted.

Decision and Reasoning: The application was granted.

WKT applied to transfer the proceedings on the grounds that:

- she ordinarily resides in Coolangatta;
- the proceedings at first instance were heard at Coolangatta;
- she has been diagnosed with adjustment disorder with anxiety and depressed mood as a result of the domestic violence; and she has been unable to engage legal representation in Cairns ([12]); and
- she cannot afford to pay her legal representation at the Gold Coast, but was hopeful of obtaining Legal Aid assistance ([13]).

MKA opposed the transfer on the basis that:

- his legal representatives are based in Cairns;
- he was put to the expense of flying and accommodating them at Coolangatta in the first instance proceeding;
- there is no evidence that a timely hearing date would be available in Southport ([14]).

Morzone DCJ emphasised that the exercise of discretion to grant the transfer is governed by the objectives of the *Domestic and Family Violence Act 2012* (Qld), one of which is to '…maximise the … wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives'. His Honour placed emphasis on WKT's mental health condition, which is likely to be aggravated by the appeal proceedings ([25]-[26]).

***ETB v Commissioner of Police* [2018] QDC 26 (6 March 2018) – Queensland District Court**

'Aboriginal and Torres Strait Islander people' – 'Breach of protection order' – 'Physical violence and harm' – 'Sentencing' – 'Sentencing - double jeopardy' – 'Totality'

Charges: Contravention of domestic violence order ('DVO') x 2; Common assault x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and respondent were in a relationship and raised 5 children together ([14]). The first contravention of DVO occurred when the appellant swore at the appellant and threatened to slice his own throat ('June contravention of DVO'). The second contravention of DVO occurred when the appellant verbally abused the appellant ('September contravention of DVO'). The aggrieved slapped the appellant and told him to leave. The common assault charge occurred when, in retaliation for the slap, the appellant punched the aggrieved in the head and ear (together, 'September charges') (see [10]).

The appellant was sentenced to 3 months' imprisonment for the June contravention of DVO, 9 months' imprisonment for the September contravention of DVO, and 9 months' imprisonment for the common assault ([2]). The magistrate declared 39 days' pre-sentence custody and set a parole release date after 2 weeks ([4]).

Issues: The appellant appealed on 4 grounds in relation to the September charges (see [7]-[8]):

- first, that the sentence was manifestly excessive;
- second, that the sentencing magistrate erred by failing to have proper regard to principles of totality;
- third, that the sentencing magistrate erred by incorrectly applying relevant case law; and
- fourth, that the magistrate erred by contravening s 16 of the *Criminal Code 1999* (Qld) by imposing imprisonment on each of the offences of contravention of a domestic violence order and common assault.

Decision and Reasoning: The appeal was allowed.

In relation to the fourth ground of appeal, the Dearden DCJ held that the September charges could be appropriately separated, because the contravention of DVO was in relation to the verbal abuse, and the common assault was in relation to the physical punch ([18]). However, this meant that the respondent conceded that sentence of 9 months for solely verbal conduct was manifestly excessive ([20]). District Judge Dearden considered that the appropriate sentence for the September contravention of DVO should be 3 months ([21]).

The remaining issue was whether the sentence of 9 months imprisonment for the common assault charge

was manifestly excessive ([23]). Considering case law and mitigating circumstances (the fact that the verbal abuse did not involve threats to harm the aggrieved and the assault was precipitated by the aggrieved slapping the appellant), Dearden DCJ held that the sentence was manifestly excessive ([23]-[30]). The appellant was re-sentenced to 6 months' imprisonment ([32]).

***ACP v McAulliffe* [2017] QDC 294 (8 December 2017) – Queensland District Court**

'Family law issues' – 'Necessary or desirable test applied to conditions' – 'Protection order' – 'Risk of future domestic violence'

Appeal type: appeal against a protection order.

Facts: The male appellant and the female aggrieved person (MP) were in a relationship. Commencing in October 2012, there were a number of 'instances' of domestic violence (see [28]-[38]). A temporary protection order was made on 15 February 2016. A year later, on 7 March 2017, a Magistrate made a protection order against the appellant for the benefit of MP and her three sons under the *Domestic and Family Violence Protection Act* 2012 (Qld)(DFVPA). There were five conditions stipulated under the order; the first and fourth were standard conditions under s 56 of DFVPA:

1. Appellant be of good behaviour towards the aggrieved and not commit domestic violence against her.
2. Appellant is prohibited from remaining at, entering or attempting to enter, premises or approaching the premises where the aggrieved lives or works.
3. Subject to four exceptions, appellant is prohibited from contacting, attempting to contact or asking someone else to contact the aggrieved.
4. Appellant be of good behaviour towards the named children and not commit associated domestic violence against them and not to expose them to domestic violence.
5. Appellant is prohibited from contacting the named children subject to the same exceptions applicable under condition 3.

Issue: whether the protection order was necessary or desirable to protect the aggrieved from domestic violence?

Decision and reasoning: the appeal was allowed to the extent that a protection order was made but only with

the standard conditions. Conditions 2, 3 and 5 were removed and condition 4 was renumbered as condition 2.

Before considering the issue on appeal, Horneman-Wren SC DC's observed that the Magistrate did not expressly assess either of the first two steps of the three-step process considered by Morzone QC DCJ in *MDE v MLG* as the necessary approach to determining the requirement, under s 37(1)(c) of the *DFVPA*, that *"the protection order is necessary or desirable to protect the aggrieved from domestic violence"* (see [67]). His Honour then took the opportunity to emphasise the discretionary nature of this requirement and that Morzone QC DCJ's view on how to determine whether an order is necessary or desirable shouldn't be seen to mandate those three steps (see [68]-[69]). Indeed, his Honour later recognises that it was sufficiently clear from the Magistrate's reasons that she answered the first question of the three-stage approach in the affirmative (see [76]-[78]).

In relation to the issue on appeal, his Honour considers the Magistrate's finding that an order was necessary as unreasonable and reached in error. His Honour opined that evidence of risk of future domestic violence in the absence of a protection order (first step) is not a sufficient basis for concluding that the necessary condition is satisfied (see [80]). However, his Honour regarded the Magistrate's finding that the protection order was desirable as one that ought to have been made (see [81]). In accordance with the requirement under s 37(1)(c) that the court must only be satisfied with one of the two conditions (see [88]), and as reflected in the orders of this appeal, his Honour therefore agreed with the Magistrate in her decision to make the protection order (see [88]).

Ultimately, it was the terms in which the Magistrate made the order that necessitated modification of the protection order. His Honour noted that under s 57(1) of the *DFVPA*, before the court may impose other conditions in addition to those set out in s 56, it must be satisfied that the condition is both necessary in the circumstances and desirable in the interests of the aggrieved, named person or the respondent. Having recognised this, his Honour then pointed out that the Magistrate failed to explain that she was satisfied that the imposition of other conditions was both necessary and desirable (see [89]-[90]). The order to remove conditions 2, 3 and 5 of the protection order reflect this view of his Honour that the Magistrate erred in imposing those other conditions.

***ACP v Queensland Police Service (No 2)* [2017] QDC 293 (8 December 2017) – Queensland District Court**

'Breach of protection order' – 'Interpretation of order' – 'Ouster order' – 'Particularise a charge' – 'Return condition' –

'Uncertain in its terms'

Charges: Breach of temporary protection order x 1.

Appeal type: Appeal against conviction.

Facts: A temporary protection order was made naming ACP as the respondent and MP as the aggrieved. Condition 4 of the order provided that ACP must vacate the family property, and condition 5 allowed ACP to return to the property to collect belongings in the company of a police officer ([10]). The order did not specify the time by which ACP must vacate the property, but ACP gave evidence that the Magistrate said that ACP must vacate the property 'straight away' ([58]).

MP returned to the property 3 days later, to find ACP loading belongings onto a truck. ACP had not yet vacated the property ([20]-[21]). ACP gave evidence that he understood the order to mean that he could vacate the property himself, and only needed police attendance to return to the property ([60]).

The bench charge sheet did not set out the particulars of which condition of the order the defendant was alleged to have contravened ([8]), contrary to s 177(4) of the *Domestic Violence and Family Protection Act 2012* (Qld) ([19]).

Issues: Whether the temporary protection order was uncertain in its terms.

Decision and Reasoning: The appeal was allowed, and the conviction was set aside.

Judge Horneman-Wren SC concluded: first, that the charge was not adequately particularised; and second, that the order was uncertain in its terms. First, the charge sheet did not inform the defendant of the factual ingredients of the offence ([72]). Second, even though the order did not provide a timeframe within which ACP was to vacate the property, the Magistrate stated that 'the order is quite clear on its face and I am satisfied that the appellant was aware that he was to get out straight away' ([79]). This was an error because 'straight away' was not incorporated in the condition ([90]).

***MEG v Commissioner of Police* [2017] QDC 302 (10 November 2017) – Queensland District Court**

'Appeal against sentence' – 'Breach domestic violence order' – 'Probation' – 'Procedural fairness' – 'Sentencing' – 'Sentencing submissions'

Charges: Contravention of a domestic violence order as an aggravated offence x 1; Assault or obstruction of

a police officer as a domestic violence offence x 1; Possession of dangerous drugs x 1; Contravene direction x 1; Contravention of a domestic violence order simpliciter x 1; Authority for controlled drugs x 1; Failure to properly dispose of a syringe or needle x 1.

Appeal type: Appeal against sentence.

Facts: The appellant breached a domestic violence order naming the appellant's mother as the aggrieved and her son as a named person in the order. The breach occurred when the appellant made threats to kill herself and her son, in the presence of her son ([17]).

The appellant pleaded guilty and was sentenced to six months' imprisonment for the contravention of a domestic violence order as an aggravated offence and four months' imprisonment for the contravention of a domestic violence order simpliciter. For the other charges, the appellant was convicted and not further punished ([2]).

At sentence, the Magistrate indicated that he was considering a prison probation order of 2 months' imprisonment and 12 months' probation ([5]). After hearing submissions on that sentence, the Magistrate asked the appellant whether she consented to the probation order. MEG asked, 'what happens if I say no?' The Magistrate interpreted this question to mean that MEG did not consent to the order, and immediately imposed the four- and six-month sentences of imprisonment ([29]).

Issues: Whether the appellant was denied procedural fairness, and whether the sentences were manifestly excessive.

Decision and Reasoning: The appeal was allowed, and the appellant was re-sentenced to two months' imprisonment, which was time already served.

Judge Horneman-Wren SC held that the Magistrate erred in construing MEG's question ('what happens if I say no?') as a refusal to consent. Further, the Magistrate erred in sentencing the appellant to a head sentence of six months without inviting further submissions on the sentence ([32]). The Magistrate did not give reasons for why six months was an appropriate head sentence, and did not refer to any comparable cases ([33]).

PFM v Queensland Police Service **[2017] QDC 210 (11 August 2017) – Queensland District Court**

'Contravention of domestic violence order' – 'Extending protection order' – 'History of domestic violence offences' – 'Parole' – 'Post-separation abuse' – 'Re-sentence' – 'Totality'

Charges: Contravention of domestic violence order x 1.

Appeal type: Appeal against sentence.

Facts: The complainant had obtained a domestic violence order with the appellant as the aggrieved. The order contained a condition that the appellant was not to have contact with the complainant. In contravention of this condition, the appellant travelled to the complainant's house, stood outside, and called out to her and her son ([16]). The appellant had a criminal history including 13 breaches of domestic violence orders, spanning 12 years to 2015. The appellant was sentenced to 4 months' imprisonment.

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed for two reasons: first, the sentencing judge erred in not applying the principle of totality; and second, the sentence was manifestly excessive.

In relation to totality, the appellant had previously been sentenced for a failure to appear, and was sentenced to 5 months imprisonment. Since the appellant was on parole, the imposition of the new sentence automatically cancelled his parole. Therefore, the effect of the sentence was to impose a 9-month sentence. The magistrate did not treat the matter in this way, and calculated the parole eligibility date as one third of the 4-month sentence ([40]-[41]).

In relation to the length of the sentence, the sentence was outside the appropriate range. Morzone QC DCJ stated that 'it seems that the Court allowed the appellant's previous offending to overwhelm other material considerations and the nature and seriousness of the offending subject of the sentence' ([42]). The offending conduct was in the lower range, and would not normally attract a sentence of imprisonment. However, the nature of offending in the context of previous past breaches of domestic violence offences warranted a period of one month's imprisonment ([64]).

The judge determined that the extension of the protection order to was 'necessary or desirable for the order to regulate the parties' communication and contact for that period. By that time, the parties' parental relationship and need for contact will change as the child matures into his early teens.' [70]

***NAS v QPS* [2017] QDC 173 (21 June 2017) – Queensland District Court**

'Appeal against sentence' – 'Partially suspended sentence' – 'People from culturally and linguistically diverse backgrounds'

Charges: Assault occasioning bodily harm whilst armed with an instrument x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and complainant were married and had a 5-month-old baby. The appellant was from Papua New Guinea and was staying in Australia on a tourist visa ([2]). The offence occurred when the appellant became angry and threw an apple at the complainant, struck her with a broomstick, and struck the back of her head while she was holding the baby ([3]).

The appellant pleaded guilty on the following day and was immediately sentenced to 15 months' imprisonment, suspended after serving a period of 2 months for an operational period of 3 years ([1]). He was represented by a duty lawyer ([5]).

The magistrate stated that the 'only' appropriate sentence was 15 months' imprisonment ([11]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed.

Judge Reid held that the Magistrate erred by stating that 15 months was the 'only appropriate term' ([23]). Comparable cases, most relevantly *R v Pierpoint* [2001] QCA 493, indicated that a lesser sentence was also open ([25]).

On one hand, the offending was serious: it was somewhat protracted, committed against a female partner, and in the presence of a young child. On the other hand, the appellant had no criminal history, the appellant had ceased hitting the complainant before the police arrived, and there was no previous domestic violence order in place ([26]-[27]).

The appellant was re-sentenced to 9 months' imprisonment, to be suspended in 10 days, after the appellant had completed serving the sentence of 2 months imprisonment ([30]). Had a pre-sentence custody certificate been provided, a wholly suspended sentence could have been imposed ([30]).

***LDS v QRR* [2017] QDC 199 (15 June 2017) – Queensland District Court**

'Cumulative sentence' – 'Manifestly excessive' – 'Natural justice' – 'Psychologist' – 'Sentencing' – 'Statistics' – 'Wilful damage'

Charges: Contravening domestic violence order x 3; wilful damage x 1; common assault x 1.

Appeal type: Appeal against sentence.

Facts: The complainant was the aggrieved in a domestic violence order taken out against the defendant. The breaches of domestic violence order and common assault charge occurred when the appellant punched and pushed the complainant to the ground on three occasions ([6]). The wilful damage charge occurred when the appellant stomped on her mobile phone while she was trying to contact the police ([7]). Following a plea of guilty, the Magistrate imposed cumulative sentences totalling 18 months' imprisonment, with a parole release date after 6 months ([3]).

Issues: There were three grounds of appeal: first, that the Magistrate placed disproportionate weight on general community deterrence; second, that the Magistrate disregarded the appellant's mental health issues; third, that the Magistrate erred in ordering the sentences to run cumulatively without consulting either party.

Decision and Reasoning: The appeal was allowed.

In relation to the first ground, the Magistrate described the appellant's offending as a 'reign of terror heaped upon the complainant' ([16]). District Court Judge Muir described this statement as an exaggeration because the violence was at the lower end of the scale and the offences were committed within a short time period ([31]). The Magistrate also referred to statistics that 700 women would be killed in the next 10 years if nothing was done about domestic violence ([19]). District Judge Muir held that using statistics in this way indicated that the Magistrate did not place sufficient weight on the appellant's mitigating factors.

On the second ground, the appellant asserted that he suffered from depression, post-traumatic stress disorder and schizophrenia. However, the psychologist's letter tendered in evidence did not mention those conditions. The Magistrate enquired as to who gave the diagnoses, but more information could not be tendered ([27]). District Judge Muir held that the Magistrate was entitled to place little weight on the diagnoses.

On the third ground, Muir DCJ held that it was an error for the Magistrate to not invite submissions about the possibility of cumulative sentences ([36]).

On the whole, Muir DCJ concluded that the sentence was outside the appropriate range ([47]). The appellant was re-sentenced to an overall head sentence of 9 months' imprisonment, with the appellant to be released immediately on parole after having served approximately 4 months in prison ([50]).

***JC v KP* [2017] QDC 175 (26 May 2017) – Queensland District Court**

'Consent' – 'Protection order' – 'Weapons licence'

Appeal type: Appeal against decision to grant protection order.

Facts: The appellant and respondent were brothers. A Magistrate ordered that a protection order be made against the appellant by consent (p 2), with the respondent as the aggrieved. The Magistrate represented to the appellant that the order would not affect the appellant's weapons license (p 3). In fact, a protection order would limit the applicant's weapon's license for five years (p 5). The appellant appealed the decision on the ground that the appellant was induced to consent to the order being made (p 2-3).

Issues: Whether the order should be set aside.

Decision and Reasoning: The order was set aside. Judge Long of the District Court concluded that the appellant did not understand the full consequences of the order being made, and the matter was remitted to a contested hearing (p 6-7).

***CDX v Queensland Police Service* [2017] QDC 96 (5 April 2017) – Queensland District Court**

'Conflating factual issues' – 'Contravention of domestic violence order' – 'Exposing children' – 'Text messages'

Charges: Contravention of domestic violence order (DVO) x 1; Possess restricted items x 1; Possess explosives x 1; Assault or obstruct police officer x 1.

Appeal type: Appeal against sentence from Magistrates Court.

Facts: The appellant was subject to a DVO with the complainant named as the aggrieved ([12]). The appellant sent threatening text messages to the complainant, and took their child out of school ([12]). This formed the basis of Charge 1, contravening a DVO. When the police arrived at the appellant's house, he

refused to cooperate, and appeared to reach for a knife while holding the child ([12]). This formed the basis of Charge 4, obstruct police officer.

The appellant was sentenced to six months' imprisonment with a non-parole period of two months ([1]).

Issues: The defendant appealed on the grounds that: the sentence was manifestly excessive; the Magistrate took irrelevant matters into consideration by relying on the documentation from the domestic violence order; the Magistrate fettered her objectivity; and the Magistrate conflated the facts of Charge 1 and Charge 4 ([2]-[3]).

Decision and Reasoning: The appeal was allowed. Horneman-Wren SC DCJ concluded that the Magistrate erred in conflating the factual issues in charges 1 and 4 ([42]). The other grounds of appeal were not made out. Horneman-Wren SC DCJ considered that a shorter sentence would have been appropriate, but since the appellant had been in custody for 7 weeks, his Honour recorded a conviction and did not further punish the appellant ([47]).

***CED v HL* [2016] QDC 345 (22 December 2016) – Queensland District Court**

'Children' – 'Protection orders' – 'Temporary protection order' – 'Vary'

Appeal Type: Appeal against variation to Temporary Protection Order.

Facts: A temporary protection order was made against the appellant which stipulated his former female partner, the respondent, as the protected person. The appellant and the respondent had a son together, K. The terms of the temporary protection order were varied twice. The first variation occurred after the respondent took K out of school (against K's wishes). The appellant arrived to pick up K, at K's request. An argument ensued between the appellant and the respondent. The temporary protection order was varied to name K as a protected person.

Second, the respondent reported that her father (the maternal grandfather of K) had made threats against the appellant in the presence of K. The temporary protection order was varied to prevent the appellant from permitting, encouraging or facilitating in-person contact between K and the grandfather. The appellant's position was that he had never been threatened by the respondent's father in that way and that K wanted to see his grandfather.

The appellant applied to a magistrate to have these terms varied and removed. The application was refused.

Issue/s: Whether the variations ought to be allowed?

Decision and Reasoning: The appeal was allowed. Kent J held that there were insufficient reasons given for the orders made refusing the variations. This was an error of law and the decision had to be set aside on that basis. Further, there was an insufficient evidentiary basis to prove that either of the contested conditions were necessary or desirable. First, K's presence at the incident between the appellant and respondent was purely incidental. It was upsetting but no more upsetting than other separate actions of the respondent. It was not prolonged or dangerous and not wilfully brought about, or persisted with, by the appellant. Second, the grandfather's threats against the appellant were out of the appellant's presence and not initiated by the appellant. They were unlikely to be repeated and did not involve any violence against K. This was too tenuous to substantiate the challenged conditions (see [38]).

***RWT v BZX* [2016] QDC 246 (30 September 2016) – Queensland District Court**

'Costs' – 'Cross-application' – 'Cross-orders' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Protection order' – 'Protection orders' – 'Sexual and reproductive abuse' – 'Systems abuse'

Appeal Type: Appeal against a protection order and an order for costs.

Facts: The male appellant and the female respondent were married in India. It was an arranged marriage. They lived in Australia with their son and the appellant's parents. Each applied for a protection order against the other, making serious allegations which were denied. There were also proceedings in the family court at the time of the protection order hearing.

The respondent's application and affidavit set out particulars of domestic violence under several headings: verbal abuse, controlling behaviour, psychological abuse using the child, sexual abuse, financial abuse, threats and intimidation. She perceived an alliance against her (the appellant, his parents and the son). She annexed to her affidavit a transcript of a recording she made as she was packing to leave the family home to provide evidence of this. Conversely, the appellant alleged that the respondent had assaulted the child. He had previously taken the child to a doctor and reported the complaint.

The magistrate made an order in favour of the wife. He dismissed the appellant's application and also made an order for costs. In doing so His Honour stated:

‘Sadly what I say in these proceedings can’t be used in the Family Court. These proceedings are private proceedings. I wish they could. I wish the Family Court could hear what I think about the reliability of [the appellant]. It’s been a scurrilous case. On my view, his application has been deliberately false and vexatious. I can say that, in 12 years as a magistrate, I have never ordered costs in a domestic violence case before. I intend to today for the first time in many hundreds of cases’.

Issue/s: Some of the grounds of appeal included –

1. There was no proper basis on the evidence for the learned Magistrate to make a protection order under s 37 of the [*Domestic and Family Violence Protection Act 2012* (Qld)] (‘the Act’);
2. There was no proper basis for the learned Magistrate to order costs under s 157 of the Act against the appellant in favour of the respondent.

Decision and Reasoning: The appeal was dismissed.

Was there a proper basis for the order made against the appellant? (see [4]-[34])

1. Devereaux SC DCJ held that it was open to the magistrate to conclude that the appellant had committed acts of domestic violence against the respondent: s 37(1)(b) of the Act.

    (a) The magistrate was correct to use the transcript of the recording made by the respondent as proof of her case and as relevant to the credibility of the appellant. The transcript showed the manner in which the appellant treated the respondent. Further, the ‘startling’ language and attitude of the child towards his mother in the transcript gave rise to the inference that the appellant had treated the respondent in such a way over a lengthy period in front of the child: see [12].

    (b) The magistrate, correctly, interpreted the transcript as confirmation of the respondent’s claim that the discussion was principally about money – the appellant’s demand that she deposit all her wages into the joint account: see [13]. Evidence of the respondent’s friend further corroborated the respondent’s evidence about financial abuse: see [18].

    (c) Devereaux SC DCJ agreed with the magistrate’s analysis of the transcript of the recording (see [14], [29]). It provided evidence of threats by the appellant, that the appellant would shout at her in front of the child, and that the child had been ‘coached and poisoned against his mother’ (see [15]-[24]).

    (d) His Honour further held that: *‘the passages I have referred to in this judgment from His Honour’s*

reasons reduce to the finding that his Honour rejected utterly the credibility of the appellant and accepted completely the credibility and reliability of the respondent. There is nothing in the materials which objectively suggests that those findings were not open to His Honour or that I should draw different inferences from facts in the record' at [29].

2. Devereaux SC DCJ also held that it was open to the magistrate to conclude that the protection order was necessary or desirable to protect the respondent from domestic violence: s 37(1)(c) of the Act.

   (a) Devereaux SC DCJ noted the magistrate's conclusions about the appellant's application, namely that it was *'an outrageous case and pure nasty, vindictiveness on this woman because she wouldn't hand over her money to a controlling, bullying husband. I don't believe she has been anything other than a good mother to her child. I dismiss the [appellant's] application …, as I said, but I do intend to make an order in favour of the wife'.*

   (b) The magistrate continued: *'[i]n my view, as I mentioned during submissions, the fact that property settlements in family law matters are still contentious and, indeed, the mother still isn't even getting face-to-face contact with her own child at the moment, there is every opportunity for the husband to continue his bullying behaviour to try and manipulate the wife into caving in to his demands about the child, about financial affairs, and anything else that he might have a penchant to do in his bullying behaviour. She is absolutely in need of protection. He needs to be kept well away from her'* (see [26]).

   (c) Devereaux SC DCJ held that these statements could be properly understood as the magistrate's reasons for being satisfied that the protection order was 'necessary or desirable to protect the aggrieved from domestic violence' (see [28]). This reasoning, that it was necessary or desirable for an order to protect the respondent from domestic violence in the setting of the continuing family court proceedings, was correct: *GKE v EUT* (see [32]).

Devereaux SC DCJ noted generally that '[i]t is advisable that a magistrate make specific findings with respect to the matters set out in s 37 of the DVFP Act' (see [27]). However, here, 'the manner in which His Honour reached and set out conclusions is sufficiently clear to be amenable to examination and review' see [28].

- *The appeal against the costs order* (see [35]-[68])

Devereaux SC DCJ held that the magistrate was entitled to thoroughly reject any of the appellant's

assertions. Having done so, it was open to the magistrate to conclude that the appellant's application was brought to vex the respondent – 'it was deliberately false and vexatious', brought because 'she wouldn't hand over her money to a controlling bullying husband'' (see [65]-[66]).

***WJ v AT* [2016] QDC 211 (19 August 2016) – Queensland District Court**

'Cross-application' – 'Cross-order' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Exposing children' – 'Family law' – 'Physical violence and harm' – 'Protection order' – 'Purpose of the domestic and family violence protection act 2012 (qld)' – 'Risk'

Appeal Type: Appeal against the making of a protection order against the appellant and appeal against the decision of the Court to dismiss the appellant's application for an order.

Facts: The male appellant and the female respondent were in a relationship. They had two children together, DJ and MJ (aged 3 and 2), and another daughter, LS (aged 8), from the respondent's previous relationship. The appellant had been abusive to LS in the past. The parties had separated and the three children lived with the respondent. The respondent and the appellant each applied for a protection order against the other. There were also contact/care proceedings in the Federal Circuit Court.

The respondent's case was that on 14 August 2015 the appellant spoke loudly and in an insulting way towards her. Many, if not all, of these statements were made in front of DJ and MJ, upsetting the children. The appellant rubbed his beard against the respondent's eye area and continued to verbally abuse her. The respondent tried to ignore him. He took her phone and ran outside. There was a struggle. He pushed the respondent, she was thrown onto the car bonnet and the appellant sustained some scratches (see [6]-[32], [112]-[126]). Conversely, the appellant alleged that the respondent 'went berserk', pushed him around the balcony, grabbed and attacked him, and he ran away from her. She then physically assaulted him. He sustained scratches and a ripped shirt. He also alleged he was a victim of economic abuse (see [33]-[53]).

The Judicial Registrar (JR) made a protection order against the appellant in favour of the respondent. The JR dismissed the cross-application by the appellant (see [56]-[58]).

Issue/s: One of the grounds of appeal was that the decisions of the Judicial Registrar were made against the weight of the evidence, namely the making of a protection order against the appellant in favour of the respondent; including the two children, MJ and DJ, in the order; including the child LS in the order; and the refusal to make a protection order against the respondent in favour of the appellant.

Decision and Reasoning: The appeal was dismissed.

- *Should an order have been made against the appellant?*

First, Smith DCJA held that a number of the acts committed by the appellant amounted to domestic violence as per s 37(1)(b) of the Act *Domestic and Family Violence Protection Act 2012* (Qld)] ('the Act') – 'the rubbing of the beard was physically abusive, the taking of the phone was physically abusive and the insulting words about the first respondent was in my view emotionally or psychologically abusive' (see [131]).

Second, in considering whether a protection order was 'necessary or desirable' to protect the aggrieved as per s 37(1)(c), Smith DCJ noted that the reasoning of McGill SC DCJ in *GKE v EUT* applied here. McGill SC DCJ said:

'I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved … I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future'(see [32]-[33]).

Smith DCJA noted that 'necessary' is defined by the dictionary as 'requiring to be done, achieved; requisite, essential' and desirable is defined as 'worth having'. There is therefore a 'lower threshold when one is concerned with the term 'desirable'. But both are focused on the need to protect the aggrieved from domestic violence' (see [137]-[139]).

His Honour ultimately agreed with the JR's reasoning that an order was both necessary and desirable to protect the aggrieved from respondent. At [140]:

'There is no doubt that the parties are embroiled in Federal Circuit Court proceedings. There are children of the relationship about whom contact/care arrangements will need to be made. These will need to be dealt with in a civilised and appropriate fashion. I have considered s 4 of the Act. In light of the history between the parties, the events of 14 August 2015, the nature of the relationship, and degree of animosity expressed by the appellant towards the first respondent, in my view, it was both desirable and necessary that the order be made in favour of the first respondent. Like the JR, I consider without such an order there is a real risk of future domestic violence'.

- *Should MJ and DJ have been included in the order?*

Section 53 of the Act provides that the court may name a child 'if the court is satisfied that naming the child in the order is necessary or desirable to protect the child from (a) associated domestic violence or (b) being exposed to domestic violence committed from the respondent'. Section 10 of the Act defines the meaning of 'exposed to domestic violence'.

Smith DCJA was satisfied that the children were exposed to domestic violence (see [148]). Further, His Honour stated: 'I do not consider there is any requirement they understand the words spoke, particularly bearing in mind they were spoken aggressively'(see [149]). Additionally, it was also necessary and desirable for the children to be included in the order because, as the JR found, there was a continued risk of exposure to domestic violence in the future. This was because the parties would continue to be in contact through the children of the relationship and proceedings were on foot in the Federal Circuit Court (see [150]-[151]).

- *Should LS have been included in the order?*

His Honour held that:

'[I]n all of the circumstances, bearing in mind that there is a real possibility of contact between the appellant and LS, and bearing in mind the acrimonious situation between the parties and the events of 9 July 2015 [when the appellant was physically abusive towards LS] and 15 August 2015, I consider the JR was right to add LS to the order to avoid the risk of her being exposed to domestic violence' at [159].

- *Should an order have been made against the first respondent?*

In this regard, Smith DCJA noted the respondent had tried to ignore the appellant and that the scratches sustained by the appellant could have been caused in self-defence or accidently by the respondent. In this regard, His Honour quoted the explanatory notes to the 2011 Bill at [166]:

'Lastly, the Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders. During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed the concern that in many instances domestic violence orders are made against both people involved. This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship

cannot be a victim and perpetrator of this type of violence at the same time. A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings. Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken' (His Honour's emphasis).

In light of this, Smith DCJA held that there was no 'physical abuse' of the respondent by the appellant. Also, on the totality of the evidence, the respondent was most in need of protection (see [167]-[172]).

***EAV v Commissioner of Police* [2016] QDC 237 (16 September 2016) – Queensland District Court**

'Alternatives to imprisonment' – 'Community based orders' – 'Contravention of a domestic violence order' – 'Cross-application for mutual protection orders' – 'Magistrates' – 'People with mental illness' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Previous breaches of domestic violence protection order' – 'Protection orders' – 'Sentencing'

Charge/s: Breach of a domestic and family violence order.

Appeal Type: Appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship. They were subject to a domestic violence protection order on 8 July 2015 for a period of two years. These were cross-orders. In October 2015, the appellant breached these orders and was fined $500. On 20 November 2015, police attended their address after reports of a dispute. The appellant told police that he and the complainant were in a heated argument, which the complainant had initiated. The appellant said he bumped into the complainant, causing her to stumble. The complainant slapped the appellant. He then grabbed the complainant, threw her on the bed, and restrained her with his body weight. He released her and the argument continued until police arrived.

In sentencing, the magistrate expressed significant concern about the chronology of events namely, that the domestic violence order had been made in July 2015, breached by the appellant on 27 October 2015, the appellant was sentenced for that breach on 11 November 2015, and he then breached the domestic violence order again on 20 November 2015. The appellant was sentenced to three months' imprisonment, wholly suspended, with an operational period of 12 months.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. Dearden DCJ noted that the magistrate failed to give appropriate recognition to a number of relevant factors, namely at [22]:

- 'there were mutual, cross-orders for domestic violence in place at the time of the offending;
- 'the initial violence in the incident was, in fact, the complainant slapping the appellant;
- 'the appellant's violence, in response, was relatively low level (although nonetheless unacceptable);
- 'the appellant had been in receipt of medical care in respect of a significant mental health issue, and importantly, had undertaken the Anglicare Living Without Violence Program, which was a substantial program, indicating on his part a significant willingness to change;
- 'the appellant had expressed his remorse to police immediately after the event'.

His Honour noted that 'magistrates dealing with breaches of domestic violence are, of course, under significant time pressures and the learned magistrates sentencing remarks are brief'. However, His Honour held that, 'the transcript does not indicate that the learned magistrate in any way considered alternatives other than imprisonment in respect of this matter, and appears only to have taken into account the chronology (which is obviously significant) and to some very minor extent (referenced at the conclusion of her sentencing remarks) the steps that the appellant had taken in respect of receiving assistance from Dr Calder-Potts and Anglicare' (see [24]).

The appellant was resentenced to 18 months' probation with a special condition that he continue treatment and complete 100 hours of community service. No conviction was recorded.

***IFM v Queensland Police Service* [2016] QDC 140 (17 May 2016) – Queensland District Court**

'Breach bail condition' – 'Contravention of a domestic violence order' – 'Deterrence' – 'Physical violence and harm' – 'Repeated contraventions' – 'Sentencing'

Charge/s: Contravention of a domestic violence order x 2, breach bail condition x 2, and a further contravention charge.

Appeal Type: Appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship. In relation to the first contravention of a domestic violence order, on 18 March 2015, the appellant pushed the complainant over

and punched her to the jaw. No physical injury was alleged. After being arrested and charged, the appellant was released on bail. The second contravention of a domestic violence order occurred on 30 May 2015. The appellant grabbed the complainant by the throat and hit her, knocking her to the ground. He kicked her, dragged her to her feet and verbally abused her. The appellant then dragged her to a nearby park, knocking her to the ground again, hit her in the head, picked her up and continued to drag her. No physical injury was alleged. A head sentence of 15 months imprisonment was imposed on the second contravention of domestic violence order.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Counsel for the appellant submitted that a sentence of 12 months imprisonment with a release after four months was appropriate in light of the authorities of PMB v Kelly [2014] QDC 301 and Singh v QPS [2013] QDC 37. Durward SC DCJ distinguished both of these cases (see [20]).

Here, Durward SC DCJ was satisfied that a sentence of 15 months imprisonment was not manifestly excessive. This was in light of a number of factors. The appellant's conduct involved significant aggravating circumstances namely, the first contravention of a domestic violence order was committed two weeks after the expiration of an earlier imposed sentence, the second contravention charge occurred while the appellant was on bail for the former offence, and the appellant had previous convictions for breaches of domestic violence orders (including one committed against the same complainant) (see [21]). Further, the conduct of the appellant in the second charge was 'sustained and patently violent'. It occurred not only in a residence but in a public area (see [22]). Finally, the appellant had a significant criminal history (see [23]).

***AJS v KLB v Anor* [2016] QDC 103 (13 May 2016) – Queensland District Court**

'Emotional and psychological abuse' – 'Following, harassing and monitoring' – 'Protection order' – 'Risk of future domestic violence' – 'Whether a protection order was necessary or desirable to protect the respondent from domestic violence'

Appeal Type: Appeal against protection order.

Facts: The female respondent and the male appellant began a relationship in March 2014. The appellant gave her a false name, 'Cray', and other false details about his life. The respondent ended the relationship on 31 December 2014. From January to May 2015, the respondent received a series of text messages from the

appellant. While at first these messages were consistent with someone trying to salvage the relationship, they became increasingly aggressive and abusive. Some included sexually explicit references.

The respondent contacted police in February 2015. The police made contact with the appellant. The appellant asserted that he was not 'Cray' and, in a series of phone calls, threatened the police and the respondent with legal action. He then sent the respondent a nine page threatening and intimidating letter. A temporary protection order was made in favour of the respondent. The appellant then instructed his solicitors to write a letter seeking the proceedings to be discontinued. This letter denied that he ever knew the respondent.

On 20 November 2015, the court made a protection order in favour of the respondent against the appellant. The magistrate noted in his findings that the respondent was clearly upset and frightened in court. She had difficulty giving evidence and, even when removed to the vulnerable witness room, she covered her face from the camera. The appellant, on the other hand, appeared confident and in control.

Issue/s: One of the grounds of appeal was that there was no or no sufficient evidence to support the finding that His Honour was satisfied that an order was necessary or desirable to protect the respondent from domestic violence.

Decision and Reasoning: The appeal was dismissed. Harrison DCJ had regard to the decision of Morzone DCJ in *MDE v MLG & Commissioner of the Queensland Police Service* where he asserted that the question of whether 'the protection order is necessary or desirable to protect the aggrieved from domestic violence' in s 37(1)(c) of [*Domestic and Family Violence Protection Act 2012* (Qld)] ('the Act') requires a three-stage process supported by proper evidentiary basis. As per Morzone DCJ at [55]:

- 'Firstly, the court must assess the risk of future domestic violence between the parties in the absence of any order:

  (a) 'There must evidence to make factual findings or draw inferences of the nature of, and prospect that domestic violence may occur in the future. This will depend upon the particular circumstances of the case. Relevant considerations may include evidence of past domestic violence and conduct, genuine remorse, rehabilitation, medical treatment, physiological counselling, compliance with any voluntary temporary orders (s 37(2)(b)), and changes of circumstances.

  (b) 'Unlike, its predecessor provision under the now superseded legislation, the court does not need to be satisfied that future domestic violence is 'likely'. However, there must be more than a mere

possibility or speculation of the prospect of domestic violence'.

- 'Secondly, the court must assess the need to protect the aggrieved from that domestic violence in the absence of any order. Relevant considerations may include evidence of the parties' future personal and familial relationships, their places or residence and work, the size of the community in which they reside and the opportunities for direct and indirect contact and future communication, for example, in relation to children'.
- 'Thirdly, the court must then consider whether imposing a protection order is "necessary or desirable" to protect the aggrieved from the domestic violence. In this regard, pursuant to s 37(2)(a), the court must consider the principles in s 4(1)'.

Harrison DCJ held that although the magistrate did not refer specifically to each of the three stages of the three-stage process described in *MDE*, the magistrate did not err in finding that it was desirable to make the necessary protection order for the protection of respondent from domestic violence:

1. There was sufficient evidence to make the finding that there was a risk of future domestic violence in the absence of any order. Here, the magistrate had regard particular regard to the two letters from the appellant. These did not show any remorse or rehabilitation and the mere fact that the appellant had not contacted the respondent since he was caught on 9 June 2015 did not advance the issue of rehabilitation any further. Additionally, it was particularly relevant that the appellant tried to lie his way out of the temporary protection order. These considerations 'took the matter much further than the mere possibility or speculation of the prospect of domestic violence' (see [85]-[87]).
2. The magistrate had regard to the impact of the appellant's behaviour on the respondent, and the fact that they both lived and worked in the Atherton Tablelands (a relatively small community where there would be real opportunities for direct and indirect contact in the future). This evidence was clearly sufficient to satisfy the second stage in *MDE* (see [88]).
3. In relation to the third stage, a number of matters in s 4(1) of the Act were relevant namely, the safety, protection and wellbeing of the respondent; the need to treat her with respect and to ensure minimal disruption to her life; holding the appellant responsible for his domestic violence and the impact it had on the respondent; and the respondent was vulnerable as under paragraph (d), as was demonstrated with her difficulties in giving evidence (see [89]-[90]).

***DMK v CAG* [2016] QDC 106 (15 April 2016) – Queensland District Court**

'Abuse of process' – 'Definition of domestic violence' – 'Desirability of protection order' – 'Domestic violence protection order' – 'Emotional and psychological abuse' – 'Evidentiary standard of proof' – 'Relevant relationship' – 'Systems abuse' – 'Vexatious or frivolous'

Appeal type: Appeal against domestic violence protection order

Facts: The appellant and respondent were in a de-facto relationship for almost 10 years and had children together. After separating, the respondent became the children's primary caregiver. The appellant assisted her in looking after the children and they continued in a parenting relationship. A domestic violence protection order was made against the appellant to protect the respondent in the Magistrates Court. The magistrate had regard to three court orders existing between the parties in making this order. These were a Family Court order, a protection order made against the respondent naming the appellant as aggrieved, and a temporary protection order with the respondent as the aggrieved.

Prior to the making of the domestic violence protection order, the appellant made a complaint to police that his daughter was 'sexting'. A few weeks later, he made another complaint that the respondent texted him in contravention of the protection order naming him as the aggrieved. However, after investigations the police determined both these complaints were unfounded. The appellant then allegedly threatened to kill their children, the respondent, her new partner and his children. The appellant than made a further complaint that the respondent's new partner had unregistered firearms. After searching his home, the police did not find any of the alleged firearms. Several months later the appellant complained that the respondent kidnapped his 17-year-old daughter. This complaint was also unfounded. Finally, the appellant allegedly threatened the children that the respondent would be sent to gaol.

The magistrate was satisfied that a protection order was desirable to protect the respondent from domestic violence. He accepted that the appellant's conduct in making complaints to police caused the respondent to live in constant fear of the appellant. In particular, she feared that the appellant would act on his threats to kill her and her family. The magistrate considered that this amounted to domestic violence for the purposes of s 8 of the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act).

Issues: Some grounds of appeal were:

1. Whether magistrate erred in finding the appellant's conduct in making complaints to the police was

'domestic violence' within the meaning of the Act.

2. Whether the magistrate erred in failing to exercise his discretion reasonably by not finding that the prosecution case was frivolous or vexatious or otherwise an abuse of process.

3. Whether the magistrate erred in failing to exercise his discretion reasonably by making the protection order.

Decision and reasoning: The appeal was dismissed and the protection order was affirmed.

As a preliminary issue, Morzone QC DCJ denied the appellant's request for a de novo rehearing as of right ([12]-[23]). Further, His Honour rejected the submission that the evidentiary standard of proof under the Act is higher than on the balance of probabilities ([24]-[27]- discussing *Briginshaw* v *Briginshaw* [1938] HCA 34).

1. The magistrate did not err in finding the conduct amounted to domestic violence under the Act. The appellant's complaints to police were 'over-reaching, baseless or made for a collateral purpose' ([44]). They were not made for the purpose of protecting the children as submitted by the appellant, but rather to harass the respondent. This, together with the appellant's threats to the children, impacted the respondent and caused her to live in substantial fear for her own safety and the safety of her children, her partner and his children. The complaints to police were harassing and intimating to amount to emotional and psychological abuse. They were also threatening and controlling or dominating to cause fear to the respondent's safety. Therefore, the behaviour fell within the definition of domestic violence under ss 8(1)(b),(d) and (f) of the Act.

   In finding that the complaints amounted to domestic violence, the magistrate accepted the uncontested facts and rejected the appellant's evidence where it conflicted with other witnesses. There were no identifiable incontrovertible facts or uncontested testimony to demonstrate the magistrate erred in making these conclusions about the evidence.

2. The proceeding in making the protection order was not frivolous or vexatious: '*It could not be characterised as being of little or no weight, worth or importance, and thereby frivolous. It is not usual for proceedings of this nature to trouble, annoy, or distress one of both parties. That may be natural consequence of the proper conduct of proceedings in the context of highly emotional family breakdown and litigation. There is no evidence of vexatious conduct in this case'* ([7]). Nor was the proceeding an abuse of process. The proceeding was commenced and maintained by the prosecution for the

'substantial and legitimate purpose of obtaining the appropriate remedy under the Act' ([10]).

3. The magistrate did not err in concluding that a protection order was necessary or desirable to protect the respondent from domestic violence under s 37(1)(c) of the Act. The respondent was fearful of future domestic violence from the appellant. Therefore, the order was desirable. In coming to this conclusion, the magistrate considered and assessed that there was a risk of future domestic violence if an order was not made. The appellant and respondent remained in a dispute before the Family Court, were in contact frequently in relation to their children, and the appellant showed no remorse for his conduct. There was no requirement that the magistrate was satisfied that future domestic violence was 'likely'. The magistrate also assessed that the appellant's behaviour in the ongoing parental relationship was inappropriate and that he was misconceived about his 'responsibility, entitlement and nobility, which manifested in an absence of insight into the consequences of his actions' ([16]). These findings were open on the facts. Therefore, the magistrate exercised his discretion properly and reasonably in making the protection order against the appellant.

***BJH v CJH* [2016] QDC 27 (26 February 2016) – Queensland District Court**

'Damaging property' – 'Emotional and psychological abuse' – 'Meaning of domestic violence s 8' – 'Physical violence and harm' – 'Protection order' – 'Risk' – 'Whether it was necessary or desirable to make an order to protect the aggrieved'

Appeal Type: Appeal against a Protection Order.

Facts: The appellant appealed against a magistrate's decision to make a Protection Order requiring him to be of good behaviour towards the aggrieved (his partner) and her son. The order was made after a disagreement over the family meal. The appellant took the aggrieved's mobile phone in an attempt to get her to go downstairs to discuss matters with him. The aggrieved tried to get the phone back and the appellant discarded it onto the floor, causing minor but irreparable damage to its cover. At some point, the back of the appellant's hand came into contact with the aggrieved's ear, causing relatively low level pain and no injury to the aggrieved. The appellant and the aggrieved continued arguing loudly until the police arrived (see [9]).

The magistrate made the following findings of domestic violence (see [10]):

- The appellant took the aggrieved's phone in an attempt to force her downstairs. He threw the phone to the ground in response to the aggrieved's attempts to retrieve the phone.

- The appellant slapped the aggrieved in a backhanded motion to the head on purpose.
- There was constant harassment by the appellant towards the aggrieved that night that was intimidating (causing her to retreat from him). This intimidation and harassment amounted to an act of domestic violence when considered with the yelling and the banging of plates (emotional and psychological abuse).

Issue/s: Whether the magistrate erred in making a protection order under s 37 [*Domestic and Family Violence Protection Act 2012* (Qld)], specifically:

1. Whether the magistrate erred in finding that domestic violence had been committed against the aggrieved: s 37(1)(b).
2. Whether the magistrate erred in finding that it was necessary or desirable to make the order to protect the aggrieved from domestic violence: s 37(1)(c).

Decision and Reasoning: The appeal was allowed. Rackemann DCJ held that it was open to the magistrate to conclude that there was at least some domestic violence committed by the appellant against the aggrieved. His Honour agreed that the following behaviour amounted to domestic violence under s 8 [of *Domestic and Family Violence Protection Act 2012* (Qld)]:

'The action of the appellant in seizing the aggrieved's mobile telephone was behaviour which, in the circumstances, was coercive - being designed to compel the aggrieved to do something which she did not wish to do (ie come downstairs to discuss matters of concern to the appellant). Further, the appellant responded to the aggrieved's attempt to get her telephone back by, amongst other things, throwing the phone onto the floor thereby damaging it. That the phone was discarded in a throwing motion had support in the evidence' at [11].

However, beyond that, the magistrate erred in her findings of domestic violence. In light of the evidence (see consideration at [14]-[29]), the magistrate's finding of an 'intentional back-handed slap' could not be supported. Further, the magistrate erred in characterising the appellant's behaviour as emotionally or psychologically abusive – behaviour that, amongst other things, intimidates (a process where the person is made fearful or overawed, particularly with a view to influencing that person's conduct or behaviour) or harasses (there must be an element of persistence): *GKE v EUT*. A consideration of the evidence could not support this conclusion (see [30]-[46]).

The finding of more extensive domestic violence on the night in question than what occurred further affected the magistrate's consideration of whether an order was necessary or desirable. In reconsidering whether an order was necessary or desirable, Rackemann DCJ again noted the decision in *GKE v EUT* where McGill SC DCJ observed in relation to s 37(1)(c) [*Domestic and Family Violence Protection Act 2012* (Qld)] that:

'I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made, and then consider whether in view of that the making of an order is necessary or desirable to protect the aggrieved … I also agree that there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future' (see [32]-[33]).

Here, the risk was not such to conclude that the making of a protection order was 'necessary or desirable' on the facts as established at the time of the hearing before the magistrate in February 2015. This was in circumstances where: there was no demonstrated history of domestic violence prior to the night in question; the event was a single incident involving domestic violence which, whilst in no way acceptable, was not at the most serious end of the scale of such conduct; the aggrieved gave evidence that she was not fearful of the appellant and did not believe that she needed protection from him; and, at the time of the hearing before the magistrate, the appellant and the aggrieved had continued their relationship without suggestion of further incident (see [49]-[50]).

***Commissioner of Police v DGM* [2016] QDC 022 (15/3279) Kingham DCJ 22 February 2016 – Queensland District Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Assault occasioning bodily harm' – 'Breach of temporary protection order' – 'Mitigating factors' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing' – 'Temporary protection order' – 'Verbal abuse' – 'Victim'

Charges: Assault occasioning bodily harm, breach of temporary protection order (TPO) (4 counts), breach of bail (7 counts).

Appeal Type: Appeal against sentence.

Facts: Two weeks before the offending, a TPO was served on the respondent (an Aboriginal man) which named the complainant (his partner), their young son and their unborn child as protected persons. The order

prohibited him from being in the vicinity of the complainant apart from authorised contact with their child with the complainant's consent and required that he be of good behaviour towards the protected persons. The offending occurred when the respondent went to the complainant's house to visit his son without authorisation. He approached the complainant with a metal pole and verbally abused her. He dropped the pole and walked towards the complainant with a clenched fist. He then punched, struck and kicked her which caused her to fall to the ground. She was taken to hospital and released that night. After fleeing, the respondent returned later that night, came into her yard and asked to talk to her. Police found him sitting in a car with a machete at his feet. His criminal history included property, street and driving offences, as well as a history of breaching community based orders. He had a serious drug addiction. He pleaded guilty early and was sentenced to 12 months' imprisonment for assault occasioning bodily harm. Concurrent lesser terms for the other offences were imposed. The offending also wholly activated an existing suspended sentence. He was released on parole immediately.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. Her Honour held that the Magistrate erred in taking considering the respondent's eventual surrender to police as a mitigating factor. While the surrender was voluntary, it had to be considered in the context of numerous bail breaches leading up to sentence, which was consistent with his history of disregard for court orders. In relation to the complainant's apparent wish to continue the relationship with the respondent, her Honour noted at [34]-[35] that – *'Courts in Queensland and in other states of Australia, have recognised the need to approach submissions about reconciliation with real caution, because of the particular features of domestic and family violence. The fact that a victim is a reluctant complainant is not a mitigating factor. Likewise, reconciliation after the victim has complained ought not mitigate the sentence*. *There may be cases in which reconciliation is relevant to an offender's prospects of rehabilitation. However, that comes from the offender's conduct, not the victim's forgiveness. The nature of the relationship means victims may, contrary to their own welfare, forgive their attacker. That does not reduce the risk posed by the offender and, depending on the dynamics in a particular relationship, it could well exacerbate the risk. Necessarily, prospects of rehabilitation must be assessed by reference to the offender's attitude and conduct, not the victim's.'*

In this case, the Magistrate correctly did not treat the complainant's support as a mitigating factor. However, the Magistrate did err by immediately releasing the respondent to encourage his rehabilitation. Rehabilitation is an important consideration for young indigenous people with drug addictions. However, given the

seriousness of the offence and the vulnerability of the victim, the need for denunciation and deterrence outweighed the need for rehabilitation. In citing comparable authorities, (see from [45]-[62]), her Honour then concluded that the sentence was manifestly inadequate. The respondent was re-sentenced for assault occasioning bodily harm to 18 months' imprisonment, with parole release set at the one third mark in the sentence. A conviction for a domestic violence offence was recorded.

***Green v Queensland Police Service* [2015] QDC 341 (27 November 2015) – Queensland District Court**

'Contravention of a domestic violence order' – 'Following, harassing and monitoring' – 'Prior history of contravention of domestic violence orders' – 'Sentencing' – 'Too much emphasis on prior criminal history' – 'Totality'

Charge/s: Contravention of a domestic violence order.

Appeal Type: Appeal against sentence.

Facts: The appellant was 24. He had a criminal history, including nine previous convictions for contravention of domestic violence orders. The appellant was hospitalised when his female partner, the aggrieved, stabbed him in the leg and foot with a knife during an argument. A temporary protection order was made prohibiting the appellant from contacting the aggrieved. The stabbing incident was not the subject of any charge. Over the next two days, the appellant contacted the aggrieved on her mobile phone 60 times. These calls did not involve any threats or actual violence. The appellant was on parole for a sentence imposed at an earlier time. The appellant was sentenced to six months imprisonment, which was to be served cumulatively upon the 15 month prior sentence.

Issue/s: The magistrate erred in two significant respects which resulted in an excessive sentence:

1. The magistrate placed too much emphasis on the appellant's criminal history for like offending and imposed a sentence which was disproportionate to the gravity of the instant offence; and
2. In imposing a cumulative term, the magistrate failed to review the aggregate sentence and consider whether the total sentence imposed was just and appropriate.

Decision and Reasoning: The appeal was allowed. First, Morzone QC DCJ noted that the surrounding circumstances, the appellant's criminal history and the stabbing incident, were properly provided by the prosecution by way of context for the subject offending. However, His Honour continued at [17]:

'[t]he danger was that that context could potentially take on an overwhelming character with the prospect of elevating the nature of the offending the subject of the sentence. It seems to me that that danger was realised and can be demonstrated by the sentencing remarks of the magistrate where she conflated the past criminal history, other intervening behaviour and the subject offending'.

Here, the criminal history and the conduct that constituted it were not as proximate to the subject offending as apprehended by the magistrate. Evidence of the stabbing was accepted in the context that the police did not press charges against the aggrieved but the magistrate determined that the aggrieved was acting in self-defence. Further, there was little or no regard given to any particular findings of fact surrounding the subject offending, namely, the 60 occasions of telephone contact. Rather, this was relegated to almost incident behaviour. Thus, Morzone QC DCJ held that '[b]y conflating the historical criminal behaviour and other violent behaviour with the subject offending, it seems to me that Her Honour mistook the facts and allowed erroneous or irrelevant matters to guide or affect her exercise of discretion' (see [18]-[21]).

Second, Morzone QC DCJ held that at [30]:

'the magistrate acted on a wrong principle by characterising the pre-existing sentence to a "different issue altogether" because the appellant breached his parole by reoffending. She apparently had no regard to the "period of imprisonment" required by section 160F of the [*Penalties and Sentences Act* 1992 (Qld)]… and the extension of the totality principle … It seems to me that her approach caused her to fall into error by failing to take into account material considerations of the whole period of imprisonment (including the balance of the previous sentence), reviewing the aggregate sentences and considering whether the latter was just and appropriate'.

The appellant was re-sentenced to three months imprisonment, to be served concurrently with the existing sentence.

***TZL v Commissioner of Police* [2015] QDC 171 (3 July 2015) – Queensland District Court**

'Breach of domestic violence order' – 'Criminal history' – 'Deterrence' – 'Minor breach' – 'Sentencing'

Charge/s: Breach of domestic violence order.

Appeal type: Appeal against sentence.

Facts: The appellant pleaded guilty and was convicted for contravening a domestic violence order and

sentenced to 10 months' imprisonment. The order prohibited the appellant from contacting the aggrieved apart from matters in relation to their child. He breached this condition by 41 sending emails over an 11 week period, the content of some of which were not solely in relation to their child. He was released on parole on the day of sentence. The appellant had an 'appalling' (see at [21]) history of breaching protection orders – consisting of 10 total convictions of which 8 related to the aggrieved. In fact, he was on probation for these offences when this offence was committed.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. Kingham DCJ acknowledged at [17] that this was an 'unusual' sentence. There was no physical violence, actual or threatened. There was no intimidation or any harassing or controlling behaviour. While there were 41 emails, they were sent over an 11 week period and not all of them breached the order as some were related solely to the child. There was also one very minor personal contact at a child care centre. Kingham DCJ found these facts in combination do not warrant a sentence of imprisonment. Notwithstanding, the appellant's clear 'disdain' ([21]) for protection orders as evidenced by his criminal history warranted a strong element of personal deterrence in the sentence. However, her Honour emphasised that the purpose of the sentence was not to punish the appellant again for prior offending, and that the Magistrate, 'gave the Appellant's prior history such weight that it led to the imposition of a penalty which was disproportionate to the gravity of this offending' (See at [22]). As such, the Court concluded (while also taking into account comparable authorities) that the sentence was excessive. It was reduced to 6 months. The immediate parole release was not changed.

***MDE v MLG & Queensland Police Service* [2015] QDC 151 (2 June 2015) – Queensland District Court**

'Necessary or desirable test' – 'Protection order' – 'Three stage approach'

Appeal type: appeal against a protection order.

Facts: On 17 October 2014, a police officer made an application for a protection order against the appellant (MDE) for the benefit of the first respondent (MLG) under the *Domestic and Family Violence Protection Act* 2012 (Qld) (DFVPA). MDE had been continually harassing MLG over the phone and outside her apartment (see [1]-[6]). On 23 October 2013, a temporary protection order was issued with the standard condition (under s56 DFVPA) that "the respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved." Three months later, on 21 January 2015, the Magistrate heard the

application and decided to issue a protection order against MDE having been satisfied the requirements under s 37 of DFVPA could be established. The order incorporated the standard condition under s 56 and other conditions under s 57 of the DFVPA ([13]).

Issues: The appellant appealed against the Magistrate's decision on six grounds, of which the first three questioned the correctness of the Magistrate's application of s 37 of the DFVPA and the last three concerned procedural and fact-finding errors on the Magistrate's part (see [18]). Relevantly, the first ground of appeal was that the Magistrate failed to follow, as required, the decision in *GKE v EUT* [2014] QDC 248 at [33] which provides that a future 'risk' of violence must be considered and, if absent, a protection order should not be issued (see [64]).

Decision and reasoning: The appeal was allowed and the protection order was therefore set aside.

The second and third grounds of the appeal (see [69] and [56] respectively), along with the fourth, fifth and sixth grounds (see [73]-[79]), were rejected by Morzone QC DCJ (see [72] and [63] respectively). The first, however, was allowed.

Morzone QC DCJ found that the Magistrate relied on erroneous or irrelevant matters and principles in their determination of whether the order was "necessary or desirable" ([68]). Specifically, his Honour highlighted at para [65]-[66] that the Magistrate's reasons confused the requirements set by s 37(1)(a) and s 37(1)(c). His Honour further noted that the Magistrate failed to expressly examine the material considerations relevant to s 37(1)(c) and (2) ([67]). These included the nature and risk of future domestic violence, the protective needs of the aggrieved (if any), and, if a need was found, how imposing a protection order would be "necessary or desirable" to meet those needs ([67]).

The Magistrate's decision was therefore considered unreasonable by Morzone QC DCJ. This prompted his Honour to re-examine the third element posed by s 37(1)(c), that is, whether a protection order is necessary or desirable to protect the aggrieved from domestic violence ([84]).

Importantly, earlier in his judgement, Morzone QC DCJ expressed the view that the third element of s 37(1) requires a three-stage process supported by a proper evidentiary basis (adduced pursuant to s 145 of the DFVPA) (see [55]). In short, the three steps involve (1) assessing the risk of future domestic violence between the parties in the absence of any order, (2) the need to protect the aggrieved from that domestic violence in the absence of any order, and (3) whether imposing an order is "necessary or desirable" to protect the aggrieved from the domestic violence (see [55]).

Upon analysis of the evidence in para [85]-[89], Morzone QC DCJ reached the conclusion that the first and second stage cannot be established, meaning the imposition of a protection order was neither necessary nor desirable to protect MLG from the domestic violence and therefore, the protection order ought not remain in force.

***SM v AA* [2015] QDC 172 (29 May 2015) – Queensland District Court**

'Domestic violence order' – 'Ex parte application' – 'Following harassing, monitoring' – 'Physical violence and harm' – 'Verbal abuse'

Appeal Type: Application for an extension of time in which to file an appeal against the variation of a domestic violence order.

Facts: The appellant (the respondent in a domestic violence order) failed to appear at the Magistrates' Court for an application to extend the order. The Magistrate noted appellant's absence. The Court proceeded to 'hear and decide the application' pursuant to section 94 of the *Domestic and Family Violence Act 2012* (Qld).

Issue/s: Whether the Magistrate correctly heard and decided the matter.

Decision and Reasoning: The appeal was allowed. Judge Reid considered the remarks of the Magistrate. The remarks did not consider the reasons put before the Court by the applicant as to why the domestic violence order should be extended. These reasons included allegations of physical and verbal abuse and multiple breaches of the order. Instead, the Magistrate simply made the order and considered whether the order should be extended for 18 months or for two years. Judge Reid was concerned that the Magistrate dealt with the matter, 'merely as a rubber stamp exercise'. There was nothing in the Magistrate's remarks to indicate that she had read the material to ascertain whether or not the breaches of the order actually occurred. There was little or no particularity in the allegations, specifically about when or where the breaches occurred. In circumstances where parties do not attend, it is incumbent upon the Magistrate to 'hear and decide' the matter, even if it is entirely upon affidavit evidence. The transcript did not indicate that the Magistrate considered the question at all. As such, the order was set aside.

***LKL v BSL* [2015] QDC 337 (15 May 2015) – Queensland District Court**

'Affidavit evidence' – 'Domestic violence order' – 'Evidence' – 'Procedural fairness'

Appeal Type: Appeal from dismissal of application for protection order.

Facts: The appellant appeared unrepresented in the Magistrates' Court and filed for a protection order pursuant to the *Domestic and Family Violence Act 2012* (Qld). She was initially granted a temporary protection order in the Magistrates' Court. The Magistrate then made directions to the effect that the evidence of all witnesses in support of the application was to be filed as affidavit evidence. No such affidavit evidence was provided. The appellant believed that the application itself, without further affidavit evidence was sufficient. The application for the protection order was then refused, with the Magistrate concluding that there was no material before the Court (see further at [7]-[9]).

Issue/s: Whether the aggrieved in a protection order application can rely solely on the application without further affidavit evidence.

Decision and Reasoning: The appeal was upheld. The *Domestic and Family Violence Act 2012* (Qld) makes clear that the formal rules of evidence do not apply and gives the Court broad powers to 'inform itself in any way it considers appropriate' (see s 145). However, the court obviously still has an obligation of procedural fairness. Dick SC DCJ explained that in hearing and determining an application for a protection order, *'there still must be evidence in the sense of there being some material put before the Court which provides a rational basis for the determination and it must be put before the Court in a way which gives the opposite party the opportunity to challenge that evidence and put the opposite party's case in relation to the matter' (See at [11]).* The Magistrate's directions did not exclude the appellant's sworn application as evidence. Therefore, the Magistrate's conclusion that there was no material before the Court was an error of law. The Magistrate did not consider and determine the application. As such, it is clear that an aggrieved person can rely solely on the application as evidence without the need for further affidavit evidence. The respondent can then respond to the application if they choose. The application was remitted back to the Magistrates' Court for determination by a different magistrate.

***GKE v EUT* [2014] QDC 248 (27 August 2014) – Queensland District Court**

'Costs' – 'Domestic violence order' – 'Emotional and psychological abuse' – 'Family law' – 'Following harassing, monitoring' – 'Harassing' – 'Intimidation' – 'Necessary or desirable' – 'Systems abuse'

Appeal Type: Appeal against the making of a domestic violence order.

Facts: A domestic violence order was made in the Magistrates' Court against the appellant in favour of the respondent. There had already been orders made in the Family Court in relation to arrangements for their three children. The appellant filed for enforcement of these orders in the Family Court. He attended the respondent's home for the purpose of serving court documents. When the respondent opened the door, she closed it immediately because she felt frightened. This incident and other prior incidents led to the application for the order.

Issue/s:

1. Whether the appellant's commencement of proceedings in the Family Court and the personal service of documents on the respondent constituted intimidation or harassment sufficient to meet the definition of emotional or psychological abuse and therefore domestic violence within the meaning of the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act).
2. Whether a protection order was necessary or desirable to protect the respondent from domestic violence.
3. Whether costs should be awarded against the respondent.

Decision and Reasoning: The appeal was upheld.

1. McGill DCJ upheld the Magistrate's finding that the incident at the respondent's home constituted domestic violence. His Honour considered the definition of 'emotional and psychological abuse' in s 11 of the Act. He noted that the issue is whether the behaviour is subjectively intimidating or harassing to the other person. Therefore, evidence of the subjective response of the aggrieved is relevant (see at [21]). His Honour noted at [22] that while examples in the Act refer to persistent conduct, intimidation within the meaning of s 11 could arise from a single incident. However, harassment cannot arise from a single incident. His Honour stated that there has to be 'some element of persistence' such that, 'It is not just a question of whether the aggrieved finds something upsetting' (see at [23]). As such, while the incident at the house amounted to domestic violence, the Family Court application itself was not an example of domestic violence –

   '*I suspect it would be possible for the making of repeated applications to the Family Court without justification to amount to "harassment", though it would have to be a clear case; it would certainly not be harassment simply because from time to time the respondent denied the appellant access to the children and he made an application to the Family Court to obtain it'* (see at [20]). The mere fact the

appellant takes steps to enforce Family Court orders does not and cannot constitute domestic violence. Conversely, the respondent unjustifiably withholding the children cannot justify domestic violence by the appellant.

2. McGill DCJ noted that this question is concerned with the future. Another relevant consideration was that while the respondent did not want to see the appellant at all, the terms of the Family Court order and the presence of the children dictated that there had to be some continuing contact between the parties.

   See at [32] – *'In my opinion the focus must be on the issue of protecting the aggrieved from future domestic violence, the extent to which on the evidence there is a prospect of such a thing in the future, and of what nature, and whether it can properly be said in the light of that evidence that is necessary or desirable to make an order in order to protect the aggrieved from that…I agree with the Magistrate that it is necessary to assess the risk of domestic violence in the future towards the aggrieved if no order is made….'*

   The evidentiary basis for this risk must amount to more than the mere possibility of such conduct occurring (See at [33]). It is also relevant to consider the seriousness of the violence that is threatened, the credibility of the threat and the practical consequences of the order on the person against whom the order is made. For example, a no contact order ought not be made where some contact is necessary in relation to children (see at [42]-[43]). In applying these principles, his Honour found that it was not necessary or desirable to make an order. His Honour noted that while it was possible that circumstances could arise which amount to intimidation, the issues relating to the children remain in the Family Court. It would not be appropriate to make a protection order to interfere with the appellant's right to enforce his rights in that jurisdiction. There was no real risk of domestic violence as long as the respondent complied with the Family Court orders (see at [67]).

3. Costs were not ordered in favour of the appellant. Section 157 of the Act provides that each party must bear their own costs unless the court decides that their application was malicious, deliberately false, frivolous or vexatious. It is not clear whether this section applies to an appeal. However, his Honour concluded that while the general power to award costs under s 15 of the *Civil Proceedings Act 2011* has not been expressly excluded by the Act, that power should be exercised having regard to the specific costs provision in s 157. Therefore, it is not simply a matter that costs follow the event for this type of

proceeding. In any case, an adverse costs order against the respondent was not appropriate.

***TND v Queensland Police Service* [2014] QDC 154 (18 July 2014) – Queensland District Court**

'Assault' – 'Breach of domestic violence order' – 'Deterrence' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Sentencing'

Charges: Breach of domestic violence order, assault of a police officer.

Appeal Type: Appeal against sentence.

Facts: The appellant and the aggrieved were drinking, then returned home (in the Normanton district). Following a dispute, the appellant became agitated and punched the aggrieved, causing a minor injury. After police were called, officers were forced to use capsicum spray to subdue the appellant. He continued to threaten violence after his arrest. He had a long criminal history including many property and drug offences. He had one prior conviction for breaching a domestic violence order, for which he was fined $100. He submitted this matter was not one of 'significant gravity' (See at [9]). The appellant submitted in the Magistrates' Court that the relationship was not one characterised by violence. Following pleading guilty, he was sentenced to six months' imprisonment with immediate parole release for the breach offence. He was sentenced to one month imprisonment wholly suspended for an operational period of nine months for the assault offence. In his sentencing remarks, the Magistrate referred to crime statistics and noted the prevalence of breaches of domestic violence orders and offences against police in the Normanton district, which necessitated a strong element of general deterrence in sentencing.

Issue: Whether the sentence for the breach offence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The Court acknowledged that the Magistrate did err by not properly indicating how he took into account of the plea of guilty, and by using the statistics, which were found to not be reliable. Mitigating factors included the appellant's youth and his early plea of guilty. The relationship was long-term and was not characterised by actual violence. His criminal history, while relevant, was minor. However, at [35] Bradley DCJ emphasised that domestic violence involving psychical violence is a serious issue and the appellant did cause some injury to the aggrieved. He had been recently convicted of breaching a protection order and general and specific deterrence were important. He was subject to various court orders when he committed the offence. The maximum penalty was three years. As such, the sentence

was held to be appropriate.

***R v MKW* [2014] QDC 300 (18 June 2014) – Queensland District Court**

'Abuse of process' – 'Breach of domestic violence order' – 'Concurrent criminal proceeding' – 'Double jeopardy and other charges' – 'Double punishment' – 'Grievous bodily harm' – 'Permanent stay of proceedings' – 'Physical violence and harm'

Charge/s: Grievous bodily harm.

Proceeding: Application for a permanent stay of proceedings.

Facts: An indictment before the District Court charged the applicant with grievous bodily harm. The incident involved the applicant drinking alcohol in a group which included the complainant (his de facto partner). An argument ensued. The applicant struck the complainant with a collapsible chair. He was charged with breaching a domestic violence order, pleaded guilty in the Magistrates' Court and was sentenced to 12 months' imprisonment with parole release after four months. The police then obtained a medical report indicating that the complainant's injuries, if left untreated were likely to have caused 'disfigurement or loss of vision' and could have proved life threatening (see at [3]). As a result, he was then charged with grievous bodily harm (GBH) three days after being released from custody.

Issue/s: Whether the continued prosecution of the GBH charge would constitute an abuse of process under s 16 of the *Queensland Criminal Code* because the applicant had already been punished for the same act.

Decision and Reasoning: The application was dismissed. O'Brien DCJA considered the test as applied in *R v Dibble; ex parte Attorney-General (Qld)* [2014] QCA 8 (11 February 2014). His Honour concluded at [9] that the applicant was punished in the Magistrates' Court for the act of striking the complainant with the chair and that it was this same act which formed the basis of the GBH charge. Ordinarily, to punish the defendant again for that same act would contravene s 16 of the Code. However, the Crown submitted that s 138 of the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act) operates to authorise the continued prosecution of the GBH charge. The Court accepted this argument. The crucial issue was whether the original prosecution for the breach offence against the Act constituted a 'proceeding' under that act. If it did, s 138(3)(a) would apply so that the prosecution for the breach offence would not affect any other proceeding against the applicant arising out of the same conduct. His Honour concluded that the prosecution for the breach offence was a proceeding under the Act (see at [15]). As such, *R v Dibble; ex parte Attorney-General (Qld)*

(where a permanent stay was granted) was distinguished on the basis that the Act specifically authorises continuation of the prosecution. However, this issue has not been authoritatively resolved and uncertainty remains. See at [17] where his Honour states –

'I should add that, if my tentative view of s 138(4) of the legislation is correct and if the applicant were to be convicted of the indictable offence, then the question remains as to whether s 16 of the Code prohibits him being further punished for that offence. At the very least, I would consider that ordinary and well-established sentencing principles would require that regard be had to the penalty imposed in the Magistrates Court for the breaching offence.'

See pages 111-113 of the Queensland *Domestic and Family Violence Protection Act (2012)* Bench Book and the summary of *R v Dibble; ex parte Attorney-General (Qld)* [2014] QCA 8 (11 February 2014) for further information.

***CPS v CNJ* [2014] QDC 47 (21 March 2014) – Queensland District Court**

'Coercive control' – 'Emotional and psychological abuse' – 'Establish relationship with victim's former partner' – 'Harassing' – 'Meaning of domestic violence' – 'Protection order' – 'Protection order necessary or desirable' – 'S 8(1) of the Domestic and Family Violence Protection Act 2012 (Qld)' – 'Separation'

Matter: Appeal against the making of a protection order.

Ground: The magistrate erred in making a protection order pursuant to the *Domestic and Family Violence Protection Act* 2012 ('DFVPA').

Facts: The appellant male and respondent female had been in a relationship from May until late September or early October 2021. The magistrate hearing the original application found that both parties lived as though in 'a soap opera', behaving in puerile, immature and childish ways. The conduct of the appellant was identified as 'repeated early contact amounting to harassment'. Further, complaints about property amounted to harassment. After the relationship between the respondent and appellant came to an end, the appellant sought out the respondent's ex-partner and struck up a relationship with him.

Decision and Reasoning: The continuous contact with the respondent following the end of the relationship, as well as the contact with the respondent's ex-partner, were found to be capable of constituting domestic violence. The appellant's conduct was capable of falling into one or more of the categories enumerated in s

8(1) of the DFVPA, namely, behaviour that is "emotionally or psychologically abusive" and/or "is threatening" and/or "coercive" or "in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing of that of someone else".

However, the court was not persuaded, on balance, that the actions of the appellant in seeking out and striking up a relationship with the respondent's ex-partner was sufficient to persuade the magistrate that a protection order was 'necessary or desirable to protect the respondent from domestic violence' in future. Therefore, it was found that the domestic violence order should not have been made.

***W v Queensland Police Service* [2013] QDC 87 (2 May 2013) – Queensland District Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Assault occasioning bodily harm' – 'Breach of domestic violence order' – 'Criminal history' – 'Physical violence and harm' – 'Possession of dangerous drug' – 'Sentencing'

Charge/s: Assault occasioning bodily harm, breach of domestic violence order, possession of dangerous drug.

Appeal type: Appeal against sentence.

Facts: Following an argument with the complainant, the appellant followed her, grabbed her by the harms and threatened her. She broke free, but was punched by the appellant in the right side of the jaw, causing her to bleed profusely. He was highly intoxicated. That constituted the assault offence. He was found to be in possession of cannabis at the time. The breach involved the same complainant. That offence occurred when she was heavily pregnant. The appellant demanded she have sex with him and she refused. He threw her phone at her and punched a door. He was intoxicated. He had a criminal history consisting of various street offences, one conviction for assault occasioning bodily harm and one conviction for breaching a domestic violence order. He was sentenced to three months' imprisonment for the breach charge and nine months' imprisonment for the assault charge, and fined $400 for the drug charge.

Issue/s: Whether the penalty was too severe. More specifically, there were issues concerning –

1. Whether the Magistrate misapplied *Earl v Heron* [2011] QDC 183.
2. Whether the Magistrate gave excessive weight to the appellant's criminal history and the need for

specific deterrence.

Decision and Reasoning: The appeal was dismissed.

1. In relation to *Earl v Heron,* the appellant submitted *inter alia* that - in that case the offender committed a random act of violence on a stranger. This case concerned violence during a heated domestic argument between long term spouses, which makes this cases less serious. This argument was dismissed – with Smith DCJ concluding at [44] – *'I do not accept the submission that an act of violence during a heated domestic argument between spouses is necessarily less serious than a random act of gratuitous violence on a stranger. It all depends upon the circumstances of the particular case.'* His Honour went on to make clear that the courts cannot condone either type of violence.
2. In relation to the appellant's criminal history, the Court concluded that the Magistrate was entitled to take into account the relevant prior convictions, and was also entitled to consider the injuries caused (a broken jaw), which were 'reasonably significant' (See at [50]). This made it an offence not at the low end of the scale.

***MAA v SAG* [2013] QDC 31 (28 February 2013) – Queensland District Court**

'Abuse of process' – 'Breach of protection order' – 'Children' – 'Coercive control' – 'Following, harassing, and monitoring' – 'Stepchildren' – 'Systems abuse' – 'Use of authorities'

Proceedings: Appeal against protection order.

Facts: The appellant and the aggrieved were in a domestic relationship from 2007 to 2009 [6]. The appellant sent the aggrieved abusive and derogatory text messages and disturbed the aggrieved's place of residence, which prompted her to change the locks. The aggrieved accused him of shoving and pushing her when she was pregnant with one of their children in 2008.

The appellant made numerous baseless complaints to a range of governmental bodies to intimidate the aggrieved, including:

1. the Queensland Ombudsman.
2. the Anti-Discrimination Commission of Queensland.
3. the Registry of Births, Deaths, and Marriages, regarding the registering of their daughter's name, with

the result that this was not registered until the Family Court made an order in relation to her name.

4. Centrelink, which lead to an investigation of the aggrieved's parenting payments.
5. the Commission for Children and Young People.
6. the Child Guardian.
7. Queensland Health.
8. The Health Quality and Complaints Commission.
9. The Medical Board, against the children's medical practitioner.
10. Legal Services Commission, against her legal representatives.
11. The Family Court where a notice of Child Abuse and subsequent investigation concerning the aggrieved's three daughters.
12. Complaints of abuse and her parenting that lead to a police investigation and welfare checks; and
13. The initiation of two unwarranted and dismissed court proceedings by the appellant against the aggrieved

Grounds of Appeal: The Magistrate erred in finding that the appellant committed an act of domestic violence against the aggrieved and that the appellant is likely to commit an act of domestic violence again or is likely to carry out a threat to commit an act of domestic violence [24].

Decision and reasoning: Appeal dismissed.

It was open to the Magistrate to reject the appellant's evidence that he committed the acts of complaining to numerous bodies for bona fide reasons [36]. The appellant's numerous complaints to governmental bodies were unjustified and an abuse of process and were made to and had the effect of harassing and intimidating the aggrieved [38]. That the aggrieved's children were subject to repeated investigation was further evidence of the harassment caused by the appellant.

The appellant's intimidation and harassment, on the evidence, amounted to acts of domestic violence and there was proper basis that the appellant would likely commit a further act of domestic violence. The aggrieved's daughters also required protection.

***Singh v Queensland Police Service* [2013] QDC 37 (20 February 2013) – Queensland District Court**

'Aggravating factor' – 'Breach of bail condition' – 'Breach of domestic violence order' – 'Exposing a child' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Sentencing' – 'Verbal abuse'

Charge/s: Breach of domestic violence order (2 counts), breach of bail condition.

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty in the Magistrates' Court to two counts of breaching a domestic violence order. The order prevented him from directly or indirectly contacting the aggrieved. The parties had been in a de facto relationship for five years. The first count involved the appellant standing over the aggrieved, pointing menacingly at her. He was taken into custody and released on bail with a no contact condition. In breach of this condition, he attended her home, yelled insults at her, broke property, head butted an informant and verbally abused her, all in the presence of their children and a witness. The Magistrate acknowledged that the presence of the three young children was a serious aggravating feature. The appellant had a relevant criminal history, including four previous domestic violence convictions committed against the aggrieved. The Prosecutor provided minimal assistance to the Magistrate as to the appropriate sentence. He was sentenced to nine months' imprisonment followed by two years' probation for each count, to be served concurrently. He was convicted and not further punished for the breach of bail.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was initially dismissed. Robertson DCJ commented that it is 'regrettable' (see at [7] & [25]) that the prosecutor did not provide the Magistrate with any assistance as to the appropriate sentence. The Court held that these acts were a 'nasty and prolonged' (see at [29]) example of domestic violence against a vulnerable complainant, by an offender who had a long history of violence against the same woman. He had previously shown disregard for court orders, and in this case also showed complete disregard for the bail undertaking. The only mitigating factor was the early plea of guilty. While the sentences were 'severe', they were not so severe as to amount to an error by the Magistrate.

(The appeal was then re-opened and upheld due to a procedural issue with taking into account the appellant's prior convictions following the Court of Appeal's decision in *Miers v Blewett* [2013] QCA 23 (22 February 2013). The requisite notice was not given, so the appellant's prior convictions could not be taken into account. However, the Legislature has now amended s 47 of the *Justices Act 1886* to ensure that prior convictions can be taken into account in sentencing whether or not notice has been served.)

***LCJ v KGC and Commissioner of Police* [2012] QDC 67 (30 March 2012) – Queensland District Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Domestic violence order' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Physical violence and harm'

Appeal Type: Appeal against a protection order.

Facts: The appellant applied for and was granted a protection order (under the then *Domestic and Family Violence Protection Act 1989* (Qld)). The applicant (the respondent/aggrieved) tendered evidence to the Magistrate that the appellant was physically violent to her on two occasions by grabbing her around the neck. There was also evidence that the appellant threatened to kill her if she went to the police. There was a history of violence in the relationship, which had involved verbal and physical abuse and controlling behaviour since 1992.

Issue/s: Some of the issues concerned –

1. Whether it was open to the Magistrate to be satisfied that the appellant committed domestic violence against the aggrieved.
2. Whether it was open to the Magistrate to be satisfied that the appellant was likely to commit further domestic violence against the aggrieved.

Decision and Reasoning: The appeal was allowed and the protection order was discharged.

1. In relation to whether the Magistrate's conclusion that the appellant committed domestic violence against the applicant was correct, Irwin DCJ concluded that the Magistrate was entitled to prefer the evidence of the applicant's witnesses over the unsigned statements of the appellant and his witnesses. The statements tendered by the applicant were signed. The appellant's statements were not. It was also open to the Magistrate to conclude that the appellant had continually harassed and intimidated the applicant.
2. However, Irwin DCJ concluded that it was not open on the evidence for the Magistrate to conclude that the appellant was likely to commit an act of domestic violence again, or carry out a threat to do so. After

the application was made, the applicant stated that the appellant had left the house where they were living, had not returned and there had been minimal contact since a temporary protection order was made. There was no evidence of physical violence and she said she did not feel threatened by him. As such, there was not sufficient evidence to support an inference that domestic violence was likely to occur again. While there were a string of emails that did constitute harassment, the last of these were 12 months before the Magistrate made the protection order. The appellant had also clearly indicated he wished to have no further contact with the applicant.

Magistrates' Court

WJM v NRH [2013] QMC 12 (3 May 2013) – Queensland Magistrates' Court

'Desirable' – 'Domestic violence order' – 'Family law' – 'Physical violence and harm' – 'Principle of paramount importance'

Proceeding: Application for a Protection Order under the *Domestic and Family Violence Protection Act 2012* (Qld).

Facts: This concerned a police application under the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act) for a protection order against the respondent in favour of the aggrieved. After finding out that her husband had been having an affair, there was a violent incident between the aggrieved and the respondent. This involved the respondent punching the aggrieved extremely forcefully. The aggrieved had no family in Australia. The aggrieved and the respondent had taken steps to reconcile, including seeing a psychologist. The respondent had not yet seen a personal therapist to deal with anger management issues. The aggrieved claims to now feel supported by her husband and his family. She stated that if she feels scared she would move back home to China, and that making a protection order would not impact on how safe she feels.

Issue/s: Whether the protection order should be made.

Decision and Reasoning: The order was made. Contanzo JJ applied the principle of 'paramount importance that the safety, protection and wellbeing of people who fear or experience domestic violence is paramount'. His Honour found that it was 'desirable' to protect the aggrieved from the risk of further domestic violence by her husband. In making the order, his Honour noted the severity of violence used by the respondent – *'As a matter of logic and common sense, the more severe the violence exhibited by a perpetrator, the more risk there is that serious violence will be used again unless there has been an appropriate and sufficient intervention. The gravity of the situation is that the degree of violence used was inexplicable and irrational'* (See at [53]).

It was noted that this case involved balancing the public interest of preventing domestic violence with private rights in a marriage. In this case, would an order '"get in the way" of the ongoing reconciliation by the parties?' (See at [20]).

His Honour concluded that the 'reduction of stressors on their relationship' had not gone far enough to negate the risk of further domestic violence. The aggrieved remained vulnerable to further domestic violence, though

less vulnerable than she had previously. As such, even though the aggrieved did not feel she needed to be protected from her husband, it remained desirable that she be protected with an order. However, the order made went 'no further than is necessary for the purpose of protecting the aggrieved from the respondent' (See at [58]).

***Armour v FAC* [2012] QMC 22 (21 November 2012) – Queensland Magistrates' Court**

'Cross-jurisdictional applicability' – 'Domestic violence order' – 'Economic abuse' – 'Emotional and psychological abuse' – 'Family law' – 'Following, harassing, monitoring' – 'Necessary or desirable' – 'Physical violence and harm' – 'Principle of paramount importance'

Proceeding: Application for a Protection Order under the *Domestic and Family Violence Protection Act 2012* (Qld).

Facts: This concerned a police application under the *Domestic and Family Violence Protection Act 2012* (Qld) (the Act) for a protection order against the respondent in favour of the aggrieved.

Issue/s: Whether the respondent committed domestic violence against the aggrieved, and whether the protection order was 'necessary or desirable' as required under section 37(1)(c) of the Act.

Decision and Reasoning: The protection order was made, with Constanzo JJ concluding that it was necessary and desirable to protect the aggrieved from domestic violence. In relation to the meaning of 'necessary or desirable', his Honour noted that the test is framed in the alternative. A court may make a protection order if it considers it 'desirable' but not 'necessary' and vice versa. His Honour then considered the plain English meanings of both words (See at [17]). A finding that it is 'necessary or desirable' to make an order must arise out of a need to protect the aggrieved from domestic violence with the terms of the order (see at [18]). This need for protection, 'must be a real one, not some mere speculation or fanciful conjecture' (See at [19]). This involves an assessment of risk that is faced by the aggrieved. While the risk of further domestic violence must actually exist, it is not necessary that the need or the risk be significant or substantial. However, it must be, 'sufficient…to make it necessary or desirable to make the order in all the circumstances' (See at [20]).

In considering whether a protection order is 'necessary or desirable', a court must have regard to section 4 of the Act, but can have regard to other matters if relevant. For example, in the old equivalent legislation, the

test was one of likelihood. It involved the court considering whether the evidence indicates that there was, 'some real, significant likelihood' that further acts of domestic violence would be committed. Something more probable than a mere 'chance or risk' was required (See at [23]). This test is not mandatory in the new legislation, but is still a relevant consideration. That is, if the evidence indicates that a respondent is likely to commit an act of domestic violence again, it may be 'necessary or desirable' to make a protection order under the new legislation. However, the likelihood test is clearly not determinative (See at [25]). Sometimes it may be appropriate to make an order if the risk is only 'possible' as opposed to 'likely' (See at [65]). See in particular from [27]-[70], where Contanzo JJ engages in detailed comparisons of the equivalent provisions in all state and territories, as well as analogous Commonwealth legislation. At [47], his Honour explains how provisions from one state or territory can be relevant to courts in another –

'While the legislation in other States cannot affect the jurisdiction of this court, the types of considerations referred to by the various Acts may provide some insight into the types of considerations which may, in appropriate cases, be relevant considerations in the determination of whether it is necessary or desirable for this court to make an order. They certainly do not provide anything approximating an exhaustive list of possible relevant circumstances. Whether they are relevant will depend on the law in Queensland and on the facts and live issues of each case. What weight ought to be given to any such relevant circumstance must also depend on the overall facts and circumstances of each hearing. The types of considerations referred to by the various Acts may simply provide this court with some inkling about the types of considerations legal minds, and judicial minds, may need to bring to bear on the determination of issues raised under the Queensland Act. However, I have taken great care to look at the context in which each of the other state laws is drafted.'

At [52]-[70], his Honour extrapolated the relevance of the Court's power to make orders prohibiting conduct under section 1323 of the *Corporations Act 2001* to domestic violence issues. The discretionary considerations listed in section 1323 may be relevant when a Magistrates' Court is considering whether to make a protection order to protect the aggrieved from, 'coercive, deceptive or unreasonably controlling economic abuse' as well as other types of domestic violence (See at [56]).

In determining whether it is 'necessary or desirable' to make an order, a court will need to engage in a balancing exercise of public and private rights. That is, does the public interest in preventing domestic violence outweigh the private rights of the relevant parties? (See at [57] & [96]). At [61], his Honour observed that it may be 'necessary or desirable' to make an order, 'even if one of the grounds for finding that domestic

violence has been committed by the respondent has ceased to exist,' and that, 'if one reason why it is decided that a risk of future domestic violence is because of ongoing contact, such as in family court proceedings or because of other unresolved relationship issues, the order may need, in appropriate cases, to extend beyond the likely conclusion of those proceedings or resolution.'

At [63], his Honour stated that it may be 'necessary or desirable' to make an order by having regard to evidence apart from the evidence that establishes domestic violence has been committed. All facts and circumstances may be considered, including evidence, 'which is properly before the court but which was not led by or relied upon by the applicant.' A court can draw reasonable inferences from this evidence, such as inferences that a respondent induced an aggrieved to withdraw their complaint or to commit perjury.

Another factor is the gravity of the situation. That is, even if on the evidence it could not be said that it was 'necessary' to make an order, the gravity of the situation could indicate that it would be still 'desirable' to protect the aggrieved with the order, in which case an order can still be made.

Civil and Administrative Tribunal

ABC v Assistant Commissioner Maurice Carless [2023] QCAT 85 (8 March 2023) – Queensland Civil and Administrative Tribunal

'Discipline finding pursuant to s7.4 of the police service administration act 1990 (qld)' – 'Evidence' – 'Police officer offender' – 'Protection order'

Proceedings: Police officer's application for review of the respondent's decision on a disciplinary finding pursuant to s7.4 of the *Police Service Administration Act 1990* (Qld) and proposed sanction made 14 September 2020.

Issue: Whether the findings of domestic violence were valid, and whether the domestic violence constituted misconduct.

Facts: The first allegation was of acts of domestic violence committed against the applicant's wife following their separation after the discovery of her affair. The applicant was alleged to have read her texts, private emails and Skype account messages and had consented to the grant of a protection order to his wife.

The final four aspects of contravened conduct were unrelated to domestic violence.

Decision and reasoning: Domestic violence was made out, and held to be unacceptable conduct from a police officer in a private setting and therefore misconduct.

The Tribunal found that the applicant's consent to the protection order was not evidence of acts of domestic violence, as no admissions were made in the order and its terms had no suggestion of acts of domestic violence. On the evidence, the Tribunal was satisfied that the applicant accessed his partner's texts and emails without her permission but was unable to make the same finding relating to her Skype account.

The Tribunal found that a physical altercation had occurred on one occasion over the phone and that this demonstrated that the applicant's ex-partner was at least offended by the applicant accessing her private emails and texts. Domestic violence was therefore made out under s 8 of the *Domestic and Family Violence Protection Act 2012* (Qld) (includes conduct that is 'offensive').

In assessing whether the domestic violence constituted misconduct, the Tribunal considered whether the conduct that met that which the community could reasonably expect of a police officer. The significance of the deeply personal and distressing context of the applicant's behaviour was noted, the Tribunal stating it made

his relatively low-level behaviour explicable to the community. However, it was nonetheless found to be unacceptable conduct from a police officer in a private setting. The Tribunal confirmed the finding made at the disciplinary hearing in relation to the domestic violence matter.

***NK v Director-General, Department of Justice and Attorney-General* [2021] QCAT 270 (30 July 2021) – Queensland Civil and Administrative Tribunal**

'Administrative law' – 'Breach of protection order' – 'Coercive control' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Threats to kill' – 'Working with children negative notice'

Proceedings: Application for external review of the Department's decision to issue the applicant a negative notice.

Facts: The applicant's ex-partner had been granted a 'Protection Order for ongoing physical violence and controlling behaviour' [13]. Within five months, the applicant was convicted of contravening the Order by being with his ex-partner and her two children, one of whom was the applicant's son [1]. As a result, the applicant was issued with a 'negative notice' to work with children preventing the issue of a positive notice blue card. The applicant applied for administrative review of the Department's decision. As the applicant had not been convicted of a 'serious offence', he was entitled to be issued with a positive notice unless his case was 'exceptional' [2]. A case is exceptional if it is not in the best interests of children to issue a positive notice.

Decision and reasoning: The Tribunal confirmed the department's decision that the applicant's case was exceptional.

The Tribunal assessed the risk in allowing the applicant to work with children, 'by identifying and weighing protective factors with risk factors' [3]. The Tribunal accepted that the applicant had taken steps to address his issues, as evidenced by his participation in a men's behavioural change program [9]. However, the applicant was not 'aware of the psychological and emotional impact of his behaviour on others' nor able to 'exercise restraint and self-control… sufficient to work with children' [28]. The Tribunal noted that applicant's submissions focused on 'minimising and not admitting responsibility' for his actions while failing to demonstrate his ability to identify the triggers for his behaviour or use appropriate coping strategies [10]. Therefore, the Tribunal was not satisfied that the applicant had reduced 'the risk of his susceptibility to [the offending behaviour] in stressful situations' [20]. The Tribunal noted that the applicant faced recent and serious allegations of ongoing physical violence and controlling behaviour, which included threatening to kill

his partner, and subjecting her to physical and verbal abuse in front of children. This behaviour had continued despite the Order, which he had breached within 5 months of its commencement [13]. Therefore, the applicant's 'limited insight into the seriousness of his behaviour and its impact on others, together with evidence of ongoing coercive control' were risk factors that outweighed protective factors and made the applicant an unsuitable candidate for working with children [26].

Applicant SIL v Scheme Manager, Victim Assist Queensland, Department of Justice and Attorney-General **[2021] QCAT 237 (13 July 2021) – Queensland Civil and Administrative Tribunal**

'Administrative law' – 'Application for financial assistance' – 'Coercive control' – 'Evidence issues' – 'False police reports' – 'Listening to Victims' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Prior acts of domestic violence' – 'Systems abuse' – 'Victim as (alleged) perpetrator' – 'Visa threats' – 'Weapon'

Proceedings: Application for external review of the Department's decision to deny an application for financial assistance.

Facts: The male perpetrator and female victim were married and living together with their infant daughter. The perpetrator was sponsoring the victim, a Taiwanese citizen, for a permanent visa. The victim reported being subjected to 'ongoing incidents of strangulation, financial, emotional, verbal and social abuse', and 'control and coercion', involving threats of deportation and child removal [21]. In December 2017, the victim reported to police that her husband had attacked her with a knife. However, due to the victim speaking 'very limited English' police interviewed the perpetrator only, who stated that he had been attacked by the victim [33]. In February 2019, the victim's application for financial assistance under the *Victims of Crime Assistance Act 2009* (Qld) ('the Act') was refused [5].

Decision and Reasoning: The original decision was set aside and returned for reconsideration with a direction that the victim was eligible for financial assistance.

Under the Act, a person who is directly injured by an act of violence is eligible for financial assistance [9]. The Tribunal reviewed the evidence of the December 2017 incident and found that it had directly resulted in an injury to the victim [39]. The Tribunal's finding was based on evidence that the victim had been admitted to hospital with lacerations to her hand, while her husband had not required medical attention [37]. The Tribunal acknowledged that there were 'discrepancies' in the account provided by the victim to hospital staff but found

that this was due to the language barrier and the victim's physical state, which included dizziness [31]. The Tribunal accepted the victim's version of events and noted that she had been 'denied a voice' by Queensland Police [33]. In addition, the Tribunal noted that the perpetrator's position as the victim's sponsor gave him 'considerable power' over the victim, as she was required to be in a relationship with him for 2 years to be eligible for a permanent visa [36].

***SF v Department of Education* [2021] QCAT 10 (13 January 2021) – Queensland Civil and Administrative Tribunal**

'Administrative law' – 'Applicant and children in hiding to escape domestic violence' – 'Application for home education registration' – 'Confidentiality provisions' – 'Following, harassing monitoring' – 'Human rights' – 'Non-disclosure of registered address' – 'Ongoing risk of harm' – 'People with disability and impairment' – 'Separation'

Proceedings: Application for external review of the Department's decision to deny an application for home education registration.

Facts: The applicant and her children had moved in an attempt to escape domestic violence and were forced to hide their location to keep the family safe. The applicant's former partner had used numerous unlikely resources to locate her. One of the applicant's children had been diagnosed with conditions affecting their ability to learn, and the applicant applied to the Department of Education to home school the child. Although her application met the requirements for home education, the Department did not grant the application as the applicant did not provide her street number, street name and town name. Where the approved form required details of "residential address" and "address where the home education will be delivered", the applicant inserted "address suppressed (due to privacy, see attached)" with a town name, a postal address and mobile phone number.

Decision and reasoning: The decision of the Department of Education was set aside and substituted with a decision to grant home education registration for the student.

The Tribunal found that none of the provisions of the *Education (General Provisions) Act 2006* (Qld), read together or in isolation, imposed an express obligation on the applicant to disclose her street number, street name and town name (at [9]-[16]). In addition, while the approved form – which was required for the application – asked the applicant to provide details of her "residential address" and "address where the home education will be delivered", the Tribunal found that the requirements of this will vary according to the

individual circumstances of the case, within the context of the overarching objects and guiding principles. Here, the form could not operate "to require SF to disclose these details in circumstances where it compromises her and her family's safety contrary to those objects and guiding principles" (at [17]-[26]).

The Department made a number of submissions, including that the confidentiality provisions of the Act and its own internal policies were sufficient to ameliorate the risk of unauthorised disclosure. However, the Tribunal was not satisfied that these were sufficient to ameliorate the risk, based on the applicant's evidence and submissions regarding the circumstances of her and her children (at [29]). As at [30]-[31]:

> "The risk for SF is that the confidentiality provisions and policies repose a discretion in departmental officers about the use and disclosure of information, require interpretation by departmental officers and leave it open for a person to apply to the department to access the information under the *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld). Moreover, adding another layer of people with access to SF's information increases the opportunity for human error or failure, with potentially tragic and irreversible consequences.
>
> The more information SF is required to disclose and the more people who have access to that information, the greater the risk to her and her children…"

Moreover, while it was not strictly necessary to consider the substantial compliance provisions of the *Acts Interpretation Act 1954* (Qld) as the Tribunal found that the applicant had provided sufficient information to meet the procedural requirements of the application form, the Tribunal was satisfied of substantial compliance in any event (at [35]-[41]).

Finally, the Tribunal's decision and interpretation of the statutory provisions was compatible with the *Human Rights Act 2019* (Qld). As at [46]-[47]:

> "SF and her children have moved to escape domestic violence. They are still at risk of harm. The child she seeks to home school has a dual diagnosis of conditions affecting the child's ability to learn, sufficient to constitute an impairment and therefore a protected attribute under the *Anti-Discrimination Act 1991* (Qld). SF has identified that her child learns best with one-on-one educational support and has tailored a detailed, goal-directed home education program suited to the child's needs. An interpretation that would mandate SF to provide her street number, street name and town name before granting her application for home education in these circumstances, is not an interpretation that least infringes her and her family's human rights.

> Moreover, the Tribunal does not accept this interpretation limits human rights only to the extent that is reasonable and demonstrably justifiable. The Tribunal accepts SF's evidence of the serious risk to her and her family from an interpretation mandating her to disclose her street number, street name and town name. The Tribunal does not accept that the confidentiality provisions of the Act and the Department's own internal policies are sufficient to uphold her children's right to protection in their particular circumstances."

An interpretation requiring the applicant to disclose her street number, street name and town name was not necessary to achieve the purposes of ensuring the child was properly registered and the applicant was able to be contacted in circumstances where she had provided a postal address, mobile number and details of her circumstances (at [48]).

South Australia

Court of Appeal

South Australia Police v Hill **[2022] SASCA 22 (22 March 2022) – South Australian Court of Appeal**

'Double jeopardy' – 'Impermissible double charging' – 'Subsection 20(3) of the Criminal Law Consolidation Act 1935 (SA)'

Charges: assault aggravated (formerly) in a relationship with the victim x 2, and contravening a term of an intervention order for her protection in a manner involving physical violence or the threat of physical violence x2.

Proceedings: Police appeal against order of Magistrate allowing the withdrawal of pleas of guilt to and dismissal of two counts in ruling each pair of charges involved impermissible double charging.

Facts: The respondent was charged by Police with assault of the complainant aggravated because he was (formerly) in a relationship with her, and contravening a term of an intervention order for her protection in a manner involving physical violence or the threat of physical violence, committed on 16 December 2019. The respondent was later charged by Police with assault of the complainant aggravated because he was (formerly) in a relationship with her and/or used an offensive weapon, and contravening a term of an intervention order for her protection, committed on 29 March 2020. The respondent pleaded guilty to each of these four counts (together with other counts). The Magistrate ruled that each pair of counts involved impermissible double charging. The Magistrate granted permission to the respondent to withdraw his guilty pleas to two of the counts and dismissed them. The Magistrate imposed a single penalty in respect of the remaining counts.

Issue: Firstly, does subsection 20(3) of the Criminal Law Consolidation Act 1935 (SA) create a single offence or multiple offences? Secondly, does a conviction for an offence of contravening a condition of an intervention order, where the contravening conduct comprises a substantive offence, preclude a conviction for the substantive offence when the substantive offence is aggravated by another circumstance and vice versa?

Decision and Reasoning: Appeal allowed.

Held by the Court:

1. (Per Lovell, Doyle and Livesey JJA and Blue AJA) Subsection 20(3) of the *Criminal Law Consolidation Act 1935* (SA) creates a single offence albeit with differential maximum penalties depending on the existence of circumstances of aggravation (at [143] per Lovell and Livesey JJA and Blue AJA (Doyle JA agreeing)).

   (Per Kourakis CJ) It is not necessary to decide whether subsection 20(3) creates one or two offences depending on the existence of circumstances of aggravation (at [19] per Kourakis CJ).

2. (Per Lovell, Doyle and Livesey JJA and Blue AJA) A conviction for contravening an intervention order condition, where the contravening conduct comprises a substantive offence, does not preclude a conviction for the substantive offence or vice versa (at [172] per Lovell and Livesey JJA and Blue AJA; at [178] per Doyle JA).

   (Per Kourakis CJ) A conviction for contravening an intervention order condition, where the contravening conduct comprises a substantive offence aggravated by another circumstance, does not preclude a conviction for the substantive offence or vice versa (at [19] per Kourakis CJ).

3. (Per Kourakis CJ, Lovell, Doyle and Livesey JJA and Blue AJA) The appeal should be allowed and, subject to hearing the parties, a conviction recorded on the two counts dismissed by the Magistrate with no alteration to the sentence imposed by the Magistrate under section 26 of the Sentencing Act 2017 (at [174] per Lovell and Livesey JJA and Blue AJA (Kourakis CJ and Doyle JA agreeing)).

***Groom v Police* [2020] SASCA 1 (22 January 2021) – South Australian Court of Appeal**

'Abuse of process' – 'Application for permission to appeal' – 'Protection order' – 'Systems abuse'

Proceedings: Application for permission to appeal the dismissal of an application for revocation of an intervention order.

Facts: This matter had an extensive history (set out at [7]). The intervention order was originally made on 19 October 2011, and confirmed by consent on 22 February 2012. The applicant's appeal against confirmation of the interim intervention was upheld on 25 June 2013: *Groom v Police (No 3)*. On 10 December 2013, the application to confirm the intervention order was again confirmed by consent in the Magistrates Court. The

applicant's appeal was dismissed by a single judge on 21 March 2014 and an application for permission to appeal to the Full Court refused on 19 November 2014: *Groom v Police*. In December 2014, the applicant was convicted of contravening a term of the intervention order and an appeal was dismissed in July 2015: *Groom v Police*. In 2016, the applicant filed an application to revoke the intervention order, which was dismissed by the Magistrate. Various appeals were dismissed by a single judge and the Full Court in 2017. Notwithstanding the Full Court's judgment, the applicant again applied to a Magistrate to revoke the order made on 19 October 2011 and confirmed on 10 December 2013. The Magistrate dismissed the application on 26 May 2020 and this was affirmed on appeal by Lovell J.

Grounds of appeal: The Magistrate and Lovell J erred in failing to find that there was new and compelling evidence to demonstrate that the order was invalid and should be revoked.

Held: The Court not only dismissed the application for permission to appeal but also held at [10]-[11] that:

> "In our view, the latest material filed in support of the application for permission to appeal demonstrates that the applicant continues to attempt to relitigate matters previously ventilated and considered in the Magistrates Court, by the various Judges of this Court and by the Full Court.
>
> We consider the current application for permission to appeal, in the circumstances, to be an abuse of process."

The Court referred the matter to the Attorney-General to consider whether there were proper grounds for an application to be made under s 39 of the *Supreme Court Act 1935* (SA) to stay any further proceedings sought to be instituted by the applicant (at [12]-[13]).

Supreme Court - Full Court

Police v Peel **[2021] SASCFC 7 (5 February 2021) – South Australia Supreme Court (Full Court)**

'Breach of suspended sentence bond' – 'Breach protection order' – 'Prosecution appeal against decision to allow appeal' – 'Protection order'

Charges: Several offences including contraventions of an intervention order and breach of suspended sentence bond.

Proceedings: Prosecution appeal against Supreme Court decision to allow respondent's appeal against breach of suspended sentence bond: *Peel v Police* [2020] SASC 48 (7 April 2020).

Facts: The male respondent was convicted of several offences including contraventions of an intervention order protecting his female former partner. He was sentenced to 4 months and 15 days imprisonment, partially suspended on a good behaviour bond. The respondent breached the bond by further contravening the intervention order. The Magistrate declined to excuse the breach and revoked the suspension. A single judge allowed the respondent's appeal.

Grounds of appeal: Whether "proper grounds" existed for excusing a failure to comply with a suspended sentence bond.

Held: The single judge below erred, but there was no utility granting permission to appeal or allowing the appeal in this case as the respondent had served the unexpired portion of the sentence.

Consideration of whether there are "proper grounds" involves "consideration of the nature of the breach and the circumstances in which it was committed, and of any disproportionality between the nature and extent of the breach and the severity of the consequence of revoking the suspension and requiring the original sentence to be served" (at [38]). Any history of similar offending may be relevant "on the basis that it informs a full understanding of both the seriousness of the breach offending, and of the circumstances in which, and reasons for which, the original suspended sentence was imposed and hence the proportionality or otherwise of revoking the suspension of that sentence"(at [44]).

The Magistrate was entitled to have regard to the respondent's history of similar offending, which was a "relevant, and indeed quite significant consideration" in the context of the case, and the judge below erred in concluding otherwise (at [46]).

***Warne v The Queen* [2020] SASCFC 124 (21 December 2020) – South Australian Supreme Court (Full Court)**

'Appeal against re-sentence' – 'Appeal against sentence' – 'Coercive control' – 'Misuse of alcohol or drugs' – 'Physical violence and harm' – 'Protection orders' – 'Self-defence' – 'Separation' – 'Strangulation' – 'Threats to kill' – 'Weapons'

Charges: Basic assault x 1; Aggravated assault causing harm x 2; Possession of a Class A firearm without a licence x 1; Aggravated threatening life x 1; Aggravated assault x 3.

Proceedings: Appeal against re-sentence (re-sentence was imposed following a successful appeal against conviction).

Facts: The offences occurred in connection with a domestic relationship between the appellant man and his female former partner. The appellant was convicted of 8 charges following a trial by jury. He was sentenced to 4 years and 5 months imprisonment, with a non-parole period of 3 years. The appellant successfully appealed his conviction on one count of aggravated assault causing harm. The re-sentencing arising from the appeal against conviction was undertaken by a different judge, as the first sentencing judge had retired. The re-sentencing judge imposed a sentence of 4 years and 9 months imprisonment, with a non-parole period of 3 years and 4 months.

Grounds of appeal:

1. It was an error to impose a head sentence and a non-parole period that was greater than that which had been imposed prior to the appellant's successful appeal.
2. The re-sentencing judge's starting point was too great.
3. The re-sentencing judge erred in finding that home detention was not appropriate in all the circumstances.
4. The re-sentence was manifestly excessive.

Held: The appeal was allowed. Based on the submissions made to the re-sentencing judge and the content of the sentencing remarks made, Hughes J (with Peek and Stanley JJ agreeing) inferred that the re-sentencing judge overlooked the approach to be taken when imposing subsequent sentences for the same offending

identified in *R v Baltensperger* [2004] SASC 392. In re-sentencing, the judge is "required to firstly have regard to the original sentence and only upon concluding that if there is good reason to depart from it, sentencing in a different manner. Where there is a departure, it would be appropriate to provide some explanation for it and in this case, there was none" (at [41]). This inference gained further support by the lack of significant disparity between the re-sentence and the original sentence (at [42]).

After considering the relevant circumstances, Hughes J held that the original sentence was not manifestly excessive (at [48]-[56]). Hughes J (Peek and Stanley JJ agreeing) noted a controlling course of conduct:

> [51] The course of conduct in February 2017 was sustained and violent. The appellant caused injuries to the victim and also sought to control her with frightening and dangerous behaviour tending to place her in fear for her life and to submit. That was reinforced by the explicit threat made by the appellant to the victim whilst he directed a firearm at her at close range. There has been no expression of remorse or contrition by the appellant, or any indication of insight on his part with respect to his conduct.

However, the circumstances concerning the count of aggravated assault causing harm, which was successful on appeal, were to be properly viewed as separate from the other acts as charged, thereby not attracting principles of concurrency. This was therefore the basis for imposing a sentence lower than the original sentence namely, 4 years' imprisonment with a non-parole period of 2 years and 8 months (at [57]-[59]).

***Warne v The Queen* [2020] SASCFC 12 (26 February 2020) – South Australia Supreme Court (Full Court)**

'Appeal against conviction' – 'Physical violence and harm' – 'Protection orders' – 'Self-defence' – 'Separation' – 'Strangulation' – 'Threats to kill' – 'Weapons'

Charges: Assault x 1; Aggravated assault x 3; Aggravated assault causing harm x 2; Possessing a firearm without a licence x 1; Aggravated threatening life x 1.

Proceedings: Appeal against conviction.

Facts: The complainant in respect of each of the charges of violent offending was the male appellant's then female partner. The assault charges were aggravated by reason that they were alleged to have occurred in contravention of an Intervention Order.

Grounds of appeal:

1. The trial judge erred in failing to direct the jury as to their obligations to decide the case only on the evidence, to not discuss the case with persons other than their fellow jurors, to not make their own enquiries, and to bring to the trial judge's attention any departure from the above by any member of the jury.
2. The trial judge erred in failing to direct the jury as to self-defence.
3. The trial judge's directions lacked balance to the extent that they resulted in a miscarriage of justice.
4. The trial judge erred in failing to adequately direct the jury in relation to the potential implications for the complainant's credit of the timing of the photographs purportedly showing the injuries alleged to have been sustained during the course of the conduct the subject of count 1.

Held: Permission to appeal in respect of grounds 1 and 2, and allowing the appeal on ground 2, but only to the extent of setting aside the conviction on count 2 (aggravated assault causing harm) and ordering a retrial on that count, and otherwise dismissing the appeal.

Ground 1: The trial judge ought to have given post-empanelment directions to the effect contended for by the appellant. Nevertheless, there was no miscarriage of justice. This was not a case where there had been media publicity and the appellant did not identify any information of significance that might have been available through internet searching. It was speculative to suggest that the jury's deliberations were infected by extraneous information.

Ground 2: There was a sufficient evidential basis to require that the trial judge leave self-defence to the jury in respect of the charge the subject of count 2 as the alleged assault was immediately preceded by verbal and physical aggressive conduct by the complainant. The trial judge's directions in this respect were inadequate, falling short of an accurate and clear articulation of the defence.

However, the court did not accept that the evidence as to the generally volatile nature of the parties' relationship, and instances of aggressive behaviour by the complainant on other occasions (including her use of an axe in the context of the incident leading to count 2), provided a sufficient evidential foundation for self-defence in respect of the balance of the counts of violent offending with which the appellant was charged.

The appeal in respect of ground 2 was allowed, but only to the extent of setting aside the conviction on count 2.

Application for permission to appeal on grounds 3 and 4 was dismissed. The appellant did not demonstrate any lack of balance in the trial judge's summing up.

Subsequent appeal against re-sentence was allowed: *Warne v The Queen* [2020] SASCFC 124 (21 December 2020).

***SPC v The Queen* [2020] SASCFC 43 (28 May 2020) – South Australia Supreme Court (Full Court)**

'Children' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charges: 8 counts, including aggravated causing harm with intent to cause harm, aggravated threatening life, rape

Case type: Appeal against conviction

Facts: The appellant an was convicted of 2 counts of aggravated causing harm with intent to cause harm, 3 counts of aggravated threatening life and 2 counts of rape. He was acquitted of a charge of aggravated cause harm. The victim was the appellant's wife, who had migrated from China in 2009, and with whom the appellant had children. The victim testified that their relationship was marred by verbal, physical and sexual abuse, and recounted an incident of violence and rape which had preceded the charged counts (relationship evidence).

Grounds:

- The judge failed to adequately direct the jury on the use of evidence of the victim's distress when she reported the offending to a police officer.
- The judge failed to properly direct the jury on the use of the evidence of the violent relationship on the element of consent on the rape charges.
- The verdict on the last rape offence (Count 8) was unreasonable because the evidence could not exclude the possibility that the appellant failed to appreciate that the victim was not consenting.

Held: Kourakis CJ (Nicholson and Bampton JJ agreeing) dismissed the appeal.

As to ground 1, the appellant argued that the judge failed to give any directions as to the proper use of the evidence of the victim's distress when she attended at the police station. It was submitted that the judge

should have directed the jury that (1) because of the passage of time and the significance of the reconciliation contended for by the appellant, the distress was not relevant; and (2) if they were to use the distress as circumstantial evidence of consistency with respect to the alleged rape, they would need to be satisfied that distress was not an emotional reaction to the victim's decision to leave the appellant ([36]). The Court, however, dismissed this ground for 4 reasons. First, it was not put by the prosecutor, nor left to the jury by the judge, that the victim's distress was corroborative or supportive of her testimony ([44]). Second, the evidence was admissible due to the close temporal connection to the last rape offence, the degree of distress and the circumstances in which the victim abandoned the course in which she had enrolled to report the appellant's violence against her. The distress was also proximate to the rape the victim alleged occurred the night before ([45]). Third, the alternative explanations for the victim's distress proposed on appeal were unrealistic ([46]). Fourth, counsel for the appellant at trial consented to the judge's proposal not to give any directions on the evidence of distress ([47]).

As to ground 2, the appellant's complaint primarily related to the judge's failure to give specific directions on how the relationship evidence was relevant to prove the mental element on 2 of the rape counts ([50]). The Court found that the the judge's directions on the use of the relationship evidence in considering whether the objective elements of the offence had been established were sound ([56]). The judge did not err by omission in not directing the jury to ignore the relationship evidence on the question of the appellant's appreciation of whether or not the victim was consenting to sexual intercourse on the rape charges. Neither counsel referred to the relationship evidence on that issue. It was common ground that, notwithstanding their violent relationship, consensual sexual intercourse was a feature of their relationship. The proper use of the relationship evidence on the subjective element of the rape charges was, therefore, not a live issue at trial.

The verdict on count 8 was not unreasonable. It was sufficiently supported by the victim's evidence, and there was no evidentiary matter capable of raising a doubt as to the appellant's guilt which could not be dissipated by the jury's evaluation of her testimony ([64]).

***R v Roberts* [2019] SASCFC 94 (1 August 2019) – South Australia Supreme Court (Full Court)**

[Summary prepared by Magistrates' Associates of the Adelaide Magistrates Court]

'Admissibility' – 'Assault' – 'Evidence' – 'Propensity' – 'Relevancy'

Charges: Causing harm with intent to cause harm

Appeal type: Appeal against conviction

Facts: The defendant was convicted by jury of causing harm with intent to cause harm to the complainant who he was in a sexual relationship with. The defendant, while intoxicated, grabbed her and dragged her out of the house, pushed her on to the footpath and kicked her body causing various injuries. The appellant's brothers Stephen and Joe were present at the house. The complainant said that before living with the defendant, a former partner, Ray, had also been violent to her. The defence put to the complainant in cross-examination that it was Ray not the appellant who assaulted the complainant. Ray was deceased by the time of the trial. The complainant gave:

- General evidence that the appellant was 'rough to [her] nearly everyday [they] were together' and 'slapped' her around; and
- Specific evidence that on 14 February 2017 the appellant was angry at her and twisted and broken her arm for which the injury required surgery. The complainant lied to medical staff that she had fallen off a deck.

A police officer who attended the scene gave evidence of two tranches of the appellant's brother, Stephen's, statements and conduct:

- The first tranche was that Stephen 'loudly told police to leave the property and shut the front door'.
- The second was that when told the appellant was arrested for assaulting the complainant, Stephen stated 'If she's saying those things she needs to be dealt with. She needs to learn the Aboriginal way'.

Grounds of Appeal:

- Ground 1: Did the Trial Judge err in admitting the specific evidence as to the appellant having broken the arm of the complainant on 14 February 2017, and in doing so cause a miscarriage of justice?
- Ground 2: Did the Trial Judge err at law in admitting evidence of words spoken out of Court by a person not called as a witness (Stephen Roberts), and in doing so cause a miscarriage of justice?

Held:

- Ground 1: Peek J and Hughes J allowing the appeal, Kourakis CJ dismissing the appeal.
- Ground 2: Peek J allowing the appeal, Kourakis CJ and Hughes J concurring.

Reasons:

Ground 1 – Kourakis CJ (dismissing)

- ‘The admissibility of evidence of a violent relationship…between a perpetrator and a victim involved in a domestic relationship has long been held to be admissible on a charge of a violent criminal offence’ citing R v Olasiuki (1973) 6 SASR 255 at 263-264 and R v Hissey at [2] (1973) 6 SASR 280.
- On the admission of the evidence relating to the breaking of the complainant’s wrist by the appellant, the jury ‘could not reason in the appellant’s favour that he was unlikely to be the complainant’s assailant because he was in a romantic relationship with her’ at [4].
- ‘The risk of misuse of discreditable conduct evidence is greatest when it is admitted as propensity evidence. It is more difficult to compartmentalise specific propensity reasoning from bad person reasoning’ at [9]
- The probative value of the evidence ‘substantially outweighed any prejudicial effect’ as ‘it showed that the appellant’s romantic relationship with the appellant did not inhibit him from bashing and slapping her around and, importantly, causing her serious bodily harm three weeks earlier’ and as such was admissible under s 34P(2)(a) at [10].
- The evidence of the broken arm assault ‘did not materially add to the prejudicial effect of the evidence that the appellant bashed and slapped around the complainant’ at [10].
- ‘Prejudice is not necessarily accumulated by the arithmetic addition of the occasions of discreditable conduct. The prejudice lies in the error of reasoning’ at [10].

Ground 1 – Peek J (allowing) (Hughes J concurring)

- In relation to s 34P(2)(a) prosecution often contend in domestic violence matters that there is a ‘permitted use’ under s 34P(2) for the admission of evidence of prior conduct at [74].
- The only ‘permitted use’ here is said to be that such evidence is relevant to the alleged assault on the basis that ‘the assault did not come out of the blue’ (the out of the blue argument) at [74].
- The out of the blue argument is often linked to and strengthened by delays in reporting to police due to fears of repercussions and situations where the existence of a violent relationship is established or confirmed by independent evidence at [76].
- ‘If only evidence of the specific allegation is led…it is not unlikely that members of a jury may gain the

impression that the assault charged involves an incongruous, unprovoked and unexplained occurrence' at [75].

- Tection 34P(2)(a) requires that separate assessments must be made as to both 'any probative value' and 'any prejudicial effect' of the evidence to determine whether the prosecution have 'demonstrated that the former substantially outweighs the latter' at [77].
- In relation to the probative value: If the 14 February 2017 assault is set aside it may be contended that 'there is an apparent difference in the evidence of the complainant as between the usual degree of violence ('rough' and 'slapping around') and 'the high degree of violence alleged to be involved in the subject assault' at [79].
- The out of the blue argument in this matter is narrow. There was no delay in reporting and there is no independent evidence outside of the complainant's to establish the existence of a violent relationship at [81].
- In relation to the prejudicial effect: although prosecution eschewed any reliance on s 34P(2)(b), the question arises under s 34P(2)(a) and s 34P(3) 'as to the extent of the risk that the jury might adopt a process of propensity reasoning due to the doubling of the number of allegations of a high level of violence in circumstances where the allegations appeared superficially similar' at [82].
- The prosecution did not call medical evidence in relation to the 14 February 2017 assault and in doing so denied the appellant 'the ability to cross-examine as to whether such injuries where more consistent with her original history of falling from a deck than her later version of an assault' at [82].
- Under s 34P(3) the Judge is 'specifically required' to determine whether the permissible use can be kept 'sufficiently separate and distinct from the impermissible use' at [83].
- 'It is quite evident from the transcript that the Judge did not undertake a sufficient analysis of the application of s 34P and did not refer to s 34P(3) at all' at [83].

Ground 2 - Peek J (allowing) (Kourakis CJ and Hughes J concurring)

- The prosecution 'attempted to justify the admission of both tranches of Parkinson's evidence by citing Walton v The Queen (1989) 166 CLR 283 and R v Hendrie (1985) 37 SASR 581 that stand for the proposition that 'in some circumstances a person's state of mind may be proved by contemporaneous acts or statements made by that person' at [27].
- Although the decisions in Walton and Hendrie are 'unexceptionable', '…the danger of proliferation of tendering evidence of statements or actions of persons not called as witnesses must be guarded against'

at [36].

- Evidence of this nature should only be received ‘if it is of direct and immediate relevance to an issue which arises at trial’ (R v Blastland [1986] AC 41, 53 and R v Szach (1980) 23 SASR 504) at [47].
- The trial judge admitted the evidence of Parkinson in this case to rebut the suggestion put to the complainant in cross-examination that she was assaulted by someone else other than the complainant at [52].
- While it was open to the prosecution to call further evidence that it was not Ray that has assaulted the complainant, this evidence had to be admissible at [58].
- In relation to the first tranche: Stephen’s ‘less than cordial welcome of police arriving at his home was entirely consistent with personal beliefs or feelings he holds about police which could be referable to any number of reasons or previous experiences’ and not necessarily connected to the crime at [60].
- The second tranche of evidence the prosecution’s position is that Stephen’s statement was’ "Consistent" with knowledge that the appellant did consult the complainant’. However, there was in fact no evidence that Stephen knew who assaulted the complainant
- The evidence as to Stephen Roberts’ statement and conduct was ‘nebulous and highly speculative’ as distinct from being directly relevant to trial at [60].
- It ‘is simply not the type of clear and unequivocal "state of mind" evidence’ referred to in Hendrie and Walton. There was no evidence that Stephen knew who assaulted the complainant at [63].
- The prosecution was ‘simply not permitted to tender evidence of an action or statement of a person who they were not prepared to call, on some sort of ‘prophylactic’ basis that the jury might consider that the words were consistent with a prosecution case theory’ at [64].

Appendix 1: 34P–Evidence of discreditable conduct

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (discreditable conduct evidence)–
(a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

(b) is inadmissible for that purpose (impermissible use); and

(c) subject to subsection (2), is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (the permissible use) other than the impermissible use if, and only if–
(a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and

(b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue–the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

***R v Wilton* [2019] SASCFC 65 (13 June 2019) – South Australia Supreme Court (Full Court)**

'Adequacy of directions to jury' – 'Confessions and admissions' – 'Miscarriage of justice' – 'Property offences'

Charges: 1x aggravated serious criminal trespass in a place of residence, 1x theft.

Appeal type: appeal against conviction of above charges.

Facts: The appellant and the complainant were in a relationship and two children were born of that relationship. The appellant and the complainant had separated and there were family court orders allowing the appellant fortnightly access to the children and restraining him from being within 50 metres of the complainant's house. The appellant was found in the complainant's house in possession of various items belonging to the complainant. Upon the police's arrival, the appellant stated, "I fucked up" and begged the

complainant not to press charges.

Issues: The appellant advanced two grounds of appeal; both grounds were considered together since they were intrinsically linked in both time and context ([42]). The appellant argued that the trial Judge failed to give adequate directions to the jury as to the use that could be made of the purported confessional statement “I fucked up” and the evidence of the appellant begging not to be charged ([3]).

Decision and reasoning: appeal dismissed.

To illustrate that the trial judge’s directions were not deficient, Parker J first made two material observations of the trial proceedings. The first was that the trial Judge reminded the jury of the defence’s submission that the appellant’s remarks were potentially equivocal and couldn’t be regarded as determinative ([47]). The second was that the trial Judge expressly stated that the use that could be made of the appellant’s behaviour was entirely within the jury’s discretion; it could be used for or against him, rejected in whole or in part, or attributed with different degrees of significance ([48]).

His Honour then referred to the observations of the High Court in *RPS v The Queen* to reflect the absence of any error in the trial Judge’s directions. In the extract, the High Court stated that the facts are to be determined by the jury and the trial Judge may comment on the facts but often the safest course for a trial Judge will be to make no comment on the facts beyond reminding the jury of the arguments of counsel ([49]). In addition, for the same purpose, his Honour referred to similar observations made in *R v Golubovic* where it was pointed out that in trials such as the one at hand, there may be little need for the judge to identify the issue or explain the cases of the parties ([50]).

Collectively, these observations are said to point towards a key principle relevant to the appeal, that is, when considering the adequacy of the Judge’s directions to the jury, it is important that the factual issues are few and not complex ([49]-[51]).

For these reasons, amongst others, his Honour deemed that it was unnecessary for the Judge to provide more elaborate directions in the terms suggested by the appellant (see [3]). The directions given by the Judge were viewed as sufficient to ensure the jury wasn’t confused about the issues that needed to be determined ([53]).

***Police v Heritage* [2019] SASCFC 60 (31 May 2019) – South Australia Supreme Court (Full Court)**

'Activation of suspended sentence' – 'Breach of conditions of good behaviour bond' – 'Sentence'

Charge: Aggravated assault.

Appeal type: Appeal against Magistrate's sentence (excusal of breach of bond).

Facts: In 2016 the respondent assaulted his partner and was sentenced to imprisonment for 9 months, suspended upon entering into a good behaviour bond for 18 months. In 2017 the respondent breached his good behaviour bond by committing a further assault on his partner. The Magistrate excused the breach of bond, extended the bond by 6 months, and sentenced the respondent to imprisonment for 28 days for the fresh offending suspended upon the respondent entering into a further good behaviour bond for 18 months. The Police appealed against the excusal of the breach of bond 'on the ground that, in excusing the breach, the Magistrate erroneously relied on the respondent's personal circumstances as opposed to the nature and circumstances of the offending' at [3].

Appeal dismissed by single Judge. Police sought permission to appeal to Full Court.

Issue: Did the Magistrate erroneously rely upon the respondent's personal circumstances as opposed to the nature and circumstances of the offending when excusing the breach of bond?

Decision and reasoning: Granting permission to appeal and dismissing the appeal, the Full Court held:

'The approach by the Magistrate to the finding of *proper grounds* to refrain from revoking the suspension was erroneous, as was the Magistrate's conclusion that there were *proper grounds* to refrain from revoking the suspension' at [41]. 'The Judge erred in concluding that the Magistrate did not rely on the respondent's personal circumstances in deciding to refrain from revoking the suspension' at [47]. Notwithstanding the error, the appeal should be dismissed in the exercise of the court's residual discretion, as the respondent has been living a law-abiding life in the community for an extended period of time since being sentenced, and the balance of the original period of suspension of the original sentence and the extended period of the suspension has now expired at [63].

Reasoning - proper grounds:

The police relied upon a series of decisions commencing with *Norman v Lovegrove* [1986] 40 SASR 266and

R v Buckman [1988] 47 SASR 303 in which the Supreme Court held that when determining whether there are *proper grounds* within the meaning of s 58(3) of the *Criminal Law (Sentencing) Act 1988* (SA)—a largely identical provision is now contained in s 114(3) of the *Sentencing Act 2017* (SA)—upon which a breach of bond should be excused, those proper grounds must relate to the 'nature and circumstances of the breaching offence as opposed to the personal circumstances of the defendant' at [13]. Blue J held in relation to the meaning of the expression *proper grounds* that 'it has authoritatively been decided by this Court and it follows from the text, context and evident purpose of subsection 58(3) that those grounds are confined to the nature and circumstances of the breach; they do not extend to personal circumstances of the offender or to circumstances occurring after the breach' at [22]. His Honour reasoned that the 'distinction between circumstances of the offence and personal circumstances is well understood in practice although it is more difficult to define in *a priori* terms. The circumstances of the offence comprise those circumstances existing at the time of commission of the offence which bear on the culpability of the offender in committing the offence' at [31].His Honour differentiated between a 'circumstance of the offence', for example, an offender suffering a mental impairment which contributed to the committing of the offence, and a 'personal circumstance', for example, where 'it is desirable that a defendant receive treatment for a mental impairment which cannot effectively be provided in prison' or where hardship is caused to the defendant's dependant at [31].

His Honour, at [35], cited the Magistrates three reasons for refraining from revoking the suspension:

- That the respondent needed professional assistance to address his mental health and anger management issues;
- That the respondent was supporting his partner and 10 month old child who would suffer hardship if the respondent were to be imprisoned; and
- That the revocation of the suspension of the sentence of imprisonment would be disproportionate and oppressive to the 2017 offending.

His Honour held that reasons 1 and 2 were personal circumstances. While the third reason related to the circumstances of the breach, his Honour held that 'there was no basis on which it was open to the Magistrate to conclude that activation of the original sentence would be a disproportionate consequence of the 2017 offending' at [40].

Reasoning – the reasons of the Judge:

The Judge referred 'to decisions of single Judges of the Court that the Full Court authorities do not preclude a

court taking into account personal circumstances', however, stated that it was not necessary to decide this as the Magistrate did not take into account the respondent's personal circumstances when deciding to restrain from revoking the suspension' at [43]. Blue J held the Judge erred in his conclusion that the Magistrate did not rely on the respondent's personal circumstances in refraining from revoking the suspension.

Reasoning – permission to appeal:

Permission to bring a second appeal by the Crown against sentence by a magistrate 'will only be granted in rare and exceptional cases. This will ordinarily only be when it is necessary to establish or maintain correct sentencing principles or adequate sentencing standards or where the error is so disproportionate to the seriousness of the crime that it demands correction on appeal' at [49]. Permission to appeal should be granted 'having regard to the importance of the maintenance of the correct sentencing principles and the availability of the residual discretion' at [61]. However, as allowing the appeal would have resulted in the defendant's imprisonment after he had been living a law-abiding life in the community for a sustained period' at [62], the Court should dismiss the appeal in the exercise of its residual discretion.

***R v Dhir* [2019] SASCFC 55 (22 May 2019) – South Australia Supreme Court (Full Court)**

'Misdirection or non-direction' – 'Permissible and impermissible use of evidence' – 'Sexual and reproductive abuse'

Charges: 1 x digital rape (count 2), 4 x aggravated assault causing harm (counts 1, 3, 4 and 5).

Appeal type: Appeal against conviction of above charges.

Facts: The appellant and complainant were married. The appellant allegedly committed the rape by putting his hand under the complainant's jeans at a train station platform. The assault (count 3) was alleged to have been committed soon after the rape when the couple was walking home from the train station. The remaining offences were committed in the matrimonial home.

Issues: The appellant appealed against the convictions on seven grounds (see [4]), all of which generally concerned the directions given to the jury by the Judge.

Decision and reasoning: appeal was allowed on grounds 3, 4, 5 and 7 and dismissed on grounds 1, 2 and 6. All convictions ordered on the District Court information were quashed and the matter was remitted for a new trial.

For the purposes of convenience, Kourakis CJ first dealt with the fifth ground of appeal in which the appellant contended the Judge erred in directing the jury to ignore a defence submission concerning the plausibility of the digital rape charge (see [49]-[50]). His Honour accepted this ground of appeal, claiming the Judge withdrew a legitimate and factually compelling submission ([50]) with the likely effect of leading the jury to interpret the Judge's direction as withdrawing the defence counsel's broader implausibility submission (of which this particular submission formed an integral part of) from their consideration ([51]).

The first ground of appeal was divided into two complaints; his Honour rejected the first complaint, stating it was unnecessary to draw the distinction in order to comply with s 34R of the *Evidence Act 1929* (SA) (see [53]). As to the second complaint, His Honour acknowledges that the Judge ought to have expressly directed the jury in relation to the impermissible use of the discreditable conduct evidence under s 34R(1) of the *Evidence Act 1929* (SA). In failing to do this, the Judge was said to have failed to comply with the obligations laid out under s 34R(1). Nonetheless, such an omission did not occasion any miscarriage of justice and the second complaint was therefore rejected ([58]).

His Honour notes the merit of the second ground of appeal in stating that the Judge should have directed the jury as to the limited use that could be made of the alleged admissions ([59]). However, his Honour discerned no miscarriage of justice in this omission on the Judge's part, particularly in light of the Judge's cautionary observations ([45]-[46]) and the fact that the complainant's evidence was proven unreliable in any event ([59]).

The third, fourth and seventh ground of appeal raised a particular issue that was considered through the relevant authorities (see [61]-[75]). Ultimately, his Honour allowed these grounds of appeal in recognising that the Judge placed undue weight to the evidence of distress.

***R v Mark* [2019] SASCFC 48 (9 May 2019) – South Australia Supreme Court (Full Court)**

'Appeal against sentence' – 'Grounds for interference' – 'Sentence manifestly excessive'

Charges: 1x aggravated assault, 1x breach of a suspended sentence bond.

Appeal type: appeal against sentence for the above offences.

Facts: the appellant punched his domestic partner in the face. In doing so, the appellant breached the intervention order in place at the time which prohibited the appellant from assaulting, threatening or

intimidating his domestic partner. The appellant entered a guilty plea to the assault charge and the matter was transferred to the District Court for sentencing with the breached bond and other matters. An 11-month sentence was imposed for the aggravated assault while the suspended sentence was revoked and a six-month sentence (subject of the good behaviour bond) was ordered to be served cumulatively on the sentence for the aggravated assault.

Issues: the appellant's grounds of appeal were two-fold. First, the sentence imposed for the aggravated assault was manifestly excessive ([6]). Second, the judge erred in sentencing the appellant on the basis that the offence was committed against a background of previous domestic violence ([6]).

Decision and reasoning: appeal was allowed, sentence imposed by trial Judge was set aside and the appellant was resentenced (see [36]).

His Honour first set out the authority and principles relevant to determining whether to interfere on appeal with a decision on sentence and whether a sentence is manifestly excessive ([17]-[21]).

His Honour rejected the appellant's submission that the assault was on the lower end of the scale of seriousness. A single punch to the face was deemed serious by his Honour in light of the fatal consequences such an action may have had ([23]-[24]). It's seriousness was also heightened by the fact it was committed with an intervention order in place at the time which aimed to protect the victim from the assault that occurred ([27]).

Whether the starting point of 18 months for a first offence of violence produced a sentence outside the permissible range for the offending and offender in question was determined in reference to multiple factors. First, the importance of specific and general deterrence in sentencing for offence of domestic violence lent some justification to the sentence imposed ([26]). Second however, the offender's poor track record of responding to the leniency extended to him by the courts (see [10]) was considered in light of his personal and mitigating circumstances ([28]). Ultimately, notwithstanding the seriousness of the offending, and having regard to the fact that the assault was the appellant's first offence of violence, his Honour concluded that a starting point of 18 months was too high and outside the permissible range of sentences for this offending and this offender ([31]).

The second ground of appeal was allowed since the factual basis of the judge's sentence lacked a sufficient foundation on the evidence presented to the court and wasn't actually conceded by the appellant ([32]).

***R v Adamson* [2018] SASCFC 114 (11 November 2018) – South Australia Supreme Court (Full Court)**

'Arson' – 'Damaging property' – 'Evidence'

Charges: Arson x 1.

Appeal type: Appeal against conviction.

Facts: The appellant was found guilty of arson following jury trial. It was alleged that he deliberately lit a fire inside a townhouse in which he and his partner lived until their separation three weeks prior to the fire. His alibi was that he was at a lacrosse club at the time that the fire was lit. The prosecution relied upon a number of items of circumstantial evidence which it argued cumulatively showed the appellant's guilt beyond a reasonable doubt.

Issues: The appellant appealed his conviction on the basis that the guilty verdict was unreasonable and cannot be supported having regard to the evidence, and in particular in consideration of his alibi. He contended that no reasonable jury could have rejected his alibi as a reasonable possibility.

Decision and reasoning: In considering the grounds of appeal, the Court applied the principle set out *M v The Queen* [1994] HCA 63, namely, whether, on the totality of the evidence, it would be open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. On a thorough analysis of all the evidence, the Court dismissed the appeal on the basis that:

- The evidence established that the fire in the townhouse had been deliberately lit. It also established that a few hours prior to the fire being lit, the appellant spoke of burning it down.
- The strength of the evidence that supported the appellant's alibi was a matter for the jury, to be considered in light of the other evidence presented in the trial.
- There was a sufficient basis in the evidence for the jury to reject the appellant's alibi as a reasonable possibility, and to find beyond reasonable doubt that he deliberately lit the fire.

***R v Peet* [2018] SASCFC 91 (5 September 2018) – South Australia Supreme Court (Full Court)**

'Children' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Sentencing'

Charges: Murder.

Appeal type: Appeal against sentence.

Facts: The circumstances of the offending were that early in the morning, following an argument with the respondent's partner, during which she slapped, kicked and hit him with a vacuum cleaner pole, the respondent struck her with a crow bar at least six times. The respondent dragged her body to the laundry where he placed a cable tie around her neck and tightened it. The combined effect of the blows and the compression of her neck caused her death. Not long after this occurred the children woke. The respondent made breakfast for them. He then went outside and smoked a cigarette before returning inside. There was a knock at the door. The respondent put the children in their rooms and told them to be quiet. He did not answer the door and the people knocking went away. At some point, and possibly whilst the people were still at the front door, the respondent went back to each child. The respondent restrained the six-year-old with cable ties and placed a sock in her mouth, fixing it in position with packing tape. He placed a cable tie around her neck and tightened it. Her death was caused by the combined effect of suffocation and asphyxiation. The respondent also restrained the five-year-old with cable ties and asphyxiated him. His tongue was bruised suggesting that prior to death he too may have had something placed in his mouth obstructing his airway.

The sentencing Judge sentenced the respondent to life imprisonment with a non-parole period of 30-years to commence on the day the respondent was taken into custody. The sentencing Judge accepted that the respondent was experiencing a degree of dissociation when he killed the children. On appeal, the DPP contended that the 30-year non-parole period was manifestly inadequate, and submitted that the inadequacy was so great, having regard to the gravity of the offending, that the Court should increase the non-parole period to ensure the maintenance of adequate standards of punishment for the offence of murder. The respondent conceded that the non-parole period was manifestly inadequate and that it should be set aside and a new non-parole period fixed.

Issues: Whether the sentence was manifestly inadequate.

Decision and reasoning: The Court took into account the respondent's personal circumstances ([87]), loss felt by the family ([85]), and the value of human life. At [83]-[84], the Court noted that –

> *'A just sentence in the present case must accord due recognition to the human dignity of three victims… It has been said that the value of human life is intrinsic. The murderer denies their victim life and all the potentialities that accompany living which are of inestimable worth. Speaking generally, that denial, that exaction, cost or loss, is magnified where the victim is a child. The younger and more innocent the child*

> *the more the murderer repulses us as a community and the more grave or heinous the act of murder because of the value we place on life.'*

The punitive, protective and rehabilitative purposes of fixing a non-parole period were also relevant. The punitive purpose in particular reflected the gravity of the offending. The sentencing Judge found that the respondent intended to kill each victim. As King CJ said in *R v Stewart* (1984) 35 SASR 477, multiple murders fall into the worst category of offending. Therefore, condign punishment was afforded great weight. The Court also noted that the respondent should not be left without hope for spending some time in the community again in the future, as this promotes rehabilitation. The murder was not premeditated in the conventional sense. The murder also occurred in the context of a relationship characterized by domestic violence. The murder was described at [78] as being brutal and the final act cold and lacking in humanity. Citing *Munda v Western Australia* (2013) 249 CLR 600, 'A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner'. Although the sentencing Judge found that the respondent suffered a degree of dissociation at the time of the incident, this neither prevented him from forming the intent to kill nor did it prevent him from understanding the nature and quality of his actions. It helped him to depersonalize his two children, but did not prevent him taking action which he considered necessary for the purposes of his own self-preservation ([80]).

The Court found that the determination of a non-parole period in this case could not be reduced to a formula and that the totality principle was applicable to the setting of a non-parole period in relation to a life sentence for murder. The Court allowed the appeal and held that the non-parole period fixed by the sentencing Judge was manifestly inadequate. A non-parole period of 36 years was substituted. Although the respondent was entitled to a discount of up to 10% on the basis of his guilty pleas, to allow the respondent any further reduction would result in a non-parole period unacceptably disproportionate to the gravity of the offending which would vindicate the dignity of the victims ([90]).

***R v Hibeljic* [2018] SASCFC 35 (11 May 2018) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Emotional and psychological abuse' – 'Following, harassing and monitoring' – 'Imprisonment' – 'People from culturally and linguistically diverse backgrounds' – 'Sexual and reproductive abuse' – 'Women' – 'Young people'

Charges: Blackmail x 1; Knowingly distributing an invasive image x 1.

Appeal type: Appeal against sentence.

Facts: The appellant had been in a relationship with the victim. They were both 18 years old. He threatened to distribute a video of the victim with her breasts exposed unless she had sex with him, and in fact distributed it to three people (her friend, new boyfriend and father). He knew that her father was of Syrian background, very strict and was likely to react harshly if he became aware of the video ([10]). Upon watching the video, her father subjected her to 'significant physical harm' in a 'frightening and vicious physical attack' ([22]). The victim's relationship with her family was significantly damaged, and she was forced to leave Adelaide and abandon her tertiary education ([24]).

The sentencing judge sentenced the appellant to 3 years and 3 months' imprisonment with a non-parole period of 15 months.

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The Court of Appeal dismissed the appeal, holding that the sentence was not manifestly excessive. It was significant that both offences involved a sexually explicit video of the victim, and the appellant's gross betrayal of trust involved in distributing it ([45]). The blackmail was a 'particularly serious instance' of this type of offending ([46]). The appellant was aware of the likelihood of a serious and significant reaction on the part of the victim's father ([51]).

The appellant submitted the sentencing judge did not properly take into account his youth, lack of criminal history, general good character and likelihood of rehabilitation ([60]). However, the Court held that the sentence of imprisonment, without suspension or home detention, was reasonably imposed ([63], [68] [81]).

***R v Taheri* [2017] SASCFC 115 (8 September 2017) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Character reference' – 'Imprisonment' – 'Physical violence and harm' – 'Risk of deportation' – 'Systems abuse' – 'Women' – 'Written reference'

Charges: Aggravated serious criminal trespass in a place of residence x 1; Aggravated threatening harm x 2; Aggravated threatening life x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and complainant were married but separated. An intervention order was in place. The appellant broke into the complainant's house while the complainant and her sister were inside. He cut through a flyscreen window with a knife and put a rope around the complainant's throat. The appellant threatened to kill the complainant and hurt her sister if she did not withdraw the complaint she made to the police about him ([10]). The appellant came to Australia as a refugee and was living on a permanent residence visa.

The appellant was sentenced to a head sentence of five years' imprisonment with a non-parole period of 2 years ([5]). The judge ordered partial concurrency to the extent of 12 months ([34]).

Issues: The appellant appealed on 4 grounds, that the judge erred in:

1. failing to make a finding as to the risk the appellant posed to community safety in declining to make a home detention order under s 33BB *Criminal Law (Sentencing) Act 1998* (SA) ([15]);
2. the approach in relation to partial concurrency;
3. her treatment of a written reference provided on behalf of the appellant;
4. failing to consider the risk of deportation in imposing a sentence of more than 12 months ([7]).

Decision and Reasoning: The appeal was dismissed.

On the first ground, Nicholson J held that s 33BB *Criminal Law (Sentencing) Act 1998* (SA) does not require a sentencing judge to make a specific finding as to the risk that an offender poses to the community. Nicholson J held that declining to order home detention was within the judge's discretion ([31]).

On the second ground, Nicholson J held that it was open to the judge to discount the written reference as to character. The reference did not consider the appellant's character apart from how he presented himself in a social setting ([20]-[22]).

On the third ground, Nicholson J held that concurrency between the sentences was within the judge's discretion ([36])

On the fourth ground, Nicholson J held that on the assumption that the risk of deportation was relevant, the sentencing judge considered those matters ([46]).

***R v Saunders* [2017] SASCFC 86 (27 July 2017) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Breach of bail' – 'Coercive control' – 'Contravention of a protection order' – 'Damage to property' – 'Emotional and psychological abuse'

Charges: Property damage x 1; Breach bail x 1; Contravening term of intervention order x 1.

Appeal type: Appeal against sentence.

Facts: The appellant went to the complainant's residence, knocked on her bedroom window and then smashed the window by punching it ([10]). The appellant was subject a bail agreement and intervention order that prohibited him from approaching the complainant ([11]). The sentencing judge imposed a head sentence of 10 months and 22 days ([2]-[3]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed (see [29], [30] and [47]). Justice Stanley commented that 'the very point' of the appellant's bail agreement and intervention order was that the complainant could feel safe and protected in her own home ([26]). His Honour emphasised that 'the purpose of those instruments is to prevent acts of domestic violence which are often emotional and psychological as much as physical' and which 'can have profound consequences for the victim' ([27]). Justice Hinton added that 'it is important to the maintenance of confidence in the protection that intervention orders are intended to provide that the courts treat any breach as very serious' (emphasis added), not only physical violence ([44]). The sentence was at the high end of the permissible range, but was not plainly wrong (see [28], [47]).

***R v Sykes* [2017] SASCFC 59 (31 May 2017) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Burglary' – 'Contravention of a protection order' – 'Kidnapping' – 'Separation' – 'Sexual and reproductive abuse'

Charges: Aggravated serious criminal trespass in a place of residence x 1; Aggravated kidnapping x 1; Aggravated threaten life x 1; Aggravated indecent assault x 1; Aggravated assault causing harm x 1;

Aggravated threaten harm x 2; and threaten harm x 1; Breach intervention order x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and victim had been in a relationship ([6]-[7]). Shortly after the relationship had ended, the appellant entered the victim's house at midnight ([9]). He bound her arms and legs, blindfolded her and removed her clothes ([11]). He told her that he was going to cut off her nipples, breasts and fingers, break her nose, penetrate her with objects, and drive her to a secluded place to make her suffer ([12]-[16]). The offending continued for at least several hours ([22]). The appellant pleaded guilty to the offences. He was sentenced to 11 years and one month imprisonment with a non-parole period of six years.

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Parker J, Vanstone J and Blue J agreeing, held that the sentence took into account all relevant factors, and the sentence was within an appropriate range.

Parker J stated at [33]:

> 'Every person has a right to feel safe in their house and the appellant had violated the security and safety of the victim and also violated her personally. He had terrorised her for what must have been hours in her own home. In her view his behaviour appeared to have been deliberately designed to inflict the maximum amount of terror.'

Counsel for the appellant referred to two other cases concerning home invasions (*R v Siviour* [2016] SASCFC 51 and *R v Stephen John Forbes* DCCRM 15-1418 and 15-340). Parker J emphasised that conduct giving rise to charges of trespass and kidnapping may be extremely varied, and therefore the length of reasonable sentences may differ ([58]). His Honour considered that the appellant's sexual offending against a former domestic partner was an aggravating factor not present in *Siviour* and *Forbes* ([59]). His Honour held that the sentencing judge balanced the appellant's lack of criminal history, expression of remorse and strong work history, against the serious nature of the offending and the enormous impact on the victim ([62]).

***R v Nelson* [2017] SASCFC 40 (8 May 2017) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'General and specific deterrence.' – 'People affected by substance abuse' – 'Traumatic brain injury'

Charges: Causing serious harm with intent to cause serious harm x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The victim and defendant were formerly in a domestic partnership. The offences occurred on one occasion. In the presence of other people at their home, the defendant: grabbed the victim and dragged her outside; began to call her names; repeatedly hit her head and kick her head and body ([6]). The victim sustained an extremely severe traumatic brain injury, and was likely to be left with long-term cognitive defects ([7]). The sentencing judge had regard to the defendant's disadvantaged background and low level of cognitive functioning (attributed to the defendant having sniffed petrol since he was four years old) (see [10]-[20], [26]-[27]).

The defendant was sentenced to 3 years and 3 months' imprisonment, with a non-parole period of one year and six months.

Issues: The prosecution argued that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. The Court (Parker J, with Kourakis CJ and Nicholson J agreeing) found that this was an exceptional case that required intervention by the appellate court ([36]). Parker J considered that the sentence did not give enough weight to the need for general and specific deterrence in domestic violence offences. Parker J stated (at [45]-[47]) that:

"It was necessary for the sentencing judge to take into account, as his Honour did, the defendant's background of disadvantage and social deprivation arising from his upbringing in a traditional and remote Aboriginal community. However, the fact that … the defendant had very recently been released after a period of imprisonment imposed for two assaults on a different female drinking companion operated to reduce the leniency that his personal circumstances might otherwise have attracted. Moreover, the attack by the defendant upon his domestic partner was particularly brutal and has had grave consequences for her … The sentence did not give appropriate effect to the views consistently expressed by this Court concerning the need to give significant weight to considerations of specific and general deterrence when sentencing defendants who have engaged in serious domestic violence."

The defendant was sentenced to 5 years imprisonment, with a non-parole period of 3 years.

***R v Neilson* [2016] SASCFC 90 (19 August 2016) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'People who are gay, lesbian, bisexual, transgender, intersex and queer' – 'Physical violence and harm' – 'Post-separation violence' – 'Women'

Charges: Causing harm with intent to cause harm x 1; Aggravated assault x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and one of the complainants (J) were divorced ([8]). The appellant went to the matrimonial house, where J lived with her new partner (M), the other complainant ([10]). The appellant pushed the J and M into the house. The appellant grabbed M around the throat, pushed her against a wall and punched her ([11]). The appellant picked J up off the floor and threw her onto the dining table ([13]). M suffered ongoing damage to her eye and both women suffered psychological consequences ([17]).

Issues: Whether the judge erred in not suspending the sentence.

Decision and Reasoning: The appeal was dismissed. The appellant had favourable personal circumstances, including his lack of criminal history, little risk of reoffending, remorse and lack of planning in the attack ([25]-[33]). Bampton J held that the sentence was within range, and those factors were reflected in the fixing of the non-parole period at approximately 42 percent of the head sentence ([41]). The favourable factors were appropriately balanced with the unfavourable factors, including the seriousness of the offence, the ongoing injuries, the fact that the offences were committed in the victims' home, and the fact that the offences constituted domestic violence ([43]).

***R v Ritter* [2016] SASCFC 88 (16 August 2016) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Assault causing harm' – 'Causing harm with intent' – 'Coercive control' – 'Economic abuse' – 'Financial abuse' – 'Following, harassing and monitoring' – 'Fresh evidence' – 'Isolation' – 'Manifestly excessive' – 'Physical violence and harm' – 'Rehabilitation' – 'Threats to children'

Charge/s: Assault causing harm, causing harm with intent.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female victim had been in a relationship for two years. His behaviour towards her had been violent and controlling. On 19 March 2014, the applicant was yelling abuse at the victim and she became so fearful she ran into the streets. He chased her and punched her in the face. On 22 April 2014, the applicant verbally abused the victim, hit her around the head with a pillow and punched her to the left side of her mouth. The second assault caused injuries requiring surgery. As a result of the two incidents, the victim had scars on the left and right sides of her mouth. There was also evidence of a number of uncharged acts. The applicant was sentenced to a total head sentence of six years and eleven months imprisonment, with a non-parole period of five years.

Issue/s:

1. Fresh evidence, a psychologist's report and a report from an officer of the Department of Correctional Services, ought to be admitted.
2. The head sentence and the non-parole period were manifestly excessive.
3. The sentencing judge erred in not having or seeking materials on which a proper assessment could be made of the applicant's prospects for rehabilitation.

Decision and Reasoning: The appeal was dismissed. First, Parker J held that the reports were not to be received as fresh evidence. The psychologist report could have been obtained with reasonable diligence for use at the trial, it added very little to what was before the sentencing judge, and the psychologist was not completely briefed on the applicant's substantial criminal history. The report from Correctional Services also did not add anything significant to what would have been before the sentencing judge (see [50]-[67]).

Second, the head sentence was not manifestly excessive. This was in light of the gravity of the offending conduct, the abusive nature the relationship and the applicant's significant criminal history of violence. Parker J further rejected the submission that the two sentences ought to have been served concurrently. The offending conduct occurred almost five weeks apart (see [78]-[86]). The non-parole period was also not manifestly excessive. Considerations of deterrence, prevention and punishment militated towards a relatively higher non-parole period, as did the nature of the offences and the context in which they occurred (see [87]-[91]).

Third, the sentencing judge did not err in concluding that the appellant had extremely poor prospects for rehabilitation. The appellant had a long criminal history, including numerous convictions for assaults (many involving domestic violence). He also had many convictions for breach of restraining orders, failure to comply with bail agreements and breaches of bonds (see [92]-[96]).

Parker J (Lovell and Nicholson JJ concurring) described the coercive control which the appellant subjected the victim to:

> [19] When the victim was threatened or attacked by the appellant she would try to leave their flat, often running into nearby streets and parks and attempting to hide. The appellant would frequently chase her or track her down in order to continue his abuse.
>
> [20] The appellant monitored the victim's movements and rarely let her leave the house without him. He also controlled her finances, regularly forcing her to withdraw money from her account for his benefit, including so that he could buy drugs and alcohol.
>
> [21] The appellant regularly threatened that if the victim reported any abuse to the police or left the relationship he would harm her and her children. She was too frightened to leave or to report the abuse to police, friends and family.

***R v Gardiner* [2015] SASCFC 107 (5 August 2015) – South Australia Supreme Court (Full Court)**

'Circumstantial evidence' – 'Evidence' – 'Expert testimony' – 'Grievous bodily harm' – 'Intent' – 'Murder' – 'Physical violence and harm' – 'Post-offence conduct' – 'Relationship evidence'

Charge/s: Murder.

Appeal Type: Application for permission to appeal against conviction.

Facts: The applicant was convicted of the murder of his domestic partner. The applicant had camped with the victim in his car in an isolated location. The victim's body was found in the car. Medical evidence relating to the nature of the injuries and the cause of death was led at trial. The trial judge found on the basis of this evidence that the victim suffered a severe beating. There was no dispute that the injuries were caused by the applicant. The trial was concerned with whether the evidence could prove that the injuries that the applicant inflicted caused her death and whether they were inflicted with an intention to cause grievous bodily harm.

Issue/s:

1. Whether the guilty verdict was unreasonable because the evidence did not prove beyond reasonable doubt the requisite intent for murder.
2. Whether the judge misinterpreted the medical evidence in concluding that severe force was required to cause a certain injury.
3. Whether the judge misused evidence of the applicant's post-offence conduct, such as not calling an ambulance while claiming he had.

Decision and Reasoning: Leave to appeal was granted but the appeal was dismissed.

1. There was a long history of violence in the relationship. The applicant had previously been charged with assaulting the victim. In this context and also taking into account the extent and number of injuries suffered by the victim, Kourakis CJ (with whom Blue J and Stanley JJ agreed) held that the trial judge was correct in concluding that the evidence showed beyond reasonable doubt that the applicant intended to cause grievous bodily harm.
2. The Court acknowledged that the judge did mistakenly conclude that the doctor's evidence indicated that severe force was required to cause an injury to the victim's liver. However, the judge did not reason from this misunderstanding to reach her conclusion. Instead, the judge reasoned that the applicant had the requisite intention from evidence of all the injuries, not just evidence of the liver injury. The judge then correctly reasoned from the nature and extent of the injuries that the applicant had intended to cause grievous bodily harm.
3. The applicant lied to various witnesses that he had called an ambulance but it had not arrived. In fact, he did not call an ambulance. The Court found that the judge correctly used this evidence to show that he was aware how badly the victim was injured, and that his failure to call an ambulance showed he possessed the requisite intention.

***R v McDonald* [2015] SASCFC 99 (29 July 2015) – South Australia Supreme Court (Full Court)**

'Contemporaneity between intention and action' – 'Directions and warnings for/to jury' – 'Evidence' – 'Intent' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted by a jury of murdering his de facto partner. It was not in dispute that he inflicted the blows that caused her death. The pathologist's view was that the appellant inflicted at least 50 blows. The injuries were inflicted over several hours, possibly intermittently. The issue at trial was whether he had inflicted these blows with the requisite intent to cause death or grievous bodily harm. The appellant was highly intoxicated at the time of the incident.

Issue/s:

1. Whether the verdict was unreasonable and not supported by the evidence.
2. Whether the trial judge erred by not directing the jury of the following - that it is necessary that the intention to cause death or grievous bodily harm exists contemporaneously with the infliction of the injuries that caused the victim's death.

Decision and Reasoning:

1. This argument was dismissed – see at [4].
2. The Court agreed that parts of the judge's directions amounted to an error of law. A correct direction was initially given by the trial judge. This was – '*The prosecution must prove that at the time that McDonald struck any collection of blows the combined effect of which was to cause a degree of internal bleeding…which caused LT's death, he intended to kill her or cause her grievous bodily harm' (see at [29])*. However, the judge then gave subsequent directions to the jury. These directions stated that it was sufficient that the appellant formed an intention to kill or cause grievous bodily harm when any of the blows were struck, even if that particular blow (struck with the requisite intent) did not contribute to or cause the internal bleeding that led to her death. Other directions given by the judge were not capable of correcting this error. However, the appeal was dismissed pursuant to the proviso.

   See also at [33] where Kourakis CJ (with whom Sulan J and Parker J agreed) noted that the inference of intention*, 'overwhelmingly supported as it is by the evidence of the beating, is reinforced by the evidence of the prior violence to which the appellant subjected LT in their relationship and his admission that he was enraged at the time. The appellant is more likely by reason of those related circumstances to have formed an intention to cause grievous bodily harm relatively early on in the course of the*

beating.'

***R v Capaldo* [2015] SASCFC 56 (28 April 2015) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravating factor' – 'Mitigating factors' – 'People with mental illness' – 'Physical violence and harm' – 'Possession of firearm' – 'Sentencing' – 'Where the offender is also a victim'

Charge/s: Various offences relating to the possession of a loaded, semi-automatic handgun.

Appeal Type: Appeal against sentence.

Facts: At trial, evidence was put before the judge relating to the violent behaviour of the appellant's former partner. The appellant made a statement to police indicating that she obtained the handgun for her own protection. She pleaded guilty and was sentenced to one year and six months' imprisonment with a non-parole period of 5 months.

Issue/s: Whether the sentence should have been suspended and whether the trial judge demonstrated pre-judgment and an appearance of bias.

Decision and Reasoning: The appeal was upheld. In a joint judgment, Gray and Sulan JJ found that the Judge impermissibly intervened in the trial process, giving rise to an appearance of bias in the eyes of a fair-minded lay observer. The judge constantly interrupted and in cross-examining the appellant, suggested that she was not willing to participate in a police interview, which was false. The Judge was also in error by not accepting the appellant's explanation for the reasons that she possessed the firearm. The sentencing therefore proceeded on errors of fact. In resentencing, Gray and Sulan JJ acknowledged the serious nature of the offending, particularly that the gun was loaded and easily concealable. Counsel for the appellant conceded that a sentence of imprisonment was warranted. In mitigation, the appellant had no criminal history and had suffered serious abuse at the hands of her former partner, to the extent that she suffers from PTSD. As such, the head sentence was reduced to 17 months with a reduced non-parole period of 4 months and the sentence was also suspended upon the appellant entering into a good behaviour bond for 3 years. Kelly J also upheld the appeal but dissented with respect to re-sentencing and concluded that it should be remitted back to the District Court, given the disputed facts.

***Rana v Gregurev* [2015] SASCFC 58 (27 April 2015) – South Australia Supreme Court (Full Court)**

'Appeal' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Interim intervention order' – 'Purpose of intervention orders'

Appeal Type: Application for permission to appeal against a decision of a single judge of the Supreme Court who dismissed an appeal against a decision of a Magistrate who refused to make an interim intervention order.

Facts: The applicant brought an application for an interim intervention order in the Magistrates' Court against the respondent (the applicant's former girlfriend's mother). The applicant claimed that the respondent had been bullying, cyber stalking and contacting his psychiatrist online and in person, as well as defaming him on the internet. The basis of his application was that it was reasonable to suspect that the respondent would commit an act of abuse against him by causing personal injury and criminal defamation on the internet. In the original appeal to a single judge of the Supreme Court, Peek J dismissed every ground of appeal - see *Rana v Gregurev* [2015] SASC 37. The applicant had a long history of psychiatric issues, and a psychiatrist's report detailed the impact of the websites on his general well-being (See at [31] of Peek J's decision).

Issue/s: Some of the issues concerned –

1. Whether the applicant had a sufficient opportunity to present his application in the Magistrates' Court.
2. Whether the Magistrate correctly applied ss 8 and 10 of the *Intervention Orders (Prevention of Abuse) Act 2009* (the Act) which define different types of abuse and sets out general principles which the Court must follow in considering intervention orders.
3. Whether the Magistrate correctly exercised her discretion to refuse the applicant's application and whether she should have found that there was evidence which gave rise to a reasonable suspicion that the respondent would commit an act of abuse.
4. Whether the Magistrate correctly applied ss 6, 10 and 28 of the Act which set out what must be proven in an intervention order application.

Decision and Reasoning: All aspects of the Supreme Court decision (Peek J - *Rana v Gregurev* [2015] SASC 37) were upheld by the Full Court.

1. This argument had no substance – he appeared before the Magistrate on four occasions. The Magistrate was concerned to ascertain the detail of the case.

2. Peek J (in the Supreme Court) noted at [14]-[15] that the purpose of the Act is to, 'protect people when it is reasonable to suspect that somebody…will, without intervention, commit an act of abuse'. His Honour also noted that because abuse is defined so broadly, it is important for the courts to ensure that this does not result in the Act being abused through 'specious or unwarranted claims' which will have 'detrimental consequences' to the courts and to people who become the subject of unwarranted orders. The Magistrate correctly applied the Act to conclude that it was not reasonable to suspect that without an intervention order there would be any further abuse.

3. In dismissing ground 3, the Court noted that the crucial issue is not whether acts of abuse had been committed in the past, but whether, without an intervention order, such acts would be committed again, and whether the imposition of such an order is appropriate in the circumstances.

4. The Court found the Magistrate correctly approached the task in the application which was to decide whether there was a reasonable suspicion that an act of abuse would occur.

***R v Koch* [2015] SASCFC 31 (27 March 2015) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Causing serious harm with intent' – 'General deterrence' – 'Impact of offence on victim' – 'Physical violence and harm' – 'Relevance of guilty plea' – 'Sentencing' – 'Trespass'

Charge/s: Criminal trespass in a place of residence, causing serious harm with intent and using a motor vehicle without consent.

Appeal Type: Application for permission to appeal against sentence.

Facts: The victim of the offending was the mother of the respondent's former partner. After entering her house by the back door, he questioned her about his relationship with her daughter. He became enraged, at which point he restrained her, pushed her to the floor and punched her multiple times to the side of the head. He provided no medical assistance to her and left her lying unconscious on the floor. The victim sustained lasting injuries as a result of the offending. The sentencing judge's starting point was 6 years' imprisonment. Taking

into account his pleas of guilty, the respondent was sentenced to four years and six months' imprisonment with a non-parole period of two years and three months.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning:

In granting permission and allowing the appeal, the Court noted the high maximum penalties, (life imprisonment for criminal trespass and 20 years for causing serious harm with intent) and the relatively insignificant mitigating factors. The offending was 'particularly brutal' (See at [35]). Parker J (Kourakis CJ and Bampton J concurring) held that the notional starting point of 6 years was manifestly inadequate and the sentence itself was not adequate to amount to general deterrence or just punishment. See in particular at [42] – '*General deterrence is a very important consideration in sentencing for offences of violence committed in the course of domestic disputes. The sentence imposed fails to provide the level of general deterrence necessary to ensure public confidence in the enforcement of the criminal law in this fraught area.'* The Court also found that the trial judge's 25% discount for the guilty plea was too high. The respondent 'had no practicable option other than to plead guilty' (see at [46]), which needed to be taken into account in determining the quantum of the discount. The total effective sentence was therefore increased to six years and eight months (applying a 20% discount for the guilty plea), with the non-parole period set at four years and two months.

***Groom v Police* [2014] SASCFC 125 (19 November 2014) – South Australia Supreme Court (Full Court)**

'Breach of intervention order' – 'Consent to confirmation of intervention order' – 'Interim intervention order' – 'Systems abuse'

Appeal Type: Application for permission to appeal against a decision of a single judge of the Supreme Court.

Facts: After the appeal in *Groom v Police (No 3)* was upheld, the matter was remitted back to the Magistrates' Court, where confirmation of the interim intervention order was again made. The applicant consented to the order following negotiation with the prosecution who agreed to withdraw 31 charges for breach of the order. The applicant then appealed to a single judge of the Supreme Court (Kelly J), and argued that consent should be withdrawn because he was under 'enormous stress' and had been 'railroaded' (See at [7]). Kelly J refused permission to appeal because the applicant's counsel had been properly briefed to represent him in the Magistrates' Court, the consent to the confirmation was informed, the applicant was present throughout the

process and he raised no objection and confirmed to the Magistrate that he would accept the order. This was different to the hearing considered in *Groom v Police (No 3)*, where the applicant was in custody and believed he could not properly defend the proceedings.

Issue/s: Whether the appellant could withdraw his consent to the intervention order and have the confirmation set aside.

Decision and Reasoning: Permission to appeal was refused. The applicant submitted to the Full Court that he was denied natural justice because he was not provided with a copy of the transcript from the Magistrates' Court hearing, and questioned the 'officiality' of the transcript on which Kelly J had relied. He also questioned the behavior of members of Police Prosecutions in relation to their conduct with the transcript. The appeal was dismissed – the Court held that the applicant did not identify how the missing transcript caused prejudice. The differences in the arguments in this appeal compared to *Groom v Police (No 3)* were stark. It is likely that the applicant's 'ongoing and deeply felt grievance against his former partner' were the cause of the continuing appeals rather than any legal error.

***R v Barnes* [2014] SASCFC 79 (18 July 2014) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault causing harm' – 'Aggravating factor' – 'Damaging property' – 'Deterrence' – 'Exposing a child' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Aggravated assault causing harm (two counts) – Circumstance of aggravation: that the victim was the defendant's domestic partner.

Appeal type: Appeal against sentence.

Facts: The defendant discovered messages from his cousin to his de facto partner on her phone. After waking her up at 3am to question her about these messages, he hit her on the left side of the head before he gave her time to explain. This caused bleeding. He then pinned her down after she tried to break free. Their son, who was sleeping in the same room, witnessed the defendant hitting the complainant. A similar incident occurred the following evening. The defendant punched her to the right of the face with a closed fist and hit her in the right eye. He tried to strangle the complainant who could still breathe so she pretended to pass out. He held up her phone, put it on a coffee table and stomped on it which caused the phone and the table to

break. After carrying their son towards his bedroom, he kicked her on the lower back despite her begging him not to hit her again. His criminal history included many driving offences as well as dishonesty and drug offences. He was sentenced to 18 months' imprisonment for each count to be served cumulatively, with a non-parole period of 18 months. The judge stated he reduced the sentence by 25% on account of the guilty plea.

Issue/s:

1. Whether the sentences were manifestly excessive.
2. Whether the sentences should have been made concurrent.
3. Whether the sentence should have been suspended.

Decision and Reasoning: The appeal was allowed in respect of concurrency.

1. Gray J (with whom Peek and Stanley JJ agreed) firstly noted that the offences were unprovoked. The defendant was woken from sleep and defenceless. The Court then acknowledged the various mitigating factors, including the defendant taking steps towards rehabilitation and the fact that he had formed a new relationship with no evidence of domestic violence. However, in applying the authorities which indicate the seriousness of domestic violence and the need for strong personal and general deterrence and noting the defendant's long criminal history of defying court orders, the Court held that a head sentence of 18 months' imprisonment for each offence was open. See in particular from [17] – [22] for a summary of the relevant authorities.
2. The Court noted that when there are two truly separate occurrences of criminal conduct, cumulative sentences are likely to be appropriate. When a number of offences form a course of criminal conduct, concurrent sentences are likely to be appropriate. As such, the Court held that the sentence should have included some element of concurrency because the offending was, in substance, a course of conduct separated by a short period of time. Partial concurrency of 6 months was appropriate. As such, the 18 month sentence for the second count was made concurrent for 6 months, so that the total effective sentence became 2 years and 6 months.
3. This argument was rejected. It was within the discretion of the trial judge to not suspend the sentence notwithstanding the applicable mitigating factors. The offending was extremely serious, cowardly and brutal. Furthermore, it partly took place in the presence of a child, who became distressed on the

second occasion.

***R v Nedza* [2013] SASCFC 142 (18 December 2013) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravating factor' – 'Attempting to dissuade a witness' – 'Breach of bail' – 'Breach of restraining order' – 'Concurrency' – 'Creating risk of harm' – 'Deterrence' – 'Double punishment' – 'Exposing a child' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Totality'

Charge/s: Rape (two counts), creating a risk of harm, attempting to dissuade a witness, breach of bail, breach of restraining order.

Appeal Type: Application for permission to appeal against sentence.

Facts: The respondent attended the home of his former partner and then proceeded to threaten her with a knife, assault her multiple times, commit two acts of anal rape, threaten her daughter and parents and caused her to swallow petrol. He had possession of a cigarette lighter and threatened to set her alight. He also pressed the knife against their sleeping baby's cheek. The respondent then, through his sister offered to pay the complainant money if she dropped the charges. All of the conduct was in breach of bail and a domestic violence restraining order. The respondent's criminal history included multiple instances of prior violent offences committed against the complainant and her mother which demonstrate a pattern of domestic violence. The respondent pleaded guilty to all charges and was sentenced to a total term of imprisonment of 10 years with a non-parole period of 5 years and six months, imposed concurrently with a sentence of 6 months' imprisonment for different offences.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: Permission to appeal was granted and the respondent was re-sentenced to 15 years' imprisonment with a non-parole period of 10 years. The Crown submitted that the sentence failed to reflect the seriousness of the offending and the need for deterrence (personal and general). Gray J (with whom Stanley J agreed) agreed with this argument and noted the offending involved various aggravating factors including that it was committed in breach of bail and the restraining order, the presence of children, the use of a knife and the putting of a knife on the head of a sleeping baby. His Honour concluded that the

sentencing judge did not give sufficient consideration to these mitigating factors.

See in particular at [46] – '*In seeking and obtaining a restraining order against the defendant, the complainant had sought the law's protection against violence inflicted by her former partner, the defendant. Despite this and in breach of that restraining order, the complainant was again the victim of violent offending of a most serious nature. The restraining order ought to have demonstrated to the defendant in the clearest terms the seriousness with which domestic violence is regarded both by the courts and by wider society. The fact that the offending occurred in breach of that order is a serious matter of aggravation and a significant factor in my conclusion that the sentence imposed by the Judge was manifestly inadequate.'*

Nicholson J also upheld the appeal and made the same orders but made some additional comments regarding concurrency and double punishment in sentencing. His Honour noted that it was appropriate to deal with the breaches of bail and restraining orders (both summary offences) together with the more serious offences. However, it was important to avoid any double punishment in doing so, especially when the more serious offences were 'aggravated by and assumed colour and context from' (see at [102]) the summary breach offences. The trial judge ordered separate sentences and made them partially or wholly concurrent. However, '*the success of this approach depends upon being able to notionally but accurately separate out that component of the sentence nominated for the two summary offences which represents the aggravating feature with respect to the principal offences. Only by being able to do this can a sentencing Judge accurately identify the extent to which, if at all, partial or full concurrency ought to be ordered. Adopting the approach of sentencing separately for the two summary offences where those offences also aggravated the principal offences enhances the risk of an overall under-punishment or over (double) punishment* (see at [103])' – (see further at [105]). His Honour concluded that in this case, the best approach was to impose a single sentence for all offences as opposed to ordering individual sentences with partial and whole concurrency periods. Concurrency and totality however still should not be overlooked when employing that approach.

***R v M, AG* [2013] SASCFC 39 (24 May 2013) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Intervention order' – 'Physical violence and harm' – 'Post-separation violence' – 'Sentencing' – 'Sexual and reproductive abuse'

Charges: Aggravated serious criminal trespass in a place of residence x 1; Rape x 5; Theft x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The defendant was the victim's (M) former partner ([1]). The defendant had been arrested and granted bail on multiple occasions for offences committed against M ([6]-[10]). The present offences occurred when the defendant attended M's home while on bail. He pushed her into the house, leaving their baby in the car. He took a sledgehammer that M left inside her house for her own protection. He threatened to rape her with it, and then proceeded to force her to perform fellatio on him, vaginally and anally raped her, and forced the hammer of the sledgehammer into her vagina ([12]).

The defendant initially pleaded not guilty and provided an alibi notice, but after the prosecution presented him with evidence disproving the alibi notice, the defendant pleaded guilty ([15]). The defendant was sentenced to 7 years' imprisonment with a non-parole period of 4 years. The judge declined to make an intervention order ([2]).

Issues: Whether the sentence was manifestly inadequate and whether the judge erred in failing to make an intervention order.

Decision and Reasoning: The appeal was allowed, and the sentence was almost doubled to 13 years' imprisonment with a non-parole period of 9 years ([55]). The Court also imposed an intervention order with the sentence ([64]).

Sulan J (Vanstone and Peek JJ agreeing) held that the sentencing judge appeared to have overlooked the brutality and seriousness of the offending and placed too much weight on the appellant's personal circumstances ([45]-[46]). His Honour said that 'personal and general deterrence must take precedence over the personal circumstances of the defendant' ([46]).

The offences were serious because they occurred in the victim's own home ([29]), the defendant had a criminal history that suggested a disregard for the law ([34]) and the terrifying nature of the weapon used ([41]). The pleas of guilty did not demonstrate genuine contrition, coming only after his alibi evidence had been disproved ([47]). The fact that the defendant and victim were previously in a relationship was not a mitigating factor ([42]).

R v Maiolo (No 2) **[2013] SASCFC 36 (16 May 2013) – South Australia Supreme Court (Full Court)**

'Directions and warnings for/to jury' – 'Evidence of discreditable conduct' – 'Evidence of initial complaint' – 'Indecent assault' – 'Physical violence and harm' – 'Propensity evidence' – 'Relationship evidence' – 'Sexual and reproductive abuse' – 'Unlawful sexual intercourse'

Charge/s: Indecent assault (five counts), Unlawful sexual intercourse (four counts).

Appeal Type: Appeal against conviction.

Facts: Three of the complainants were sisters. The fourth complainant was the appellant's daughter. The appellant's partner was the elder sister of the three complainants but was not a complainant.

Issue/s: Some of the issues concerned -

1. Whether the evidence of one of the sisters established an initial complainant within the meaning of s 34M(6) of the *Evidence Act 1929*.
2. Whether evidence of previous 'uncharged acts' constituted relationship evidence, and whether the trial judge correctly directed the jury in relation to the permissible use of such evidence.

Decision and Reasoning: The appeal was upheld.

1. At trial, there was evidence that one of the sisters had a conversation with police and a counsellor regarding allegations of sexual misbehaviour by the appellant. The content of these conversations were unclear and it was not clear whether the sister was referring to sexual offending against herself or other persons. The trial judge directed the jury to the effect that they could use this evidence to assess (and possibly bolster) her evidence as well as the evidence of the other complainants. This was an error of law – the complaint was not sufficiently clear. The complaint did not make clear who the subject of the offending was. It was also unclear which particular incident it referred to. The convictions were set aside.
2. Evidence of prior 'uncharged acts' were admitted under s 34P of the *Evidence Act 1929* as relationship evidence. See at [50]-[52] where Peek J, (with whom Kourakis CJ and Stanley J agreed) outlined the operation of s 34P in its common law context. Section 34R required the judge to (among other things) explain the purpose for which such evidence can and cannot be used. The trial judge, in her directions

to the jury, referred to the evidence in question throwing light on the 'nature of the relationship' or providing 'context' (see at [110]). She did not elaborate further on the purpose of the evidence. Peek J found that these directions were deficient. See at [111] - *'With respect, the use of vague words such as "context" or "relationship" without specific elaboration and guidance to the jury was rightly criticised by Doyle CJ in R v Nieterink* [1999] SASC 560 *where his Honour made the important point that while evidence of uncharged acts may be admissible under heads of relevance which tend to recur in various cases that come before the courts, it is crucial that the Judge, first, positively determines that the particular evidence of discreditable conduct does satisfy a head of relevance in the particular case and, second, gives very clear directions as to how such evidence may, and may not, be used.'* See also at [54]-[57], where his Honour commented on the construction of s 34P and specifically how to determine whether the probative value of the evidence substantially outweighs its potentially prejudicial effect on the accused.

***R v Fleming* [2011] SASCFC 41 (10 May 2011) – South Australia Supreme Court (Full Court)**

'Evidence' – 'Evidence of domestic violence inadvertently led' – 'Persistent sexual exploitation' – 'Propensity evidence' – 'Sexual and reproductive abuse'

Charge/s: Persistent sexual exploitation.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted by a jury of persistent exploitation of a five-and-a-half-year-old girl. The prosecution alleged that the appellant had been in a relationship with the girl's mother and that he committed at least more than one act of sexual exploitation. At trial, evidence was inadvertently admitted that the complainant was seeing a domestic violence counsellor. Further evidence about the appellant's aggressive and sometimes violent behaviour was also put before the Court. Following a question from the jury during deliberations, the judge directed the jury to ignore all of the evidence relating to the domestic violence counsellor and the appellant's aggressive behaviour because it was not relevant to whether the appellant had committed the offences.

Issue/s: Whether the judge should have discharged the jury after the evidence of alleged domestic violence by the appellant was inadvertently led. Alternatively, whether the directions given by the trial judge when he refused to discharge the jury were inadequate.

Decision and Reasoning: David J (Kourakis J and Sulan J concurring) dismissed the appeal. David J firstly noted at [23] that, 'in cases involving allegations of sexual impropriety in domestic situations evidence of extraneous violence is often allowed for many reasons. Such evidence is often relevant to the question of the relationship between the parties or providing a reason or reasons as to why an alleged victim may not complain.' This did not apply in this case, as the prosecution did not seek to introduce the evidence. Rather, it came out inadvertently. While David J was concerned that the judge's direction could have given the jury an impression that there was some 'sinister impermissible material' (see at [31]) that had not been introduced, his directions regarding the irrelevance of the evidence were clear and he correctly warned against propensity reasoning. As such, while the situation was not ideal, it did not amount to a miscarriage of justice.

R v Runjanjic and Kontinnen **(1991) 53 A Crim R 362; (1992) 56 SASR 114; [1991] SASC 2951 (28 June 1991) – South Australia Supreme Court (Full Court)**

'Battered woman syndrome' – 'Expert evidence - psychologist' – 'False imprisonment' – 'Grievous bodily harm'

Charge/s: False imprisonment, grievous bodily harm.

Appeal Type: Appeal against conviction.

Facts: The two female appellants were in a relationship with a man named Hill. There was a consistent pattern of domineering and violent conduct by Hill towards both appellants. The appellants were part of a plan to help Hill forcibly confine the complainant and cause her injury. At trial, they sought to admit expert evidence of 'battered woman syndrome' to support a claim of duress. The trial judge ruled that the evidence was inadmissible on the ground that the test for duress was objective and expert evidence of the state of mind of the appellants was therefore irrelevant.

Issue/s: Whether the expert evidence of battered woman syndrome ought to have been admissible to support a claim of duress.

Decision and Reasoning: King CJ (with whom Bollen and Legoe JJ agreed) held that the evidence ought to have been admissible and a re-trial was ordered. In reaching this decision, King CJ first held that the trial judge's reason did not provide a sound basis for excluding the evidence. It ignored the subjective aspect of the test for duress and it also misunderstood the main thrust of the proffered evidence. While the expert might have been in a position to comment on the state of mind of the appellants, the primary thrust of such

evidence was to establish a pattern of responses commonly exhibited by battered women. At [23]:

'The proffered evidence is concerned not so much with the particular responses of these appellants as with what would be expected of women generally, that is to say women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity. As such it is relevant'.

Second, King CJ considered whether expert evidence of battered woman syndrome met the essential pre-requisite that it had been accepted by experts in the field of psychology or psychiatry as a scientifically accepted facet of psychology. Following significant consideration of scientific literature, at [24] and [26], King CJ held that the evidence was admissible:

'It is not sufficient, in order to justify the admission of expert evidence of the battered woman syndrome, as was argued by counsel for the appellant, that the ordinary juror would have no experience of the situation of a battered woman. Jurors are constantly expected to judge of situations, and of the behaviour of people in situations, which are outside their experience. Much conduct which occupies the attention of the criminal courts occurs in the criminal underworld, or in sordid conditions and situations, of which jurors would generally have no experience. It is not considered to be beyond the capacity of juries, or of the Court if it is the trier of the facts, to judge of the reactions and behaviour of people in those situations. Expert evidence of how life in criminal or sordid conditions might affect a person's responses to situations, would not be admitted.

'This is an area in which the courts must move with great caution. The admission of expert evidence of patterns of behaviour of normal human beings, even in abnormal situations or relations, is fraught with danger for the integrity of the trial process. The risk that, by degrees, trials, especially criminal trials, will become battle grounds for experts and that the capacity of juries and courts to discharge their fact-finding functions will be thereby impaired is to be taken seriously. I have considered anxiously whether the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations. In the end, I have been impressed by what I have read of the insights which have been gained by special study of the subject, insights which I am sure would not be shared or shared fully by ordinary jurors. It seems to me that a just judgment of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained'.

Supreme Court

R v Gawel [2021] SASC 67 (1 June 2021) – South Australian Supreme Court

'Application for review of bail' – 'Bail' – 'Covid-19 delays' – 'Home detention' – 'No prior domestic violence convictions' – 'Special circumstances' – 'Strangulation'

Charges: Aggravated assault x 2, Choke, suffocate or strangle a person in a domestic setting x 1.

Proceedings: Application for review of bail.

Issues: Whether special circumstances justified bail.

Facts: The male applicant and female victim were in a domestic relationship. The applicant was convicted of trespass offences and released on home detention bail. Within 48 hours of his release, the applicant was charged with three domestic violence offences, remanded in custody, and denied bail. The applicant applied for a review of the Magistrate's decision, arguing that if he was denied bail his time spent in custody would likely exceed the sentence imposed if convicted of the alleged domestic violence offences [1]-[3].

Decision and Reasoning: Bail granted.

Justice Parker found that special circumstances existed to justify the applicant's release on bail for two reasons:

1. The applicant's time spent in custody would likely exceed the sentence imposed if convicted.
2. The applicant was no longer in a relationship with the victim and the proposed home detention bail address was 13 km from the victim's home [1]-[2].

His Honour granted bail on strict home detention conditions, with electronic monitoring and a guarantee by the applicant's friend with whom he would be residing [2]. His Honour adopted the reasoning of Livesey J in *Homsi v The Queen* [2020] SASC 242, who found that a 'delay of… two years until… trial when combined with the fact that the complainant was no longer in a relationship with the applicant and that her whereabouts were not known to him was sufficient to amount to special circumstances' [23]. His Honour accepted the applicant's submission that 'based on the most recent District Court listings' the applicant faced two years in custody awaiting trial [10]. His Honour noted that this delay was due to Covid-19. Furthermore, His Honour found that the applicant's 'alleged conduct [was] less serious than… in *Homsi*' and noted that he had no prior

domestic violence convictions [25], [27].

***Homsi v The Queen* [2020] SASC 242 (8 December 2020) – South Australian Supreme Court**

'Bail' – 'History of domestic and family violence' – 'Impact of covid19' – 'Special circumstances' – 'Strangulation' – 'Threat to kill' – 'Unlawful imprisonment' – 'Victim credibility' – 'Weapons'

Charges: 9 charges including aggravated assault, unlawful imprisonment and detention and unlawful choking under s 20A(1) of the Criminal Law Consolidation Act 1935 (SA), most in circumstances of aggravation, that the applicant committed the offence knowing the complainant was a person with whom he was, or was formerly, in a relationship.

Facts: The applicant was in custody from April 2020. The charges relate to incidents of alleged violence towards the male applicant's female partner in November and December 2019. The November incidents included allegations of threatening and forcing the complainant to take her to a car using a knife and shooting her with a gel pellet gun repeatedly over a 2 hour period.

The December allegations include refusing the complainant permission to leave her apartment while seriously assaulting her, including hitting the complainant in the head twice with the blunt side of a machete, slapping her in the face, threatening her whilst holding the machete, stating that the applicant was "going to gaol today for murder", putting a blowtorch near the complainant's face and, later, holding a pillow against her face, restricting the complainant's breathing, causing her to fear that she might lose consciousness. On the same day, two superficial lacerations were caused to the complainant's throat with the machete, together with a large defensive laceration to the complainant's finger. She escaped and contacted police and a blowtorch and machete were recovered from the scene. Police abandoned a chase for safety reasons and the complainant was subsequently found to be resident in Victoria.

The applicant has a history of failure to comply with bail conditions. A prosecutor initially expressed concerns as to the complainant's credibility and did not oppose bail in the Magistrates Court, seemingly because the complainant visited the applicant in Victoria and has a serious drug dependency. At the time of the instant application these concerns were expressed as matters for trial.

Proceedings: Application for review of denial of bail.

Issues: As a prescribed applicant within the meaning of s 10(2) of the Bail Act 1985 (SA), the applicant must

show "special circumstances" within the meaning of s 10A(1) of the Act.

Held: Application allowed:

1. Special circumstances exist for two reasons:
   (a) While the alleged offending is very serious, the applicant and the complainant are no longer in a relationship and the complainant's whereabouts are not known to the applicant. The prosecution accepts that there are issues regarding the credibility of the complainant.

   (b) The applicant has been in custody in connection with these matters since April 2020. The matter is unlikely to be tried until the first half of 2022, with the delays exacerbated by the recent lockdowns associated with the COVID-19 pandemic.

2. Bail is granted on strict home detention conditions, supported by a guarantee.

***R v Sumner* [2020] SASC 231 (4 December 2020) – South Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Application for review of bail' – 'Exceptional circumstances' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Strangulation' – 'Threats to kill' – 'Weapons'

Charges: Aggravated assault against a child or spouse x 8; Choke, suffocate or strangle a person in a domestic setting x 3; Aggravated threaten to kill or endanger life x 1; Aggravated assault that causes harm x 1.

Proceedings: Application for review of bail.

Facts: The allegations related to the applicant man's former domestic partner and their two year old daughter. The applicant was originally granted bail by a Magistrate in May 2020, which was then revoked on an application by the Director of Public Prosecutions to review the decision. An application for bail before the Chief Magistrate in September 2020 was refused. This review application related to a further refusal of an application for bail made in November 2020. The key factor that the respondent relied on was that the complainants had moved to Queensland.

Issues: Whether the complainants' move to Queensland altered the position such that it could be said there were "special circumstances", pursuant to s 10A of the *Bail Act 1985* (SA).

Decision and reasoning: Bail was granted under strict home detention conditions.

The applicant was a prescribed person for the purposes of s 10A of the *Bail Act 1985* (SA) which provides that bail is not to be granted unless the applicant demonstrates the existence of special circumstances justifying release on bail. The court was also required to have regard to the matters specified in s 10, including the gravity of the alleged offences (s 10(1)(a)) and the need that the victim may have, or perceive, for physical protection from the applicant (s 10(4)) (at [11]).

Not without hesitation, the Court was prepared to conclude that there was a fundamental change of circumstances with the complainants' relocation to Queensland. This, in combination with other matters, particularly the support from the applicant's father, the proposal of monitored, home detention bail in the applicant's family home and the applicant's lack of offending history outside of the relationship, was capable of amounting to special circumstances justifying the applicant's release on bail (at [31]). Had the complainants not moved to Queensland for their protection the Court would have refused bail (at [32]).

***Brook v Police* [2020] SASC 131 (16 July 2020) – South Australia Supreme Court**

'Aggravating circumstances' – 'Appeal against conviction by magistrate' – 'Assault' – 'Child victim' – 'Stepchild in the family'

Charges: Aggravated assault x 1.

Proceedings: Appeal.

Facts: The appellant man and the complainant's mother were domestic partners. The complainant (child) gave evidence that his mother told him it was not safe for him to be at home and told him to go to his father's house. The complainant did not leave the house and later had a verbal exchange with the appellant. The appellant grabbed the complainant by the throat, he then pushed him, and the complainant fell. The appellant straddled the complainant and punched him multiple times. The appellant relied on the defences of removing a trespasser and self-defence.

Grounds for appeal: (1) The magistrate wrongly rejected the appellant's barrister's application to appear as *amicus curiae*; (2) The magistrate erred in refusing to disqualify himself for apprehended bias; (3) The magistrate erred in his approach to witness evidence.

Decision and reasoning: *Appeal allowed on Ground 3. Conviction quashed and matter remitted to a different magistrate.* (1) Administration of justice overwhelmingly favoured giving leave to counsel to appear as *amicus curiae*. However, the magistrate's error in failing to allow counsel to appear did not cause a miscarriage of justice. (2) The course the magistrate took in relation to the trial, including allegedly referring to the complainant as the 'victim', did not establish any substantial ground for a reasonable apprehension of bias. (3) The magistrate based his rejection of the mother's evidence on the acceptance of the child's evidence. Appeal allowed based on errors in assessing witness evidence as well as a failure to consider the defence of removing a trespasser.

***BRK v Police* [2020] SASC 116 (26 June 2020) – South Australia Supreme Court**

'Appeal against sentence' – 'Breach of protection order' – 'Children' – 'Home detention' – 'People with mental illness' – 'Physical violence and harm' – 'Property damage'

Charges: Aggravated assault x 1; property damage x 1; resist police x 1; breach of intervention order x 2

Case type: Appeal against sentence

Issue: Whether special circumstances exist.

Facts: The appellant man was sentenced to 5 months and 2 weeks imprisonment suspended after 2 months upon the appellant entering into a good behaviour bond for 2 years. At sentencing the appellant conceded incarceration was appropriate but argued it should either be wholly suspended under s 96 *Sentencing Act* 2017 (the 'Act') or served on home detention pursuant to s 71 of the Act.

The appellant and his daughter argued and she rang her mother (the victim and his former domestic partner) to ask her to collect her. The appellant was argumentative, aggressive and assaulted the victim by pushing her towards the wall. The appellant also damaged the victim's vehicle. A mental health assessment deemed the appellant suicidal (he had a history of depression and bi-polar disorder). He resisted police when arrested 5 days later and breached an intervention order by failing to attend the Safe Relationships Abuse Prevention Program, and sending a SMS message to the victim asking for a character reference.

Grounds: That the Magistrate erred:

1. By imposing a sentence that was manifestly excessive in that an immediate custodial sentence was imposed and the sentence was not wholly suspended;

2. In the alternative to ground 1, in declining to order that the custodial sentence be served on home detention under s 71;
3. In erring in the approach taken to the ‘sentencing hierarchy’, in particular, the interpretation and application of ss 71 and 96.
4. In the alternative to ground 3, in failing to provide adequate reasons for refusing to order that the appellant serve the custodial sentence on home detention.

Held:

1. The Magistrate erred in failing to consider whether the sentence of imprisonment should be served on home detention. Section 71(1)(b) of the *Sentencing Act* 2017 (SA) does not prevent a sentencing court from considering home detention where partial suspension is in contemplation.
2. The Magistrate erred in failing to provide adequate reasons for declining to order that the term of imprisonment be served on home detention.
3. The parties will be heard on the factual basis on which the Court should exercise its discretion when considering whether to re-sentence the appellant.

It is a benefit of suspension under s 96 that a bond with a duration longer than the period of incarceration can be imposed with scope for supervision and directed counselling to facilitate ongoing rehabilitation [98]. Home detention cannot be ‘partially’ ordered under s 71, only ordered for the whole term of a sentence of imprisonment. If some period of imprisonment is considered necessary home detention must be rejected in favour of partial suspension [101]. In deciding whether to make a home detention order, the paramount consideration is community safety, whether that is the offender’s family in the case of domestic violence or the community generally [102]. Another important factor is whether a home detention order "would, or may, affect public confidence in the administration of justice", in which case it must not be made. The sentencing court must consider the impact home detention is likely to have on the victim, spouse, domestic partner or any other person residing with the offender ([103]). The sentencing court must also reflect on whether home detention exposes the community and domestic violence victims to safety risks. The fact that the Magistrate was prepared to partially suspend the sentence suggested the appellant is not currently thought to represent an immediate threat. It also appeared that the appellant had been on bail without incident pending the outcome of this appeal [104].

As his Honour had little information about the steps taken to assist with the appellant's rehabilitation, the availability of courses or counselling for his difficulties in managing violence and intimate relationships, and his current work and family circumstances, he proposed to stand the matter over for further submissions or evidence on the factual basis on which the Court should exercise its discretion when considering whether to re-sentence the appellant [106].

Note: On 17 July 2020 the appellant withdrew this appeal with the result that the appeal was dismissed and the matter did not proceed to resentencing.

***Coleman v Police* [2020] SASC 66 (30 April 2020) – South Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Appeal against conviction' – 'Miscarriage of justice' – 'Physical violence and harm' – 'Plea of guilty' – 'Withdrawal and restoration of plea' – 'Withdrawal of legal representation'

Offences: Assault x 1

Proceedings: Appeal against conviction.

Issue: Whether the appellant's lack of legal representation when he entered guilty pleas amounted to a miscarriage of justice.

Facts: The appellant, an Aboriginal man, assaulted his female ex-partner by punching her three or four times in the face and throwing a shoe at her. He had been represented by different solicitors from the Aboriginal Legal Rights Movement in the Magistrates Court on at least four occasions with respect to the charge, but the matter had not been progressed. The appellant's solicitor withdrew from the file after the appellant indicated in open court that he wanted to plead guilty and "get it over and done with" [6]. The Magistrate informed the appellant that she was "likely, potentially to impose a period of imprisonment as a penalty" [6]. She sentenced him to five months' imprisonment and imposed an intervention order prohibiting him from contacting the victim, except for telephone or text contact for the purpose of child access arrangements. The appellant appealed on the ground that he had not been represented and therefore the Magistrate should not have accepted his guilty plea, and that the Magistrate misled him about the consequences that would flow from the pleas and induced the appellant to plead at the hearing.

Judgment: The judge dismissed the appeal, holding that there had been no miscarriage of justice due to lack of legal representation. The appellant understood the charges to which he was pleading, the Magistrate

explained the seriousness of the offences and that the appellant was likely to receive a sentence of imprisonment, and the appellant volunteered his wish to plead [14]. The appellant had also been legally represented over the several months prior to the hearing and had accepted an opportunity to receive legal advice [20]. His Honour emphasised that the appellant was entitled to proceed unrepresented and that "the withdrawal of legal representation before the appellant entered his pleas is not, in isolation, a ground which can justify appellate interference" [20].

His Honour also held that there was no miscarriage of justice in respect of the appellant being induced to plea, because the appellant entered his pleas voluntarily, "free of any pressure or threat" [19].

***Butler v The Queen* [2020] SASC 74 (16 April 2020) – South Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Application for review of bail' – 'Physical violence and harm' – 'Relevance of covid-19 pandemic to bail application' – 'Weapon-protection order'

Offences: Aggravated assault x 2, contravention of intervention order

Proceedings: Application for review of bail

Issue: Whether special circumstances exist for the granting of bail.

Facts: The appellant man was charged with aggravated assault against his female former partner on two separate occasions and contravention of an intervention order. The appellant punched the back of the victim's head, struck her with a water bottle, and punched and kicked her in the head on several occasions. A Magistrate refused bail but the appellant sought a review of this decision, contending that special circumstances existed for the granting of bail, pursuant to s 10A Bail Act 1985 (SA).

Judgment: Kourakis CJ dismissed the appellant's application for review of the bail decision, holding that no combination of the appellant's circumstances was sufficient to constitute special circumstances indicating that he, as someone charged with assaulting a domestic partner in breach of an intervention order, should be admitted to bail [5]. His Honour did note the systematic and endemic disadvantage of Indigenous people [7] (particularly where they are imprisoned [8]) and the burden of being imprisoned during the COVID-19 pandemic with its attendant restrictions [9]. However, His Honour ultimately held that the presumption against bail applies to all bail (even home detention bail) [14] and the appellant failed to establish special circumstances. Furthermore, the appellant had breached bail orders and intervention orders in past and the

charged offences were serious in themselves [4]. His Honour highlighted that "the underlying problem is not [the appellant's] relationship with the victim … but the alleged resort to violence in dealing with interpersonal conflict" [15]. His Honour did provide that a fresh review of the question of bail would arise, however, if it appeared in the future that a trial was a long way off or that the appellant's mental health was deteriorating [17].

Peel v Police **[2020] SASC 48 (7 April 2020) – South Australian Supreme Court**

'Breach of suspended sentence' – 'Exceptional circumstances' – 'Protection order'

Offences: Contravening a term of an intervention order x2; aggravated assault x1; failing to comply with a bail agreement x1; and driving under disqualification or suspension x 1

Type of Appeal: Appeal against sentence following breach of suspended sentence of imprisonment

Ground: The Sentencing Magistrate erred in the exercise of his discretion pursuant to s 114(3) of the Sentencing Act 2017 in that:

- the learned Magistrate did not give adequate or appropriate consideration to the terms of the section and the meaning of "proper grounds" therein; and
- gave undue weight to considerations personal to the Appellant including his criminal history, as opposed to the circumstances of the breach itself, such that the sentencing process miscarried.

Facts: The appellant man was convicted of two counts of contravening a term of an intervention order, aggravated assault, failing to comply with a bail agreement and driving under disqualification or suspension on 2 September 2019. He was sentenced to four months and 15 days imprisonment to be suspended after one month upon entering into a 15 months good behaviour bond. With backdating the bond was entered into on 13 September 2019. Since 17 October 2016 the appellant had been the subject of an intervention order for three years. Condition 3 of the order read "the defendant must not be within 100 metres of the protected persons". The appellant breached this order by being found with the protected person (his female former partner) in the front yard of his family member on 23 October 2019. He was visiting family and while he was at their home the protected person attended. He did not know she would be there and nothing untoward happened between them. It was a chance encounter and by not leaving immediately, the appellant was found to have breached a good behaviour bond and convicted of contravening a term of the intervention order. The

Magistrate sentencing him to three weeks imprisonment and at the same time revoked the suspended sentence bond and ordering that the appellant serve the remaining time in imprisonment [3]. An application was made before the sentencing Magistrate providing that the Magistrate "should find that there were proper grounds to say that the failure to comply with the conditions of the suspended sentence bond should be excused and that no further action should be taken in respect to that failure" [4].

Judgment: The appeal was allowed and the suspended sentence of three months and 15 days was revoked. David AJ stated that "[t]he question whether there are proper grounds for excusing the breach is to be confined to the nature of the breach itself without any consideration of matters personal to the offender. That principle has been clearly stated in Heritage" [15]. The sentencing Magistrate was found to have gone beyond this principle and was instead influenced by the previous offending [15]. In considering this, the sentencing Magistrate was found to have erred.

***Healy v Police* [2020] SASC 40 (19 March 2020) – South Australia Supreme Court**

'Appeal against sentence' – 'General deterrence outweighed personal circumstances' – 'Good behaviour bond' – 'Intervention order' – 'Physical violence and harm' – 'Property settlement'

Charges: Aggravated assault x 1

Case type: Appeal against sentence

Facts: The appellant man pleaded guilty to one count of aggravated assault upon his wife (complainant), with whom he was now separated. There was some variance about the facts. The prosecution alleged that the appellant and complainant were experiencing domestic difficulties. The complainant came into their bedroom, looking for her mobile phone. On the prosecution case, the appellant pushed her to the dresser and moved her face in the direction of her phone. Such conduct was clearly against her will and involved force ([4]-[5]).

The sentencing Magistrate regarded the offending as 'out of character' and unlikely to be repeated but was concerned about general deterrence for this type of behaviour, which involved violence towards female partners. He placed less reliance on personal deterrence and considered that the recording of a conviction could potentially affect the appellant's future employment. Nevertheless, he recorded a conviction on the basis of general deterrence ([7]), and sentenced the appellant to a $200 good behaviour bond for a period of 18 months.

Issue: The appellant appealed on the basis that the sentencing Magistrate erred in recording a conviction and did not consider the appellant's personal circumstances, including his low risk of re-offending, the impact of a conviction on his employment and the background of the offending ([8]-[9]).

Held: The appeal was dismissed. The appellant's personal circumstances were noted at [6]. He had no criminal history, had already spent 9 hours in custody, and was employed as an electrician. The appellant and his wife no longer lived together and Family Court proceedings in relation to their property were finalised. Further, there had been no contact between the parties as a result of an intervention order.

The Court dismissed the appeal as no error could be demonstrated. The sentencing Magistrate considered all matters relevant to the appellant's personal circumstances and was entitled to approach the matter by considering that general deterrence outweighed those matters. He was also entitled to be concerned about the prevalence and nature of domestic violence.

***Rana v Police* [2020] SASC 21 (13 February 2020) – South Australian Supreme Court**

'Application for revocation of an intervention order' – 'Legal representation and self-represented litigants' – 'People with mental illness' – 'Protected person' – 'Revocation of an intervention order' – 'Women'

Case type: Application for permission to appeal against a Magistrate's decision refusing an application for the revocation of an intervention order.

Facts: The appellant filed an application in the Magistrates Court for revocation of an intervention order that was issued against him in 2008. The appellant was absent at the application hearing. The intervention order involved allegations that 'the appellant sent letters to the protected person (a female), presented at the protected person's door on a number of occasions, caused the protected person to install additional security in her home and other matters' ([3]). The protected person maintained that she regularly did not feel safe and believed that the appellant was capable of inflicting harm as he was not mentally stable ([4]). The Magistrate noted that the appellant had significant mental health problems in the past, and summarily dismissed the application pursuant to s 26(4) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA) ([8]. Under s 26(4), the Court may dismiss an application for revocation of a final intervention order without receiving submissions or evidence from the protected person if 1) it is satisfied the application is frivolous or vexatious; or 2) if not satisfied there has been a substantial change in the relevant circumstances since the order was issued or last varied ([9]).

Issue: The appellant sought permission to appeal against the Magistrate's decision to refuse his application for the revocation of the intervention order on 3 grounds:

- 'The Magistrate applied the wrong onus, as the burden of proof applied was proof beyond reasonable doubt rather than proof on the balance of probabilities;
- There was an apprehension of bias as the matter was decided in his absence; and
- A psychological report the appellant sought to tender on appeal stated he would benefit from release of the order.'

Held: David AJ refused permission to appeal and found that the Magistrate was open to summarily dismiss the appellant's application for the revocation of the intervention order ([16]). In respect of the first appeal ground, David AJ held that although the Magistrate did apply the incorrect onus, this could have only been in the appellant's favour. By applying the higher onus of proof beyond reasonable doubt, it was apparent that the Magistrate was satisfied on the balance of probabilities either that the application was frivolous or vexatious or he was not satisfied that there was a substantial change in the circumstances ([11]). In respect of the second appeal ground, his Honour found that the basis of the appellant's submissions in his affidavit did not go to the question of whether there had been a change in the relevant circumstances. Instead, the submissions indicated a preoccupation with past events ([12]). In respect of the third appeal ground, David AJ held that the psychologist's conclusion that the appellant 'is a different person now tha[n] in the past and would benefit from release of the order' fell short of there being a change in the relevant circumstances since the order was last issued. Consequently, there was no merit in the appeal ([13]-[15]).

Miller v Police **[2020] SASC 20 (13 February 2020) – South Australian Supreme Court**

'Application made out of time' – 'Costs' – 'Intervention order' – 'Recording'

Charges: 1 x contravening a term of an intervention order

Case type: Application for permission to appeal out of time against an order for costs made by a Magistrate.

Facts: The male applicant was charged with contravening a term of an intervention order, the protected person was called at trial by the prosecution to give evidence. The evidence included the victim's recording of an offending phone call, a copy of which was tendered. After she gave evidence, the prosecution closed its case and she was released. The Magistrate found a case to answer and the matter was adjourned. During

the adjourned period, the victim was charged with property damage to the applicant's vehicle. Consequently, the applicant applied for the witness to be recalled to cross-examine her further because of this behaviour. The Magistrate allowed the prosecution case to be reopened and reversed his ruling that there was a case to answer in order that the victim might be cross-examined. The victim could not be found as she had been released from giving further evidence. The Court issued a witness summons for her return, however, she was not served the summons. It was clear that she believed the matter was finished at least to the extent that her participation was concerned ([2]-[4]).

The applicant sought his costs. The Magistrate ordered that no costs should be allowed with respect to all appearances and work done up to and inclusive of the date of trial, but costs were granted for a number of hearing attendances after that date, albeit at an amount lower than that sought by the applicant ([9]).

A police officer who attended the scene gave evidence of two tranches of the appellant's brother, Stephen's, statements and conduct:

- The first tranche was that Stephen 'loudly told police to leave the property and shut the front door'.
- The second was that when told the appellant was arrested for assaulting the complainant, Stephen stated 'If she's saying those things she needs to be dealt with. She needs to learn the Aboriginal way'.

Issue: The applicant sought permission to appeal the Magistrate's orders as to costs. This application was made around 4 months out of time. The applicant submitted that he should be awarded appropriate costs up to the time the Magistrate found there was a case to answer, and that there should not have been a reduction to the costs awarded for work done after the trial date.

Held: The applicant submitted that he was successful in the matter as no conviction was recorded and no finding of guilt was made. As a result, he contended that costs should follow the event and that he should be awarded appropriate costs up to the time that the Magistrate found that there was a case to answer ([10]). The respondent submitted that the question of costs is discretionary, and noted s 189 of the Criminal Procedure Act 1921 (SA).

In his reasons, the Magistrate indicated that in allowing the case to be reopened for further cross-examination of the victim, the matter had not been completed. It is uncertain how that cross-examination would have impacted his decision to find a case to answer. The alleged offending behaviour was presented by the victim's evidence and by way of recording. It might go to the question of credit or her attitude towards the

applicant, but it is difficult to determine a scenario where that would disturb the relatively low threshold of finding a case to answer. Additionally, the Magistrate had to consider that a permanent stay of proceedings is not necessarily a completion of the matter. In light of these difficulties, David AJ held that the Magistrate did not fall into error in exercising his discretion as to costs ([10]-[13]), and consequently, dismissed the appeal.

Attorney-General (SA) v Pennington **[2019] SASC 180 (25 October 2019) – South Australian Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Appreciable risk' – 'Childhood abuse' – 'Conditions' – 'Cultural obligations' – 'Extended supervision order' – 'Extensive criminal history' – 'Forensic evidence' – 'Past domestic violence' – 'People affected by substance misuse' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Traditional lands' – 'Unacceptable risk and best interests'

Charges: 1 x aggravated recklessly causing serious harm

Case type: Application by the Attorney-General (SA) for an Extended Supervision Order (ESO) pursuant to s 7 of the Criminal Law (High Risk Offenders) Act 2015 (SA) (the HRO Act) in respect of the respondent for a 3-year term.

Facts: The male respondent was found guilty at trial of aggravated recklessly causing serious harm against his former domestic partner and was ultimately sentenced to 5 years' imprisonment ([5]). The respondent had a significant history of serious criminal offending, especially violent offending against women ([6]). His history included offences of non-consensual sexual penetration, armed robbery, aggravated unlawful wounding, possession of a weapon with intent to cause injury and fear, and unlawful assault causing bodily harm in circumstances of aggravation and breaching protective bail conditions. It was against this background and while subject to a suspended sentence, that the respondent was sentenced to the offending in question. The circumstances of that offending were that the respondent, while in an intoxicated state, stabbed the victim in the back and fled the house without rendering her assistance. The victim may have died within hours had she not been airlifted to Adelaide ([10]).

The applicant filed an application for an ESO under the terms of the HRO Act. An Interim Supervision Order was made pursuant to s 9 pending the determination of the application for an ESO, which was enlivened upon the respondent's release from custody in September 2018. Further, a psychiatric report pursuant to s 7(3) of the HRO Act was provided ([11]-[13]).

Issue: The applicant sought an ESO in respect of the respondent for a period of 3 years on the basis that he is a high risk offender who would present an appreciable risk to the community's safety if not supervised under such an order. The main issue for the Court, however, was the nature of the terms and conditions of the ESO, especially those relating to whether or not the respondent is restrained from leaving South Australia without permission ([3]).

The respondent accepted that he was a high risk offender pursuant to s 5 of the HRO Act, and did not oppose the making of an ESO provided that the order included the following conditions ([14]):

- The respondent may depart from South Australia with the intention of living in another State, and if he chooses to do so, he will not be subject to the order unless he returns to South Australia during the period of the order.
- The order will take effect if the respondent returns to South Australia.

The applicant submitted that the terms of the ESO as proposed by the respondent were beyond the scope of the Court's jurisdiction, would render it impossible to effectively supervise him when he is absent from South Australia, and would not protect the community's safety in an effective manner ([29]).

Held: The respondent was born in the dry community of Tjuntjuntjara in Western Australia ([15]), which is described as 'relatively stable and safe' and as 'one of the remotest communities in Australia' ([21]). The respondent's daughter, grandson and elderly, ill father also lived in that community. His father's family originally came from the A?angu Pitjantjatjara Yankunytjatjara (APY) Lands in the remote north-west of South Australia. The respondent proposed that he would move between the Tjuntjuntjara community and Kurrawang, where he has other relatives. He also expressed an intention to live in Esperance ([15]-[16]).

The respondent submitted that given that Tjuntjuntjara is a dry community and he has family support and access to traditional healers, he could participate in men's business and would therefore unlikely reoffend ([17]). In his opinion, an ESO in the terms proposed by the applicant would require him to stay in South Australia, rendering it difficult to visit the APY Lands ([18]). Further, it was submitted that if he was prevented from living on or near his traditional lands, both on the APY Lands and in Western Australia, this would negatively affect him and increase his likelihood to reoffend, as he would be deprived of the opportunity to play a meaningful role in his culture and lore ([19]). While it was undoubtedly in the respondent's best interests that he be permitted to return to his homeland, Kelly J noted that the question was not 'simple', and required an analysis of the relevant provisions of the HRO Act ([26]-[28]).

Her Honour placed great reliance on the psychiatric report ([35]), which noted that the respondent was at high risk of further violent offending, due to his significant history of violent and sexual offending, his limited (and only very recent) insight into that behaviour, and his tendencies to minimise his behaviour and blame circumstances and victims for his past behaviour ([36]). It was also noted that the respondent was at a heightened risk of sexual offending due to his issues with childhood abuse and increased risk of violence ([37]). If the respondent returned to his traditional lands in South Australia, he would be at a greater risk of reoffending due to potential personal conflicts with other community members and the difficulties in accessing adequate supervision in remote communities. There would also be a real risk of the respondent resuming alcohol abuse without adequate supervision and therapy ([43]). Her Honour further considered therapies appropriate to the respondent's personality type, and concluded that he would benefit from a combination of traditional western psychological therapy and support provided by traditional healers ([44]-[46]). The further the respondent travels from Adelaide, the more difficult it would be for him to access the necessary therapy ([47]).

The psychiatric report also raised the issue of the respondent's desire to return to his traditional lands to fulfil his cultural obligations and identified some risk factors involved if he were to return ([48]). Importantly, the majority of the respondent's offending occurred when he was living on his traditional lands and when he was under the influence of alcohol ([49]). Even though Tjuntjuntjara is a dry community, other communities in which the respondent had expressed a desire to visit are not ([50]). Under the terms of the order proposed by the respondent, there would be no practical way for the Court to satisfy itself that the community is protected should he choose to visit or reside in South Australia ([53]), as South Australian supervisory authorities have no practical way of determining if he was to re-enter the APY Lands ([52]).

Her Honour held that an ESO for a 12-month term would adequately protect the community and enable the respondent to continue with appropriate rehabilitation and therapy ([55]). Her Honour also found that the respondent was a high risk offender who posed an appreciable risk to the community's safety if not supervised under the order, and that it would be outside the scope of the Court's jurisdiction to make an ESO in the terms requested by the respondent, and would render his effective supervision impossible when he is absent from South Australia ([33]).

***Harwood v Police* [2019] SASC 129 (26 July 2019) – South Australian Supreme Court**

'Children' – 'Cross-examination' – 'Domestic relationship' – 'Fair trial' – 'Intervention order' – 'Legal representation and self-represented litigants'

Charges: 3 x contravening a term of an intervention order contrary to s 31(2) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA)

Case type: Appeal against conviction

Facts: The appellant, who was self-represented at trial, was convicted of three counts of contravening a term of an intervention order, contrary to section 31(2) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA). The protected person under the intervention order was the appellant's ex-partner, the victim ([1]). The agreed facts were that on 3 separate nights, the appellant attended the home of the victim's father where the victim and their daughter were residing. The appellant left letters addressed to the victim's father and old family photographs. Although he admitted to attending the premises, he argued that he genuinely believed that the victim and their daughter were residing at a different address ([2], [9]).

Under s 13B of the Evidence Act 1929 (SA), the appellant was not allowed to cross-examine the victim at trial unless it was done so by counsel. The Magistrate failed to refer to the appellant's rights under s 13B(b)(ii), which includes a reference to the Criminal Law (Legal Representation) Act 2001 (SA). Section 6(1a) of that Act provides that if a defendant who is not legally represented at trial applies to the Commission for legal assistance for the cross-examination of a s 13B witness in the trial, the Commission must, subject to qualifications, grant such assistance ([17]).

Although the Magistrate advised the appellant of his right to apply for legal aid ([14], [16]), he did not advise him that legal assistance must be granted to a defendant subject to certain qualifications (terms), and instead informed the appellant that he probably would not qualify for legal assistance ([18]). The trial was adjourned, and upon resumption, the appellant remained under the mistaken belief that he would not qualify for legal assistance and was not advised of s 6 of the Criminal Law (Legal Representation) Act 2001 (SA). The appellant was unable to test the victim's evidence in any way. Consequently, the Magistrate accepted her evidence and convicted the appellant ([21]).

Issue: The appellant appealed on the ground that the trial court did not properly and fully advise him of his right to obtain a counsel's assistance for the purpose of cross-examining the victim ([4]).

Held: Lovell J allowed the appeal and set aside the conviction. Her Honour remitted the matter for retrial before a different Magistrate and ordered the respondent to pay the appellant's appeal costs ([29]). Importantly, her Honour noted a trial judge's obligation to ensure that an accused self-represented person understands their rights and has all the necessary information in order to receive fair trial and make informed choices about his or her case ([22]-[23]). In the present instance, the appellant was required to be aware of and fully understand his rights provided for by s 13B and, by extension, s 6(1a) in order to receive a fair trial ([23]). The Magistrate was obliged to ensure that he fully understood that cross-examination of the victim could only occur if he employed counsel to do so on his behalf, and that if he applied to the Commission for legal assistance, they were bound by law to provide it, subject to any conditions they saw fit ([24]). The trial miscarried because the Magistrate failed to properly and fully advise the appellant of his right to obtain counsel's assistance for the purpose of cross-examination ([25]).

***Siropoulos v Police* [2019] SASC 127 (19 July 2019) – South Australian Supreme Court**

'Appeal against sentence' – 'Conditions' – 'Domestic relationship' – 'General deterrence' – 'Good behaviour bond' – 'Manifestly excessive' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Risk of re-offending' – 'Step child in family'

Charges: 1 x assault causing harm

Case type: Appeal against sentence

Facts: The appellant was convicted of assault causing harm after having repeatedly punched the victim in the face, in the presence of her twin daughters from a previous relationship ([14]). The appellant and victim had been in a relationship for approximately 9 years. The relationship was marred by allegations of infidelity made by the appellant, and 'he felt betrayed and became very angry' upon discovering that the victim had regularly contacted another man ([13]). The victim's injuries were extensive ([16]), and she told the Court in her Victim Impact Statement that 'she was upset that the offending occurred unprovoked in her and her children's home' ([18]).

The appellant was sentenced to 14 months' imprisonment, which was reduced to a prison term of 8 months and 2 weeks as a result of his early guilty plea. The sentence was partially suspended, allowing the appellant's release after serving 4 months imprisonment upon him entering into a good behaviour bond for 2

years ([2]). The conditions of the bond are noted at [3], and included the requirements that he does not leave South Australia unless given permission by his Community Corrections Officer for specific purposes, and that he attend any programs and appointments as directed.

Issue: The appellant appealed against the sentence on the grounds that it was manifestly excessive and that it was manifestly unreasonable to not wholly suspend the prison sentence. He also appealed the condition of the partially suspended sentence bond requiring him not to leave South Australia without permission.

Held: Kourakis CJ noted the appellant's personal circumstances at [19]-[27]. He was aged 47 at the time of the offending, worked in the fishing industry, suffered a lengthy period of depression after his father's death, had numerous previous convictions of driving offences, and consumed an excessive amount of alcohol, particularly after his father's death and to numb his emotions during hostile relationships. Although the appellant has not consumed alcohol in over 3 years, he reported weekly use of cannabis ([23]). His mother was dependant on him and he also had a brother who suffers from schizophrenia ([20]). The appellant experienced anxiety and low self-esteem, as well as health issues. His psychologist opined that he exhibited dysfunctional personality traits, and experienced self-doubt and feelings of inadequacy ([25]). According to a violence risk assessment, the appellant was identified as likely to pose a Moderate-High risk of re-offending ([26]).

Having regard to the relative importance of general deterrence, Kourakis CJ held that the length of the prison sentence was not manifestly excessive. The appellant had reoffended despite the leniency that had been previously shown to him, and the victim's physical injuries were very serious. At [35], his Honour stated that '[p]ersonal and general deterrence must be given substantial relative weight in sentencing for assaults committed by men against women with whom they are, or have been, in a relationship, particularly when in a jealous rage'. The length of both the notional starting point and the actual prison term was well within the permissible range.

Kourakis CJ also found that the Magistrate's decision to partially suspend the sentence fell within the proper exercise of the sentencing decision ([36]), and that the Magistrate considered all relevant matters ([38]). It was not unreasonable for the Magistrate to conclude that the appellant's sentencing would be optimised by a combination of both punishment and deterrence effected by imprisonment for 4 months and rehabilitation over an 18-month period ([40]).

Kourakis CJ allowed the appeal only to the extent of removing the condition of the bond requiring the

appellant to not leave South Australia unless given permission by his Community Corrections Officer, as such a condition was unreasonable. The appellant's home was in Melbourne, where his dependent mother resided and his brother received treatment for his mental illness. His Honour found that 'Australia is one nation and there is much movement between the south east corner of [South Australia] and Victoria'. His Honour also considered that there was 'no real connection between the condition that he obtain treatment and counselling and the obligation to obtain permission.' The appellant should be entitled to 'come and go from his own home, to help his mother as and when he sees fit, and to fish in Victorian waters without first obtaining permission' ([42]).

***Lang v Police* [2019] SASC 97 (7 June 2019) – South Australian Supreme Court**

'Community protection' – 'Condign punishment' – 'Damaging property' – 'Domestic relationship' – 'General deterrence' – 'Manifestly excessive--assault police' – 'Physical violence and harm' – 'Step child in family - past domestic and family violence'

Charges: 2 x aggravated assault, 1 x contravening a term of an intervention order, 1 x property damage

Case type: Appeal against sentence

Facts: The offending occurred in the context of a domestic relationship which was in the process of ending ([5]). At the relevant time, the appellant was subject to an intervention order ([11]). The appellant was living with his former domestic partner and her daughter (the protected person under that order). One count of aggravated assault involved the appellant punching his former domestic partner with a clenched first to her left shoulder in the presence of her daughter ([8]). The police were called to the house. The second count of aggravated assault involved the appellant punching the attending Sergeant numerous times, one of which was described as 'an unusual two-handed punch delivered in a jabbing manner'. The property damage occurred when the Sergeant's glasses were broken as a result of the altercation between the appellant and himself ([10]). The Magistrate found that the appellant's behaviour amounted to a breach of the intervention order, as he intimidated the daughter by assaulting her mother and the Sergeant in her presence, abusing her and conducting himself in a violent and abusive manner ([11]).

At trial, the Magistrate noted the appellant's personal circumstances at [13], referring to his age, his previous marriage, and his employment history. His character references indicated that he was a hardworking, honest person who made a positive contribution to his community ([14]). The appellant had a prior conviction for

assault of a police officer for which he was ordered to perform 200 hours of community service within 10 months ([15]). The Magistrate did not refer to the circumstances that led to the making of the intervention order ([17]). In his view, specific and general deterrence were significant sentencing principles ([18]). His Honour also 'correctly observed' that the law is required to protect police officers when performing their duties, as well as domestic partners ([19]). Consequently, the Magistrate imposed convictions on all counts and sentenced the appellant to 6 months' imprisonment ([20]).

Issue: The appellant appealed against his sentence on 2 grounds, namely, 1) that the Magistrate failed to have regard to the appellant's lack of antecedents, age, community work, good character and the interests of justice in sentencing the appellant; and 2) that the sentence of 6 months' imprisonment was manifestly excessive.

Held: Hinton J allowed the appeal in part. His Honour considered each ground separately, and placed reliance on relevant case law and statistics from the New South Wales Bureau of Crime Statistics and Research. His Honour noted that the first ground of appeal was essentially a contention that the appellant's lack of antecedents, age, community work, and good character should have attracted a weight that resulted in a lesser sentence, or resulted in the sentence imposed being suspended in part or in whole ([21]). Referring to House v The King and R v Lutze, his Honour concluded that the submissions made in support of the first appeal ground should be treated as forming part of the submission in support of the second appeal ground ([24]).

As to the second appeal ground, his Honour found that the offending was 'particularly serious' and that the Magistrate correctly referred to the court's duty to protect vulnerable people from domestic violence ([29]). His Honour cited R v Saunders for the proposition that intervention orders and bail conditions can prevent acts of domestic violence, and that the violation of such orders and conditions can have profound consequences for the victim's sense of safety and security. Hinton J observed 'the effectiveness of intervention orders as a means of protecting members of the community will be undermined if the courts do not respond appropriately to their breach' ([33]).

Hinton J did not find the sentence of 6 months' imprisonment to be manifestly excessive per se. The appellant did not provide any explanation for his conduct or express remorse or contrition, and mitigating circumstances were absent. Although he is an intelligent person, his prior involvement with the courts and police should have been a clear reminder that such violent, abusive conduct towards his family and police is not tolerated ([40]). The appellant's prospects of rehabilitation were good, as he generally lived a 'good and productive life' and

would likely continue to do so upon his release ([41]).

His Honour, however, found the requirement that 'he serve the entirety of the 6 month sentence so as to punish, to deter specifically and generally and to provide the protection' to be manifestly excessive. The Magistrate's approach was not reasonably open, having regard to the appellant's personal circumstances and, in particular, his age, antecedents, previous good character, work history and prospects of rehabilitation ([43]-[44]). The Magistrate appeared to focus on condign punishment to the exclusion of rehabilitation, and overlooked the appellant's likely response to supervision in the community for an extended period, which would have provided greater protection for the community ([44]).

In summary, the appeal was allowed, but to the limited extent of directing, pursuant to s 96(4) of the Sentencing Act 2017 (SA), that the appellant serve 16 weeks of his 6-month sentence in prison and suspend the remainder of the sentence on condition that he 1) enter into a good behaviour bond for 18 months; 2) be subject to supervision by a Community Corrections Officer; and 3) attend any counselling, treatment and therapeutic programs that deal with anger management and/or domestic violence as directed and deemed appropriate by his Community Corrections Officer ([45]).

***Wondimu v Police* [2019] SASC 62 (18 April 2019) – South Australia Supreme Court**

'Bail' – 'Bail conditions' – 'Breach' – 'Following, harassing and monitoring' – 'Self-represented'

Charges: Stalking x 1; non-compliance with bail agreement x 3.

Case type: Appeal against conviction and sentence.

Facts: On 2 November 2016, the appellant was arrested and charged with stalking his father-in-law. He was released on bail subject to conditions, one of which prohibited him contacting his then wife of 13 years, who was also the mother of his five children and the daughter of his father-in-law. On 10 November 2016, the appellant telephoned his wife, but did not leave a message. The appellant also sent 2 text messages on a separate occasion. As a result, he was arrested and charged with 3 counts of breaching the terms of his bail. The Magistrate found the appellant guilty, and imposed convictions in relation to each count and released him upon his entering into a 6 months' good behaviour bond in the sum of $500. The appellant appealed against the conviction and sentence. His appeal against conviction was over 40 weeks out of time.

Issue: This is an appeal against a conviction and sentence, where the appeal against conviction was made

out of time. The appellant submitted that the relevant bail condition was unreasonable or unlawful for including the prohibition against contact with his wife when she was not the complainant. He also argued that he had not been competently represented by counsel at his trial.

Held: Upon the hearing of the appeal, the appellant was unrepresented. Hinton J noted that one of the purposes of conditions of a bail agreement is to prevent further offending ([33]). Hinton J was not satisfied that the impugned condition was legally unreasonable, as the evidence suggested a domestic disturbance between the appellant and his wife, a repeat of which the police intended to prevent by prohibiting contact. Further, Hinton J found that the validity of a bail agreement does not depend on the prosecution's success at trial of any charge to which the bail agreement relates. The fact that a person is charged is sufficient to subject him or her to bail ([36]).

Hinton J also found that it was open to the Magistrate to be satisfied of the appellant's guilt on Count 1 beyond reasonable doubt ([44]). His Honour noted that contact, in terms of communication, can be direct or indirect and that the evidence established that the call was made from the appellant's phone. His Honour found that it is irrelevant whether a mental element attaches to the act, as the offence of breaching a bail agreement pursuant to section 17 of the *Bail Act 1985* (SA) is one of strict liability. A bail agreement, in his view, not only seeks to ensure compliance but also requires the accused to take positive steps to ensure compliance. To hold that an offence is one that has a mental element attaching to the act would undermine the requirement that an accused granted bail take positive steps to avoid an inadvertent breach ([43]).

His Honour refused to grant the appellant an extension of time in which to appeal against his convictions, as no explanation was provided for the delay and the appeal did not have sufficient prospects of success. His Honour held that the the appeal was, in effect, an effort to have the appellant's case re-tried so that he could adopt a different approach ([45]). The appeal against sentence was also dismissed. The appellant was obliged to take steps to ensure compliance with the bail conditions, which he failed to do ([46]-[51]).

***Mathew (SA) Nominees Pty Ltd v Belconnen Automotive Pty Ltd* [2019] SASC 39 (21 March 2019) – South Australia Supreme Court**

'Contract' – 'Costs' – 'Misleading conduct' – 'Specific performance'

Civil proceedings: claim by plaintiff for specific performance of motor vehicle purchase contracts; counterclaim by defendant for misleading conduct, jurisdictional challenge; and security for costs application by defendant.

Appeal type: appeal against Magistrate's reasons, security for costs order, and failure to make jurisdictional challenge order.

Facts: The plaintiff purchased three high performance Holden motor vehicles in the name of the plaintiff's company. Only two are relevant to this matter. The purchases were negotiated by Mr Mazzacano and two others. Mr Mazzacano, as a former Holden employee, was entitled to an employee discount scheme. The plaintiff's claims that he ordered the vehicles and was invoiced for each by the defendant ($42,927 and $44,467). He paid both the balance and deposit. The defendant contends that the plaintiff company was not entitled to access the discounts as the purchase was not for the benefit of Mr Mazzacano. The defendant did not deliver the vehicles but returned the purchase monies to the plaintiff. The plaintiff sought specific performance of its contracts with the defendant on 19 July 2017 and filed an application for summary judgment. The defendant filed a defence stating that the plaintiff was not entitled to the EPSA discount. The defendant subsequently filed an amended defence and counterclaim, and included a counterclaim for misleading conduct and the defendant filed interrogatories seeking clarification on the nature of the business being operated by the plaintiff asking 'what is the nature of the business that was being operated by the plaintiff during 2017'.

The defendants made a jurisdictional challenge and a security for costs application. The plaintiff appeals against orders granting security for costs and declining to order costs in relation to the defendant's jurisdictional challenge.

Issues:

1. The Magistrate's Reasons are inadequate in that they fail to address various issues raised by the plaintiff.
2. The Magistrate erred in his decision to order security for costs in giving no weight, or insufficient wait to various matters.
3. The Magistrate erred in ordering security for costs in an excessive amount, in particular having regard to the true quantum of the dispute, the inclusion of past the failure to make to make reductions for the costs of the counterclaim and the interruption caused by the failed jurisdiction application.
4. The magistrate erred in failing to make an order (in respect of the defendant's jurisdictional challenge that the defendant pay the plaintiff's costs of that application).

Decision and reasoning:

Dismissing the appeal, Doyle J held:

There was no error in relation to the Magistrate's exercise of his discretion to order security for costs per *House v King* (1936) 55 CLR 499.

The plaintiff did not establish that there was the potential for substantial injustice were permission to be refused and the orders for security left to stand.

Reasoning – appeal ground 1:

That a Magistrate attaches insufficient weight to a particular consideration is not, in itself, an allegation of error in the sense required by *House v The King* at [49]. That 'Appellate intervention in interlocutory decision making' should be 'truly exceptional at [50]. In relation to the alleged inadequacy of reasons in relation to both security for costs and the costs of the failed jurisdiction application, his Honour, held at [53] that 'in the case of interlocutory disputes, little by way of reasoning may be required'…'as long as the key planks in the judge's reasoning process leading to the relevant decision are apparent, that will generally suffice'. The Magistrate in their reasons, 'identified the plaintiff's status as a trustee company', the 'defendant's delay in bringing the application' and 'stated his conclusions in relation to the availability of security for past costs' at [55].In the event that a plaintiff is a trustee, a defendant 'should not be subjected to the potential complexity…expense and uncertainty, associated with having to resort to derivative rights in order to recover any costs' at [64]. The plaintiff did not identify whether it holds the properties in its own right or as trustee, and as such the Magistrate was right to attach significance to the consideration [75]. In relation to the Magistrate not giving any weight to the defendants' delay in bringing the application for security. While 'it is a well-established that applications for security should be brought promptly' [at 78], whether it is in the interests of justice to make an order for security is also a factor [at 82].

Other matters that were of some relevance to the discretion to order security was the absence of indication by the plaintiff that it would not be able to provide security, further there was no challenge to the bona fides or arguable merit of the plaintiff's claim including that he had paid the for the cars prior to the order for security for costs. At [104] it was open for the Magistrate to make a reduction to the quantum of security upon the existence of the counterclaim, however the amount ordered was not 'erroneously high'.

Conclusion as to security for costs:

- The plaintiff did not suggest that it was unable to provide security.
- The plaintiff having to meet its costs obligations flowing form the litigation constitutes an injustice or prejudice in this case.

Reasoning – appeal ground 2:

At [65] 'while it is significant, the context of an application for security, that a plaintiff is suing as trustee, it does not follow automatically that it will be appropriate that there be an order for security'.

***Shahin v El-Shafei; El-Shafei v Shahin* [2018] SASC 167 (6 November 2018) – South Australia Supreme Court**

'Disclosure' – 'Domestic, family or apprehended violence or for personal safety' – 'Orders and convictions' – 'Orders to restrain'

Proceeding: Private application for final intervention order.

Appeal type: Appeal against Magistrate's revocation of interim intervention order.

Facts: Mr Shahin is the owner of two adjacent properties, numbers 17 and 18. His family occupies number 17, while his sister occupies number 18. Dr El-Shafei owns number 19, which is adjacent to number 18. There have been ongoing disputes between the parties regarding a number of matters. Dr El-Shafei alleges he was assaulted by Mr Shahin, claiming a resulting wrist injury. Dr El-Shafei is charged with an offence relating to damage caused to the boundary fence. Following the dismissal of a police application for an intervention order, Dr El-Shafei filed a private application which proceeded *ex parte* withDr Cannon (then Deputy Magistrate) granting an interim order pursuant to s 21 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). The application for a final intervention order was heard a week later by Magistrate Sheppard. The interim order was revoked and the matter referred back to Dr Cannon for further hearing. Dr Cannon declined to award costs of the intervention order application in favour of Mr Shahin. Mr Shahin filed a notice of appeal again Dr Cannon's dismissal of his application for costs. Dr El-Shafei subsequently filed a notice of appeal against Magistrate Sheppard's revocation of the interim intervention order on 29 June 2018. A second and third amended notice of appeal were filed by Dr El-Shafei on the 12 July and 5 September 2018. The second notice amended an incorrect identification of the parties. The third notice filed the day before the appeal hearing, was not served on Mr Shahin's representatives until the morning of the hearing.

Issues:

- Whether an applicant for an intervention order is required to make full and fair disclosure on the same basis as any other person seeking an *ex parte* order.
- Whether s 76A of the *Criminal Procedure Act 1921* (SA) was available to set aside an interim intervention order or whether the operation of s 76A is precluded by s 26(5) *Intervention Orders (Prevention of Abuse) Act 2009* (SA)('IO Act').
- Whether Magistrate Sheppard erred in revoking the interim order or denied Dr El-Shafei procedural fairness by declining to adjourn proceedings until Dr El-Shafei arranged legal representation.
- Whether Dr Cannon misdirected himself as a matter of law and fact by referring to his own conduct rather than by inquiring whether Dr El-Shafei had acted in bad faith or unreasonably pursuant to s 189C of the *Criminal Procedure Act 1921* (SA).

Decision and reasoning:

Permission to appeal

As a criminal proceeding (per R 4.07 of the *Magistrates Court Act 1991* (SA), the jurisdiction conferred on by the IO Act is vested in the Criminal Division), any appeal relating to an intervention order is subject to s 42 of the *Magistrates Court Act 1991* (SA) at [41]. S 42(1a) of the *Magistrates Court Act 1991* (SA) does not preclude an appeal against interlocutory judgment in these circumstances. Per Sulan J in *Groom v Police (No 3)* [2013] SASC 93, the words "before commencement or completion of the trial" in s 42(1a)(c) have no operative effect unless there is a trial. Accordingly, 'the Court has power to grant permission for an interlocutory appeal if … there are special reasons why that would be in the interests of the administration of justice' at [45]. Granting permission, his Honour was satisfied special reasons existed due to the significant questions of law raised (ie the application of s 76A of the *Criminal Procedure Act 1921* (SA) and validity of referring the matter for further hearing) at [48].

Dismissing Dr El-Shafei's appeal, Parker J held

'An applicant for an interim intervention order is not required to make full and fair disclosure in the same manner as an applicant for an *ex parte* order' at [76]. 'The relevant issue is not whether one party is more or less blameworthy than the other, but rather whether it is reasonable to suspect that an act of abuse may be committed' (grounds for issuing an intervention order per s 6 IO Act) at [77]. S 23 IO Act provides the Defendant with an opportunity to respond before the Court concludes whether a final order is appropriate at

[78]. ‘There is a real risk that the imposition of a full and fair disclosure obligation in such an environment is likely to frustrate or impede the object of providing prompt intervention to protect those at risk of abuse’ at [78]. Given the impracticality of subjecting the police to full and fair disclosure, private applications should be under no greater obligation at [81].

S 26 IO Act does not operate to preclude the Court from exercising its powers under s 76A where the operation of s 76A is considered necessary to remedy an injustice. The power conferred by s 76A was available to the Magistrate at [109], [112].

- S 76A was not applied to frustrate the operation of a legislative scheme (the IO Act) but to rectify a situation considered unjust (*Police v Clayton-Smith* [2010] SASC 127 per Gray J).
- The requirement to award persons with a relevant interest an opportunity to be heard before the revocation or variation of an order, as enacted by s 26(5)(a) IO Act, exists at common law and is therefore a relevant consideration in applying s 76A at [107], [109], [112].
- Likewise, s 26(5)(b) does not extend the requirements of the common law as the same matters will be considered in making an order as in the varying or revoking that order at [110].

There was no process or outcome error in the decision of Magistrate Sheppard. Her Honour’s concern about the accuracy and timing of the information provided by Dr El-Shafei was a proper reason for revoking the interim order at [117]. As the ‘decisive issue was the reliability of the information put before the Court’ and as Dr El-Shafei was awarded ample opportunity to address those issues, he was not unfairly disadvantaged by a lack of legal representation at [129]. The orders of Magistrate Sheppard required a rehearing of the application for an interim order. A rehearing did not occur and the proceedings of 18 May 2018 before Dr Cannon therefore miscarried at [132]. If Dr El-Shafei pursues his application the matter should proceed to a hearing to determine whether a final order should be made (per s 23 IO Act) at [135].

Upholding Mr Shahin’s appeal against the dismissal of his costs application, Parker J held

There were not proper grounds to reject Dr El-Shafei’s application for costs as Dr Cannon ‘did not have sufficient information to decide whether or not Dr El-Shafei had acted in bad faith or unreasonably’ at [139]:

- Given Justice Parker’s finding that an applicant for an *ex parte* intervention order is not required to provide full and fair disclosure, Dr El-Shafei’s failure to provide all relevant information did not warrant a cost order against him at [137]-[138]

- While Dr El-Shafei may have caused the Court to be misled (a proper basis for setting aside the interim order), without a determination of the factual allegations made against him, Dr El-Shafei cannot be said to have acted in bad faith or unreasonably at [138]. That question should be determined if and when a final order is determined at [140].

Stone v Police **[2018] SASC 147 (27 September 2018) – South Australia Supreme Court**

'Contravention of an intervention order' – 'Evidence' – 'Factors affecting risk' – 'Protection order'

Charges: Contravention of an intervention order x 2.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted after trial of two counts of contravening a term of an intervention order. After finding the evidence of the protected persons to be truthful and accurate, the Magistrate recorded convictions and imposed a good behaviour bond for 12 months.

Issues: The appellant appealed the convictions on a number of grounds including that the Magistrate erred in admitting evidence of past discreditable conduct, applied the wrong onus of proof in relation to the charges, placed undue reliance on the credibility of the protected person, impermissibly relied on evidence of a charge that was dismissed in finding the appellant guilty of the two charges, wrongly regulated the cross-examination of the appellant, and that the evidence was insufficient to support the convictions beyond reasonable doubt.

Decision and reasoning: Kelly J dismissed the appeal on the following grounds:

- The evidence of past discreditable conduct complained of was properly admitted.
- The Magistrate applied the proper onus of proof in finding the charges proven.
- The evidence was sufficient to satisfy the convictions.
- The Magistrate made proper assessments of the witnesses at trial, as required, and was entitled to be satisfied beyond reasonable doubt as to the credibility of the protected person as a witness following his assessment of that person's evidence.
- The Magistrate did not rely on evidence relating to the dismissed charge in finding the appellant guilty of the two counts on which he was convicted.
- The cross-examination of the appellant at trial did not go beyond the bounds of fair and proper cross-

examination.

***White v Police* [2018] SASC 124 (5 September 2018) – South Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Physical violence and harm' – 'Protection orders' – 'Vulnerable people'

Appeal type: Appeal against decision of a magistrate to issue a final intervention order.

Facts: The police issued an interim intervention order against the appellant for the protection of Mr Larkins, his wife, his child and three other children in his care, all of whom lived in the same street as the appellant. The appellant and his wife (who had separated, but continued to live in the same house) had a poor relationship with Mr Larkins and his wife. Mr Larkins and his wife were Indigenous Australians. Mrs Larkins had been involved in Federal Court proceedings relating to unspecified issues with the appellant's wife.

The Magistrate was required to determine whether or not the interim intervention order should be confirmed as a final intervention order or a final intervention order be made in substitution. The order was declared to address a domestic violence concern. The Magistrate made a final intervention order against the appellant in substitution for the interim order, finding that it was reasonable to suspect that the appellant would, without intervention, commit acts of abuse against the protected persons and that it was appropriate in the circumstances to issue a final order. The protected persons were unchanged but the terms of the final intervention order differed somewhat from those of the interim order.

Issues: Whether a final intervention order should be made; Whether the Magistrate erred with respect to evidentiary matters and in applying the statutory requirements for making a final intervention order.

Decision and reasoning: It was entirely open to the Magistrate to accept the evidence of Mr Larkins and his wife on critical issues in preference to that of the appellant and his wife. The transcript showed that the appellant appeared angry and malevolent towards Mr Larkins and his family, displaying significant animosity with racial overtones towards them. It was reasonable to find that the appellant would commit further acts of abuse in the absence of an intervention order. In all the circumstances, the Magistrate's order was appropriate.

Dismissing the appeal, Nicholson J held that:

- The order made by the Magistrate was interlocutory and special reasons must be established in order to obtain leave to appeal.
- The features of a final intervention order, together with the fact that the appellant has no right to apply for a variation or revocation for at least 12 months, were sufficient to establish special reasons, at least where there is an arguable case on appeal.
- Bearing in mind the usual advantages possessed by a trial judge when assessing oral evidence, it was open to the Magistrate to make the findings of fact he made on the evidence that was before him.
- The Magistrate did not err with respect to the evidentiary matters complained of by the appellant.
- The Magistrate did not err in applying the statutory requirements of s 6 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). The findings made in satisfaction of these requirements were open on the evidence.

***Hussey v Police* [2018] SASC 122 (31 August 2018) – South Australia Supreme Court**

'Children' – 'Damaging property' – 'Evidence' – 'Exposing children to domestic and family violence' – 'People with children' – 'Physical violence and harm'

Charges: Breach of bail x 1; Property damage x 2; Assault causing harm x 1.

Appeal type: Appeal against conviction for assault.

Facts: The appellant and complainant had been in a relationship for about eight weeks. Each had one daughter. The complainant was woken by her daughter vomiting. The next day, the complainant and appellant argued. When the complainant told the appellant to leave her home, he became very angry and violent. The complainant alleges that the appellant kicked, punched and shoved her. She ran to her neighbour's house with her daughter and asked them to call the police. She could hear him ripping the flyscreens off her house. The Magistrate described the appellant and complainant as witnesses who 'gave their evidence clearly and with some passion, both of them without major discrepancies'. He found the appellant guilty of assault but not guilty of the property damage charges.

Issues: Whether the verdict was open on the evidence; Whether the Magistrate adequately explained why the appellant's evidence was rejected; Whether the magistrate's reasons were adequate.

Decision and reasoning: The appellant appealed the guilty verdict on the grounds that (1) the Magistrate's

reasons were insufficient to explain his finding that 'Nothing was sufficient to justify a movement of the foot sufficiently hard to damage the side of her face. He could have extracted his foot without kicking her to the cheek'; (2) that the Magistrate did not explain why his evidence was rejected beyond reasonable doubt; and (3) that there was insufficient evidence for the Magistrate to have rejected beyond reasonable doubt his version of events, which should have led to the Magistrate entertaining a reasonable doubt as to his guilt in relation to the assault charge.

Bampton J held that, having read the evidence in its entirety and in accordance with the requirements referred to in *M v the Queen* [1994] HCA 63, the finding of guilt was not supported by the evidence. The state of the evidence was such that the prosecution failed to prove that the appellant intentionally applied force to the complainant causing 'harm to the tongue and cheek'. Her Honour held that the Magistrate did not adequately explain his finding of guilt and did not explain how the elements of assault were satisfied. The Magistrate's reasons were not underpinned by a reasoning process linking and justifying the findings made ([53]). There was reasonable doubt as to the appellant's guilt. It was not open to the Magistrate to be satisfied beyond reasonable doubt of the appellant's guilt. Accordingly, the appeal was allowed, the verdict of guilty was set aside and a verdict of not guilty was substituted.

***R v Hayes* [2018] SASC 114 (9 August 2018) – South Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Bail' – 'Family law' – 'Physical violence and harm' – 'Sentencing'

Charges: Intentionally causing harm x 1; Contravening an intervention order x 1.

Proceeding type: Prosecution appeal against grant of bail.

Facts: The respondent, an Aboriginal man, was charged with intentionally causing harm and contravening an intervention order. The respondent assaulted his former partner (the complainant) during an access visit to their son. The circumstances of aggravation included that the complainant was his ex-partner and the respondent used a coffee mug, to inflict injuries to the head and face of the victim ([5]). The respondent also had a criminal history for offences of violence and dishonesty ([9]). The respondent was a prescribed applicant within the meaning of s 10A of the *Bail Act 1985* (SA) such that bail may not be granted unless special circumstances are established. The DPP contended that bail should not be granted due to the risk of re-offending (given the respondent's history of non-compliance with various court orders) and concerns for the complainant's safety ([15]).

Issues: Whether bail should be granted.

Decision and Reasoning: Kelly J dismissed the appeal. Special circumstances justifying release on bail included that the complainant no longer resided in the Court's jurisdiction ([17]), the likely trial date would not be for some time, and a recent report that Aboriginal and Torres Strait Islander people are highly over-represented in the remand population. According to the Australian Law Reform Commission Report No 133, Aboriginal and Torres Strait Islander people continue to be over-represented in the remand population by a factor of over 11. However, a finding of special circumstances does not mean that bail is automatically granted. At [12], her Honour stated –

> *'Ordinarily, it may be expected that if special circumstances are established, then a grant of bail may follow but upon special circumstances being established, it will remain open to the bail authority to refuse bail if nonetheless, having regard in particular to the gravity of the offending, the likelihood that the prescribed applicant will re-offend, the likelihood that the prescribed applicant will interfere with a witness or evidence and the likelihood that he or she will abscond, the bail authority considers that bail should not be granted'.*

Notwithstanding that the respondent was a prescribed applicant, her Honour held that there were special circumstances. It was therefore appropriate to grant the respondent bail on conditions of strict home detention ([18]).

***Parish v Police* [2018] SASC 18 (27 February 2018) – South Australia Supreme Court**

'Adequacy of reasons' – 'Magistrates court' – 'Physical violence and harm'

Charges: Assault causing harm x 1.

Appeal type: Appeal against conviction.

Facts: The complainant gave evidence that the appellant punched her from behind, pushed her to the floor, pushed her head into the floor and wall, and bit her on the cheek ([16]-[17]).

Issues: Whether the conviction was unreasonable or insupportable having regard to the evidence.

Decision and Reasoning: The appeal was allowed, and the matter was remitted for retrial before a different magistrate ([98]).

Lovell J described the case as an 'oath on oath' case ([10]). At [51]-[54], Lovell J provides a useful exposition of what is necessary for a Magistrate to include in a judgement to amount to adequate reasons. Simply summarising the evidence is not sufficient. The reasons must engage with conflicts in evidence and how those conflicts can be resolved.

Lovell J held that the Magistrate failed to provide adequate reasons in two areas. First, in accepting the evidence of a police officer and M's treating doctor without explaining how the Magistrate reconciled the inconsistencies between their evidence and M's evidence ([57]-[79]). Second, in dismissing the evidence of the appellant's uncle without explaining why ([80]-[86]).

***B, JL v Police* [2017] SASC 9 (10 February 2017) – South Australia Supreme Court**

'Intermediate sanctions' – 'Physical violence and harm' – 'Pregnant people' – 'Protection orders' – 'Sentencing' – 'Women' – 'Young people'

Charges: Aggravated assault x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and complainant were in a domestic relationship. They had a 7-month-old child and the complainant was pregnant with another child. The appellant was 17 years old at the time of the offences. An intervention order was in place requiring the appellant to not assault, harass, intimidate or threaten the complainant. The offence occurred when the appellant grabbed the complainant by the upper arms and squeezes them ([6]).

The Magistrate recorded a conviction and imposed a 12-month good behaviour bond.

Issues: Whether the magistrate erred in recording a conviction.

Decision and Reasoning: The appeal was allowed. The conviction was set aside, and again imposed the 12-month good behaviour bond ([24]).

The appellant submitted that the magistrate failed to have sufficient regard to the appellant's youth and the purposes of the *Young Offenders Act 1993* (SA), in particular the policy that there should be no unnecessary interruption of employment ([12]).

Stanley J emphasised that the appellant had a history of domestic violence and highlighted the need for general deterrence at [19]:

> Offences of violence by men against women are all too prevalent. All too often they result in harm but the deterrence of those offences will not be adequately achieved unless all offences of violence, whether they cause harm or not, are properly addressed.

Nonetheless, Stanley J held that the public interest in a conviction being recorded is diminished when the defendant is a youth ([18]). It was important that the appellant was now reconciled with the complainant and his ability to provide for her and their children would be diminished by recording a conviction ([22]).

***R v Fox* [2017] SASC 5 (3 February 2017) – South Australia Supreme Court**

'Intervention order' – 'Physical violence and harm' – 'Presumption against bail' – 'Protection orders' – 'Protective function' – 'Special circumstances'

Appeal Type: Appeal against refusal to grant bail.

Facts: The applicant and the female complainant had been in a relationship for 10 years. On 14 September 2016, the applicant was charged with using a dangerous article, aggravated assault with a weapon against his own child or spouse, and committing an assault aggravated by the use of an offensive weapon. These offences occurred in the context of the breakdown of the applicant and complainant's relationship and were committed against the complainant and her new partner. On 14 September 2016, an interim intervention order was made against the applicant. The applicant breached this order on two occasions.

The applicant was charged with two counts of contravening a term of an intervention order pursuant to s 31 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) and one count of aggravated threat to cause harm. The applicant was a prescribed applicant pursuant to s 10A(2)(ba) of the *Bail Act 1985* (SA) because he was charged with breaching an intervention order in circumstances involving violence. As such, there was a presumption against the grant of bail unless the applicant established the existence of special circumstances: s 10A(1). The magistrate refused to grant bail.

Issue/s: The magistrate erred in failing to find there were special circumstances.

Decision and Reasoning: The appeal was dismissed. Hinton J noted generally that Parliament's approach to an act of defiance to a protective order allegedly perpetrated in circumstances involving violence 'only

tolerates release into the community on bail if special circumstances can be established' (see [16]). This is part of the community's recognition of the 'prevalence of domestic violence' and the need to insist on strict compliance with intervention orders to ensure they fulfil their protective purpose (see [17]).

His Honour continued that, 'special circumstances will only exist where the applicant can demonstrate that he or she does not pose the risk which Parliament had in contemplation in reversing the presumption and in relation to whom the denial of bail would result in consequences beyond the contemplation of Parliament'. The relevant risk here was 'of further defiance of an order and violence threatened or perpetrated in doing so' (see [19]).

The ability to fashion bail conditions which reduce the risk of offending and offer protection to the victim will not ordinarily amount to special circumstances (see [40]).

On the facts, Hinton J held that there were no special circumstances warranting the grant of bail. None of the sorts of special circumstances referred to in *R v Buhlmann* were present (see [20] of this case). The applicant had not pointed to any exceptional hardship that would result from his continued incarceration (see [42]).

***Police v Martin* [2016] SASC 194 (14 December 2016) – South Australia Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Error of law' – 'Failure to provide inadequate reasons' – 'Intervention order' – 'Power to issue intervention orders' – 'Protection orders'

Appeal Type: Appeal against the imposition of a final intervention order.

Facts: The male appellant was having an affair with a married woman, Ms P, who told him her marriage was over. The appellant was concerned that she was not telling the truth. On 8 October 2015, after an argument, the appellant went to Ms P's home address at night. Being unable to see or raise her, he went to the backyard and called out to her. Ms P and her husband contacted the police. The appellant left without making any threat or committing any violence.

The next day, police approached the appellant and searched his vehicle. They found a can of OC spray (oleoresin capsicum spray), a hammer and a small knife, but it was agreed that he did not take these onto Ms P's premises. The appellant was charged with being on premises without lawful excuse and for the items in

his car. A police interim intervention order was issued against him with respect to Ms P, her husband and their children. On 19 August 2016, the appellant pleaded guilty. Relevant to this appeal, on the same day, the magistrate imposed an intervention order pursuant to s 19A of the *Criminal Law (Sentencing) Act 1988* (SA).

Issue/s:

1. The magistrate did not give any, or adequate, reasons for issuing the intervention order.
2. The magistrate erred in the exercise of his discretion to issue the intervention order against the appellant pursuant to s 19A(1)*Criminal Law (Sentencing) Act 1988*.

Decision and Reasoning: The appeal was allowed. Peek J held that s 19A of the *Criminal Law (Sentencing) Act 1988* did not create a freestanding power to issue final intervention orders. At [24], His Honour stated that:

'Section 19A does no more than enable a court hearing substantive charges – in this case it happened to be a Magistrate – to issue an intervention order as if a complaint had been made under the Intervention Orders (Prevention of Abuse) Act 2009; the critical question of whether an order is to be made pursuant to such a complaint (or "as if a complaint had been made") will depend on the substantive provisions of the Intervention Orders Act.'

Here, the sentencing magistrate made no reference to the requirements set out in the Intervention Orders Act. As such, it was impossible to assess whether the magistrate approached the matter incorrectly and failed to address the issues relevant to making a restraining order (see [33]-[34]). There was also an unacceptable risk that the magistrate took an incorrect approach to s 19A and failed to have sufficient regard to the requirements of the Intervention Orders Act (see [35]). Accordingly, the intervention order was quashed. The original police interim intervention order was declared to be continuing in force until it was withdrawn or a confirmation hearing convened.

***Craill v Police* [2016] SASC 168 (4 November 2016) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Breaching bail' – 'Contravention of an intervention order' – 'Exposing children' – 'Listening to Victims' – 'Physical violence and harm' – 'Protection orders' – 'Repeated contraventions of protection order' – 'Sentencing' – 'Suspended sentence'

Charge/s: Aggravated assault x 1; contravention of an intervention order x 9, breaching bail x 5.

Appeal Type: Appeal against sentence.

Facts: The appellant attended the home of the female victim (his former partner). An argument ensued. While holding their eight-week-old child, the appellant pushed the victim against the bedroom door by holding her throat (aggravated assault). The appellant was also charged with nine counts of failing to comply with a term of an intervention order and the five counts of breaching bail. The applicant was sentenced to five months and two weeks imprisonment. This also involved revoking a suspended sentence imposed for an offence of driving while disqualified. The breaching offences were five of the counts of contravening an intervention order and one of the counts of breaching bail.

Issue/s: Some of the grounds of appeal included –

1. The magistrate erred in the application of s 18A of the *Criminal Law (Sentencing) Act 1988* (SA);
2. The magistrate erred in failing to find that there were no proper grounds to refrain from revoking a suspended sentence.
3. The magistrate erred in failing to have regard or sufficient regard to the complainant's attitude toward penalty;
4. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

First, the magistrate did not err in the application of s 18A. It was appropriate and convenient to go directly to the single sentence imposed for the course of conduct constituting the breach and contravention charges. The magistrate treated this offending separately from the offending on the charge of aggravated assault. Any descent into further detail would have created unnecessary elaboration – *R v Major* applied: see [18].

Second, there was no error in the approach of the magistrate. One of the key submissions rejected by Stanley J was that proper grounds existed to refrain from revoking a suspended sentence because there was a marked disproportion between the seriousness of the offence constituting the breach and the sentence of imprisonment that would be activated. In rejecting this, Stanley J held that the breaching offences shared the same characteristic as the earlier offending; they involved the appellant failing to comply with a term or condition imposed on him. However, more importantly, there was not a marked disproportion between the

seriousness of the breaching offences and the sentence of imprisonment activated. The contraventions of an intervention order were ‘serious offending’. As per Stanley J at [28]:

‘In R v McMutrie this Court said that a breach of a restraining order is a matter of particular gravity. The object of the Intervention Orders (Prevention of Abuse) Act 2009 (SA) is the prevention of domestic and non-domestic abuse, and the exposure of children to the effects of such abuse. The principal instrument for achieving this objective is the making of intervention orders. The protective objects of the Act can only be achieved if courts are scrupulous in doing what they can to ensure that persons who are subject to such orders comply with them. The repeated breaches of those orders by the appellant demonstrate a persistent, blatant and contumelious disregard for the orders and the authorities that impose them. Crimes of domestic violence are often occasions for the exercise, or attempted exercise, of power over the victim by the offender. Breaches of intervention orders can be occasions for the offender to intimidate the victim with an implied threat that such orders will not protect them. The courts must act to contradict this impression’.

Third, there was no error in the approach taken by the magistrate to the victim’s attitude towards penalty. Stanley J noted that ‘[w]hile the attitude of the victim to an offence is not an irrelevant factor in sentencing, that attitude cannot be determinative of what constitutes an appropriate sentence. Moreover, this principle must be applied with considerable caution in cases of domestic violence’ ([33]). His Honour continued at [36]:

‘The reason for such caution is obvious. In situations of domestic violence a victim’s motivation for advocating a particular penalty is often influenced by their ongoing relationship with the defendant and an unhealthy relationship of dependency between them. Their attitude is often influenced by apprehension about the consequences for them in the future given a continuing relationship with the defendant. This attitude frequently fails to reflect what is in their best interests and what the court might consider appropriate in all the circumstances. It would be contrary to sound sentencing practice to place victims of domestic violence in the position where they hold, or appear to hold, the keys to the offender’s release. To place victims in that position is to impose on them a burden they ought not be required to bear’.

Finally, the sentence was not manifestly excessive. This was in circumstances where the aggravated offence was towards the lower end of the scale for that offence but it was still a serious offence, exacerbated by the presence of a small child; the aggravated assault was not mitigated by the expressed attitude of the victim; the repeated breaches of the intervention order constituted serious offending; the appellant did not have a favourable criminal history; and considerations of general and specific deterrence were particularly important here: see [52]-[53].

Thakur v Police **(2016) SASR 180; [2016] SASC 75 (3 June 2016) – South Australia Supreme Court**

'Appeal' – 'Court not to allow appeal against order confirmed by consent unless consent was not freely given' – 'Interim intervention order' – 'Protection orders'

Appeal Type: Appeal to set aside an interim intervention order.

Facts: On 13 January 2015, a magistrate issued an interim intervention order against the appellant protecting his wife. The appellant was reported for five breaches of this order. On 7 May, the appellant was interviewed by police in relation to those alleged breaches. The appellant provided the police with his phone and its passcode. On the same day, the prosecutor contacted the appellant's solicitor and offered to resolve the trial if the appellant consented to the confirmation of the intervention order. The prosecutor also offered not to proceed with the fresh charges in relation to the alleged breaches in those circumstances. The appellant's solicitor said his client agreed to this. After being charged with subsequent breaches, the appellant sought to appeal the confirmation of the order.

Issue/s: The appellant consented to the confirmation of the interim intervention order in error or by mistake because he believed there was no other satisfactory alternative available to him to recover his mobile telephone from police and thereby protect the confidentiality of commercially sensitive information.

Decision and Reasoning: To find 'special reasons' under s 42(1a)(c) of the *Magistrates Court Act 1991* (SA) to allow an appeal against an interlocutory order, only an 'arguable' case needs to be demonstrated. The appellant's case was arguable (see [26]-[27]). Permission to appeal was granted.

However, the appeal was dismissed. At [38], Stanley J held that:

'a court will allow an appeal from the confirmation of an intervention order made pursuant to s 23(3) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA) in circumstances where the defendant's consent was not freely given in the sense that the consent was not properly informed, was made inadvertently or was made by mistake or in error in the sense that the person giving the purported consent did not appreciate to what it was he or she was consenting'.

His Honour rejected the submission that 'it is sufficient to set aside the order that a defendant only establishes that he or she consented to the confirmation of the order without due consideration to material matters, if that proposition is understood as requiring merely a failure on the part of the defendant to direct his or her mind to

some relevant consideration in giving consent' (see [39]).

Here, the appellant's consent was freely given. Stanley J did not accept that the appellant had no satisfactory alternative but to consent to the confirmation of the intervention order. He could have been under no misapprehension as to what it was consenting to (see [40]-[41]).

Police v Hodder **[2016] SASC 70 (24 May 2016) – South Australia Supreme Court**

'Costs order' – 'Investigations before applying for protection order' – 'Police domestic violence' – 'Police protection order' – 'Reasonableness of police actions'

Case type: appeal against costs order following a magistrate's refusal to confirm an intervention order.

Facts: The respondent (Mr Hodder), his former wife (Ms Hodder) and her new partner (Mr Minchin) were police officers. Mr Minchin made an application for an intervention order against Mr Hodder alleging that Mr Hodder acted in a threatening and harassing manner towards him. The police obtained an interim intervention order on his behalf. After a trial, the magistrate found that Ms Hodder and Mr Minchin were not reliable witnesses. The magistrate found no basis for confirming the order and dismissed the application ([19]).

The magistrate ordered costs against the police for the whole of the proceedings, holding that they acted unreasonably in bringing and maintaining the proceedings ([20]).

Issues: Whether the magistrate erred by:

1. ordering costs when the police had not acted in bad faith or unreasonably;
2. awarding costs for the entirety of the proceedings; and
3. fixing costs above the scale.

Decision and Reasoning: The appeal was partly allowed.

On the first ground, Parker J held that the magistrate erred in finding that the police acted unreasonably. The prima facie position is that costs should not be awarded against a complainant in proceedings for a restraining order. The fact that the police could have investigated a matter further does not establish unreasonableness. Prosecutors should not prejudge the issue and should proceed where it is open to the court to accept the complainant as a credible witness ([37], [56]).

The second ground depended on whether it was reasonable for the police to continue the proceeding after the second day, when Mr Minchin's credibility had been damaged. The matter was remitted to the same magistrate to decide whether the police acted unreasonably in continuing with the application after the second day of the trial ([78]).

On the third ground, Parker J held that it was within the magistrate's discretion to award costs above the scale, having regard to the complexity of the evidence such as subpoenas and telephone recordings and the need to engage senior counsel ([88]).

***Police v Kritcos* [2016] SASC 28 (10 March 2016) – South Australia Supreme Court**

'Confirmation of intervention order' – 'Emotional abuse' – 'Evidence' – 'Following, harassing, monitoring' – 'Interim intervention order'

Appeal Type: Appeal against a Magistrate's decision to revoke an interim intervention order.

Facts: An interim intervention order was made against the respondent (the appellant's former husband). A Magistrate dismissed an application to confirm the order and revoked the order. The alleged abuse consisted of three letters that the respondent sent to the appellant. One of the letters concerned renewal of their deceased pet dog's council registration and the attached dog tag. She believed that the respondent was making a point of using her address when he knew she did not want it disclosed and that the letter was a 'gratuitous and hurtful' reminder of the dog's death. During their marriage, they had intimidated the respondent's former wife by driving past her house. She was worried she would suffer similar harassment. The respondent denied all knowledge of the other letters. The appellant gave evidence which alleged prior acts of abuse by the respondent, including threats to kill and physical abuse. The Magistrate largely rejected this evidence as not proven, taking into account the fact that the appellant admitted lying in an affidavit previously filed in the Family Court. The Magistrate also rejected the respondent's explanation about sending the dog tag and found it was sent out of spite to upset the appellant.

Notwithstanding, while this conduct was spiteful, the Magistrate was not satisfied it resulted in emotional and psychological harm within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009* (the Act). The Magistrate concluded that it was reasonable to suspect that the conduct would cause 'upset, annoyance and anger' but not harm. While the Magistrate found it was reasonable to suspect that the conduct would continue without intervention because the respondent's evidence 'did not provide any direct reassurance that

the conduct will not continue' (See at [19]), he found that it would not be appropriate in the circumstances to confirm the order. He gave the respondent an opportunity to show he would not persist with the conduct. If the conduct persisted, the appellant could make an application for a further interim order. The Magistrate also noted the appellant was a personal trainer, coaches kick boxing and holds a black belt in martial arts.

Issue/s:

1. Whether the Magistrate erred in concluding that the letters did not amount to an act of abuse under the Act.
2. Whether the Magistrate erred in concluding that it was not appropriate to make an order in the circumstances.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that the Magistrate erred by not having regard to the definition of emotional and psychological harm in the Act which includes 'distress, anxiety or fear that is more than trivial'. Doyle J held that while the Magistrate should have expressly referred to this definition, the Magistrate's finding was that, 'the correspondence was reasonably expected to cause "upset, annoyance and anger" in contradistinction to non-trivial "distress, anxiety or fear"' (see at [36]). The appellant also submitted that the Magistrate erred in 'approaching the issue of harm on the basis that he needed to be satisfied that the defendant's conduct was "intended to, and caused" harm. Doyle J concluded that the Magistrate had to consider three issues – 'First, whether the letters might reasonably be expected to cause harm (s 8(4)(j)) and then whether they were intended to, and did in fact, result in harm (s 8(2))' (see at [39]). His Honour concluded that the effect of the Magistrate's finding was that, 'the letters were neither intended to, nor did in fact, result in harm' and '(the Magistrate) appropriately addressed both the respondent's state of mind in engaging in the relevant conduct and the (subjective) impact of this conduct on the protected person' (see at [39]). In relation to the exclusion of other evidence relating to the history of the relationship, Doyle J held that the appellant was given several opportunities to detail the effect of the letters upon her.
2. The appellant submitted that the Magistrate failed to have regard to the principles set out in s 10 of the Act which are relevant to determining whether it is appropriate to make an order. In particular, the section makes clear that abuse can consist of isolated incidents. Doyle J stated at [44] – 'his Honour did not suggest that isolated instances could not constitute abuse. His reasoning was merely that on the

facts of this case the letters (neither individually nor cumulatively) were not sufficient to constitute abuse.' In relation to the Magistrate's references to the appellant being a personal trainer and having martial arts qualifications, his Honour stated that this was a 'somewhat obscure' reference, but it was, 'probably best understood as being a reference to matters which might have given the protected person some level of personal confidence and physical prowess. While I consider these matters to have been of only marginal relevance, I do not think they are entirely irrelevant or that it was erroneous to take them into account' (see at [45]). The Magistrate's conclusion to give the respondent an opportunity to not persist with the relevant conduct is not a factor referred to in s 10(1) of the Act, but was nevertheless not irrelevant. It is a relevant consideration that the respondent is someone who might respond to an opportunity to change their behaviour. See finally at [48] –

'Here there was no proven act of past abuse. While the Magistrate accepted there was a reasonable suspicion abuse would occur in the future without intervention, it might be inferred that the Magistrate did not consider there to be a high likelihood of this occurring. Indeed, the Magistrate's judgment appears (from his reference to the contingency that his judgment might prove to be misplaced) to have been that the suspicion will probably not come to fruition. It is also relevant that while there was a suspicion of abuse in the broad sense contemplated by the Act (i.e. extending to emotional and psychological harm), the Magistrate made a positive finding that it was not reasonable to suspect that the defendant would cause physical harm to the protected person.

***R v LI* [2016] SASC 4 (4 February 2016) – South Australia Supreme Court**

'Battered woman syndrome' – 'Evidence' – 'Expert testimony' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Proceeding: Application to exclude expert evidence.

Facts: The defendant was tried for murdering his mother. His counsel sought to adduce expert psychiatric evidence relating to his relationships with his family, his mother as well as his childhood. The Director of Public Prosecutions sought to have this evidence excluded.

Issue/s: Whether the evidence fell outside the area of human knowledge or experience, such that a jury would be able to form a judgment about it without expert assistance.

Decision and Reasoning: The application was allowed and the evidence was excluded. It was not in dispute that the defendant caused his mother's death – the issue at trial related to self-defence. The evidence detailed his traumatic upbringing where he witnessed episodes of domestic violence. It explored the dynamics of the relationship between the accused and his mother. It did not detail any recognised psychiatric illness or disability that the accused suffered which would affect his capacity to give evidence or recollect events. Indeed, the psychiatrist was in fact impressed with the accused's ability to describe subtleties of his history in a way that convinced the psychiatrist that his account was accurate and that the relationship was abusive. The psychiatrist's view was that the case was 'unusual'. Blue J noted at [12] that the only 'expert' element of the report was the psychiatrist's view that the accused was fit to stand trial and that the mental impairment defence was not available. His Honour then distinguished the case of *R v Runjanjic; R v Kontinnen* (1992) 56 SASR 114; [1991] SASC 2951 (28 June 1991), where the Court held that expert evidence regarding the 'learned helplessness' associated with 'battered woman syndrome' were contrary to ordinary expectations of human behaviour such that juries could be misled without the assistance of expert evidence. The recent Queensland Court of Appeal decision of *R v Jones* [2015] QCA 161 (1 September 2015) was analogous. In that case, the proposed expert psychiatric evidence was found to be a matter of common knowledge. The same approach was adopted in this case. Many of the matters in the evidence simply detailed the history of the relationship and issues relating to Chinese family culture. These were not issues that needed explanation from a psychiatrist. See at [22] – *'The accused can give the evidence as he sees fit about the verbal or physical violence that he suffered at the hands of his mother. If that evidence is accepted by the jury it will be self-evident that the relationship between Mr Li and his mother was both complex and intense.'*

***Koay v Police* [2015] SASC 158 (7 October 2015) – South Australia Supreme Court**

'Aggravated assault' – 'alleged prior violence' – 'Evidence' – 'Physical violence and harm' – 'Relationship evidence'

Charge/s: Aggravated assault.

Appeal Type: Appeal against conviction

Facts: The appellant, a woman, and the complainant, a man, met in 2011 and married in 2012. The appellant was on a spousal visa. The complainant's version of events involved the appellant coming into his bedroom at night when he was trying to sleep. He asked her to leave the room multiple times but she did not. He recorded some of the incident on his phone (and the recording was admitted in evidence). As they were grappling with a light switch, he claimed that the appellant punched and scratched him. He attempted to block

the punches. He asked her to stop punching him. He suffered minor injuries. At trial, the appellant claimed that she acted in self-defence. She claimed that she was scared of him because he had previously been violent towards her, and that the reason for going into his bedroom was to discuss her visa.

Issue/s: Whether the Magistrate erred by rejecting her claim of self-defence without the proper analysis required by s 15 of the *Criminal Law Consolidation Act 1935*.

Decision and Reasoning: The appeal was dismissed. The appellant submitted that rather than restricting himself to the events on the night, the Magistrate should have considered the evidence of alleged prior violence by the complainant to place context around the incident. The Magistrate noted that the appellant's claim that she was scared of the complainant lacked credibility, as she decided to enter his room in the middle of the night, notwithstanding his requests that she leave. The Magistrate found it difficult to accept her reason for going into the room (to discuss the visa) and also difficult to accept that the middle of the night was the most convenient time to do so. He described the appellant's evidence of self-defence as vague. It did not explain how the conduct was reasonable for her own defence. Vanstone J accepted the Magistrate's conclusions – the appellant made no attempt to directly address the elements required for self-defence in her evidence and she did not explain why, despite the complainant's requests, she did not leave the room. Vanstone J also held that the Magistrate was correct not to rely on the evidence of alleged prior violence inflicted by the complainant because it was not 'fleshed out in detail' (see at [18]) and there was nothing in this evidence which was relevant to the incident on the night.

***Police v Baker* [2015] SASC 110 (30 July 2015) – South Australia Supreme Court**

'Appeal' – 'Appeal against acquittal' – 'Assault' – 'Consent' – 'Evidence' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Victim'

Charge/s: Assault.

Appeal type: Prosecution appeal against acquittal.

Facts: The respondent allegedly slapped his female companion in the face. This was witnessed by a police officer, whose evidence formed the basis of the prosecution case. The companion did not give evidence and at the time of the incident was not distressed. She informed the police officer that it was 'OK'. According to the officer, at the time of the incident, the companion did not want the respondent to be arrested. During the hearing, the Magistrate invited submissions as to whether the prosecution evidence was sufficient to ground

consent or 'otherwise of having received force from the defendant' (see at [3]). The respondent was acquitted of the charge, with the Magistrate concluding that the prosecution's evidence was so lacking in weight or reliability that no reasonable tribunal of fact could safely convict (an *R v Prasad* (1979) 23 SASR 161; (1979) 2 A Crim R 45) direction). The Magistrate found a reasonable doubt about the 'lack of consent' element in the offence of assault. He noted that the prosecution's case was 'hampered' by the victim's failure to give evidence (See at [13]).

Issue/s: Whether the Magistrate erred in finding that the prosecution's evidence lacked in weight or reliability and whether the Magistrate erred in finding a reasonable doubt as to the 'lack of consent' element.

Decision and Reasoning: The Court firstly noted the hesitance of appellate courts to interfere with Magistrates' decision to acquit. The appeal was dismissed for this reason but Nicholson J accepted the appellant's submissions relating to the trial process.

The Court accepted that there was a prima facie case to answer. The Magistrate gave no reasons regarding how he concluded that lack of consent could not be inferred beyond reasonable doubt. The appellant submitted that a reasonable tribunal of fact would not be able to ignore the inherent unlikelihood that a person would consent to being hit with the force as described by the police officer. Nicholson J accepted this submission, finding that the *Prasad* direction should not have been made and the case should have proceeded. The victim's lack of complaint, lack of cooperation with the police and her request that the respondent not be charged were evidentiary matters which may assist in determining whether she had consented to the slap. In fact, they were consistent with a finding that the victim was prepared to submit to the conduct. Importantly, Nicholson J noted at [24] – 'Submission and failure to complain are not the same as consent' and at [27] – 'Whilst each case will turn on its own facts, the mere fact that an alleged victim does not give evidence, will not necessarily mean that lack of consent cannot be proved beyond reasonable doubt.' However, while there were errors in the Magistrate's approach, there were no 'clear and compelling circumstances' ([27]) to interfere with the acquittal in this case.

***Groom v Police* [2015] SASC 101 (14 July 2015) – South Australia Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Construction of terms' – 'Contravention of intervention order' – 'Electronic listening device' – 'Evidence' –

'Interpretation of intervention order' – 'Protected person' – 'Public interest'

Charge/s: Contravention of intervention order.

Appeal Type: Appeal against conviction.

Facts: An intervention order was in place between the appellant and his former partner. The breach arose from a conversation between the appellant and his former partner. The order prohibited discussions between the pair other than with respect to their child. In conversation, the appellant then brought up the appellant's ongoing court proceedings relating to the intervention order itself. At trial, the Magistrate admitted into evidence an audio recording of this conversation secretly made by his former partner. His former partner claimed she was advised by police to record communications between her and the appellant. Conversations between her and the appellant were usually unwitnessed by anyone else, which made previous complaints that she had made to police a case of her word against his and thus difficult to prove in court.

Issue/s:

1. Whether the conversation was permitted by the intervention order.
2. Whether the recording should have been excluded because it was unlawful pursuant to the *Listening and Surveillance Devices Act 1972* (the Act). More specifically, whether the use of the device was in the public interest or for the protection of the former partner's lawful interests under section 7 of the Act.

Decision and Reasoning: The appeal was dismissed.

1. The Court rejected an argument that the conversation was permitted by the intervention order. The topic of the conversation, (the intervention order itself) was not related to their child which was the only topic that the intervention order allowed them to discuss. See further at [47]-[58].

2. Nicholson J held: the conversation was a private conversation within the meaning of the Act; the former partner intended to use the device to record the conversation and that there was no consent to the conversation being recorded. The Court then considered whether the use of the device was in the public interest or for the protection of the former partner's lawful interests. While his Honour acknowledged that the breach was relatively minor, he noted that breaches of intervention orders are serious. In this case, the former partner had made many allegations of breaches but had encountered problems with proof. The Court accepted that the former partner held genuine concerns for her own safety. Nicholson J then made the following comments at [39]-[40] about how recording private conversations can be in a protected person's

'lawful interests' – '*… there is no way of knowing how seriously an intervention order might be breached until the fact of breach takes place. Breaches of intervention orders are capable of constituting serious crimes. Irrespective of whether or not a serious crime is in contemplation, a court should more readily accept that the recording of a "private conversation" has been carried out in pursuit of a person's lawful interest in circumstances where that person has a genuine concern for their own safety. Domestic violence is a very serious problem in our community. It would appear that, at least, the recognition and reporting of domestic abuse, be it physical, psychological, or by threatening behaviour, is on the rise. An intervention order is a very important first step in protecting a person, usually a woman, who has been the subject of domestic abuse. Such an order gains much of its value in this respect according to the extent that it can be enforced. Respondents must be discouraged from infringing any such court order.'*

The Court also accepted that the recording was in the public interest for two reasons. Firstly, that there is a public interest in, 'allowing a protected person… the ongoing protection available through the recording and documenting of interactions that result in breaches' (See at [44]). Secondly, that these recordings can assist the defence as well as the prosecution (see at [45]). It would also be possible for a defendant to make similar recordings to disprove a false allegation.

***Murray v Police* [2015] SASC 64 (22 April 2015) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Assault' – 'Assaulting police' – 'Being unlawfully on premises' – 'Contravention of intervention order' – 'Damaging property' – 'Exposing a child' – 'Hindering or resisting police' – 'People with mental illness' – 'Physical violence and harm' – 'Prospects of rehabilitation' – 'Unlawful damage' – 'Verbal abuse'

Charge/s: Being unlawfully on premises, unlawful damage, assault (two counts), contravention of intervention order (three counts), hindering or resisting police (three counts), assault police (one count)

Appeal Type: Appeal against sentence.

Facts: The defendant was in an intermittent relationship with the victim. There were various incidents of verbal and physical violence over several years. This led the victim to apply for an intervention order which prohibited the defendant from approaching, contacting or communicating with the victim or her daughter. However, he returned to live with the victim on various occasions without the intervention order being

changed. On the day in question, the defendant and the victim were arguing. The victim attempted to shut him out but he forced the door open, which knocked the victim onto the ground. He attempted to enter the victim's daughter's room multiple times to prevent her from calling the police. The daughter was pushing against it from the inside. He damaged various objects and threw a television across the room. He pushed the victim into a door frame and attempted to light a spray can while pointing it at the victim. He then pushed and attempted to punch two police officers, who had to use capsicum spray to subdue him. A psychiatrist diagnosed the defendant as suffering from an adjustment disorder with depressive features when he committed the offences. A single penalty for all offences of 14 months, 23 days' imprisonment with a non-parole period of 8 months was imposed. The defendant's history included one like offence of violence committed against the same victim. He had had previous long term relationships which did not involve violence. The Magistrate concluded that the defendant had no insight into the offences he committed, and that his prospects of rehabilitation were minimal.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. Blue J found that while the Magistrate was rightly appalled at the nature of the violence, insufficient weight was given to the defendant's prospects of rehabilitation given the fact he had previous relationships that did not involve violence. The Magistrate also erred in not taking into account the lack of prior convictions for violence before his relationship with the victim and the psychiatric illness that he was suffering. He also had the support of a former long-term partner. As such, taking into account his pleas of guilty, he was resentenced to 11 months and 19 days' imprisonment. This was suspended after the defendant served 5 months and five days upon entering into a good behaviour bond for 18 months.

***Cook v Galloway* [2015] SASC 36 (6 March 2015) – South Australia Supreme Court**

'Costs' – 'Family law' – 'Interim intervention order' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Systems abuse'

Appeal Type: Appeal against dismissal of an application for the confirmation of an interim intervention order.

Facts: The appellant and the respondent were in a de facto relationship and had separated. While proceedings in the Family Court were on foot, the appellant applied for an interim intervention order that was granted, but not confirmed. The factual basis for the intervention order was a series of incidents following the

end of the relationship, where the appellant alleged his former de facto partner had, among other things, sexually assaulted him and punched him (See at [8]-[18]).

Issue/s:

1. Whether the intervention order should have been confirmed.
2. Whether the Magistrate erred finding that the proceedings were brought unreasonably which led to an adverse costs order against the appellant.

Decision and Reasoning: The appeal was upheld in respect of costs but otherwise dismissed.

1. Nicholson J found that the role of a Court in confirming an intervention order involves considering whether it is reasonable to suspect that the defendant, without intervention, will commit an act of abuse, and secondly, that the order is appropriate in the circumstances. His Honour acknowledged that the Magistrate neglected to make several findings of fact, and as such did not wholly follow the approach of Kourakis CJ in *Police v Giles* [2013] SASC 11 (15 January 2013). However, the Court held that the Magistrate was correct to conclude that there was no reasonable suspicion that abuse would occur in the future. The respondent lived away from the appellant and they rarely saw each other. Furthermore, the relationship was over and there was no longer any aggressive behaviour.
2. The Court held that the appellant's concerns were genuine, and called for determination by a Magistrate. Nicholson J noted that just because the application failed, this did not mean that the proceedings were brought unreasonably. The Court cited previous authority and noted the public policy concerns of making adverse costs orders against applicants in intervention order applications, as they may deter people from bringing worthy applications.

***Stone v Police* [2015] SASC 28 (3 March 2015) – South Australia Supreme Court**

'Contravention of intervention order' – 'Evidence' – 'Evidence of discreditable conduct'

Charge/s: Contravention of intervention order (two counts).

Appeal Type: Appeal against conviction.

Facts: The protected persons in the order were the appellant's neighbours, with whom the appellant had been in conflict for an extended period. There was a considerable amount of evidence admitted at trial regarding

the history of the appellant's behaviour towards the complainants.

Issue/s: Whether the Magistrate erred by admitting evidence of the appellant's prior discreditable conduct.

Decision and Reasoning: The appeal was upheld. The Court found that the Magistrate did not give an adequate explanation of the purpose of the evidence of the appellant's prior behaviour towards the complainants. Furthermore, the Magistrate made no reference to s 34P of the *Evidence Act 1929* which sets out rules regarding this type of evidence. The Court found that the evidence was 'highly prejudicial' to the appellant because it was similar to the offences which were the subject matter of the trial, and indicates that the accused has a propensity to commit offences of a similar nature. If it was to be used in that way, the Magistrate had to be satisfied that its probative value outweighed its prejudicial effect on the accused. Furthermore, no notice was given by the prosecution of their intention to adduce such evidence, and no direction was made by the Magistrate as to its use.

***Fenton v Police* [2014] SASC 167 (7 November 2014) – South Australia Supreme Court**

'Aggravated assault' – 'Alcohol' – 'Evidence of distress' – 'Expert testimony' – 'Physical violence and harm' – 'Uncooperative witness'

Charge/s: Aggravated assault – (Circumstance of aggravation: that the defendant committed the offence knowing the victim was his domestic partner.)

Appeal Type: Appeal against conviction.

Facts: The defendant assaulted the victim by pushing her onto the floor with his knees in her back, twisting her arms and forcing her face into the floor. At trial, the defendant claimed he was acting in self-defence. Both the defendant and the victim were severely intoxicated.

Issue/s:

1. Whether the Magistrate erred by not taking into account inconsistencies in the victim's evidence.
2. Whether the Magistrate should have left certain matters for expert evidence.
3. Whether the Magistrate erred by relying on evidence of the victim's distress as observed by police.

Decision and Reasoning: Blue J dismissed all grounds of appeal.

1. In relation to the inconsistencies in the victim's account, his Honour at [22] stated that the Magistrate in fact did consider this in relation to the victim's credibility as a witness, but it did not have a substantial impact on the case. The second ground of appeal, which was that the victim gave new information in cross-examination that she had not previously given in her witness statements was dismissed for similar reasons (See [26]). The third ground of appeal was that the Magistrate failed to have regard to the victim's 'guarded and defensive' answers during cross-examination. This was rejected – the Magistrate had the benefit of seeing the victim give evidence. It was open to him to make a favourable assessment of her credibility.
2. Blue J acknowledged that had the Magistrate gone further in making conclusions regarding the consistency of bruises to the victim's back with the victim's account and the potential effect of alcohol on self-control, this may have transgressed into the realms of expert evidence. However, the Magistrate only made limited use of his own common sense and experience when making conclusions with respect to the bruises on the victim's back and the potential impact of alcohol. It is common knowledge that - alcohol can reduce inhibitions which can lead to a loss of self-control and if a person is disposed to be aggressive, alcohol can lead a person to act aggressively. The Magistrate was entitled to make limited use of these observations without needing expert evidence.
3. On the defendant's version of events, the victim's distress was caused by embarrassment about, among other things, her own conduct of striking and slapping the defendant. Blue J held that it was not self-evident that a person in the victim's position would have exhibited distress as a result of embarrassment as submitted by the defendant. The Magistrate was not obliged to expressly reject this possibility. He used the evidence of distress legitimately.

***Police v Siaosi* [2014] SASC 131 (5 September 2014) – South Australia Supreme Court**

'Certainty of terms' – 'Conditions of orders' – 'Contravention of intervention order' – 'Impact of breach on offender' – 'Interim intervention order' – 'Validity of terms in intervention order'

Charge/s: Contravention of intervention order.

Appeal Type: Appeal against conviction.

Facts: An intervention order was made in favour of the appellant's former wife. The fifth term of the order prohibited the appellant from entering or remaining 'in the vicinity' of the property at which his former wife

lived. The appellant formed a friendship with another woman who, by coincidence, lived quite close to his former wife's home. After visiting this property, the appellant realised that there was a direct line of sight between the backyard of his friend's property and his former wife's property. There was no direct route of access between the houses, and they were not addresses on the same street. The distance between the two houses was measured to be 26 metres. He was convicted of breaching the fifth term of the order.

Issue/s: Whether the fifth term which prohibited the appellant from being 'in the vicinity of' specified premises was void for uncertainty and whether it was a valid exercise of power under s 12(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (the Act).

Decision and Reasoning: The appeal was upheld. The term was void for uncertainty and not a valid exercise of power under the Act. Peek J held that mandatory terms in intervention orders must be 'clearly and specifically authorised by the words of s 12(1)' (See at [18]). The terms of intervention orders can leave the affected person in no doubt as to the meaning and extent of the order. His Honour noted that the term 'vicinity' is inherently imprecise, which is in contrast to s 12(1) of the Act which requires that orders be specific and certain. Police do not have powers to insert 'broad and vague terms' (See at [28]) which gives them a right to use their individual opinions to determine in a particular case whether a contravention of the term has occurred.

***Callow v Police* [2014] SASC 8 (24 January 2014) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Contravention of bail agreement' – 'Contravention of intervention order' – 'Criminal history' – 'Damaging property' – 'Deterrence' – 'Following, harassing, monitoring' – 'Offender character references' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Aggravated assault (2 counts) – Circumstance of aggravation: that the applicant committed the offence knowing the victim was his wife, aggravated assault causing harm, driving while disqualified, contravention of bail agreement (5 counts), contravention of intervention order (5 counts), property damage.

Appeal Type: Application for extension of time to appeal against sentence.

Facts: See at [4] for a detailed factual summary of each offence. The assault offences involved the appellant kicking his wife while she was in bed and on a separate occasion punching her when she was on the couch

recoiling from the applicant. The contravention of the intervention order counts all involved the applicant leaving voicemail messages for his wife. The applicant was sentenced to a single term of 1 month imprisonment for all offences. The remaining eight months were suspended with a good behaviour bond.

Issue/s: Whether the whole sentence should have been suspended.

Decision and Reasoning: The application was dismissed. The applicant submitted that the Magistrate should have suspended the whole sentence based on the mitigating factors which led the Magistrate to suspend most of it. The Magistrate placed large weight on the mitigating factors, including that the applicant runs a successful business which he uses to help pay child support, as well as favourable character references. In fact, the Court described the sentence as 'merciful' given that the offending was repetitive, protracted and serious, and included 'contumacious disregard' of court orders (See at [10]). The Court also upheld previous authority that deterrence is an important factor in sentencing where there is a history of domestic violence, particularly breaches of intervention orders.

***F, S v Police* [2013] SASC 164 (1 November 2013) – South Australia Supreme Court**

'Emotional and psychological abuse' – 'Interim intervention order' – 'Physical violence and harm' – 'Standard of proof'

Appeal Type: Appeal against confirmation of intervention order.

Facts: The Magistrate confirmed an intervention order made in favour of the appellant's ex-wife. Some of the alleged incidents of domestic violence included the appellant holding a screwdriver to his ex-wife's throat, swearing and throwing clothes and shoes around in arguments. The Magistrate made findings of fact in relation to each alleged incident. On that basis he found a reasonable suspicion that the appellant would, without intervention, commit an act of abuse against his ex-wife and that such an act would cause distress, anxiety or fear which was not trivial.

Issue/s: Whether the Magistrate made proper findings of fact. Whether the Magistrate should have applied the higher standard of proof of 'beyond reasonable doubt', rather than the 'balance of probabilities'.

Decision and Reasoning: The appeal was dismissed. The Magistrate set out the evidence very carefully, and in fact found that most of the alleged incidents were not sufficiently proven. The Court also found that the balance of probabilities is the correct standard, because the consequences of the imposition of an intervention order are 'not so grave as to warrant such a heavier onus' (at [18]). Finally, the Magistrate did not

err by finding that the proven facts could amount to distress, anxiety or fear which is not trivial, because these considerations are somewhat subjective so the trier of fact has a distinct advantage.

***Mullins v Police* [2013] SASC 148 (20 September 2013) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Aggravating factor' – 'Breach of bail' – 'Contravention of intervention order' – 'Damaging property' – 'Double jeopardy and other charges' – 'Double jeopardy in sentencing' – 'Mitigating factors' – 'Physical violence and harm' – 'Resisting police' – 'Sentencing' – 'Victim'

Charge/s: Aggravated assault (three counts), Contravention of intervention order (three counts), breach of bail (two counts), resisting police, damaging property.

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty to all 10 offences which were on four Magistrates' Court files. All of the offences were committed either against or in the presence of the appellant's partner (the mother of his child) in the context of arguments. The contravention of the intervention order arose from conduct that would have made his partner feel threatened, as opposed to a positive intention to make her feel threatened or any physical contact. A single sentence was imposed for each file and the four sentences were made cumulative. None of the sentences were suspended.

Issue/s: Some of the issues concerned –

1. Whether the Magistrate erred in ordering a sentence of imprisonment for the resist police charge.
2. Whether the sentence imposed on the appellant contravened the rule against double punishment.
3. How the appellant should be re-sentenced.

Decision and Reasoning: The appeal was upheld.

1. One sentence of three months' imprisonment was imposed for the resist police and the first aggravated assault charge. The Magistrate made no reference to the facts of the resist police charge, which was in fact not particularly serious and only involved 'childish and idiotic' behaviour (see at [15]) and nothing more. Even though the aggravated assault charge required a sentence of imprisonment, this did not

mean that the resist police charge also required a sentence of imprisonment. A similar conclusion was reached in relation to the second Magistrates' Court file, where the appellant was sentenced to one term of one month imprisonment for the breach of bail and contravention of intervention order offence. He should not have been punished for the breach of bail offence because he believed he was not in breach of bail, which was acknowledged by the Magistrate.

2. The facts that formed the basis of the contravention offence in the fourth file were the same facts that formed the basis of the aggravated assault charge. The facts that formed the basis of the second contravention offence relied on the same facts as the property damage charge. Therefore, Peek J found that there was both 'double charging' and 'double punishment'. Convictions were recorded for four offences when they only should have been recorded for two and a penalty imposed for four offences when it only should have been imposed for two. It may have been possible to charge alternative offences, but once pleas of guilty were taken the other count should have been dismissed. Peek J did acknowledge the problem that where a breach is particularly serious, the maximum penalty for a contravention offence is two years, while the maximum penalty for offences such as aggravated assault is higher. In that case, his Honour stated that the best option would be to lay the more serious charge with the contravention offence laid as an alternative charge, to be withdrawn upon a guilty plea to the more serious charge. Furthermore, the fact that the offender knew that the assault was also a contravention of an intervention order would be an aggravating factor in sentencing the more serious charge.

3. In resentencing, his Honour took into account the appellant's youth, minimal criminal history and good rehabilitation prospects. He also took into account the victim impact statement, in which the complainant stated she wished to maintain a relationship with the appellant and stated that she is 'not a victim'. His Honour described this as a 'mature and balanced view of the relationship'. However, relevant also was the need to protect domestic partners, the repeated nature of the offending and the need to ensure intervention orders are obeyed. The appellant was re-sentenced to 50 weeks' imprisonment, fully suspended.

***Groom v Police (No 3)* [2013] SASC 93 (25 June 2013) – South Australia Supreme Court**

'Adjournment' – 'Consent to confirmation of intervention order' – 'Interlocutory orders'

Appeal Type: Appeal against the order of a Magistrate.

Facts: With the appellant's consent, a Magistrate confirmed an interim intervention order which had been put in place against him in favour of his domestic partner pursuant to s 23(3) of the *Intervention Orders (Prevention of Abuse) Act 2009*. At the time of the hearing, the appellant was in custody and appeared unrepresented in the Magistrates' Court. On the day of the hearing, he did not have documentation relating to his case including an affidavit sworn by the applicant, and his responses to this affidavit. This was because he had attempted to have the documents brought to him in prison by a friend but permission was refused. The prosecution had not provided him with the affidavit. The Magistrate granted an adjournment until the afternoon, but refused to grant a longer adjournment.

Issue/s: Whether the appellant's consent to the intervention order was freely given and whether he could withdraw his consent and have the order set aside.

Decision and Reasoning: The appeal was upheld. Before deciding the main issue, the Court confirmed as a matter of procedure that the Magistrate's confirmation order was interlocutory in nature as it was capable of variation or revocation. As such, permission to appeal was required (See at [29]- [32]). The Court then found (at [40]) that had the longer adjournment been granted, no prejudice to the protected person would have occurred because the interim intervention order would have remained in place. Sulan J drew an analogy between consent under s 23(3) and admissions made in civil proceedings. As such, the corresponding principles that govern whether such admissions can be withdrawn became relevant. The Court found that the appellant's consent was given in circumstances, 'in which he considered that he had no satisfactory alternative but to agree', because of all the circumstances outlined above, the fact that he was partially unrepresented, as well as the fact that he was not aware that he could have applied for a further adjournment. As such, his consent was not freely given.

***T, R v L, KC* [2013] SASC 51 (15 April 2013) – South Australia Supreme Court**

'Family law proceedings' – 'Intersection of legal systems' – 'Jurisdiction of family court of australia' – 'Jurisdiction of state courts' – 'Protection order' – 'Self-represented litigants'

Appeal type: Appeal against Magistrate's decision to dismiss application for intervention order.

Facts: The appellant and respondent were separated and had two children. Orders were made in the Federal Magistrates Court in relation to custody, access and protection of their children ([4]). The orders provided that the children live with the appellant, that the respondent have limited access to the children, and preventing

the respondent from bringing the children into contact with certain people ([5]-[6]).

The appellant sought an intervention order in the Magistrates Court restraining the respondent from contacting the children ([11]).

Issues: Whether the Magistrate erred in holding that the Family Court was the proper forum for the appellant to pursue the relief he seeks.

Decision and Reasoning: The appeal was dismissed. The Family Court had jurisdiction over the proceedings and could amend the parenting orders if it considered appropriate ([18]-[19]). An intervention order made by the Magistrates Court would be invalid to the extent of inconsistency with the Family Law Act ([16]).

***Police v Giles* [2013] SASC 11 (15 January 2013) – South Australia Supreme Court**

'Emotional and psychological abuse' – 'Evidence of prior abuse' – 'Following, harassing, monitoring' – 'Interim intervention order' – 'Physical violence and harm' – 'Reasonable suspicion'

Appeal Type: Police appeal against a Magistrate's refusal to confirm an interim intervention order.

Facts: The Magistrate refused to confirm an interim intervention order which had previously been made ex parte against the respondent in favour of his former de facto partner. At trial, there were disputed facts regarding various prior incidents of physical and verbal abuse. The Magistrate made no findings of fact about these incidents.

Issue/s:

1. Whether the Magistrate's failure to make findings of fact about these incidents amounted to an error of law.
2. Whether the Magistrate erred in finding that there was no reasonable suspicion that the respondent 'would if unrestrained commit an act of abuse which was to result in more than trivial emotional harm' (See at [4]). This appeal therefore concerned the meaning of 'trivial' distress, anxiety or fear and the degree of suspicion which is required.

Decision and Reasoning: The appeal was upheld.

1. The Magistrate's failure to make factual findings amounted to an error of law because: they were

important to determining the nature of the relationship; they affected the degree of anxiety that the respondent's former de facto partner may have felt about potential further acts of abuse and they were probative of further allegations made by his former de facto partner. Kourakis CJ noted at [29] that while proof of past acts of abuse is not a precondition to the making of an intervention order, the Act 'appears to contemplate that the court will make findings of fact about past events and provides that it is to make those findings on the balance of probabilities'. As such, a reasonable suspicion (under s 6) that an act of abuse will be committed must be based on findings of fact made on the balance of probabilities.

2. The Court found the Magistrate erred in finding that there was no reasonable suspicion in the circumstances. There is no requirement that the facts found by the Magistrate themselves constitute an act of abuse, that they be recent or that they occur before or after a relationship breakdown. An order could be made based on a statement of intention to commit an act of abuse, no matter who that statement was made to. While the timing of the acts is relevant, Kourakis CJ stated that depending on the circumstances, an event many years earlier could constitute a reasonable suspicion (See at [30]-[31]). A reasonable suspicion will include a suspicion that the 'defendant will act in a certain way' and a suspicion that those acts would have the prescribed effect on the protected person of something more than a trivial kind (See at [32]). In this case, the respondent's former de facto partner had anxiety that the respondent may kill her. This was not trivial and the Magistrate had erred in finding it was.

   Kourakis CJ then made several factual findings including that the appellant used a knife and verbally abused his former de facto partner and therefore found that the prescribed reasonable suspicion under the Act existed. His Honour then found that it would be appropriate in the circumstances to make the order.

***RYSZ v Police* [2011] SASC 167 (7 October 2011) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Alcohol' – 'Breach of restraining order' – 'Emotional and psychological abuse' – 'Physical violence and harm' – 'Sentencing' – 'Threatening to cause harm' – 'Verbal abuse'

Charge/s: Breach of domestic violence restraining order, threatening to cause harm.

Appeal Type: Appeal against sentence.

Facts: In 1999, a domestic violence restraining order was made against the appellant in favour of his wife. In 2010, he called his wife, verbally abused her and threatened her partner. This conduct amounted to a breach of the order which prohibited him from contacting her in any way. His criminal history was relevant and included offences of violence against his wife and daughter, as well as many prior breaches of the restraining order. He had an alcohol problem. At the time of the offending, he had ceased taking anti-depressant medication and had increased his alcohol consumption. He was sentenced to four months' imprisonment.

Issue/s: Some of the issues concerned –

1. Whether the Magistrate erred in imposing a sentence of imprisonment.
2. Whether the Magistrate erred in not partially suspending the sentence.

Decision and Reasoning: The appeal was allowed in respect of the partial suspension.

1. The appellant submitted, *inter alia* that as over 7 years had elapsed since the last breach of the order, the current offence should be seen as an isolated lapse and that the latest breach was relatively minor. This submission was rejected. Given the applicant's history of seven previous convictions for breach of the order, leniency was not warranted. White J then discussed the nature of breaches of restraining orders and noted that their purpose is to protect vulnerable family members. His Honour at [31] then drew an analogy between breaches of domestic violence restraining orders and driving while disqualified, in that, 'both involve some defiance of a court order; both negate the protection of the community which they were intended to achieve; and considerations of general and personal deterrence are important in each case.' Generally, the most appropriate penalty for driving while disqualified is imprisonment. His Honour (again at [31]) then drew some distinctions between the nature of the two offences. His Honour then concluded, notwithstanding the differences between the two types of offences, '*I consider that, having regard to the important role of domestic violence restraining orders and of the necessity of courts promoting respect for their own orders, a sentence of imprisonment may be appropriate in those cases, like the present, in which the order has been repeatedly breached and the offender has not taken advantage of the lenience previously extended to him. In cases of contumacious breaches of order, considerations of both general and personal deterrence are especially important*' (see at [32]).
2. The Court agreed with the appellant's submission that the sentence should have been partially suspended. The appellant had complied with the order for a long period since 2003 and the latest

offence did appear to be isolated. Furthermore, it was at the lower end of the scale of seriousness for offences of that type. The offence was also explained by the fact that the appellant was coming off anti-depressants' and was intoxicated (see further at [41]-[45]).

Police v Dolan **[2010] SASC 341 (9 December 2010) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Breach of bail' – 'Common assault' – 'Guilty plea' – 'Physical violence and harm' – 'Pregnant women' – 'Programs for perpetrators' – 'Sentencing' – 'Trespass'

Charge/s: Common assault, trespass, breach of bail.

Appeal type: Appeal against sentence.

Facts: The defendant had been in a relationship with the victim for nine months. The victim was 8 weeks' pregnant at the time of the offending. The defendant was the father and aware of the pregnancy. While the defendant and the victim were having a conversation, the defendant became aggressive, at which point the defendant punched her in the left side of the head which caused her to fall to the ground. He then kicked her in the head while she lay on the ground, which caused her to pass out. While she suffered no permanent injury, she experienced extreme pain. After being arrested and placed on bail, the defendant breached this bail by trespassing because he wanted to see if his partner was with another man. He again breached bail by having a conversation with his partner. He pleaded guilty and was placed on an 18 month supervised good behaviour bond, which included conditions that he obey the directions of a Correctional Services Officer, particularly in relation to attending programs for mental health, anger management and domestic violence. The Magistrate stated that a term of imprisonment would have been appropriate but for the guilty plea.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. Gray J held that the Magistrate erred by not paying sufficient regard to the fact that this was an act of domestic violence against a young pregnant woman, which was not justified by the fact that the defendant was angry. While the defendant was not charged with an aggravated assault based on a domestic relationship, this remained a relevant factor. The mere fact that the defendant pleaded guilty should not have resulted in a term of imprisonment not being imposed. Indeed, other

factors, such as the fact that it was an offence of domestic violence required consideration. His Honour's starting point for common assault was 6 months' imprisonment, which was reduced to 4 months' because of the guilty plea and remorse. His Honour then had regard to the lack of criminal history and evident remorse and suspended the sentence, upon the defendant entering into a three-year good behaviour bond to be supervised for 18 months. Conditions that he attend anger management, drug and alcohol abuse and domestic violence programs were included. The convictions for the other offences were confirmed but no further penalty was imposed.

***Vonstanke v Police* [2010] SASC 15 (4 February 2010) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Breach of bail' – 'Contravention of restraining order' – 'Evidence of prior abuse' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Aggravated assault (aggravating factor – that the offence was committed against the appellant's domestic partner), contravention of restraining order (two counts), breach of bail.

Appeal Type: Appeal against sentence.

Facts: The appellant's domestic partner believed the appellant was having an affair. She obtained documents from his computer. In attempting to get the documents back, the appellant pushed her backwards into a chair after grabbing her. The appellant prevented her from getting help by cutting the power to her telephone. She was fearful of the appellant. This conduct constituted the breach of the restraining order as well as the assault. After being arrested and released on bail with conditions that he not contact the victim, the appellant contacted the victim daily through the internet as well as by appearing at locations the victim drove to and sending her flowers. This conduct was in breach of bail and the restraining order. The offences were committed in the context of a background of domestic violence. The total effective sentence imposed was nine months' imprisonment.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. While the victim suffered no physical injury, she was isolated, in considerable fear and subjected to physical force while the applicant prevented her from obtaining assistance. The fact that this incident was not unique was also relevant - the physical assaults she had

suffered from the appellant in the past were an important consideration. See in particular the following comments by Duggan J at [16] – *'Personal and general deterrence play an important role in offences involving domestic violence. This is particularly so in the case of a repeat offender. Furthermore, Parliament has acknowledged the importance of deterrence in such cases by declaring that an offence of violence against a domestic partner is an aggravated offence attracting an increase in the maximum penalty over and above that applicable in the case of an offence of common assault. The fact that the assault constituted a breach of a restraining order made by the Court is a further factor to take into account in considering the single sentence imposed in respect of the assault and breach of restraining order.'*

Johnstone v Police **[2008] SASC 357 (17 December 2008) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Domestic discipline' – 'Offences against children' – 'Physical violence and harm' – 'Programs for perpetrators' – 'Sentencing'

Charge/s: Aggravated Assault (aggravating factor – that the offence was committed knowing the victim of the offence was their child)

Appeal Type: Appeal against sentence.

Facts: The appellant plead guilty and was convicted for the aggravated assault of his son. The appellant inflicted a substantial blow on the child, which left bruising and finger marks on his leg. However, he did not require any hospital treatment. It occurred in the context of the appellant attempting to discipline his son. The appellant's criminal history included a prior conviction for an assault in a domestic setting. He was sentenced to six months' imprisonment, fully suspended upon entering into a good behaviour bond for two years with conditions that he be under the supervision of a Community Corrections Officer and that he undertake counselling for drug issues, anger management and domestic violence issues.

Issue/s: One issue concerned whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld and the sentence was reduced to three months' imprisonment, fully suspended with the same bond conditions as fixed by the Magistrate. While acknowledging the appellant's criminal history, Nyland J found that this was an isolated incident in the context of the appellant attempting to discipline his son, and was not intended to cause any injury. As such, while the

sentence was excessive, the Court agreed with the Magistrate that a sentence of imprisonment was appropriate – 'the court must make it clear, not only to the appellant but to others who might be like-minded, that violence of any kind to a child will not be tolerated' (see at [28]).

***R v Wilkinson* [2008] SASC 172 (4 July 2008) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated serious harm with intent' – 'Aggravating factor' – 'Bail' – 'Deterrence' – 'Following, harassing, monitoring' – 'History of abuse' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Aggravated serious harm with intent, aggravated assault causing harm, aggravated harm with intent. (Aggravating factors – that the appellant knew the victim was his de facto spouse).

Appeal type: Appeal against sentence.

Facts: The appellant was on bail for an unrelated charge at the time of the offending. The first incident arose when the complainant went to collect the appellant (her de facto partner) due to the appellant's curfew as a condition of his bail. The appellant reacted angrily to this, which led to the assault. She was admitted to hospital for four days. The complainant's injuries were extremely serious with lasting effects including permanent facial and dental damage, ongoing amnesia, psychological issues and disfigurement. The appellant was arrested and eventually released on bail with conditions that he not approach or communicate with the complainant in any way. In breach of this bail, the appellant seriously assaulted the complainant again by punching her in the face, choking her, pulling her by the hair and throwing her into a mirror. The complainant again sustained serious injuries and required hospital treatment. There was a long history of domestic violence in the relationship, and one of the past incidents involved an assault by the appellant. The complainant called police but was unable to explain what occurred. When police returned the call, the appellant held a gun to the complainant's head. She told the police all was OK and hung up. At the time of the offending, the appellant was 27 and the complainant was 17. They had been in a relationship for some years and the police had been contacted about domestic violence three times in the 12 months prior. The appellant had relevant criminal history apart from the history of domestic violence. He pleaded guilty and was sentenced to 7 years and 8 months' imprisonment.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Gray J (with whom Sulan J and White J agreed) discussed the causes of domestic violence and the preferred response of the courts. See at [27]- [28] -

'The causes of domestic violence are multiple. It has been recognised that relevant contributing factors include immaturity, mental illness, abnormal personality disorders, inhibition through drug abuse, poor anger management and lack of counselling and support. Courts have identified all of the above as common causative factors in modern times. Although imposing longer and longer terms of imprisonment does remove perpetrators from the community, domestic violence continues and its incidence increases. The imposing of sentences of imprisonment is a blunt instrument that does not adequately address the underlying causes of domestic violence in any real way.

The courts have long recognised that personal and general deterrence have a heightened significance when sentencing for the crimes of domestic violence. As King CJ observed in R v Banens (Unreported, Supreme Court of South Australia, King CJ, Legoe and Von Doussa JJ, 18 November 1987) at 7-8:

"The sentence which is imposed by the court for a crime of domestic violence is aimed, in large part, at deterring other people who may be involved in like situations. I think that, in a serious case of domestic violence, it is necessary for this Court to make clear, by actual intervention, to the public that the sentences imposed for this type of crime are calculated to provide effective deterrence to those who might be tempted to commit similar crimes. Not only must the penalties imposed operate, as far as such penalties can, as an effective deterrent, but it must be made clear to the public that the courts are imposing sentences having that effect. It is a question not only of actual deterrence but assurance to the public that deterrent penalties are being imposed."'

His Honour went onto comment on the vulnerability of victims at [29] – '*Domestic violence is predominantly directed by men toward women. The community expects the law to protect women, to protect the weak from the strong, and to protect the vulnerable from the oppressor. These are factors that have led the courts to treat crimes involving domestic violence as grave crimes. Parliament has enacted laws designed to provide protection to those subjected to domestic violence. Parliament has recognised that crimes involving violence and assault may be aggravated by a domestic situation.'*

This was particularly relevant on these facts as the victim/complainant was only 17. She had made multiple complaints to police but had received little protection, other than the no contact and no alcohol conditions of the appellant's bail. The Court did not make use of the wide powers under s 11 of the *Bail Act 1985*. While the

bail agreement indicated there was to be supervision by a Community Corrections Officer, there is no evidence that this occurred. Also, the appellant was not required to undertake counselling to address his violence, alcohol abuse and anger issues. As such, in this case, the no contact condition provided little protection and the complainant was left vulnerable and in danger. The Court concluded that the sentencing judge was correct to take a serious view of the appellant's conduct. Over the preceding 12 months, the appellant had 'bullied, victimised and brutalised his younger partner' (See at [41]) and had continued this conduct notwithstanding the fact that the complainant sought protection from police and the bail conditions. Personal deterrence was important as the appellant had not been deterred by earlier warnings. General deterrence was also particularly important. See finally at [42] where Gray J referred to the fact that Parliament has made an assault in a de facto relationship an aggravating factor, which draws attention to the seriousness of this conduct. The Courts should pay due attention to this factor in sentencing.

***R v Carr* [2008] SASC 125 (13 May 2008) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Antecedents' – 'Character' – 'Common assault' – 'Deterrence' – 'Emotional and psychological abuse' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing' – 'Threatening life'

Charge/s: Common assault (two counts), threatening life.

Appeal Type: Appeal against sentence.

Facts: The victim was the appellant's wife. There was a long history of physical and psychological abuse in the relationship. The assaults involved the appellant slapping and spitting on his wife. The threatening life offence involved the appellant holding a knife to his wife's throat. He was sentenced to two years and five months' imprisonment, with a non-parole period of twelve months.

Issue/s: Whether the sentence was manifestly excessive. In particular, whether the sentence should have been suspended.

Decision and Reasoning: The appeal was upheld and the appellant was re-sentenced to two years' imprisonment with a non-parole period of 9 months. The appellant submitted that the sentencing judge erred in not sufficiently taking into account the time he spent in custody and in home detention and his prospects of rehabilitation. The respondent submitted that there was no error in the sentencing judge's approach, and that

the charges had to be considered against the background of domestic violence that occurred over the period of a 17 year marriage. The respondent argued that this made general deterrence of paramount importance. Anderson J (Doyle CJ and Bleby J agreeing), agreed at [31] that general deterrence is a very important consideration in sentencing where there has been a history of domestic violence in the relationship. This was applied at [38], where Anderson J held that the history of domestic violence in the relationship and the importance of general deterrence could not justify suspending the sentence. However, the sentencing judge erred in assessing the appellant's prospects of rehabilitation as moderate. This was contradictory to the information that was before him, which included a lack of prior convictions and the fact the appellant no longer had a problem with alcohol abuse. The sentencing judge also erred by not specifying the extent to which he took the period of home detention into account.

***R v Lennon* [2003] SASC 337 (2 October 2003) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aboriginal and Torres Strait Islander people' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful and malicious wounding with intent to cause grievous bodily harm'

Charge/s: Unlawful and malicious wounding with intent to cause grievous bodily harm.

Appeal type: Application for leave to appeal against sentence.

Facts: The respondent, an Aboriginal man, was intoxicated and engaged in an argument with his de facto wife. He lost his temper and struck her on the head with the blade of a shovel which caused very serious injuries. He then threatened to break her legs, struck her on the knees with the shovel handle and struck her on the arm, which was already broken and in plaster. He had a relevant criminal history including offences of violence. He was sentenced to 18 months' imprisonment with a non-parole period of 10 months.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. Mitigating factors included the fact that the offence was committed on the spur of the moment while he was intoxicated and he was immediately remorseful (see at [9]). However, Doyle CJ (with whom Prior J and Vanstone J agreed) described the attack as 'brutal' and 'cowardly' (see at [10]). Doyle CJ then made the following comments at [12] –

'The court has said consistently that it must do what it can to protect women from violence by men. This applies just as much to violence within a domestic relationship as it does to violence in other situations. In cases like this the community expects, and protection of women requires, that the court should impose a sentence that is likely to deter the individual offender and to deter other potential offenders. The fact that the violence occurs on the spur of the moment is a relevant factor, but this is often true in the case of domestic violence. The impulsive nature of such offences is often offset by the fact that, as here, there is a pattern of violence within the particular relationship, or on the part of the particular offender. Mr Lennon's record makes it clear that he has not yet learned that violence towards women cannot be accepted.'

As such, while there was no error in the primary judge's reasoning, the sentence was too low. It was not justified by the mitigating factors in the context of the objective seriousness of the crime and the respondent's criminal history. The respondent's Aboriginality was acknowledged but no significance of that factor was identified. The Court held that the head sentence should have been twice what was imposed. There was a need for the Court to re-sentence because the original punishment was, 'so inadequate as to shake confidence in the administration of justice' (see at [18]). The appellant was then re-sentenced to four years' imprisonment with a non-parole period of 20 months. While Doyle CJ was of the view that a longer non-parole period was warranted, this was not appropriate because the original non-parole date fixed by the trial judge was to expire within two weeks of the decision being handed down. To increase the non-parole period so close to this date would have been particularly harsh on the respondent.

***R v Parisi* [2003] SASC 249 (14 August 2003) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravating factor' – 'Assault occasioning bodily actual harm' – 'Contravention of restraining order' – 'Damaging property' – 'Deterrence' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Threatening life'

Charge/s: Damaging property (two counts), contravention of restraining order (two counts), threatening life, assault occasioning actual bodily harm.

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty in the District Court to all of the above charges. The victim was the

appellant's estranged wife. Prior to the offences, there was domestic and family violence that led to the restraining order being obtained. The property damage offences involved the appellant damaging his wife's car. The threatening life and assault offences involved the appellant attending a house at which his wife was staying and producing a knife. He was allowed to enter the house after he handed over the knife and stated that he would not harm his wife. He then entered the house, grabbed his wife in a headlock and punched her in the face multiple times while threatening to kill her. She suffered a broken nose and black eye. The appellant's criminal history included various drug and assault offences. A psychiatrist concluded that the appellant had developed a depressive disorder associated with the deterioration of his relationship, which had caused him to act aggressively and violently towards his wife and children over some years. His condition had not stabilised. He was sentenced to three years and two months' imprisonment with a non-parole period of 18 months.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The appellant submitted that the primary judge did not adequately consider the appellant's rehabilitation and had given undue weight to his criminal history and the comments of the psychiatrist. He submitted that the sentence should have been suspended. However, the appeal was not upheld for these reasons. Rather, the original sentence was set aside due to an error with calculating the maximum penalties for the property damage offences. In re-sentencing, Nyland J (with whom Gray J and Debelle J agreed) concluded that while the two property damage offences might not appear particularly serious, they should be treated as part of an escalating course of conduct which culminated in the assault, which caused serious injury and would have been a terrifying experience. Her Honour also noted that the fact the conduct was committed in breach of a domestic violence order was an aggravating factor. General deterrence was significant to 'bring home to others who might be like-minded that the courts will not tolerate this type of behaviour' (See at [21]).' He was re-sentenced to two years and nine months' imprisonment with a non-parole period of nine months. The reduced length of the sentence gave credit for the appellant's guilty plea and time already served in custody and on home detention bail. The non-parole period was reduced to take account of the positive reports from the psychiatrist about the appellant's rehabilitation, such that he was no longer a threat to his wife and personal deterrence was no longer necessary.

***R v McMutrie* [2002] SASC 253 (8 August 2002) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of

principle.

‘Aggravating factor’ – ‘Attempted murder’ – ‘Breach of restraining order’ – ‘Deterrence’ – ‘Double jeopardy and other charges’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Possession of a knife with intent to kill or to cause grievous bodily harm’ – ‘Sentencing’ – ‘Unlawful wounding’

Charge/s: Attempted murder, wounding with intent to kill or do grievous bodily harm, unlawful wounding, breach of restraining order.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant’s relationship with his former de facto partner had recently ended. The appellant approached her at a club because he wanted her to come outside to witness him attempt to cut his own throat. As he attempted to force her to leave, a struggle ensued and she was wounded by his knife. They had been in a relationship for 20 years. The appellant had a history of domestic violence, mental health issues and various other illnesses. His criminal history involved alcohol and drug related offending and prior breaches of restraining orders. He was acquitted of attempted murder and wounding with intent but convicted of unlawful wounding and possessing a knife with intent. The trial judge indicated that the possession of the knife and unlawful wounding offences arose out of the same events. He pleaded guilty to breaching the restraining order. He was sentenced for all three offences to three years’ imprisonment with a non-parole period of 18 months.

Issue/s:

1. Whether the appellant was convicted twice for the same offending conduct, as the same facts were relied upon for the possess knife with intent charge and the unlawful wounding charge, such that the rule against double jeopardy was infringed.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal against conviction was upheld and the appeal against sentence was dismissed.

1. The Crown conceded that there was a risk of a miscarriage of justice and acknowledged that the jury may have relied on the same factual circumstances for both convictions. As such, the appellant would have been entitled to the defence of ‘autrefois acquit’. The conviction for the possess knife offence was therefore set aside.

2. In upholding the original sentence, Gray J (with whom Perry J and Williams J agreed) noted the lasting impacts of the history of domestic violence on the victim and their children. The Court held that an immediate custodial sentence was needed. See in particular these remarks at [15]-[18] –

'Domestic violence is not just physical abuse but includes a range of violent and abusive behaviours perpetrated by one person against another. A high percentage of victims are women and children. Domestic violence has existed for centuries. However over the last 30 years its prevalence has been increasingly recognised. This has caused considerable community and governmental concern. More recently legislation has evolved in an effort to protect the vulnerable…The law seeks to protect the innocent and vulnerable. The legislative scheme is directed towards providing protection. This protection is primarily provided through the mechanism of restraining orders (Now known as intervention orders). *Restraining orders are the principal legal response to domestic violence. They are can be* (sic) *obtained expeditiously from a magistrate's court. The standard of proof is on the balance of probabilities. Orders can be tailored to the particular conduct of the abuser and breaches are a criminal offence. In this case the victim had obtained a restraining order. She had done all she could to protect herself. The breach of that order is a matter of particular gravity. The use of the knife to engender fear and wound was an aggravating feature to the appellant's crime. The gravity of his conduct called for the imposition of an immediate custodial sentence'*

See furtherat [23] – '*A restraining order had been obtained to prevent the very conduct the subject of the wounding conviction. The need for personal deterrence is a significant factor in this case. The appellant needs to understand that court orders must be obeyed and that non compliance in circumstances of domestic violence will be viewed very seriously. General deterrence is also an important consideration in sentencing.'*

District Court

R v TM [2023] SADC 55 (12 May 2023) – South Australian District Court

'Evidence issues' – 'Judge-alone trial' – 'Physical violence and harm' – 'Pregnancy' – 'Pregnant people' – 'Rape' – 'Response to rape' – 'Sexual abuse' – 'Uncharged acts'

Charges: 6 x rape.

Proceedings: Judge alone trial.

Facts: The accused man and complainant woman were in a relationship for about 14 years. The six specific rapes subject of the charges arose over a 13-year period of their relationship, against a backdrop of violence and non-consensual intercourse.

The complainant alleged that the accused had raped her on multiple occasions, including while pregnant. The complainant alleged the accused was violent and aggressive towards her, verbally abusing her and pushing her around. The complainant gave evidence that their relationship went through periods where it improved – such as following their marriage - and that throughout the relationship they had both consensual and non-consensual sexual intercourse.

Reasoning and decision: Guilty on all counts.

Barklay J had regard to the forensic disadvantage for the accused involved with the age of the offending which applied only to the accused.

The credibility and reliability of the complainant were central to the case, and there was strong focus on the inconsistencies in her account of the six specific offences. Overall, Barklay J found that the complainant was persuasive and credible, providing a detailed account about events that had occurred years prior. While acknowledging that she was uncertain as to some details, this was not found to undermine her reliability as to the essential elements of the rape [102]. Barklay J particularly found her preparedness to give evidence that despite the rape she had consensual intercourse with him, that she had begun to accept the rape and that she didn't leave because she loved him, was hopeful and wanted to stay together for her family were hallmarks of a truthful and honest account, and that this evidence reinforced his perception of her honesty and truthfulness [100], [103].

Barklay J then turned to consider each charge separately. He emphasised that the other charged acts were

only used to provide context to the alleged offences [105] and that the uncharged acts of continual violence and rape were only relevant to inform why and how the offending continued, why the complainant didn't report the acts and why the accused was able to act without concern that she would complain [106]. While there were inconsistencies, he found her detailed accounts compelling, and the discrepancies largely related to minor details that did not cause doubt as to the overall evidence.

Specifically, the defence's contention that the complainant would have left after the first rape were the allegations true was not accepted given the unpredictability of people's responses to rape and the complex emotions involved:

> [112] It was submitted by defence counsel that following the first incident of rape, if it had occurred, she would have left TM. I reject that submission. It is difficult to predict how a person will (or will not) respond to being raped. I do not think that it necessarily follows that she would have left the relationship. There is a combination of emotions that may follow a rape such that how a person reacts may not be predictable – including in this case shock, embarrassment and perhaps disbelief.

Similarly, the fact that one of the charges was not included in the initial police statement was not found to undermine her evidence of this rape, as Barklay J accepted that in taking the lengthy statement and collating a significant amount of information about the ongoing rape in the relationship (5 hour interview), it was possible that the one occasion may not have ended up in the statement or she may have thought she mentioned it and did not [123].

***R v Fraser* [2020] SADC 127 (2 September 2020) – South Australian District Court**

'Actus reus' – 'Mens rea' – 'Recklessness' – 'Strangulation'

Charges: Choking, suffocating or strangling a person in a domestic setting x 1.

Proceedings: Application for ruling whether *mens rea* is an element of the offence.

Decision and reasoning: *Mens rea* is an element of the offence.

There is no Supreme Court authority that has considered the elements of this offence, and, in particular, whether *mens rea* is an element of the offence. The judge in this case agreed with the reasoning of the QCA in *R v HBZ* (2020) with respect to *actus reas*:

[17] In my view, the *actus reus* of choking, suffocating or strangling is the stopping, or significantly hindering or restricting of the complainant's breathing, whether by application of force or by other means.

…

[20] Even where the *actus reus* does not involve the application of pressure or force, for example, the luring of the victim into an airless chamber, the placing of a plastic bag over the victim's face, or the administration of a poison that causes an anaphylactic reaction, the resultant stopping or significantly hindering or restricting of the victim's breathing is not a separate element of the offence but is the very evidence required to prove that the conduct (the luring, placing of the bag, the administration of the poison) was the act of choking, suffocation or strangling.

[21] For these reasons I conclude that, if *mens rea* is an element of the offence, the intention accompanying the conduct must be an intention to stop or significantly hinder or restrict the victim's breathing.

[22] There is no express or implied exclusion of *mens rea* in s 20A. The offence in s 20A was created to avoid 'relying on existing offences such as causing harm or serious harm, endangering life or attempted murder'. All of those offences require proof of *mens rea*. In enacting s 20A as a substitute for those offences and in dispensing with any requirement to prove injury or harm and yet providing a maximum penalty of 7 years imprisonment, Parliament cannot have intended to dispense with the element of *mens rea*. However, the offence does not require proof of harm or injury and thus does not require proof of a specific intent with respect to the consequence of the prohibited conduct.

[23] The very act the accused intends to perform must be to stop, significantly hinder or restrict the complainant's breathing. The intention to choke, suffocate or strangle will generally be inferred from the conduct itself but may also be established by additional evidence.

[24] Accordingly, I conclude that the presumption that *mens rea* is required before a person can be held guilty of a grave criminal offence is not displaced in relation to s 20A of the CLCA. On a charge under that provision, the prosecution bears the onus of proving that the accused intended to choke, suffocate or strangle the complainant, that he, is intended to stop, significantly hinder or restrict the complainant's breathing.

…

[30] Accordingly, I consider it unlikely that Parliament would have intended to exclude recklessness as an alternative basis for liability …

[31] As there is no statutory definition of recklessness for the purposes of s 20A, and given the characterisation by Parliament of this offence as an indicator of escalation to domestic homicide, it is appropriate to apply the common law test for recklessness set out by the High Court in *Crabbe*.

[32] I rule that the elements of the offence under s 20A are:

- At the time of the alleged offence the accused was or had been, in a relationship with the complainant.
- The accused intentionally engaged in conduct which choked, suffocated or strangled the complainant; that is conduct that stopped or significantly hindered or restricted the complainant's respiration. In the alternative, the accused engaged in the conduct which choked, suffocated or strangled the complainant foreseeing that it was probable that this conduct would stop or significantly hinder or restrict the complainant's respiration.
- The complainant did not consent to being choked, suffocated or strangled.
- The act of choking, suffocating or strangling the complainant was done without lawful justification.

***R v Rogers* [2020] SADC 72 (16 June 2020) – South Australian District Court**

'Coercive control' – 'Controlling behaviour' – 'Credibility of complainant' – 'Evidence' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Step-children' – 'Victims as (alleged) perpetrators'

Charges: Causing harm with intent to cause harm x 1; damaging property x 1; assault x 1; rape x 2; assault causing harm x 1.

Case type: Judge only trial.

Facts: The accused man was charged with 6 offences alleged to have been committed against the complainant woman between 2016 and 2018 when they were in a 'romantic relationship' and were living together for periods of time. The offences included causing harm with intent to cause harm, damaging property, assault, rape, and assault causing harm. The alleged offences were committed in a domestic setting, at different addresses where the complainant resided with her 3 children, apart from periods on

weekends or school holidays when they stayed with their respective fathers. The prosecution alleged that the relationship was characterised by the accused's violence and aggression, and that the complainant was trapped in a destructive cycle of physical violence, abuse, threats and controlling behaviour, which usually occurred in the presence of her young children. According to the prosecution, the charges are specific examples of a general pattern of behaviour demonstrated by the accused in the course of the relationship.

In relation to Count 1, the accused was alleged to have choked the complainant. He also punched and slapped her in the face (Count 3). Further, the complainant allegedly woke to the sensation of her vagina being penetrated (Count 4), and the accused further penetrated her with his fingers (Count 5). The accused also allegedly threw the complainant and stood on her ankle with his body weight, causing extreme pain (Count 6).

Held: Tracey J held that the prosecution failed to exclude the defence case as a reasonable possibility on any of the charges, and found the accused not guilty on each count ([281]-[282]). Much of the complainant's evidence was inconsistent and unreliable. Her Honour was troubled by the delay the complainant made in reporting Count 1 to police and the delay in providing the letter relied on by the prosecution as the accused's acknowledgment of the violent acts that had occurred the previous night ([234]). Whilst the letter could be interpreted as referring to the event where he strangled the complainant as she alleged, it could also be viewed as an apology for calling her a bad mother, threatening suicide, punching the wall and grabbing her arms as the defence alleged ([236]).

Much of the defence case was focused on blaming the complainant for issues in the relationship, consistent with the threatening and intimidating abuse she allegedly experienced. Her Honour rejected the defence argument that she was often the perpetrator of violence. The evidence in relation to the complainant's previous relationships did not demonstrate a propensity for violence or false reporting to police. It was clear that on some occasions, she had not been the instigator and/or was the victim. Tracey J also formed the impression that the accused exhibited manipulative behaviour ([272]). Moreover, behaviours, such as the complainant's contacting police, making statements on some occasions and not others, withdrawing complaints, denying incidents occurred, allowing the accused back into her life and seeking variation to intervention orders, are common features in serious domestic violence cases. Abusive and violent relationships give rise to behaviours that may appear too odd or counterintuitive to be believed ([273]).

Tracey J did not doubt that some aspects of the complainant's evidence were true or that she loved the

accused. However, she did have difficulty assessing the complainant's evidence overall. Whilst she sometimes appeared to be focused and doing her best to describe the events, she also appeared distant, non-committal and prone to exaggeration. She was open about her methamphetamine use and the fact that she had used drugs in her home, albeit not in front of her children ([274]). At times, the complainant's manner seemed perplexing and her Honour had difficulty accepting her version of events as credible. The differences between her evidence and what she told police were troubling. Such inconsistencies could not be excused, even allowing for the passage of time, the frequent and repetitive nature of alleged abuse blurring a memory of an event, or the chaotic lifestyle that often accompanies drug use ([275]). It appeared much of her angst stemmed from the accused's relationship with another woman. The complainant's credibility was undermined by her initial refusal to accept the accuracy of texts she had sent to this woman and her denial that the relationship with the accused did not affect her, despite text messages to the contrary ([276]). Further, her Honour noted that although domestic violence victims may not seek attention for the injuries they sustain and may take extraordinary steps to conceal evidence of abuse, the complainant's graphic descriptions of her injuries and episodes of violence were not borne out by other evidence. There was no evidence from the complainant's consultations with doctors of any bruising or injury consistent with the allegations. Her daughter's distress, apparently in response to questions about drugs, raised the question of whether there had been some discussion between her and the complainant before giving evidence ([279]). Tracey J observed that the police officers who gave evidence appeared to be careful and impressive witnesses who would have assessed and recorded any sign of injury ([280]).

R v Hanks **[2019] SADC 139 (16 September 2019) – South Australian District Court**

'Emotional and psychological abuse' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Propensity reasoning' – 'Sexual and reproductive abuse' – 'Uncharged acts'

Charges: 4 x assault causing harm (Counts 1-4), 1 x rape (Count 5), 2 x aggravated assault causing harm (Counts 6-7), 1 x aggravated assault (Count 8), 1 x aggravated creating likelihood of harm (Count 9)

Case type: Criminal trial by judge alone

Facts: The accused was charged with 4 counts of assault causing harm, 1 count of rape, 2 counts of aggravated assault causing harm, 1 count of aggravated assault and 1 count of aggravated creating likelihood of harm. The complainant was his former de facto partner ([1]). The prosecution argued that the charged acts were committed during their de facto relationship ([3]). The defence case, however, was that the

relationship was not a violent one and that the charged acts of violence and rape did not take place ([5]).

Held: The accused was found guilty of Counts 1-5 and 7-9. Judge Chapman did not find him guilty of Count 6, but guilty of the alternative offence of aggravated assault ([188]-[221]). The complainant gave evidence that the accused suffered from alcohol and drug abuse, and would get emotional about his past, resulting in rage ([19]-[20]). Judge Chapman emphasised that she avoided using the evidence in any prejudicial way against the accused, such as to reason that he was generally violent and therefore must have committed the charged acts ([187]). Her Honour noted that the fact the accused used drugs did not mean that he was a bad person or had the propensity to commit the charged offences. Rather, her Honour stated that the evidence of his alcohol and/or drug use may only partly explain his aggressive behaviour towards the complainant and his inability to control outbursts of rage ([21]). Evidence of various uncharged acts was further discussed at [23]-[52]. Judge Chapman was satisfied that all the uncharged acts occurred as described by the complainant and showed that the charged acts did not "come out of the blue" ([185]).

***R v Schmidt* [2017] SADC 98 (30 August 2017) – South Australian District Court**

'Admissibility' – 'Evidence not accepted' – 'Jealousy' – 'Judge-only trial' – 'Strangulation' – 'Tendency evidence' – 'Uncharged acts of violence'

Charges: Aggravated serious criminal trespass in a place of residence x 1; Indecent assault x 1; Assault x 1; Theft x 1.

Case type: Trial by a single judge.

Facts: The complainant alleged that the accused entered her house, strangled her, grabbed her in the vagina, punched her in the face and stole her mobile phone ([23]-[[26]). The accused denied all the allegations ([6]).

Issues: Whether the accused should be convicted.

Decision and Reasoning: Judge Rice convicted the accused on counts 1, 2 and 4 ([56]). In relation to Count 3 (assault), Rice J found that it was not proved beyond reasonable doubt that the accused punched the complainant ([54]).

Evidence of uncharged acts of violence occurring earlier in the relationship was also admitted. The prosecution said that it showed that 'the accused had a tendency to act in a violent and controlling manner' towards the complainant ([12]). However, Judge Rice ignored the evidence on the basis that some of the

complainant’s evidence was inconsistent, and was not supported by independent evidence ([20]).

Tasmania

Court of Criminal Appeal

***Gee v Tasmania* [2022] TASCCA 1 (2 February 2022) – Tasmanian Court of Criminal Appeal**

'Admissibility of evidence' – 'Admissibility of prison telephone call recordings' – 'Admissions of guilt' – 'Appeal' – 'Credibility of victim' – 'Lies of victim' – 'Persistent family violence' – 'Post-offence conduct consistent with guilt' – 'Prison telephone calls'

Charges: Persistent family violence x 1.

Proceedings: Appeal against conviction.

Facts: The appellant was found guilty of persistent family violence [8]. He appealed on the following grounds:

1. The learned trial judge erred in fact and in law in ruling that the complainant's evidence be taken at a special hearing.
2. The learned trial judge erred in fact and in law in admitting into evidence the recorded content of phone calls made by the appellant to the complainant:
   - '…in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to the appellant';
   - '…in finding that it would not be unfair to admit the evidence having regard to its late disclosure'; and
   - '…in admitting the evidence conditional upon the State recalling the witness in circumstances where it had previously asserted in support of the application for special hearing that it would not do so under any circumstances' [7].

Decision and Reasoning: The appeal is dismissed.

Ground 1: The Court affirmed the trial judge's ruling on the special hearing, dismissing the first ground of appeal [32]. The trial judge had found that when faced with the prospect of giving evidence in court in the presence of the accused, the complainant experienced symptoms of anxiety that 'adversely affected' her

ability to comprehend and respond to questions ‘to a significant degree’. The trial judge noted that the complainant’s anxiety manifested ‘itself physically by her shaking and becoming effectively unresponsive’. Therefore, the trial judge was satisfied that by requiring the complainant to give evidence ‘in the usual way’ she would likely ‘suffer severe emotional trauma’ and ‘be so intimidated or distressed as to be unable to give evidence… satisfactorily’. The trial judge explained that this was due to the nature of the complainant’s ‘relationship with the accused and… the subject matter’ [16].

Ground 2: The court dismissed the second ground of appeal, stating that ‘the evidence was highly probative, involving admissions of guilt, post-offence conduct consistent with guilt and evidence highlighting the complainant's credibility’ [48]. The court held that the complainant’s admitted lies did not mean none of her evidence was to be believed.

***Otto v Tasmania* [2021] TASCCA 15 (16 December 2021) – Tasmanian Court of Criminal Appeal**

‘Accessory after the fact’ – ‘Application for leave to appeal’ – ‘Crown appeal against sentence’ – ‘Female perpetrator’ – ‘Murder’

Charges: Murder.

Proceedings: Application for leave to appeal against conviction; Crown appeal against sentence.

Facts: The applicant was convicted of the murder of her husband, the allegations being that she instigated her husband’s friend and her former lover Bradley Purkiss to commit the crime. The case against the applicant was solely circumstantial. The victim had been behaving erratically in the weeks leading up to the murder and the applicant and co-accused had spent a number of hours together on the afternoon before the murder. It was clear that the jury did not believe the applicant’s exculpatory statements in her police record of interview. The applicant and victim had been experiencing financial difficultied prior to the murder and she had reported to witnesses that her husband had mental and physical health issues which prevented him from working, and he was said to be an intimidating person. The applicant and Purkiss had a brief sexual relationship which ended prior to the murder, but they remained close. Text messages between Purkiss and the victim on the day of the murder were recovered from the victim’s phone, there was video evidence a man wearing a hood entered the applicant and victim’s home met after the murder and the CCV was disconnected after that person entered the home.

Grounds:

Application for leave to appeal – the verdict of the jury was unreasonable and cannot be supported with regards to the evidence (accepting a verdict of accessory after the fact should be substituted if successful).

Appeal against sentence – manifest inadequacy.

Decision and reasoning:

1. Leave granted and appeal allowed.
2. Verdict of guilty of murder set aside and verdict of being an accessory after the fact to murder substituted.
3. Sentence for murder set aside.*

Porter J (Brett and Geason JJ concurring) held that the question for the court was whether it was open for the jury to have excluded all reasonable hypotheses consistent with innocence. On the evidence before the jury it was not possible to exclude the hypothesis put by the applicant in argument.

*Note: On 17 December 2021, for the crime of being an accessory after the fact to murder, the Court recorded a conviction and sentenced the appellant to six years' imprisonment to commence on 30 May 2017. The Court ordered that she not be eligible for parole until she had served one half of that sentence.

***McCall v Tasmania* [2021] TASCCA 11 (12 November 2021) – Tasmanian Court of Criminal Appeal**

'Accusations of infidelity' – 'Aggravated burglary' – 'Appeal against sentence' – 'Community protection' – 'Extensive criminal history' – 'Home invasion' – 'Manifestly excessive or inadequate' – 'People affected by substance misuse' – 'People who are homeless' – 'People who are pregnant' – 'Sentence' – 'Sentencing'

Charges:

Incident 1: Aggravated burglary x 1, assault x 1, associated summary offences;

Incident 2: evading police x 1, dangerous driving x 1, associated summary offences.

Proceedings: Appeal against sentence.

Facts: The accused man appealed the sentences imposed by Brett J for offending arising out of two separate

incidents. The first incident was of violent offending including aggravated burglary and assault towards his then domestic partner (pregnant with a former partner's child) and the violent invasion of the home of people with whom they were staying during a period of homelessness. The second incident related to the accused's attempts to avoid arrest for the first incident by engaging in dangerous driving while under police pursuit. The accused had an extensive criminal history "which manifests in persistent and serious violent offending" and "a lengthy history of traffic offending, including a number of convictions for disqualified driving, and convictions for evading police and negligent driving". Brett J noted that the only factors which could be taken into account in the accused's favour were his pleas of guilty and the principles of totality. The appellant argued that the 18-month delay between his arrest and sentence should have been taken into account in mitigation.

Issue: Were the sentences imposed (7 years total term of imprisonments, eligible for parole after 5 years, together with a driving disqualification for an aggregate of 6 years from the date of release) manifestly excessive?

Decision and Reasoning: Appeal dismissed.

Aggravating circumstances related to the first incident included:

- The aggravated burglary took the form of a very frightening home invasion.
- The victim of the assault was a pregnant woman.
- It was a prolonged assault.
- It amounted to domestic violence. [11]

Aggravating circumstances in relation to the dangerous driving included:

- The crime occurred on a Monday afternoon, when it was likely that there would be motorists and pedestrians on the streets of Penguin.
- A number of drivers had to swerve to avoid collisions.
- A number of pedestrians, including an elderly woman, were crossing roads when the appellant drove towards them.
- A number of police officers were involved in intercepting the appellant.
- The appellant drove for about 7 kilometres when evading the police.
- He ignored emergency lights and sirens.
- He continued to drive after the vehicle's tyres were deflated.

- He was a disqualified driver. [12]

The appellant was always likely to receive a term of imprisonment greater than the 18-month delay, negating any mitigation this factor might grant. [13]

Blow CJ, Jago J and Martin AJ observed:

> ….it cannot be said the impugned sentences, separately or in the aggregate, were out of proportion to the seriousness of the appellant's offending, particularly since provision was made for him to be eligible for parole two years before the expiration of the last sentence. [25]

***Gordon v Tasmania* [2020] TASCCA 17 (2 December 2020) – Tasmanian Court of Criminal Appeal**

'Appeal against sentence' – 'Exposing children to domestic and family violence' – 'Female perpetrator' – 'Manifest excess' – 'People affected by substance misuse' – 'People affected by trauma' – 'People with mental illness' – 'Traumatic childhood' – 'Verdins principles'

Charges: Wounding x 1; Common assault x 2.

Proceedings: Appeal against sentence.

Facts: The female appellant had a traumatic childhood, being sexually abused by her father and exposed to domestic and family violence. She had a history of mental illness (including depression, borderline personality disorder and post-traumatic stress disorder), substance misuse (she had ceased drug use but was drinking heavily at the time of the offending), and a lengthy record of offending. The offences occurred during the course of an argument between the appellant and her mother, and related to feelings of love/betrayal the appellant felt towards her mother for her childhood. The appellant cut her mother's fringe with a knife and forced her head back onto the couch. She put her mother in a headlock and cut across her neck. The appellant threatened to stab a neighbour while holding two knives. The appellant was sentenced to 2 years imprisonment. The sentencing judge determined not to make an order that the appellant was eligible for parole. The appellant was made the subject of a community correction order for 12 months.

Grounds of appeal:

1. The sentence was manifestly excessive.
2. The sentencing judge erred in fact and/or law in determining that an order for parole eligibility ought not

be made.

Held: The appeal was allowed on ground 2 and the appellant re-sentenced.

Ground 1: There was sufficient evidence in the forensic psychiatrist's report to establish a connection between the appellant's impaired mental functioning and its contribution to the offending: 6 *Verdins* principles discussed at [27]-[33], [39]-[46] and [47]-[50]. Nevertheless, the 2 year head sentence could not be said to be manifestly excessive. It was not outside the range available to the sentencing judge. The appellant's traumatic childhood, presence of mental disorders, and the relationship issue which lay at the heart of the offending were more appropriately taken into account in whether relief ought to be afforded in relation to the service of 2 years' imprisonment (at [53]-[56]).

Ground 2: The appellant alleged that the sentencing judge misapplied certain material relevant to parole. However, the court declined to take the alleged factual errors further, instead allowing the appeal on other grounds (at [57]-[64]).

The failure to provide some relief from the full force of 2 years imprisonment was unreasonable and plainly unjust. The circumstances of the offences/offender called for some individualisation, these being: "the appellant's background of sexual abuse, her nature and extent of her illnesses, the underlying explanation for the attack on her mother, her remorse and the prospects of rehabilitation with sustained psychological therapy" (at [78]). The appellant was re-sentenced to 2 years' imprisonment, 8 months suspended on conditions including supervision of a probation officer in relation to drug/alcohol treatment, and undergoing medical, psychological or psychiatric assessment or treatment.

***Tatnell v Tasmania* [2020] TASCCA 13 (7 August 2020) – Tasmanian Court of Criminal Appeal**

'Appeal against conviction' – 'Assault' – 'Evidence' – 'Prior inconsistent statements' – 'Strangulation' – 'Trauma informed judicial practice'

Charges: Assault x 1.

Proceedings: Appeal against conviction.

Facts: The male appellant was charged with 3 counts of assault against his wife during the course an argument. A jury found the appellant guilty of the first count, which included strangling his wife and punching the wall above her head, but not guilty of the other counts. The trial judge imposed a wholly suspended

sentence of 12 months' imprisonment and made a community correction order.

Grounds of appeal: Whether inconsistencies between the complainant's description of the relevant events in evidence and that provided to police made the jury's verdict unsafe and unsatisfactory.

Held: Appeal was dismissed.

The jury was entitled to accept the complainant's explanation of the inconsistencies. This was particularly so given the jury's advantage of hearing the complainant give evidence and in the context of all the evidence (including objective evidence of strangulation). The jury's acceptance of this evidence was sufficient to support the verdict of guilt on count 1.

***Parker v Tasmania* [2020] TASCCA 9 (12 June 2020) – Tasmanian Court of Criminal Appeal**

'Appeal against sentence' – 'Guilty plea' – 'History of abuse' – 'People affected by alcohol misuse' – 'Physical violence and harm' – 'Statistics' – 'Terminally ill victim' – 'Vulnerable victim'

Charges: Assault x 2

Case type: Second appeal against sentence

Facts: This is a second sentencing appeal by the appellant man in respect of 2 counts of assault on his female partner (see Parker v Tasmania [2019] TASCCA 16 (8 October 2019) . He plead guilty and his plea to one count was accepted in satisfaction of a charge of causing grievous bodily harm. The appellant was sentenced by Blow CJ to 4 years' and 3 months' imprisonment, with a non-parole period of 2 years, 9 months. He appealed on grounds the sentence was manifestly excessive and that the sentencing judge erred in determined the factual basis for sentence. Blow CJ resentenced him to 3 months longer than the original sentence with the same non-parole period. The offences were recorded as family violence offences.

The appellant struck the complainant, a terminally ill cancer patient, in the head with a teapot, and then pushed her, causing her to fall over. The fall caused the complainant's hysterectomy wound to split open and her bowel to protrude. He had been drinking prior to the assaults. The appellant's version of events differed from the complainant's; the complainant's sworn evidence was found to be more reliable.

The appellant's lengthy criminal history included prior convictions for assault and for breaching family violence orders for violence towards an earlier partner and the current complainant. Factors in the appellant's favour

included the fact that he pleaded guilty, phoned the ambulance and did not flee from the scene, and admitted what he had done to the 000 operator and police. He left the complainant alone and bleeding to ask a neighbour for a cigarette. He recognised his violence was associated with his alcohol problem and sought treatment. The complainant was vulnerable and suffered terrible physical and mental health consequences as a result of the appellant's actions ([11]). Aggravating features included that the assaults occurred in the context of a domestic relationship, the complainant suffered from a terminal illness and the appellant was her carer ([12]).

Ground: The second sentence was manifestly excessive.

Held: Appeal dismissed, Estcourt, Pearce and Geason JJ concurring.

Estcourt J considered Gregson v Tasmania [2018] TASCCA 14 , a case which considered comparative sentencing statistics. In considering the "yardstick" of the available statistical and comparable sentencing data, Estcourt J held that the sentence imposed on the appellant was "heavy", but not plainly unjust or unreasonable. The appellant was sentenced on the basis that he did not intend or foresee the serious harm to the complainant, but the consequences of the assault were nevertheless egregious ([29]). As the sentencing judge noted, the situation was worse than that of a drunken man assaulting a terminally ill partner, because the appellant knew that the complainant had an untreated abdominal hernia. This made the breach of trust even greater ([30]).

Pearce J did not characterise the sentence as "heavy". Whilst the appellant did not intend or foresee the terrible harm caused, the likelihood of such harm ought to have been obvious to any reasonable person with knowledge of the complainant's vulnerability ([35]).

Geason J agreed with Estcourt J's characterisation of the sentence as "heavy". His Honour noted that "this Court has on a number of occasions emphasised the importance of general deterrence in sentencing for offences involving the infliction of violence on the vulnerable", which frequently occur in a domestic or relationship setting, and that "[s]uch conduct requires a sentence that reflects the insidious nature of such offending, and the importance of protecting those vulnerable to such harm" ([41]).

***Director of Public Prosecution v Johnson* [2020] TASCCA 4 (8 April 2020) – Tasmanian Court of Criminal Appeal**

'Alcohol misuse' – 'Appeal against sentence' – 'Attempt to interfere with witness' – 'Coercive control' – 'Controlling,

jealous and obsessive behaviours' – 'History of abuse' – 'Manifestly inadequate' – 'Physical violence and harm' – 'Separation' – 'Stalking.' – 'Suffocation' – 'Use of family members'

Offences: Assault x 2; Stalking x 1; Attempt to interfere with a witness x 1; Breaching a family violence order x 15; Attempting to breach a family violence order x 23

Proceedings: Crown appeal against sentence

Issue: Whether the sentence was manifestly inadequate

Facts: The male respondent and female victim were in a relationship and had moved in together. The respondent was arrested for breaches of a protective order made for the benefit of the victim, sentenced and a 12-month family violence order was imposed consisting of full non-contact conditions. Nine days later, the respondent made contact with the victim in breach of the order, promising he had changed. The respondent called the victim telling her he had paid for a hotel for the two of them to meet. The victim agreed and when she arrived, they had consensual sexual intercourse. They then consumed a fair amount of alcohol. Later that evening, the victim received a text message from a male friend. The respondent became aggressive and claimed the victim had been cheating. He pushed her head onto the bed and struck her face four times, pulling a clump of hair out. The respondent went to the bathroom for a few minutes and when he returned, he pushed the victim's face into a pillow and sat on her back so that she couldn't move. The victim thought she was going to die. The respondent eventually let her go but grabbed her arm and told her she would never see her children again. The victim told the respondent that she had to use the bathroom; she went inside, locked the door and sat in the shower. The respondent banged on the door, but the victim came out when he stopped. She asked to be allowed to sleep; the respondent allowed her to while he was holding her arm.

The next morning, the victim called her sister to tell her what had happened, asking her to pick her up. The victim reported the matter to police. Over the next few days, the respondent sent torrents of text messages and made numerous calls to the victim, which ranged from threats to pleading. He later had his father pass two letters onto the victim, asking her to withdraw the charges and refuse to give evidence. The victim refused. The respondent was convicted and sentenced to two years' imprisonment with a non-parole period of twelve months.

Judgment: The court allowed the appeal, finding the sentence to be manifestly inadequate in that it "[fell] short of that required to adequately respond to the gravity of the offending" [41], and resentenced the respondent to three years' imprisonment with a non-parole period of 18 months. The court held that "Apart from the fact that

the offending occurred in breach of court orders intended to protect a vulnerable female, the respondent's conduct involved acts of significant persistent violence including suffocation, followed by persistent attempts to have her drop the charges or refuse to give evidence; and stalking" [31]. The court emphasised that "Offending occurring in the privacy of the home, unseen, and away from help must be met with a penalty that serves as a warning to others that detection and conviction will result in severe consequences" [31].

The court condemned suffocation, providing that "The fact that the respondent's conduct included suffocation has significance to the assessment of the objective seriousness of the offending. Suffocation should be treated with the same level of seriousness as is afforded strangulation or throttling. Such conduct is inherently dangerous, and capable of causing serious consequences within a very short period. It renders victims incapable of acting to protect themselves … it is a form of dominance and control which has the potential to cause grave psychological harm, serious injury and even death" [33]. The court held this to be an aggravating factor, along with the fact that the offending occurred just 12 days after the respondent was released and that the respondent attempted to interfere with prosecution of the case [34]-[35]. The court noted that "the objective seriousness of the offending was very high encompassing serious assaults in circumstances where help was not available, followed by a series of attempts to avoid prosecution. Because that sort of interference has a probability of success, to the detriment of the safety of the victim and the frustration of community attempts to protect the vulnerable, gaol should be the inevitable consequence of such conduct" [37].

The court concluded that:

"the prosecution of family violence matters is notoriously difficult due to the vulnerability of victims to interference and pressure from perpetrators, with whom they will often have been in a relationship … the circumstances of this case make it an appropriate vehicle through which to assert a general principle that conduct directed at interfering in the prosecution of family violence matters so significantly erodes the administration of justice that it should attract a heavy sentence of imprisonment. This is important to encourage community participation in reporting such violence, and to provide confidence in the processes which follow reporting. The importance of this principle prevails over the matters referred to by the respondent in respect of his rehabilitation and parole" [55]. And further, "Prosecutions are the cornerstone of the system for the protection of victims. They serve to expose the offending, protect the victim and afford an opportunity for intervention directed towards the rehabilitation of the offender" [54] and that "A message needs to be sent to violent men in the community that serious assaults on females and intimidatory and stalking behaviour, and

behaviour designed to persuade a witness not to give evidence, will result in considerable periods of imprisonment" [74].

***Hardwick v Tasmania* [2020] TASCCA 2 (20 March 2020) – Tasmanian Court of Criminal Appeal**

'Assault' – 'Assault of child' – 'Children' – 'Error in assessment and use of evidentiary material relevant to sentence' – 'Manifestly excessive' – 'No prior convictions' – 'Non-fatal strangulation' – 'Parenting dispute' – 'People affected by alcohol misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Separation' – 'Spousal assault risk assessment guide' – 'Suicide threat' – 'Trespass'

Charges: Aggravated burglary and assault x 1; Common assault x 1.

Case type: Appeal against sentence

Facts: The appellant man pleaded guilty to aggravated burglary and assault, and to a summary offence of common assault. He was sentenced to 2 years' and 6 months' imprisonment on various conditions. The crimes were committed in the context of a domestic relationship against his wife (the victim) and teenage son. The appellant and victim had separated after 22 years of marriage, and had 3 children. On the day of offending, the appellant attended the family home where the victim and children lived, having been denied contact with the youngest child, after having consumed a considerable amount of alcohol. He smashed into the home and choked and punched his wife and teenage child. The sentencing judge was satisfied that the appellant was not coping well with the dissolution of the marriage. The appellant had attempted suicide, and the family was concerned about his psychological state. He breached an agreement that he was not to attend the home without the victim's consent, and was therefore a trespasser. The sentencing judge made a family violence order and directed that the crimes and summary offence be recorded on the appellant's criminal record as family violence offences.

Issue: The appellant appealed against the sentence on the ground that it was manifestly excessive. It was also contended that the sentencing judge erred in his assessment and use of evidentiary material relevant to sentence. Underlying much of this submission was the complaint that the sentencing judge should have relied on a pre-sentence report which concluded that the appellant presented 'a low risk of future family violence'. The appellant also submitted that the sentencing judge misused or gave undue weight to statements in the Victim Impact Statements, in particular, the description of the effects of the act of choking.

Held: The learned judge's sentencing considerations were discussed again on appeal ([20]-[27]). The

appellant had not previously committed any criminal offences and had a "significant potential for employment". Whilst the offending was not premeditated, the medical evidence stated that he was suffering from an adjustment disorder at the time of the offending. As to the likelihood of future violence, a psychologist used a ‘structured professional judgment tool’ (SARA) designed to predict intimate partner violence recidivism. Based on the SARA, the appellant was assessed at being at moderate risk of further violence towards the victim. The combination of the SARA and other ‘red-flag’ risk factors led the psychologist to conclude that the appellant still posed a risk to the victim. Further, notwithstanding his guilty plea and cooperation in the proceedings, the appellant lacked insight and remorse and minimised the severity of his conduct. There was a need for personal deterrence as his personality traits, such as narcissism, predisposed him to having a ‘severe explosive reaction to the relationship separation’.

The appellant contended that the sentencing judge should have accepted the assessment of the probation officer in the pre-sentence report over the SARA. The Court held that the sentencing judge was not bound to accept the officer’s assessment or the reliability of the appellant’s statements to the officer ([36]). The officer was not provided with the SARA conducted by the psychologist, and took the appellant’s statements at face value ([37]). The officer’s assessment therefore provided a less reliable basis for findings relevant to sentence than the SARA ([39]-[40]).

Further, there was no basis for concern that the sentencing judge misused the Victim Impact Statements. In his sentencing remarks, he noted the victim's description of the terror she experienced while being choked and said it was "clear" that she perceived the choking as a "potentially lethal attack and felt powerless" to stop the appellant. He also described the violence as "unexpected, explosive, and unrestrained", and concluded that the assault was "brutal" with the potential to inflict serious injury ([50]). In relation to strangulation, the sentencing judge found:

> *"Attempted strangulation which does not result in death or physical injury, can still have long-term physical and psychological impact, and leave the victim susceptible to ongoing symptoms. In criminal assault such acts are generally used to subdue and force compliance by the victim without any real thought being given to the danger inherent in such conduct. Those dangers were clearly apparent in your actions in this case. Your rage and lack of restraint meant that you had no real capacity to judge or moderate your attack, and the complainant was therefore in real danger of serious injury or worse."*

The Court of Appeal held that there was ample foundation in the evidence to support the sentencing judge’s remarks. His Honour correctly regarded the choking as a "particularly concerning aspect" of the assault, and

appropriately considered the dangers attached to the appellant's conduct as part of his overall assessment of the gravity of the offending ([52]-[53]). He also observed that the appellant's conduct "constituted an extremely serious episode of family violence" ([63]). The Court of Appeal acknowledged that the choking of female victims by male offenders is understood by criminal courts as a "prevalent and dangerous feature of violence perpetrated in domestic circumstances" ([53]). Victims of domestic violence are vulnerable and the crimes are often committed in breach of the sanctity and safety of the family home ([64]). It referred to DPP v Foster and Gregson v Tasmania as support for the propositions that women in domestic circumstances are particularly vulnerable and violent behaviour by men towards women "must be condemned and discouraged" ([65]).

Consequently, the appeal was dismissed. Notwithstanding the appellant's prospects of successful rehabilitation, he engaged in dangerous and distressing conduct against his wife and child and remains an ongoing risk of future violence ([66]-[70]).

Parker v Tasmania* [2019] TASCCA 16 (8 October 2019) – Tasmanian Court of Criminal Appeal *(This decision was the subject of an unsuccessful appeal - Parker v Tasmania [2020] TASCCA 9 (12 June 2020))

'Appeal against sentence' – 'Physical harm and violence'

Charge(s): Assualt; Causing grievous bodily harm

Proceedings: Appeal against sentence

Grounds:

- 1a. The sentencing judge erred by making factual findings inconsistent with the unchallenged assertions of fact by the defence;
- 1b. The findings of fact made were objectively more serious than those asserted by the defence and led to the imposition of a sentence that was manifestly excessive
- 2. The sentence was manifestly excessive.

Facts: Appellant man pleaded guilty to two counts of assault against his then female domestic partner. The plea of one of the counts was accepted by the Crown in satisfaction of a charge of causing grievous bodily

harm. The appellant was convicted and sentenced to four years and three months imprisonment with a non-parole period of two years and nine months.

The appellant and complainant had been in a domestic relationship for about five years. The complainant was diagnosed with terminal ovarian cancer in May 2017, whilst the appellant was in prison for driving offences from April to August 2017. The complainant had treatment and on the appellant's release he was her carer. She had a number of hospitalisations and had had a hysterectomy in July. On 27 September the appellant and complainant had a prolonged argument after he had been drinking all day. The appellant struck the complaint in the back of the head with a teapot during the course of an argument. He then pushed the complainant over, causing her to strike her head on a hard item of furniture. The fall caused her surgical wound to rupture and her bowel to protrude. The complainant required immediate surgical treatment and was later assessed that have suffered an evisceration of her small bowel, an abrasion to her nose, a laceration to the back of her head, grazes to her hands and left knee, and was developing bruises [8]. The appellant was heavily intoxicated at the time of the offence.

Judgment: The appellant's sentence was quashed and the matter was remitted to the sentencing judge for resentencing.

Counsel for the appellant submitted that "there were a number of inconsistencies between the facts asserted to the sentencing judge by the Crown and the defence" [11]. Justice Pearce noted that the only difference that was of consequence was the immediate circumstances of the assaults as the circumstances would inform the objective gravity of the assaults and the appellant's culpability. Reviewing the sentencing judge's reasons, Pearce J found that "the sentencing judge either did not realise, or ignored, the inconsistencies" between the versions [15]. By ignoring these inconsistencies, the "exercise of the sentencing discretion miscarried" [22]. Given that the sentencing judge imposed sentence on the basis of disputed facts, the first ground of appeal succeeded [22]. Although the first ground succeeded, Pearce J provided that "[n]o assessment of the remaining grounds of appeal asserting that the sentence is manifestly excessive can be undertaken until the proper factual basis of sentence is determined" [23].

Director of Public Prosecutions v Foster **[2019] TASCCA 15 (12 September 2019) – Tasmanian Court of Criminal Appeal**

'Appeal' – 'Coercive control' – 'Domestic relationship' – 'Family violence order' – 'Physical violence and harm' – 'Protection orders' – 'Strangulation'

Charges: 5 x assault; 1 x demanding property with menaces with intent to steal

Case type: Appeal against sentence

Facts: The respondent pleaded not guilty to 5 counts of assault and 1 count of demanding property with menaces with intent to steal. The offences committed by the respondent occurred during the course of a domestic relationship. He was found not guilty of 3 counts of assault, but guilty of the remaining counts. The learned sentencing judge sentenced the respondent to 16 months' imprisonment with a non-parole period of half of that term. His Honour also made a Family Violence Order.

The DPP appealed against the sentence on the sole ground that it was manifestly inadequate. The appellant submitted that the respondent committed 2 serious assaults, both of which were prolonged and involved strangulation. The crime of demanding property with menaces with intent to steal was arguably serious as it was committed during a prolonged attack and involved threats to kill the complainant and her children. It was also submitted that these matters were not isolated as they occurred in the context of a violent and abusive relationship ([13]).

Issue: The question for the Court was whether the sentence was manifestly excessive or inadequate.

Held: The sentence of 16 months' imprisonment was found to be manifestly inadequate, having regard to the seriousness of the offending in the context of the domestic relationship ([42]). Estcourt J accepted that appellant's submissions as 'undoubtedly correct' ([19]). Each incident involved 'vicious and cowardly attacks by the respondent on a woman'. The respondent had convictions for violent offences, including ones of family violence. Citing an article by Heather Douglas and Robin Fitzgerald, his Honour observed that 'strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome' ([26]). It can cause loss of consciousness and lead to a sudden death ([27]). Further, the respondent's prior convictions indicated that the present offences were not isolated or unusual. He did not plead guilty and did not show any remorse ([28]). His Honour allowed the appeal, set aside the sentencing order and imposed a new sentence of 2 years and 6 months' imprisonment, with parole eligibility after serving half of that sentence. The Family Violence Order made by the learned sentencing judge was undisturbed ([36]-[37]). Brett J and Marshall AJ agreed with Estcourt J's reasons.

***Gregson v Tasmania* [2018] TASCCA 14 (31 August 2018) – Tasmanian Court of Criminal Appeal**

'Coercive control' – 'History of domestic violence' – 'Physical violence and harm' – 'Sentencing' – 'Vulnerable grounds' – 'Women'

Charges: Assault x 2.

Appeal type: Appeal against sentence.

Facts: The appellant had violently attacked his vulnerable female partner with whom he was in a domestic relationship. The parties were arguing, mostly about the appellant's intoxication and his lifestyle, characterised by his drug and alcohol abuse. The appellant delivered numerous forceful punches to the victim's face, and shortly afterwards, returned and delivered more forceful blows to her head. She did not sustain any fractures, but the conduct was unprovoked and caused her to suffer nightmares. Estcourt J sentenced the appellant to two years' imprisonment with a non-parole period of 18 months.

Issues: Whether the sentence was manifestly excessive.

The appellant submitted that:

- He was sentenced during 'women's month' which may have influenced the sentencing judge's decision.
- The sentencing judge failed to take into account that immediately before the second assault, the appellant was 'assaulted by the victim with a large serrated-edge kitchen knife', and acted in 'self-defence'.
- He should have been sentenced in the Magistrates Court.

Decision and reasoning: The appeal was dismissed. The Court agreed with the sentencing judge's description of the offending as a 'cowardly attack' and his observation that 'Vulnerable women such as the complainant are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the Courts' ([29]). Although he did not use a weapon or kick the victim, the nature and strength used was not insignificant. The Court held that although the appellant should not be re-punished for his prior criminal conduct, he was not entitled to any leniency. The Court noted that the appellant had a history of violence towards women. The prevalence of this type of conduct impacts on the community at large. Women in domestic circumstances are particularly vulnerable to the abuse of power and breach of trust by violent male partners (*Director of Public Prosecutions v Karklins* [2018] TASCCA 6 [54]–

[60]). Women who become victims in these circumstances, and other potential victims in the community, are entitled to such protection as the law can provide by the imposition of sentences that will act as both a personal and general deterrent ([37]). Whilst the sentence of two years' imprisonment was towards the upper end of the appropriate range of the sentencing discretion, it was not manifestly excessive, harsh or unjust. Having regard to the appellant's record of prior offending and disregard for court orders, the sentencing judge was found to be lenient in fixing a non-parole period, and the non-parole period of 18 months was within the range of sentencing discretion.

***Director of Public Prosecutions v Karklins* [2018] TASCCA 6 (20 April 2018) – Tasmanian Court of Criminal Appeal**

'Appeal against sentence' – 'Coercive control' – 'Damaging property' – 'Emotional and psychological abuse' – 'Exposing children to domestic and family violence' – 'Listening to Victims' – 'Physical violence and harm' – 'Pregnant people' – 'Sentencing' – 'Systems abuse' – 'Vulnerable groups'

Charges: Assault x 1; Assault on a pregnant woman x 3; Attempt to interfere with a witness x 5; Destroying property x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The respondent and complainant had been living together for 5 months with the complainant's son ([6]). The complainant was 4 weeks pregnant at the time of the offences ([7]). The respondent threatened to leave the complainant, but the complainant asked him to stay ([9]-[10]). The respondent threatened to kill her and the baby. He headbutted the complainant and strangled her three times, causing her to lose consciousness twice ([13]-[16]).

The respondent was arrested and on remand. The respondent told a friend to tell the complainant that if she retracted her statement, he would 'consider getting back with her' ([22]). The complainant did so ([23]). The respondent was sentenced to 1 year and 10 months' imprisonment with a non-parole period of 11 months.

Issues: Whether the sentence was manifestly inadequate.

Decision and Reasoning: Geason J emphasised aggravating features of the case, such as the fact that the respondent had the opportunity to reflect on his conduct between each attack ([55]), that he did not seek help for the complainant ([51]), that the crimes were committed in the context of a domestic relationship ([54]), and

that the complainant was unable to defend herself ([50]). Mitigating considerations included the fact that the respondent pleaded guilty early ([61]).

In relation to the charges of interfering with a witness, Geason J at [56] remarked on the importance of such charges in aiding the administration of justice in relation to domestic violence:

> The respondent's attempts to frustrate his prosecution should also be seen as particularly serious matters. They were a cynical exercise in emotional blackmail … Domestic violence typically occurs behind closed doors, making detection inherently difficult. Relationship dynamics frequently militate against a prosecution. Conduct directed at interfering with the prosecutorial process undermines the system intended to afford protection to victims of violence, making an inherently difficult process more so … It should be accepted in cases of family violence that attempts to interfere with the due administration of justice by the means of emotional manipulation of a vulnerable victim is a serious matter the consequences of which will always be severe.

Geason J referred to *R v Kilic* [2016] HCA 48, where the High Court stated at [21] that sentencing practices for offences involving domestic violence may 'depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations'. His Honour at [92] subsequently justified interfering with the sentence on the basis that:

> Domestic violence is properly regarded as a most serious form of offending, frequently hidden from view, and thus difficult to detect. The court has a symbolic function. Censure for domestic violence should be communicated through the sentences which are imposed.

His Honour cautioned against giving weight to the complaint's forgiveness of the respondent ([77]). His Honour questioned the sentencing judge's generous characterisation of the respondent's conduct during the assault ([83]-[86]).

***Price v Tasmania* [2016] TASCCA 22 (6 December 2016) – Tasmanian Court of Criminal Appeal**

'Assault' – 'Extraordinary case' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Public protection' – 'Unlawful assault causing bodily harm'

Charge/s: Assault x 3; unlawful act intended to cause bodily harm x 1.

Appeal Type: Appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship. The three assault counts occurred in August 2014 and April 2015 after the appellant had been drinking. The appellant punched the complainant in the face, choked her, and fractured her wrist. The final count occurred in June 2015 when, after an argument, the intoxicated appellant threw petrol on the complainant and ignited her. The complainant's daughter heard the screams and rescued her mother. The appellant was sentenced to ten years imprisonment with a non-parole period of six years.

***Daley v State of Tasmania* [2016] TASCCA 10 (22 August 2016) – Tasmanian Court of Criminal Appeal**

'Aggravating factor' – 'Children' – 'Manifestly excessive' – 'Mitigating factors' – 'Murder' – 'Physical violence and harm' – 'Relevance of impact on children'

Charge/s: Murder x 2.

Appeal Type: Appeal against sentence.

Facts: The 60 year old appellant murdered his former partner, 31 year old Meagan Wilton, and her new partner, 34 year old Benjamin Eyles, by shooting them with a shotgun. The appellant and Ms Wilton had a 21 month old son together, and Ms Wilton had two other girls, aged 12 and 9. Ms Wilton's youngest daughter and the appellant's son were in the house at the time of the murders. After leaving the premises, the appellant tried to commit suicide by shooting himself in the head. He suffered brain damage, lost the ability to walk, and required visual and hearing aids. He pleaded guilty and was sentenced to 45 years imprisonment, with a non-parole period of 25 years.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Estcourt J provided the lead judgment, with Blow CJ and Brett J agreeing but providing additional comments. Relevantly, Blow CJ stated that while the punishment here was significant and that there were a number of mitigating factors in the circumstances, these carried little weight in light of the aggravating factors of this case. As per His Honour: '[t]hese were deliberate killings. They were premeditated. They were motivated by vindictiveness towards a former partner' (see [4]). Moreover, '[t]his was a case in which the impact of the killings on survivors [was] particularly significant'. The children who were present in the house could suffer long-term psychological or psychiatric consequences (see [5]). Further, the impact of the crime would be felt by family members raising the children, and police

officers who worked on this case.

***Devine v Tasmania* [2015] TASCCA 19 (26 August 2015) – Tasmanian Court of Criminal Appeal**

'Breach of domestic violence order' – 'Damaging property' – 'Deterrence' – 'History of abuse' – 'Manifestly excessive' – 'Non-parole period' – 'Physical violence and harm' – 'Risk factor - separation' – 'Sentencing' – 'Vulnerable - new partner'

Charges: Aggravated burglary, Unlawful act intended to cause bodily harm, Breach of family violence order, Motor vehicle stealing, Destroying property

Appeal type: Appeal against sentence

Facts: The appellant and the protected person had been in a domestic relationship that ended towards the end of 2012. As a result of the appellant threatening to cut her throat and burn her house down, the protected person moved away from Hobart. Early in 2015, her house was burnt down, although no one was charged. The protected person then moved back to Hobart and entered into a new relationship. The appellant threatened her new partner, resulting in a family violence order restraining him from approaching the protected person.

On the day of offending, the appellant went to the protected person's home, kicked the front door, smashed a window, drew a knife and threatened to kill her. The appellant then lunged towards the protected person who cut her hand as a result of trying to stop him. When the protected person's partner came to assist, the appellant was holding the knife to the protected person's throat and threatened 'Why shouldn't I kill him'. When her partner attempted to separate them, the appellant stabbed him in the stomach. In relation to this conduct the appellant was charged and pleaded guilty to one count of aggravated burglary, two counts of committing an unlawful act intended to cause bodily harm, three breaches of a family violence order, one count of motor vehicle stealing, and one count of destroying property. He was sentenced to seven years' imprisonment with no non-parole period.

The appellant had a long history of dishonest and violent offending commencing from childhood. When given the benefit of suspended sentences, bonds and parole in relation to these offences, the appellant breached them. A psychologist's report noted the appellant had extremely low to borderline intellectual functioning and could be considered to have a mild intellectual disability. This was substantially the result of substance abuse in the view of the psychologist. The sentencing magistrate did not consider this as a mitigating factor,

concluding there was a significant risk he would re-offend and therefore there was a need for specific deterrence.

Issue: Whether the sentence was manifestly excessive due to the magistrate failing to order a non-parole period.

Decision and reasoning: The appeal was dismissed.

Tennent J, with whom Porter and Pearce JJ agreed, held that the issue of whether or not to order a parole period is a matter for the discretion of the sentencing judge. His Honour took into account the relevant factors including the appellant's offending history and disregard for orders in refusing to grant a non-parole order. The psychologist report did not suggest rehabilitation was likely. The sentencing judge therefore did not err in failing to order a non-parole period and the sentence was not manifestly excessive.

***Connelly v Tasmania* [2015] TASCCA 15 (29 June 2015) – Tasmanian Court of Criminal Appeal**

'Aggravating factor' – 'Arson' – 'Attempted murder' – 'Denunciation' – 'Double jeopardy in sentencing' – 'Exposing children' – 'Manifestly excessive' – 'Non-parole period' – 'Physical violence and harm' – 'Risk factor - separation' – 'Sentencing'

Charges: Attempted murder (two counts)

Appeal Type: Appeal against sentence

Facts: The appellant's relationship with his wife deteriorated after she told him that she had a sexual relationship with another man. She moved out of the family home. The appellant attempted to kill his two sons by blowing up the family car when they were sitting in it with him. He was unsuccessful but he caused an explosion and a very fierce fire. His two sons suffered life-threatening burns. Their injuries are ongoing and they will have 'functional and cosmetic problems for life'. They are at risk of ongoing psychological harm. The impact on their mother was devastating. The trial judge was satisfied that the appellant intended to kill the boys to 'deprive his wife of them' or to 'spite his wife' ([29]). He was sentenced to 20 years' imprisonment with a non-parole period of 15 years.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld in respect of the non-parole period. Estcourt J (with whom

Tennent J agreed) held that the head sentence of 20 years was not excessive. The offending was serious and both victims were young children. However, Estcourt J noted that there was one act that impacted both victims. While the sentence encompassed the entirety of the appellant's criminal behaviour, he should not be sentenced for his conduct twice.

Counsel for the appellant submitted that even if the head sentence was not excessive, the non-parole period was excessive because of factors such as his lack of prior relevant offending, the unlikelihood of any re-offending 'given the crime was directly related to his family circumstances' and the fact that 'it could not be said that the appellant's "incorrigibility" justified the setting of the non-parole period at 75% of the head sentence' ([38]). Estcourt J (Tennent J agreeing) accepted these submissions notwithstanding the appellant's almost complete lack of remorse and reduced the non-parole period to 12 years.

Wood J agreed with Estcourt J's reasoning with respect to the head sentence but dissented in regards to the non-parole period. At [7]-[21], her Honour engaged in general discussion about the applicable principles in determining the most appropriate non-parole period. Wood J then noted at [23] a number of considerations relevant to the nature of the crime. These included that it involved deliberate acts to kill two young children, the appellant's 'vindictive motive to inflict maximum anguish and emotional trauma upon his wife', his son's extensive injuries and degree of emotional suffering and physical pain, risks to their psychological well-being and the torment and harm suffered by his wife. It was appropriate for the sentencing judge to give effect to the aims of denunciation and retribution and, 'the goal of assuaging informed moral outrage of the community, reasserting society's values and giving proper weight to the harm done to the victims' ([24]).

Groenewege v Tasmania **[2013] TASCCA 7 (26 July 2013) – Tasmanian Court of Criminal Appeal**

'Arson' – 'Assault' – 'Course of conduct' – 'Denunciation' – 'Deterrence' – 'Emotional and psychological abuse' – 'Manifestly excessive' – 'Mitigating factors' – 'People with mental illness' – 'Physical violence and harm' – 'Risk factor - separation' – 'Risk factor - strangulation' – 'Sentencing'

Charges: Arson, Assault

Appeal Type: Appeal against sentence

Facts: The appellant suffered from depression and became abusive and intimidating towards his wife. After she ended the relationship, the appellant became angry and upset. He cornered his wife in a shed, pushed her to the chest, grabbed her around the throat and squeezed for four seconds, causing her to become very

fearful. The appellant asked to see his four children. His wife then walked with him to the car, got in and locked the doors before attempting to drive off and call the police. However, the appellant grabbed the vehicle and punched the window, which caused it to shatter. His wife then attended her children's school. Meanwhile, the appellant poured methylated spirits onto the main bedroom of their house, set fire to the bed and left knowing the bed was on fire. The house was damaged beyond repair. An insurance claim was denied. The impact of the offending on the appellant's wife and children was very significant. He was sentenced to four years and six months' imprisonment, with a non-parole period of two years and nine months.

Issues:

1. Whether the sentence was manifestly excessive.
2. Whether the trial judge erred by placing too much weight on general deterrence given the appellant's mental health condition.

Decision and Reasoning: The appeal was upheld in respect of issue 1.

1. The appellant submitted that various mitigating factors existed ([39]) and that the sentence was outside the range of permissible sentences for arson. Further, the appellant submitted that the assault was brief and no physical harm was caused. The respondent conceded that the assault would not add to a sentence imposed for arson, but submitted that it was relevant as a course of conduct and to demonstrate the appellant's attitude towards his wife ([44]). Porter J (with whom Wood J and Tennent J agreed) held that while the head sentence was very high, it was not outside the permissible range: '*The appellant intentionally set fire to the house and intentionally caused its entire destruction. His motive for doing so was to exact some sort of vengeance on his estranged wife intending to destroy his wife's interest in the building and its availability as a home'…'This was obsessive and possessive conduct, involving some violence, committed in the aftermath of a broken relationship. It is the type of conduct which simply cannot be tolerated'* ([52]-[53]).

   Nevertheless, the non-parole period was found to be excessive. Porter J noted that in considering the length of a non-parole period, the issue is whether the period makes the sentence manifestly excessive, '"sentence" in this context, being used in a broader sense' ([56]). The non-parole period amounted to a little over 60% of the head sentence. Given factors such as the appellant's prior good character, his mental health condition and apparent remorse ([60]), the non-parole period made the overall sentence manifestly excessive and was therefore reduced to one half of the head sentence.

2. The appellant submitted that his psychiatric condition affected his ability to properly consider the consequences of his actions, such that it was inappropriate for general deterrence to remain a large consideration in sentencing. Porter J (with whom Tennent J and Wood J agreed) held that notwithstanding the psychiatric condition, mood disorders are reasonably common in the community. As such, the sentencing judge was correct to conclude that the appellant was, 'an appropriate vehicle by which to convey a message to the general community about the seriousness and likely consequences of this type of offending'.

Enniss v Tasmania **[2012] TASCCA 10 (2 October 2010) – Tasmanian Court of Criminal Appeal**

'Assault' – 'Emotional and psychological abuse' – 'Exposing children' – 'Manifestly excessive' – 'Physical violence and harm' – 'Risk factor - strangulation' – 'Risk factor - weapon' – 'Sentencing' – 'Totality'

Charge: Assault (five counts)

Appeal Type: Appeal against sentence

Facts: The appellant lived intermittently with his partner (the complainant). The first count occurred when, during an argument, the appellant grabbed the complainant by the throat, forced her to the floor, punched her to the head multiple times and kicked her to the hip as she tried to stand up. The second assault occurred when the complainant was in her three-year-old child's bed. The appellant pointed a knife at the complainant and threatened to stab her if she did not give him her phone (i.e. an assault by means of a threatening gesture). The child remained asleep throughout the incident. The next count occurred when the appellant kicked the complainant between the legs twice, which caused her to fall to the floor. The final count was again an assault by means of a threatening gesture and involved the appellant sharpening knives and threatening to kill or violently assault the complainant. The appellant was arrested but escaped on arrival at the police station and was not found until 10 days later. While the complainant did not suffer serious physical injuries, there were lasting psychological consequences for her and her daughter. The appellant had a significant criminal history. He was sentenced to three years' imprisonment with a non-parole period of two years. Before being sentenced for these offences, he was sentenced to another 3 years' imprisonment (with a two-year non-parole period) in respect of 50 unrelated offences. This resulted in an aggregate sentence of six years' imprisonment with a four-year non-parole period.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. '*The ordeal that the appellant inflicted on his partner was horrific. He had many opportunities to desist from assaulting her, but did so over and over again, with their young daughter in the house. It was an unusually bad case of family violence. The only appropriate penalty was a significant cumulative sentence of imprisonment.'* ([20]).

Counsel for the appellant submitted that the fact the appellant was unlikely to be granted parole (even if eligible) should have been taken into account in his favour. The Court rejected this argument, holding that this is not an appropriate consideration in determining the sentence. However, the magistrate imposed the two-year non-parole period for the assault offences so as to not impose a crushing sentence. If the head sentence of three years was 'crushing', a non-parole period should not be regarded as changing that situation because parole may not be granted. Given the length of the sentence in combination with the fact that the complainant suffered no physical injuries, the head sentence was disproportionate to the gravity of the offending and the aggregate term was also disproportionate. The appellant was re-sentenced for the assault offences to 18 months' imprisonment with a non-parole period of 12 months.

***Braslin v Tasmania* [2011] TASCCA 14 (13 October 2011) – Tasmanian Court of Criminal Appeal**

'Admission of guilt' – 'Arson' – 'Circumstantial evidence' – 'Directions and warnings for/to jury' – 'Physical violence and harm' – 'Risk factor - separation'

Charge: Arson

Appeal type: Appeal against conviction

Facts: The appellant was tried by jury and found guilty of arson purely on the basis of circumstantial evidence. It was alleged that he unlawfully set fire to the house of his former female partner. She gave evidence that the night before the fire the appellant slept over at her place. She and the appellant argued the next morning as she was leaving the property. He called her a 'leg-opening slut' and said that if she left he was going to burn the house down. She left and not long after received a phone call from the appellant who asked whether she was 'warm enough'. She returned home to find the house on fire. Evidence was also given by a neighbour that he heard the appellant and his former partner arguing that morning for 10 minutes. He ignored the argument and did not claim to have seen the appellant on the morning of the fire.

Before trial, the appellant pleaded guilty to breaching a family violence order on the day of the fire by approaching his former partner and calling her a ‘leg-opening cunt’. The Crown alleged that this amounted to an admission of guilt. At trial, the appellant asserted that he did not realise the significance of this date and that he had used those words but not on the day of the fire. The appellant’s younger sister provided the appellant with an alibi. She said he was asleep at their mother’s place on the morning of the fire.

Issues: Some of the grounds of appeal were:

1. Whether the trial judge failed to correct the prosecution’s lack of adherence to the ‘rule’ in *Browne v Dunn.*
2. Whether the trial judge failed to give an adequate warning in relation to the neighbour’s voice identification evidence.

Decision and Reasoning: The appeal was upheld and the conviction set aside.

1. ‘In the context of a criminal trial, the "rule" in *Browne v Dunn* (1893) 6 R 67 requires defence counsel to put to a Crown witness in cross-examination the case upon which the accused proposes to rely, to the extent that it is proposed to contradict the evidence of the Crown witness. Similarly, if it is proposed, as part of the defence case, to lead evidence of a fact which, if true, would be within the knowledge of a Crown witness, it is usually expected, at least in this State, that defence counsel will put that part of the defence case to the Crown witness in cross-examination’ ([21]). Here, the Crown did not do this and sought to rely on such evidence in summing up. The trial judge did not correct this mistake in her directions to the jury and further she incorrectly directed the jury that they should be careful about the appellant’s sister’s evidence.
2. The direction that the jury had ‘to clearly be careful’ about the identification evidence from the neighbour fell short of informing the jury that there was a ‘special need for caution.’ The trial judge said nothing about the reasons for that caution namely, the conviction of innocent persons as a result of mistaken identification by an apparently honest witness ([34]-[35]).

Supreme Court - Full Court

***Legal Profession Board of Tasmania v W* [2023] TASFC 1 (17 March 2023) – Tasmanian Supreme Court (Full Court)**

'Legal practitioner' – 'Offer to settle dispute by withdrawal of complaints to police' – 'Professional misconduct' – 'Protection order' – 'Unprofessional conduct'

Proceeding: Legal Profession Board appeal from finding of mere unprofessional conduct by a legal practitioner.

Grounds:

1. The primary judge erred in holding that for a finding of professional misconduct both s 421(1)(a) and (c) of the *Legal Profession Act 2007* (Tas) had to be satisfied;
2. The primary judge erred in failing to make a declaration of professional misconduct having found that the respondent's conduct constituted a serious failure to reach a standard of competence and diligence.

Facts: A client of the respondent was charged with two counts of common assault against his former wife who had been granted a protection order against the client.

The lawyer wrote to the complainant on behalf of his client, offering to settle their matrimonial property dispute on terms which included that "all legal pursuits and accusations cease including Tas. Police. All matters are then resolved, finalised". The client was charged with perversion of justice. Despite this, the respondent wrote to the ex-wife's lawyer offering again to settle the matrimonial dispute upon the withdrawal of the complaints. Senior counsel for the respondent conceded ground 1.

Reasoning and decision:

1. Appeal allowed.
2. Declaration of unprofessional conduct set aside.
3. Declaration of guilt of professional misconduct made.

Estcourt J observed:

[1] I do not have the slightest doubt that it is professional misconduct for a lawyer to offer to settle a client's

dispute with another person on the condition that the other person withdraw a criminal complaint that person has made against the client and which is pending before a court.

Estcourt J found that the gravity of the respondent's attempt to have pending charges withdrawn or undermined constituted a "substantial failure to reach or maintain a reasonable standard of competence" within the meaning of s421(a) of the *Legal Profession Act 2007* (Tas). This was regardless of the client's instructions or whether the offers amounted to a crime.

The court rejected the primary judge's reasoning that the two paragraphs in s421 were to be read conjunctively. However, it was found that even if that were correct, the conduct would still amount to professional misconduct (per Porter AJ at [33].

***PQR v Sundram* [2020] TASFC 10 (4 December 2020) – Tasmanian Supreme Court (Full Court)**

'Appeal against conviction' – 'Family law' – 'Federal circuit court order' – 'Inconsistency' – 'Meaning of "parental responsibility"' – 'Protection orders'

Charges: Breaches of police family violence order, breach condition of bail.

Proceedings: Appeal against breaches of police family violence order.

Facts: The appellant and his former wife had separated, and had two children. In 2014, the Federal Circuit Court made parenting orders which included provision for "equal shared parental responsibility", and designated contact days. In 2018, police issued and served the appellant with a family violence order. This prohibited the appellant being within 50 m of the children (para 3), except in accordance with a court order (para 3(c)). It also prohibited the appellant being within 50 m of the children's school where the children "may be present from time to time" (para 11). The appellant was charged with a number of breaches.

The Chief Justice dismissed charges relating to circumstances where the appellant was within 50 m of the children during contact periods allowed by the parenting orders and when the children were not present at the school. The Chief Justice found a charge proven, imposing a fine without recording a conviction, for an instance where the appellant attended the school on a non-contact day to speak to the principal while the child was there. The visit did not fall within the exception in para 3(c) of the family violence order, and breached para 11.

Grounds of appeal: The appellant's conduct in attending at the school on 24 July 2018 was permitted by the

"Parenting Orders" made by the Federal Circuit Court which effectively restored the appellant his full rights as their father, including by having equal shared parental responsibility and a substantial and significant role in their lives, such that it cannot have been in breach of the police family violence order. There was inconsistency between the family violence orders and the parenting orders in the Federal Circuit Court and the orders of the Federal Circuit Court prevailed to the exclusion of the family violence order which underpinned the finding of guilt.

Held: The appeal was dismissed (Martin AJ, Pearce J agreeing). Martin AJ rejected the broad proposition that any constraint on the appellant's ability to visit the school, at any time, necessarily created a relevant inconsistency between the parenting orders and the family violence order. Para 11 only applied when a child "may be present" and was not relevantly inconsistent with the appellant's obligations (and rights) pursuant to the parenting order (at [47]-[49]).

In separate reasons and also agreeing with Martin AJ, Estcourt J also dismissed the appeal. While the family violence orders might "detract" from the appellant's unqualified "parental responsibility" by limiting the means by which the appellant might communicate with teachers while the children were at school, those orders did not abrogate or nullify the appellant's parental responsibilities. It could not be said that there was any relevant inconsistency between them and the parenting orders, or that the police family violence orders were incapable of operating "subject to" the Federal Circuit Court orders (at [15]-[17]).

***Director of Public Prosecutions (Acting) v J C N* [2015] TASFC 13 (27 November 2015) – Tasmanian Supreme Court (Full Court)**

'Aggravated assault' – 'Assault' – 'Bail' – 'Breach of domestic violence order' – 'Damaging property' – 'Exposing children' – 'Following, harassing, monitoring' – 'History of abuse' – 'Physical violence and harm' – 'Risk factor - separation'

Charges: Attempted aggravated assault, Breach of family violence order, Common assault, Damaging property

Appeal type: Appeal against order for bail

Facts: The respondent and the complainant had previously been in a relationship for more than two years. The complainant had two children. A family violence order was made against the respondent, restraining him from threatening, harassing or assaulting the complainant. On one occasion when the complainant went to

the respondent's house with her daughter and mother, the respondent seriously assaulted her and her mother. He was charged with two counts of assault and breaching the family violence order and was granted bail. Subsequently, the respondent breached the conditions of bail and the order when the complainant and her children stayed with him. After fighting the next morning, the respondent followed the complainant into shopping centre toilets, kicked in the door and punched her in the face twice. An interim family violence order was then made with a condition that he would not contact the complainant. In breach of that order, the respondent phoned the complainant seven times from prison. The respondent was sentenced for these offences to four months' imprisonment and a new family violence order was made to protect the complainant and her children.

Just after a month after his release, the respondent seriously assaulted another female, his former partner, and was held in custody. While in custody, he phoned the complainant 19 times. He was then granted bail. After interviewing the complainant, the police discovered that the respondent had assaulted the complainant's daughter by grabbing her bottom. He also threw a bar stool at the complainant and her son, striking him on the leg. The respondent then forced the complainant's pants down and attempted to insert a plastic vibrator into her anus, witnessed by the two children. He then punched her five times in the face, bit her ear and pushed a hot cigarette butt into her forehead. The next morning the respondent emptied the complainant's daughter's school bag onto the floor and stomped on it, threatening 'This is going to be your face'. He then grabbed her hair and pushed her against the wall. The respondent then threatened the complainant's son that he would kill him, his sister and the complainant if the police were notified of the assaults.

In relation to this conduct, the respondent was charged with 35 counts of breaching the family violence order, one count of assault with indecent intent, five counts of common assault, three counts of damaging property, and one count of attempted aggravated assault. The respondent was granted bail, having satisfied the court that bail would not adversely affect the safety, wellbeing and interests of an affected person or child under s 12 *Family Violence Act 2004* (Tas).

Issue: Whether the order for bail should be set aside.

Decision and reasoning: The appeal was allowed and the order for bail was revoked.

In favour of granting bail was that the respondent's mother and father were both ill. His mother was prepared to offer a surety of $4,000 to secure his attendance at court and compliance with bail conditions. The respondent agreed to comply with a curfew and reporting conditions. However, there was a significant risk he

would continue to offend if bail was granted when considering his history of breaching court orders and violent offending. There was also a considerable amount of evidence to prove guilt once at trial.

Supreme Court

Smith v Boarder [2022] TASSC 30 (16 May 2022) – Tasmanian Supreme Court

'Costs of unsuccessful application to extend protection order' – 'Discretion to order costs s34 family violence act 2004 (tas)' – 'Protection order' – 'Relevance of objects of family violence act 2004 (tas) to costs order' – 'Separation'

Proceedings: Motion for costs for unsuccessful application to extend protection order pursuant to Family Violence Act 2004 (the Act), s 34.

Facts: On 19 February 2020 an interim protection order was granted to Ms Boarder. At the hearing of Ms Boarder's application to extend the protection order for a further 3 years leave was refused, the interim order revoked and, following a further hearing on the issues, Mr Smith's application for costs refused. The Magistrate held that the was no change in circumstances and the only contact between the parties during the term of the interim order was a letter delivered to Ms Boarder by Mr Smith, "which contained nothing which could reasonably be construed as abusive, threatening, intimidating or coercive"[8]. Both parties had been represented by counsel at the extension hearings.

Grounds of motion to review: The magistrate erred in dismissing the costs application in that:

(a) she took into account irrelevant matters, namely:

1. Ms Boarder 's subjective fear and psychological state; and
2. the objects of the Act as stated in s 3; and

(b) she acted on a wrong principle by misdirecting herself that "a holistic approach, rather than a compensatory approach, should be taken to the issue of whether costs should be ordered." [11]

Decision and Reasoning: Motion allowed; order of magistrate set aside; Ms Boarder is to pay Mr Smith's costs of the application for extension of a family violence order in the agreed sum.

The objects of the Act in s3 were relevant considerations but Ms Boarder's demeanour while giving evidence, was, without more an irrelevant consideration. There was no finding that the fear Ms Boarder expressed related to any conduct of Mr Smith while the protection order was in force.

State of Tasmania v Matthew John Davey **(Sentence) [2021] TASSC unreported (10 December 2021) – Tasmanian Supreme Court**

Comments on passing sentence Brett J

'Allegations of infidelity' – 'Arson threats' – 'Assault' – 'Attempted murder' – 'Burning' – 'Coercive and controlling behaviour' – 'Coercive control' – 'Extensive criminal history' – 'Following, harassing and monitoring' – 'Immolation' – 'People affected by substance misuse' – 'Persistent family violence' – 'Sentencing' – 'Severe physical injuries' – 'Threats to kill'

Charges: Attempted murder x 1; persistent family violence x 1.

Proceedings: Comments on passing sentence.

Facts: The male defendant was found guilty of persistent family violence and attempted murder. Throughout the defendant's two-year relationship with the female victim, he used physical violence, verbal abuse, and threats as part of a 'continuous… pattern of coercive control'. This included threatening to kill the victim by setting her car or house on fire, and slapping, striking or hitting the victim with objects. The defendant monitored and controlled the victim's movements, communications and relationships with others, threatening to kill her if she left the relationship and detaining her at his house on at least two occasions. One assault occurred in relation to the defendant making allegations of infidelity, another after the defendant had consumed illicit drugs. The defendant attempted to murder the victim by using petrol to set her on fire during a physical altercation triggered by her attempting to leave the relationship. The victim was left with severe and lifelong physical injuries and post-traumatic stress disorder.

Issues: Sentencing.

Decision and Reasoning: The defendant was sentenced to 22 years and three months imprisonment, with a non-parole period of 14 years and 3 months, and the court made a family violence order for an indefinite period from date of sentencing.

In sentencing, Brett J considered denunciation, general and specific deterrence and community protection as key considerations due to the defendant's 'concerning history of violent offending' and the court's duty to 'respond strongly' to family violence. His Honour considered the defendant's extensive criminal record and history of drug-abuse and noted that he was 'entitled to some mitigation for the utilitarian value of pleading guilty to the persistent family violence charge', which avoided a lengthy trial. In addressing the principle of

totality, His Honour viewed it as appropriate for the defendant to serve each indictment cumulatively as each offence was 'separate and distinguishable'. His Honour considered time spent in custody and reduced the defendant's sentence accordingly. Finally, His Honour explained that the non-parole period was greater than the statutory minimum because of 'the objective seriousness of the crimes', the defendant's 'moral culpability' and other key sentencing considerations.

State of Tasmania v Levi Joseph David Hall **(Sentence)** **[2021] TASSC unreported (27 September 2021) – Tasmanian Supreme Court**

Comments on passing sentence Pearce J

'Breach of protection order' – 'Coercive control' – 'Controlling behaviour' – 'Following, harassing and monitoring' – 'History of domestic and family violence' – 'People affected by substance misuse' – 'Persistent family violence' – 'Sentencing' – 'Strangulation' – 'Technology facilitated abuse' – 'Threats to kill'

Charges: Persistent family violence x 1; breaching a police family violence order x 5.

Proceedings: Comments on passing sentence.

Facts: The male defendant lived with the female victim and her children for 12-months. The defendant entered pleas of guilty. Throughout their relationship, the defendant used 'violence, intimidation, threats and abuse' towards the victim in the context of his 'generally violent, abusive and controlling behaviour. The defendant monitored and controlled the victim's phone use, controlled when she left the house, and subjected her to physical violence in the presence of her children. On one occasion, the defendant strangled and threatened to kill the victim. A family violence order made in May 2019, was immediately breached by finding the victim, taking her to his friend's house, and holding her there while subjecting her to physical abuse.

Issues: Sentence to be imposed.

Decision and Reasoning: The defendant was sentenced to imprisonment for 5 ½ years, with a non-parole period of 3 ½ years.

Pearce J viewed the defendant's behaviour as a serious example of the crime of persistent family violence. His Honour highlighted that the offending included strangulation, which caused the victim to fear for her life and has had a 'profound' and lasting 'psychological impact'. His Honour viewed the defendant's repeated offending as discounting 'any claim to… genuine remorse…', and the fact that the offending was 'committed

in breach of a police family violence order' as evidence of his 'repeated refusal to comply with the law and… contempt of authority'. In sentencing, Pearce J considered the need for punishment and condemnation, and viewed the defendant's 'long and concerning record for violence… against women in particular' as an 'important factor in sentencing'. His Honour also considered the need to vindicate the victim and protect the community by imposing a sentence that achieved specific and general deterrence.

State of Tasmania v ARJ **(Sentence) [2021] TASSC unreported (11 March 2021) – Tasmanian Supreme Court**

Comments on passing sentence Pearce J

'Allegations of infidelity' – 'Assault' – 'Coercive and controlling behaviour' – 'Exposing children to domestic and family violence' – 'Extensive criminal history' – 'History of family violence' – 'Jealous behaviour' – 'People affected by substance misuse' – 'Persistent family violence' – 'Pregnancy' – 'Rape' – 'Sentencing' – 'Stepchildren' – 'Threat to cause abortion'

Charges: Persistent family violence x 1, constituting 16 unlawful family violence offences: one rape, one assault of a pregnant woman and 14 assaults.

Proceedings: Comments on passing sentence.

Facts: The male defendant was found guilty following jury trial. The 16 offences constituting the charge were committed over 9 occasions during the defendant's two-and-a-half-month relationship with his pregnant younger female partner. The defendant's conduct began soon after the relationship started, and 'was characterised by ongoing domineering conduct, torment and the exercise of power, control and intimidation'. The assaults included striking with a hammer, baseball bat and power cord, burning with a cigarette, and threats to cut with glass in addition to assaults without weapons. The rape was constituted by the forcible penetration of the victim's genitalia by striking with a baseball bat and the assault of a pregnant woman was the attempt to stomp on the victim's stomach with the stated intent to cause an abortion. Some of the offending occurred in the presence of the victim's children. The defendant had a history of family violence and drug abuse. The defendant was sentenced to 6 years imprisonment, with a non-parole period of four years, and the court imposed a family violence order to remain in force for 7 years from the date of sentencing.

Issues: Sentencing.

Decision and reasoning: The defendant was sentenced to 6 years imprisonment, with a non-parole period of

four years, and the court made a family violence order for 7 years from the date of sentencing.

Pearce J considered the offending in the context of the defendant's criminal record, which included family violence offences, assaults, and breaches of family violence orders. His Honour considered the ongoing psychological impact of the offending on the victim, and the need for punishment, general and personal deterrence, vindication of the victim, and protection of the community'. 'All of the offences were committed when you were subject to a family violence order… and while you were subject to electronic monitoring, thus displaying your contempt for the law and to court orders.'

***Hopkinson v Wilkie* [2020] TASSC 32 (3 July 2020) – Tasmanian Supreme Court**

'Assault in a domestic setting' – 'Consent' – 'Motion to review conviction'

Charges: Common assault.

Proceedings: Motion to review conviction by Magistrate.

Facts: The male applicant was found guilty of assaulting his female partner. The Magistrate found that the applicant hit the complainant in the head, pulled her hair and dragged her. The complainant kicked the defendant. The complainant gave evidence that she had a 'mutual argument' with the applicant and was not punched. Shelton (a witness to the incident) gave evidence that the applicant punched the complainant during a 'verbal argument between them'. The magistrate accepted Shelton's evidence and did not accept the complainant's evidence or the applicant's argument that there was consent, stating that a defence of consent 'doesn't apply to victims of domestic violence'.

Ground: The Magistrate erred in law in stating the defence of consent does not apply in the context of domestic violence.

Decision and reasoning: *Motion to review dismissed.*

As a matter of statutory construction, provisions relating to consensual violence as a defence do not include a 'carve-out … for any category or class of cases such as domestic violence cases' [34]. As a general statement of law, the defence of consent does not avail the applicant if 'there either was no consent or if there was, the complainant did not consent to the degree of force involved in the assault' [28]. Based on the magistrate's findings of fact, the defence of consent was excluded.

Baker v Barratt **[2019] TASSC 28 (4 July 2019) – Tasmanian Supreme Court**

'Administrative law' – 'Appeal against conviction' – 'Appeal and review' – 'Apprehended bias' – 'Coercive control' – 'Isolation' – 'Judicial review' – 'Motion to review' – 'People from culturally and linguistically diverse (CALD) backgrounds' – 'Physical violence and harm' – 'Procedural error of magistrate in not playing record of interview in open court' – 'Procedure and evidence' – 'Visa threats'

Charges: Common assault x 1.

Case type: Appeal against conviction.

Facts: The applicant man appealed against his conviction on a charge of common assault on the ground that the court erred in convicting him against "the preponderance of the evidence". The complainant, a Philippino woman who was applying for a visa, told the court that she had an argument with the applicant with whom she was in a relationship. During the course of the argument, she alleged that he slapped her in the face, twisted her arm and pushed her to the floor. He then allegedly tried to kick her. She also gave evidence that she rang a friend after the incident. The friend confirmed that this call was made and that the complainant had told him that she had been assaulted. He took photos of her for the purposes of recording the consequences of the assault. These were tendered along with the applicant's record of interview. The applicant admitted in his video interview that he regularly threatened to withdraw support for the complainant's Visa and controlled her access to a mobile telephone and the Magistrate identified this as evidence of the applicant's controlling behaviour. The applicant denied the assault.

Issue: The issue for the Court was whether the Magistrate reasonably came to his conclusion on the evidence at trial.

Held: Geason J found that the applicant failed to establish that the Magistrate's conclusion was not reasonably open to him. It was noted that the evidence was "of narrow compass" in that the applicant and complainant had engaged in a physical argument, evidenced by the bruising shown in the photographic evidence. Moreover, the Magistrate's conclusions and reasons were found to be unimpeachable, and he was entitled to prefer the complainant's evidence. This was because the complainant's evidence was unshaken in cross-examination and corroborated in material respects by a third party ([13]-[15]).

A further issue on appeal was that of apprehended bias. Whilst the Magistrate had a familial relationship with the complainant's employer, Geason J concluded that there was nothing in the conduct of the case or the

reasons for the decision which gave the appearance of any pre-judgment based on that relationship ([21]).

Geason J also noted that the applicant's record of interview was not played in court in its entirety, such that not all evidence was heard in open court prior to the court reaching its decision ([24]). The Magistrate elected to read the transcript of the interview rather than listen to it in full. His Honour was highly critical of this practice, emphasising that all evidence relied upon to prove a case should be heard in open court, and that the transcript itself was not evidence. The Magistrate ran the risk that something material to the case was not "seen" ([27]). Whilst this was considered to be an error, it did not give rise to any miscarriage of justice.

***Irons v Moore* [2019] TASSC 22 (22 May 2019) – Tasmanian Supreme Court**

'Application of Weissensteiner' – 'Consent and disclosure' – 'Evidence issues' – 'Hostile witness'

Charges: Assault x 1; Breach of protection order x 1.

Appeal type: Appeal against conviction.

Facts: The facts of both charges were the same: the appellant grabbed and punched the complainant in front of her children ([3]).

While giving evidence, the complainant claimed that she could not remember what happened on the day. The prosecution successfully applied to treat her as a hostile witness ([3]). The evidence was limited to circumstantial evidence and hearsay evidence of witnesses who saw the complainant's injuries immediately after the assault ([4]). The magistrate found the appellant guilty of both charges and imposed a fine.

Issues: The sole ground of review is that on no reasonable view of the evidence could the magistrate have been satisfied of the appeallant's guilt.

Decision and reasoning: The appeal was dismissed.

The principle in *Weissensteiner v The Queen* [1993] HCA 65 was considered, namely that a 'hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused' ([20]). In this case, while the complainant had given evidence, she could not remember what happened. Therefore, the only person who could have known how the injuries were inflicted was the defendant ([21]).

> 'In the light of the evidence that force had been applied by the applicant to the complainant and in the

absence of any contradictory or explanatory evidence from the applicant, I am satisfied that the application of force in lawful self-defence was not available to the magistrate as a reasonable possibility or hypothesis consistent with innocence.' [24]

Cannell v G; G v Cannell **[2018] TASSC 55 (1 November 2018) – Tasmanian Supreme Court**

'Breach of protection order' – 'Following, harassing and monitoring' – 'Meaning of harass' – 'Mens rea' – 'Physical violence and harm' – 'Safety and protection of victims and witnesses' – 'Systems abuse'

Charges: Trespass x 1; Making a false report to police x 1; Contravening an interim family violence order x 3.

Case type: Prosecution seeking review of dismissal of charges; defendant seeking review of charge proved.

Facts: The defendant and complainant were separated. The evidence in this case was contested by both parties.

The trespass charge occurred when the defendant entered the complainant's house and did not leave when asked. The false report charge occurred when the defendant alleged that the complainant had struck him in the chest while she was telling him to leave. The first contravention charge occurred when the defendant approached the complainant in the Federal Circuit Court building. The complainant alleged that the defendant said 'you're all going down'. The magistrate was not satisfied that those words were spoken, but even if they were, they did not constitute a threat. The second contravention charge occurred when the defendant parked his car next to the complainant's car during a handover of one of the children. The magistrate found that the defendant breached the order and that was no exception in the contact arrangement that would have allowed this ([39]). The third contravention charge occurred when the defendant approached the complainant on numerous occasions to serve her with an application for a restraining order ([43]).

Issues: Whether the Magistrate's decisions were reasonably open on the evidence and whether the Magistrate gave adequate reasons.

Decision and reasoning: Brett J affirmed all the magistrate's decisions.

Note: in relation to the third contravention of the restraining order, the defendant argued that the prosecution had not proved the 'mental element' of the charge because he did not intend to harass the complainant but rather serve her with legal processes. Brett J discussed the statutory definition of the word harass, which

includes following the person or keeping the person under surveillance ([48]). His Honour considered that "there is no requirement that the defendant intend or otherwise foresee the causation of [an effect on the person harassed, eg worry, fear or mental anguish]" ([60]).

> 'The evidence overwhelmingly supported the magistrate's conclusion that the defendant had harassed the complainant by following her, and that following her was deliberate and intentional…. Whilst the service of documents on the complainant was a legitimate purpose, it did not justify conduct on the part of the defendant that was in breach of the order. It goes without saying that there were other ways of achieving that legitimate purpose which did not involve contravention of the family violence order.' [63]

His Honour considered that this construction is consistent with the relevant legislation, that is, to protect likely victims of family violence from likely perpetrators of that violence ([61]).

***Harrison v Moore* [2018] TASSC 53 (19 October 2018) – Tasmanian Supreme Court**

'Breach of protection order' – 'Evidence' – 'Following, harassing and monitoring' – 'oath on oath case' – 'Physical violence and harm' – 'Technology-facilitated domestic and family violence' – 'trivial breach'

Charges: Common assault x 2; Contravention of an interim family violence order x 1.

Appeal type: Appeal against conviction.

Facts: The complainant and applicant had two young children. The assault charges occurred on one day where the complainant alleged that the applicant punched the complainant in the face and kicked her in the head ([5]-[6]). The breach of the interim family violence order occurred when the applicant sent the complainant 4 text messages asking about her and the children ([26]).

The applicant gave evidence at the Magistrates Court trial alleging that he was acting in self-defence. The magistrate accepted the complainant's evidence over the applicant's ([10]).

Issues: Whether the finding of guilt was not reasonably open to the magistrate as a matter of law; whether the magistrate should have applied the principle of 'de minimis non curat lex' (the law should not concern itself with trifles).

Decision and reasoning: All grounds of appeal was dismissed.

There were 3 grounds of appeal in relation to the assault charge. Ground 1 of the appeal was that the finding

of guilt was not reasonably open to the magistrate as a matter of law because the magistrate said she substantially accepted the complainant's version of events but accepted aspects of the applicant's version as well. This ground was rejected because the magistrate was entitled to do so ([14]-[15]).

In relation to the breach of the interim family violence order, the ground of appeal was that the magistrate should have applied the principle of 'de minimis non curat lex'. This was because the magistrate found that sending the messages constituted breaches that were 'trivial at best'. However, Brett J stated that the principle of 'de minimis' is likely not applicable in criminal proceedings ([33]). In any event, it was not applicable in this case because the Magistrate's reference to 'trivial' should be seen as an indication of the relative seriousness of the breaches compared to other examples of that offence, not that the direct contact with the complainant was a trivial matter ([34]).

***Bonde v Maney* [2018] TASSC 23 (17 May 2018) – Tasmanian Supreme Court**

'Assault' – 'Dismissal of charges' – 'Evidence of respondent'

Charges: Common assault x 1.

Case type: Application for review of Magistrate's decision to dismiss charge.

Facts: The complainant alleged that the respondent tried to grab the complainant's car keys from her, injuring her fingers in the process ([3]). The respondent denied assaulting the complainant and alleged that the complainant injured her fingers when she was trying to retrieve her keys ([4]). After the prosecution case closed, the Magistrate immediately moved to judgement without giving the respondent the opportunity to give evidence ([5]). The Magistrate dismissed the charge of assault on the basis that she was not satisfied beyond reasonable doubt that the respondent deliberately or recklessly caused the injury ([5]).

Issues: The complainant argued that the magistrate erred in law by:

- first, stating that the respondent must have intended the injuries for the charge of assault to be made out;
- second, failing to give sufficient reasons as to why she was not satisfied that the charge was proven; and
- third, dismissing the complaint when on no reasonable view of the evidence could the learned magistrate have failed to be satisfied beyond reasonable doubt of the guilt of the respondent.

Decision and Reasoning: The first ground was upheld because the causation of injury is not an element of assault ([7]-[8]). The second ground was also upheld because it was not possible to discern from the

Magistrate's reasons the factual basis for the determination ([15]). Therefore, it was not necessary to consider the third ground ([16]).

The case was remitted to be determined by another Magistrate ([20]).

***Moore v Rittman* [2018] TASSC 5 (13 February 2018) – Tasmanian Supreme Court**

'Appeal against sentence' – 'Conviction not recorded' – 'Manifestly inadequate' – 'Perpetrator interventions' – 'Self-represented litigant' – 'Sentencing' – 'Strangulation'

Charges: Assault x 2; Breaching a police family violence order x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The respondent and the aggrieved, his partner, were in a relationship and had 2 children. The assaults occurred on two occasions when the respondent choked his partner, causing her to lose breath and bruising ([4]). A police family violence order was made, requiring him to not return to the home where his partner and children were living ([5]). The police later found the respondent in the home [(6]). The respondent pleaded guilty to all charges ([7]). The respondent had no criminal history and had independently sought out participation in a men's behavioural change program.

At the sentencing hearing, the magistrate did not ask the respondent to make submissions or to provide her with information as to his personal circumstances ([9]). The magistrate, pursuant to s 7(f) of the *Sentencing Act 1997* (Tas), did not record a conviction and adjourned the proceedings on the condition that the respondent be of good behaviour and complete the Men's Behaviour Change Program ([1]). The charges were recorded as family violence offences under s 13A of the *Family Violence Act 2004* (Tas) ([10]).

Issues: Whether the sentence was manifestly inadequate.

Decision and Reasoning: Justice Brett first addressed the fact that the magistrate did not allow the respondent to make submissions. His Honour at [11] noted that:

> In the case of an unrepresented defendant, it is incumbent on the magistrate to ensure that, not only is such an opportunity provided, but that the defendant is aware of his or her right to address the court, and given some assistance with respect to the nature of the matters and information which should be the subject of the plea.

Nonetheless, this error was not directly in issue so was not determinative ([12]).

His Honour next addressed the sentence. The prosecution argued that the failure to record a conviction renders the sentence manifestly inadequate ([12]). His Honour emphasised the importance of therapeutic interventions for first-time family violence offenders at [24]:

> While a punitive and protective response is essential in cases of serious and repeated family violence, it must also be consistent with the stated purpose of the legislation that consideration is given to therapeutic intervention with a view to achieving rehabilitation and behavioural change, when an offender presents before the court for the first time in respect of acts of spontaneous family violence. Prevention of future violence by use of effective strategies to modify behaviour in respect of offenders who have appropriate insight and desire for change is likely to promote the safety, psychological wellbeing and interests of people affected by family violence.

His Honour emphasised that the good behaviour bond and conditions attached were tailored to the respondent's personal circumstances and was designed to rehabilitate the respondent and ensure that he did not reoffend ([20]). In all the circumstances, the sentence was not manifestly inadequate ([21]).

***Barnes v Crossin* [2017] TASSC 61 (12 October 2017) – Tasmanian Supreme Court**

'Arrest' – 'Reasonable suspicion' – 'Responses in criminal proceedings'

Charges: Resisting a police officer in the execution of their duty x 1.

Case type: Review of Magistrate's decision to dismiss charge.

Facts: The police attended the respondent's house in response to a call from the respondent's son, who told the police that his father was 'going off' and had hit his mother. When they arrived, there were clothes strewn around the front yard. The police arrested the respondent. They gave the reason to 'investigate family violence' ([3]). The respondent struggled against the police, which gave rise to the resisting police officer charge. The Magistrate dismissed the charge on the basis that the arrest was unlawful in the first place ([4]).

Issues: Whether the Magistrate erred in dismissing the charge.

Decision and Reasoning: The Magistrate did err in dismissing the charge.

The power to arrest is derived from the *Family Violence Act 2004* (Tas), which requires 'a reasonable suspicion that the person concerned has committed family violence' ([27]). This is distinct from a suspicion that the person committed a family violence *offence* ([33]). Brett J held that there was ample evidence to support the suspicion that there had been family violence, and he had adequately communicated that fact to the respondent ([46]).

Brett J remitted the matter to be decided by the same Magistrate ([53]).

***Kirkwood v Thomas* [2017] TASSC 56 (15 September 2017) – Tasmanian Supreme Court**

'Breach of domestic violence order' – 'Not manifestly excessive' – 'Text messages' – 'Threats' – 'Totality' – 'Verbal abuse'

Charges: Breach of family violence order x 2.

Appeal type: Appeal against sentence.

Facts: The defendant and the complainant were separated. The order prohibited him from threatening, abusing or assaulting the complainant, but not from going to her house. The first charge related to the defendant attending her house, ringing and knocking on the doors, and calling the complainant. The second charge related to the defendant sending the complainant 8 text messages also insulting the complainant and demanding money ([2]). The magistrate sentenced the appellant to two months' imprisonment, cumulatively with a 5½ year sentence he was currently serving ([5]). That sentence related to a subsequent attack on the complainant, where the defendant broke into the complainant's house and beat her with a baseball bat, leaving her with permanent disfiguring injuries and pain ([6]-[9]).

Issues: Whether the magistrate gave insufficient weight to the principle of totality, and whether the sentence was manifestly excessive ([11]).

Decision and Reasoning: The judge had to decide first if the sentence of two months was manifestly excessive in order to conclude whether the principle of totality had been breached ([12]). It was relevant that the defendant could have been sentenced for longer than 5½ years for the attack with the baseball bat ([12]). There is usually a discount for subsequent sentences, especially because denunciation and personal deterrence may have been achieved by the first sentence ([13]). There was evidence that the appellant had undertaken some family violence and anger management programs in custody ([19]). However, in this case, a

heavy sentence was warranted because there had been repeated breaches of the family violence order in the past, and family violence cases warrant tough sentences ([18]). Therefore, it was open to the magistrate to impose the cumulative sentence of two months ([22]).

***Mayne v Tasmania* [2017] TASSC 38 (29 June 2017) – Tasmanian Supreme Court**

'General deterrence' – 'Sentence' – 'Smothering' – 'Strangulation'

Charges: Common assault x 1.

Appeal type: Appeal against sentence.

Facts: The defendant and complainant had a child together but were not living together. The complainant and defendant were arguing while the complainant was lying in bed. The defendant pushed a pillow onto her face, causing her to struggle for breath for two to five seconds ([3]). The complainant did not suffer any physical injuries. The defendant pleaded guilty and was sentenced to 7 months' imprisonment ([13]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The sentence was not manifestly excessive. Wood J held that the Magistrate was right to highlight the aggravating factors of the offence, including that smothering is a dangerous act, the defendant did not stop of his own accord, and it would have been a terrifying experience for the complainant ([41]). While the sentence was high, it was appropriate to give prominence for general deterrence ([43]).

Wood J said at [43]:

> … it is important that deterrent sentences be imposed not merely for crimes that cause grave physical or psychological harm to victims. There is a need to counter the perception that somehow violence of this kind in the home is less serious than the same kind of violence inflicted on a stranger in a public place. Also, acts of violence committed in a family or domestic context causing fear and distress to victims can have debilitating effects upon their well-being or the well-being of a family member witnessing such violence. It is not only violence resulting in visible injury that must be seen as unacceptable, and these victims, as vulnerable members of our society who have experienced fear and trauma, are entitled to the court's protection.

Parker v Hall **[2015] TASSC 60 (10 December 2015) – Tasmanian Supreme Court**

'Breach of domestic violence order' – 'Following, harassing, monitoring' – 'Manifestly inadequate' – 'Recording a conviction' – 'Sentencing' – 'Totality'

Charge: Breach of family violence order

Appeal type: Appeal against sentence

Facts: The respondent and complainant had been in an on-again off-again relationship for two years. A police family violence order was made against the respondent, restraining him from contacting or approaching the complainant within 50 metres. The respondent contravened this order on four separate occasions by phoning the complainant, writing her a letter expressing his affection and remorse, going camping with her, and giving her a letter conveying his desire for reconciliation. An interim family violence order was then made. The conditions of the order were substantially the same as the police family violence order. The respondent then breached this order by meeting the complainant to talk on two separate occasions. The respondent was charged and found guilty of four breaches of a police family violence order and two breaches of an interim family violence order. The magistrate adjourned the charges without conviction for 12 months on the condition that the respondent enter into a good behaviour undertaking and not commit similar offences during the period.

The respondent had previously been found guilty of breaching a police family violence order and an interim family violence order, which were also sentenced without conviction. This offending occurred during the same time period as the six charges in question. The prosecution submitted a more severe sentence would have been imposed if all the charges had been sentenced together. The respondent had no other relevant prior convictions. His conduct did not involve any threats or violence and occurred with the complainant's consent to varying degrees. Further, the respondent's counsel submitted that as a legal practitioner, he suffered more than the average citizen as a consequence of the charges.

Issue: Whether the sentence was manifestly inadequate.

Decision and reasoning: The appeal was dismissed.

Despite the complainant's compliance, the respondent knew that his conduct was in breach of the orders. Further, his repeated offending of eight separate breaches increased his culpability and pointed towards the

need for specific deterrence. However, the respondent's breaches, while not trivial, were not at the serious end of offending. The public interest did not favour a conviction being recorded. As a result of the media attention attracted by the matter, the respondent had already felt the consequences of his offending behaviour to a degree. If the charges were heard together with the previous two offences, the offending would not have necessarily demanded a heavier or more punitive response. Considering these factors together, Wood J concluded that there was sufficient justification for leniency extended to the respondent and the sentence was not manifestly inadequate.

***Lacroix v Lacroix* [2015] TASSC 42 (3 September 2015) – Tasmanian Supreme Court**

'Extension of family violence order' – 'Family violence order' – 'Procedural fairness'

Proceeding: Review of family violence order

Facts: A family violence order was made against the applicant on 5 March 2015, in anticipation of the expiration of another 12-month family violence order made on 7 March 2014 (the first order). The applicant made no admissions in relation to the conduct resulting in the making of the first order. On 23 February 2015 the respondent, the applicant's partner, made an application for an extension of the first order. The magistrate denied this extension but suggested the respondent lodge an application for a fresh order and said, '[The applicant] heard me say that, so he's effectively on notice that that may well occur in the course of the morning and taking care of the service requirements [sic]'. Counsel for the respondent then lodged the application for a fresh order.

Issue: Whether the applicant was denied procedural fairness because he was not served with a sealed copy of the new application filed by the respondent.

Decision and reasoning: The motion to review the order was dismissed.

The magistrate was obliged to give the applicant a reasonable opportunity to be present at the hearing of the application, to obtain legal representation, and to make submissions and dispute allegations of fact at common law. The applicant was not denied these opportunities. He was present when the magistrate directed the respondent to lodge the fresh application that would be dealt with later that day. As a result, he had an opportunity to remain at court and instruct his counsel, who was also present at the time, to prepare submissions to defend the application on his behalf. The evidence relied on by the respondent for the fresh application was the same as for the extension of time. The common law rule of procedural fairness did not

require the magistrate to proceed only if the applicant was served with a sealed copy of the fresh application.

The magistrate did not err in applying the statutory requirements. Section 106E *Justice Act 1959* (Tas) does not apply to family violence orders, as submitted by the applicant's counsel. Further, rule 54N(1)(a) *Justices Rules 2003* (Tas) was complied with. The fresh application was served on the applicant on 11 March 2015. The rule does not require service before the family violence order is made, but as soon as practical after it is filed with the clerk.

However, the magistrate erred in making a final family violence order. He did not have authority to make such an order under s 31(7) *Family Violence Act 2004* (Tas), as a sealed copy of the application had not been served on the applicant and no attempt had been made to carry out service. Despite this error, no substantial miscarriage of justice resulted. The applicant had notice of the application, when and where it would be made and the evidence to be relied upon. Further, the applicant was in court the morning of the application with a lawyer and merely needed to stay until the afternoon to defend the fresh application. Therefore, there was no procedural unfairness and no substantial miscarriage of justice.

***Young v Wilson* [2015] TASSC 16 (28 April 2015) – Tasmanian Supreme Court**

'Assault' – 'Breach of domestic violence order' – 'Deterrence' – 'Following, harassing, monitoring' – 'Non-parole period' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Using carriage service'

Charges: Using a carriage service to harass, Breach of police family violence order (6 counts), Common assault

Appeal Type: Application for review of sentence

Facts: A police family violence order prohibited the applicant from approaching within 50 metres or contacting the complainant in any way. The breaches of this order involved the applicant phoning the complainant, sending her two text messages, threatening to kill her and punching her to the head and face. The punch also gave rise to the common assault charge. The carriage service offence involved the applicant phoning and sending eight menacing text messages to the complainant. The applicant had a substantial and relevant criminal history. A sentence of eight months' imprisonment was imposed. This offending also activated previously imposed suspended sentences of imprisonment. This resulted in a total effective sentence of 26 months' imprisonment with no parole eligibility.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The application was allowed.

The eight-month sentence was not excessive. The applicant had previously shown a disregard for orders made in favour of the complainant. The assault offences were serious and the applicant did not appreciate this. A deterrent sentence was needed. It was not unjust to activate two of the previous suspended sentences resulting in six months' imprisonment. However, a previous suspended term of imprisonment of 18 months for trespass, breaches of a family violence order and various traffic offences was substituted with a period of 12 months' imprisonment. This was considered too harsh, given the other sentences of imprisonment to be served by the applicant and the fact the applicant has not reoffended with respect to the driving offences. Furthermore, there was no justification for not imposing a non-parole period. The applicant's alcohol problem contributed to his ongoing offending behaviour: 'The granting of parole may encourage reformation and increase the chances of rehabilitation under supervision through conditional freedom' ([69]). He was resentenced to a total term of 18 months' imprisonment with a non-parole period of nine months.

(Note also at [17]-[27] where Wood J made some general comments on the correct procedure to be followed for breaches of suspended sentences in Magistrates' Courts and at [37]-[53] which contains general consideration of totality, suspended sentences and non-parole periods).

***Higgins v McCulloch* [2013] TASSC 49 (11 September 2013) – Tasmanian Supreme Court**

'Assault' – 'Fines' – 'People with mental illness' – 'Perpetrator intervention program' – 'Physical violence and harm' – 'Recording a conviction' – 'Sentencing'

Charge: Assault

Appeal Type: Motion to review conviction and penalty

Facts: The applicant was found guilty of one count of assaulting his wife by punching her in the face. The complainant had died by the time the matter came to trial. The parties were living together in unusual circumstances and the assault occurred in a bedroom of the family home in the presence of an adult daughter. The applicant had no prior convictions. A good behaviour bond was imposed and a conviction was recorded.

Issues:

1. Whether the finding of guilt was reasonably open on the evidence.
2. Whether the magistrate erred in recording a conviction.

Decision and Reasoning: The notice to review was dismissed.

1. This argument was dismissed based on the evidence before the magistrate: see paragraphs [5]-[27].
2. At [33], Tennent J outlined the relevant issues to be considered when deciding whether to record a conviction. A court must consider the public interest, the need for an official record to be made of the commission of the offence and whether the victim might reasonably not feel vindicated by the failure to record a conviction. These factors are to be weighed against the benefits to the offender of a conviction not being recorded. This was a family violence offence. The applicant was not entitled to any discount for a guilty plea and did not display remorse. The applicant was suffering from mental health issues, which partly explained his 'bizarre' ([44]) behaviour that occurred in the background to the assault. There was nothing put before the magistrate indicating that recording a conviction would have an adverse impact on the applicant.

***Tasmania v Finnegan (No 2)* [2012] TASSC 1 (19 January 2012) – Tasmanian Supreme Court**

'Admissibility' – 'Evidence - relationship' – 'Evidence - tendency' – 'Motive' – 'Physical violence and harm' – 'Probative value' – 'Unlawful wounding'

Charge: Unlawful wounding

Proceeding: Ruling as to the admissibility of evidence

Facts: The accused was charged with unlawfully wounding the complainant (his partner) by striking her to the face with a glass. He pleaded not guilty. The Crown sought to lead evidence from the complainant given on a *voir dire* about the accused's conduct towards her on other occasions, both before and after the alleged wounding. The accused objected to the admission of some of the evidence ([6]).

Issues: Whether some of the evidence given by the complainant should be ruled inadmissible on at least one of the following bases:

1. Irrelevance;
2. Failure to satisfy the common law rule established in *Pfennig v R* whereby propensity or similar fact evidence is not admissible if, viewed in the context of the prosecution case, there is a reasonable view of that evidence that is consistent with innocence;
3. The danger of unfair prejudice to the accused outweighing the probative value of the evidence: s 137 *Evidence Act 2001 (Tas)*; or
4. The probative value of the tendency evidence not substantially outweighing any prejudicial effect that it may have on the accused: s 101(2) *Evidence Act 2001 (Tas)*

Decision and Reasoning: The appeal was dismissed. The evidence led from the complainant as to the conduct of the accused was admissible. It was relevant on a number of bases: as 'relationship evidence', enabling the jury to assess the evidence as to what occurred at the time of the alleged wounding; as evidence of motive (jealousy); as evidence explaining why the complainant asserted she was injured because of a fall and why there was delay in her reporting what occurred; and as tendency evidence, showing that the accused had a tendency to be jealous of anyone who had a friendship/relationship with the complainant and to be generally violent towards her ([11]-[15]).

Further, the probative value of all the evidence under consideration substantially outweighed the prejudicial effect and danger of unfair prejudice to the accused. In this regard, Blow J noted at [30]-[31]:

'In my view the danger of unfair prejudice to the accused is not great… [A] properly instructed jury, having heard all the evidence of jealousy and violence, is unlikely to be distracted from its duty of impartiality and its duty to give a true verdict in accordance with the evidence.

'In my view the evidence of jealousy has substantial probative value. Without that evidence the jury might well take the view that the accused had not given any indication of jealousy on any other occasion. If the only evidence available for the jury as to violence on other occasions was the evidence of the three charged assaults, two of which shortly preceded the first report to the police of the accused wounding the complainant with the glass, that could result in the jury overestimating the likelihood of the complainant having fabricated the critical allegations. Having regard to that factor, and to the various bases on which the evidence of violence is relevant, I consider that all the evidence of violence also has substantial probative value'.

Here, there was nothing about the facts that made it one where s101(2) or s137 [Evidence Act 2001 (Tas)]

required the *Pfennig* test to be applied (at [32]).

Note: this decision has been overtaken by legislative changes effective 12 December 2017. See section 13B Family Violence Act 2004.

***James v Tasmania* [2010] TASSC 50 (11 November 2010) – Tasmanian Supreme Court**

'Breach of domestic violence order' – 'Common assault' – 'Consent' – 'Exposing children' – 'Physical violence and harm' – 'Risk factor - strangulation' – 'Temporary protection order'

Charges: Breach of a family violence order, Common assault, Driving offences, Perverting the course of justice

Appeal type: Appeal against sentence

Facts: The magistrate imposed three terms of imprisonment. First, the applicant was sentenced to 6 months' imprisonment, suspended after 4 four months, for charges relating to driving a motor vehicle while disqualified and driving with alcohol in his body. Second, the applicant was sentenced to 3 months' imprisonment, cumulative on the first period of imprisonment, for perverting justice by providing a false name to a police officer. Third, the applicant was sentenced to 6 months' imprisonment, suspended after 3 months, for 3 charges. These were: breaching a family violence order by sending an abusive and threatening text message to a woman protected by the order; breaching the order by telling the woman he would punch her in the head if she did not pack his property; and committing common assault by placing both hands around her neck and squeezing, threatening to bash her head in if she did not give him a telephone, grabbing her by the back of the neck, and placing his arm around her neck. The magistrate merely expressed this sentence as being 'cumulative.' If the third period of imprisonment was cumulative on both sentences, the effective sentence was 10 months' imprisonment. However, if it was cumulative only on the first sentence, the effective sentence was 7 months' imprisonment.

Issues: Whether the magistrate erred in failing to make the sentence clear and whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The lack of clarity as to the cumulative nature of the third sentence amounted to a sentencing error and the applicant was re-sentenced. The first and second periods of imprisonment imposed were not manifestly excessive. However, the sentence for the assault and the

breach of the family violence order was found to be manifestly excessive. A sentence of three months' imprisonment wholly suspended was substituted. His Honour stated, '[t]he nature of the assault was not severe enough to warrant a greater punishment. His culpability for breaching the order was ameliorated by his belief, the claim to which was unchallenged, that the order no longer operated, and by the complainant reconciling and living with him since the order had been made' ([22]).

***Beechey v McDonald* [2010] TASSC 47 (25 October 2010) – Tasmanian Supreme Court**

'Breach of domestic violence order' – 'Conditions of orders' – 'Guilty plea - unequivocal' – 'Physical violence and harm' – 'Risk factor - separation' – 'Temporary protection order'

Charges: Breach of a family violence protection order (2 counts), Assault

Appeal type: Appeal against conviction

Facts: The male applicant pleaded guilty to two breaches of a family violence protection order and was sentenced to a wholly suspended sentence of 2 months' imprisonment. The family violence order included an order that he not enter the premises of the complainant, his wife and mother of his 4 children. On one occasion, when returning the children to the premises, the applicant entered the residence and placed some of the children's belongings inside (the first complaint – breach of a family violence protection order). The family violence order was later replaced with an order including a term that the applicant not directly or indirectly threaten, harass, abuse or assault the complainant. The applicant and the complainant agreed to spend Christmas day together. On the day, a box the applicant was carrying came into contact with the complainant. She fell over and dislocated a shoulder (the second complaint – breach of a family violence protection order by assault).

Issue: Whether the magistrate erred in accepting the applicant's plea to one of the charges as he had made assertions that were inconsistent with his plea of guilty.

Decision and Reasoning: The appeal was upheld. Sentencing submissions from counsel for the applicant evidenced that he denied applying force to the complainant intentionally. This was inconsistent with his plea of guilty on the second complaint. A plea of guilty must be unequivocal. The magistrate should have informed counsel for the applicant of this inconsistency ([9]-[12]).

***Maingay v Seabourne* [2009] TASSC 67 (19 August 2009) – Tasmanian Supreme Court**

'Assault' – 'Breach of domestic violence order' – 'Conditions of orders' – 'Damaging property' – 'Deterrence' – 'Following, harassing, monitoring' – 'Manifestly inadequate' – 'Physical violence and harm' – 'Risk factor - weapon' – 'Sentencing' – 'Vulnerable - new partner'

Charges: Breach of police family violence order (6 counts), Assault (2 counts), Breach of interim family violence order, Damaging property, Abuse of police

Appeal type: State appeal against sentence

Facts: The male respondent was sentenced by a magistrate in respect of numerous offences. The magistrate dealt with the offences in batches and the State sought review of a suspended sentence imposed in respect of two of these batches. The first batch of offences pertained largely to charges of stealing. More relevantly, the second batch of offences related to a number of breaches of police family violence orders. On 12 December 2005, a police family violence order was made for the protection of Cassandra Deering. The respondent breached this order by head-butting and punching Ms Deering. On 5 January 2007, a second police family violence order was made. The respondent breached this by approaching Ms Deering, damaging the car belonging to her new partner, and sending a threatening text message. A number of these breaches occurred while the respondent was on bail for earlier breaches.

On 2 October 2008, a police family violence order was made for the protection of Dana Smith. The respondent breached this order by kicking Ms Smith in the head. He also said she was lucky he did not slit her throat and that he should have snapped her neck. On 27 October 2008, an interim family violence order was made which required the respondent to immediately surrender firearms. The respondent also breached this order.

Issue: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The sentence imposed in respect of the batch of offences incorporating the family violence offences was manifestly inadequate. The respondent was a repeat offender. He showed a complete disregard for the orders made to restrict his behaviour and should have felt the full effect of a deterrent sentence, notwithstanding his age and lack of a prior history. If his offending had extended only to breach by approach (potentially instigated by the protected person) the outcome would have been different. However, the respondent's offending went far beyond that; it extended to physical assaults against two separate female

partners ([24]).

Her Honour noted that, *'While it is accepted that, at the time the respondent was dealt with for all of this offending, he was still a young man with no relevant prior history, the legislation pursuant to which he had been charged was enacted to protect members of the community, and in particular to protect persons in close relationships with offenders. Deterrent sentences were required to give effect to that legislation … However, in practical terms, it is impossible in my view to argue that the deterrent effect of an actual term of imprisonment is the same as that of a suspended term of imprisonment'* ([23]).

The respondent was ordered to serve a period of four months' imprisonment. Although it might have been unfair in all the circumstances to impose a custodial sentence several months after his release, if the error in the sentence was not corrected, the perception would remain that the sentence imposed lacked the requisite deterrent effect ([26]-[30]).

***Bradshaw v Tasmania* [2009] TASSC 22 (9 April 2009) – Tasmanian Supreme Court**

'Deterrence' – 'Exposing children' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful assault causing bodily harm'

Charges: Unlawful act intended to cause bodily harm (2 counts), Aggravated burglary

Appeal type: Appeal against sentence

Facts: The male appellant had lived with the female complainant and her 7 year old daughter for over a year before the offending occurred. The relationship was violent and the complainant accordingly obtained a family violence order requiring the appellant not to threaten, harass or abuse the complainant, to keep the peace towards her, and not to damage any property at her home. The order was in place at the time of the offending. The appellant committed a series of offences against the complainant and they ceased cohabiting together. Following this, the appellant broke into the complainant's house and stabbed her twice to her right side. He took a few steps away before turning back and stabbing her again twice to her left side. The complainant was holding her daughter at the time of the attacks. The appellant was sentenced to six years' imprisonment with eligibility for parole after four years.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was rejected by all judges but with separate reasoning provided. Tennent J (with whom Porter J agreed) found that while there were mitigating factors (remorse, giving himself up, and pleading guilty), the applicant committed very deliberate acts of violence in the complainant's own home when he had no right to be there and there was a need for both personal and general deterrence ([35]-[36]). The appellant was sentenced for two particularly serious crimes. The stabbings occurred very close together but constituted two crimes because the appellant walked away and made a conscious decision to return and stab the complainant again ([33]). Further, the appellant committed a number of other offences and showed a complete disregard for orders of the court. He caused significant, long-term physical and psychological damage to both the complainant and her daughter ([34]).

In a separate judgment, Evans J also held that the sentence was not manifestly excessive in light of the totality of the appellant's criminal conduct. The appellant's criminal conduct was particularly serious. It was not impulsive. He went to the complainant's home intending to inflict harm and acted in contravention of both a bail condition and a family violence order. One of the wounds he inflicted could have been fatal. The appellant also had prior convictions for violence and carrying weapons. His attack had a profound adverse impact on the complainant ([13]-[14]).

***Tasmania v R D P* [2009] TASSC 72 (25 February 2009) – Tasmanian Supreme Court**

'Emotional and psychological abuse' – 'Evidence' – 'Exposing children' – 'Physical violence and harm' – 'Police family violence order' – 'Rape' – 'Relationship evidence' – 'Risk factor - separation' – 'Sexual and reproductive abuse'

Charge: Rape

Proceeding: Application to adduce relationship evidence

Facts: The defendant was in a relationship with the complainant for about 14 months. The alleged offence occurred after the relationship ended. A police family violence order was in place against the defendant. The complainant arranged to attend the defendant's house to collect her belongings with her 10-year-old son and her brother. She collected her belongings and then went to the bathroom with her son where she found the defendant. There was a knife on the hand basin. The complainant informed the defendant that she did not want to have sex, but he performed oral sex on her. She exposed her breasts on his demands because she thought he might hurt her if she did not. The complainant screamed for help and tried to defend herself by

kicking the defendant. The defendant then threatened to rape her anally unless she uncrossed her legs. She then uncrossed her legs and the defendant vaginally raped her. This was done in front of their child.

Issue: Whether the relationship evidence should be admitted.

Decision and Reasoning: The evidence as to the nature of the relationship was admitted, with the exception of evidence of general physical and verbal abuse unconnected with sexual activity. The evidence included general physical abuse and physical violence used to coerce the complainant into sexual intercourse, one prior occasion of non-consensual vaginal intercourse and an act of anal intercourse. Porter J held that the evidence would allow the jury to more readily assess the actions of the complainant and defendant and ascribe meaning to things said by the defendant. In particular, evidence of prior sexual intercourse without consent might serve to explain why the complainant may have displayed some acquiescence to the oral sex and the vaginal penetration. Also, evidence of prior anal penetration was relevant to the jury's assessment of why the complainant uncrossed her legs prior to vaginal penetration, given the high level of pain and discomfort the complainant suffered as a result of the earlier anal penetration. The probative value of the evidence outweighed its potential prejudice.

***Allen v Kerr* [2009] TASSC 10 (25 February 2009) – Tasmanian Supreme Court**

'Aggravating factor' – 'Assault' – 'Damaging property' – 'Deterrence' – 'Emotional and psychological abuse' – 'Exposing children' – 'Manifestly excessive' – 'Physical violence and harm' – 'Provocation' – 'Sentencing'

Charge: Common assault

Appeal Type: Motion to review sentence

Facts: The applicant was in a relationship with the victim for three years and they had one child together. The victim also had a child from another relationship. Both of these children were present during the incident. The applicant was intoxicated and swore at the victim. An argument ensued and the victim spat in his face, which the applicant claimed led to his subsequent actions. The applicant took the victim's house keys and told her to go inside before telling her to get in the car. He then smashed the car window, leaned inside and punched the victim twice to the face and four or five times to the back of the head and bit her multiple times. The police applied for a family violence order to operate for 12 months, which the applicant consented to. The applicant had a significant criminal history (though no convictions for assault) and was subject to a probation order and two suspended sentences. He pleaded guilty and was sentenced to two months' imprisonment.

Issue: One of the issues concerned whether the sentence was manifestly excessive.

Decision and Reasoning: The motion to review was dismissed.

Porter J found that the assault was not premeditated and arose from the applicant's state of intoxication. The act of the victim spitting in the applicant's face was a provocative act and an assault in itself. No weapon was used and the complainant suffered no lasting injury. On the other hand, the assault was serious particularly given the biting. Furthermore, the presence of the two children at the time of the attack was an aggravating factor, as recognised by s 13 of the *Family Violence Act 2004* (Tas)*: 'Violence witnessed by children in the domestic environment not only is distressing (usually the victim is a parent or someone in the place of a parent), but it also serves to desensitise impressionable minds to violence, and to encourage the notion that resort to violence is acceptable'* ([13]).

The community has a general intolerance towards offences of violence. However, although immediate custodial sentences are appropriate for serious cases of assault, there is no prima facie position that assault offences should be punished by an immediate gaol term. The fact that the applicant was subject to the probation order and suspended prison sentences indicates that these measures did not deter the applicant from offending. 'General deterrence in relation to offences of violence is a weighty factor' ([27]). While the penalty was a relatively severe one, it did not demonstrate error having regard to the applicant's circumstances.

***Director of Public Prosecutions v P* [2007] TASSC 51 (26 June 2007) – Tasmanian Supreme Court**

'Following harassing, monitoring' – 'Manifestly inadequate' – 'Mitigating factors' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Pregnant women' – 'Rape' – 'Risk factor - separation' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge: Rape

Appeal Type: Appeal against sentence

Facts: The respondent's relationship with the complainant ended. The complainant attempted to maintain a friendship with the respondent but he could not accept that the relationship was over. He kept coming to her home and tried to kiss and cuddle her. She would sometimes relent to avoid an argument. She was pregnant with his child at the time. On the night of the offence, he arrived at the complainant's home intoxicated. She

asked him to leave but he refused. He stopped her from calling a friend. He then refused to allow her to go to the toilet, forcibly pinned her to their bed and raped her. She eventually stopped resisting and he stopped after about 5 minutes. The rape resulted in lasting psychological impacts on the complainant. The respondent had a long record of offending, including offences of violence and threatened violence. He was sentenced to two years' imprisonment.

Issue: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. Crawford J (with whom Slicer and Evans JJ agreed) held that a sentence of two years is low for the crime of rape, which is '*a crime of violence, domination and degradation and it usually causes great psychological trauma to the victim. It requires a substantial sentence of imprisonment in most cases. Leniency may be extended in exceptional circumstances, but there were none in this case'* ([16]). His Honour was of the view that it is conceivable that a crime committed 'during the currency of a sexual relationship' might allow some leniency, but the fact of a prior sexual relationship is not a mitigating factor and the appellant's disappointment about the relationship breakdown is not relevant to sentencing: 'In no sense was his crime an act of unrequited love.' ([16]). Evans J also noted that, *'it is significant that the respondent's criminal conduct cannot be categorised as an impetuous response to the break-up of his relationship with the complainant and a manifestation of his love for her. His conduct over the period of in excess of an hour after she first asked him to leave bears all the hallmarks of an assertion of physical and sexual dominion over the complainant'* ([23]). The respondent was re-sentenced to three years' imprisonment with a non-parole period of 18 months.

***Lambie v State of Tasmania* [2007] TASSC 10 (7 March 2007) – Tasmanian Supreme Court**

'Assault' – 'Denunciation' – 'Deterrence' – 'Just punishment' – 'Manifestly excessive' – 'Physical violence and harm' – 'Sentencing'

Charge: Assault (two counts)

Appeal Type: Appeal against sentence

Facts: The appellant was in an 'up and down' relationship with the complainant that was marked with arguments and assaults. On the day of the offence, the appellant attended the complainant's home. An argument occurred and the complainant said she wanted to sort out the issues in the relationship. She stood

in the doorway, preventing the appellant from leaving. The argument continued and the appellant grabbed the complainant and threw her backwards out of the way. The appellant then followed the complainant into their bedroom and shoved his motorcycle helmet into her chest, knelt on her chest and shouted in her face. The appellant later returned to the house and took her a glass of water. The assaults aggravated an existing unknown spinal condition and the complainant had to undergo surgery and suffered temporary and permanent disabilities. There were also lasting psychological impacts. The appellant had no relevant criminal history. He was sentenced to 12 months' imprisonment with a non-parole period of 6 months.

Issue: One of the issues concerned whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld on the basis of another ground of appeal (that the sentencing judge had taken extraneous or irrelevant material into account). In relation to the issue of manifest excess, Underwood CJ (with whom Blow J and Tennent J agreed) stated that the key consideration was 'the extent of the appellant's criminal culpability for the consequences of his direct and intentional applications of force' because the sentencing judge sentenced on the basis the appellant was 'culpably liable' for all the consequences of his criminality ([19]). However, there were no submissions on this issue from counsel so the Court was reluctant to make a determination. In any case, it was not necessary to do so because the consequences of the appellant's criminal conduct were not reasonably foreseeable by him and the exceptional circumstances were such that the consequences should carry little weight in sentencing.

In re-sentencing the appellant, the Court held that the conduct was serious and that, 'the nature of the criminal conduct was such that a sentence of imprisonment is called for to mark condemnation of this kind of domestic violence and to punish the appellant' ([31]). However, the lack of relevant prior convictions made a 12-month sentence manifestly excessive. The appellant was re sentenced to six months' imprisonment, fully suspended on the condition that the appellant be of good behaviour for two years after his release.

***Remess v Rabe* [2006] TASSC 105 (4 December 2006) – Tasmanian Supreme Court**

'Evidence' – 'Ex parte proceedings' – 'Exposing children' – 'Hearsay' – 'Interim intervention order' – 'Leave'

Appeal Type: Application for review of the making of interim family violence order

Facts: An interim family violence order (FVO) was applied for on behalf of the complainant by the manager of Victim Support Services within the Department of Justice. An interim order was made in the applicant's absence and the order was to last for 60 days.

Issues:

1a. Whether the magistrate erred in making the order when leave to make an application under the *Family Violence Act 2004* (Tas) (the Act) had neither been sought nor granted.

1b. Alternatively, whether the magistrate erred in granting leave to make the application when the material was insufficient for that purpose.

2. Whether the magistrate erred in making an interim order because the evidence contained in the application was entirely hearsay.

Decision and Reasoning: The application was dismissed.

1a. The applicant submitted that the victim support officer was a person who was required to seek leave under s 15(2)(d) of the Act such that magistrate had no jurisdiction to hear the application without leave being granted. Tennent J held that a grant of leave was not a pre-condition to jurisdiction, and that s 15 merely provides for the procedure of the classes of persons who may make an application for an FVO.

1b. Counsel for the applicant conceded that the application for the order was an interlocutory proceeding. Under s 75 of the *Evidence Act 2001* (Tas), the hearsay rule does not apply as long as the party adducing the evidence also adduces evidence of its source. Counsel submitted that because the application did not disclose the sources of the information, the evidence was inadmissible. Therefore, there was nothing in the application upon which the magistrate could properly have considered the issue of leave.

Tennent J held that in relation to leave the Court should consider 'the position of the person seeking leave, their relationship to the affected person and whether they may have acquired knowledge of the matters the subject of the application' ([15]). In this case, the magistrate recognised the person seeking leave and that the protected person was a client of hers. Her position and relationship with her client, of itself, would have identified her as being able to provide assistance to the protected person. It was appropriate in those circumstances for the magistrate to grant leave. While leave should have been expressly addressed, a grant of leave was implicit from the conduct of the proceedings.

2. The applicant submitted that while some of the material in the application came from police reports, it was not clear whether the officers referred to were reporting from personal contact with the protected person or relying on others. Tennent J held that the protected person clearly identified her sources as

two police officers. Her Honour stated that s 75 of the *Evidence Act 2001* (Tas) is not limited to 'first hand hearsay'. As such, the evidence was admissible. Her Honour then commented on the making of interim orders generally at [28].

Counsel for the applicant also raised the issue of the basis on which the magistrate made an order that extended to the children of the parties. The magistrate imposed the order so as to 'err on the side of caution' but was careful to not make an order preventing the applicant form approaching his children. Tennent J held this was appropriate: 'It is well recognised that children in families where domestic violence is a factor can be affected by such violence whether or not they are directly subjected to it'. Even though there was limited material available to the magistrate, the interim nature of the order was reflected in its duration and an acknowledgment that the issue could be revisited.

Oliver v Tasmania **[2006] TASSC 95 (17 November 2006) – Tasmanian Supreme Court**

'Aggravated burglary' – 'Arson' – 'Damaging property' – 'Hardship' – 'Manifestly excessive' – 'Risk factor - separation' – 'Sentencing'

Charges: Aggravated burglary (two counts), Unlawfully injuring property (two counts), Arson

Appeal Type: Appeal against sentence

Facts: The offending related to the appellant's former partner and father of her two children. The relationship had ended acrimoniously as the appellant found out that her former partner had an affair about the time their relationship ended that resulted in the birth of a child. She broke into his home on two separate occasions and damaged it. On the first occasion she broke nine windows, destroyed a collection of vinyl records and smashed a photo frame. On the second occasion she set fire to the home and damaged the complainant's vehicle parked outside. The damage exceeded $50,000 and the contents lost had a value between $15,000 and $20,000. At the time of sentencing the appellant had three young children. She had relevant prior convictions. She was sentenced to three years' imprisonment with a non-parole period of 18 months.

Issue: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

Counsel for the appellant submitted that insufficient weight was given to the fact that the appellant was the

mother of three children. However, nothing was put to the sentencing judge that suggested any particular hardship to the children arising from their mother's imprisonment. Counsel also submitted that the penalty imposed for arson was the harshest in the preceding five years. Counsel for the respondent submitted that this was a deliberate action and resulted in substantial damage. Other dwellings could have been at risk. The offending was motivated by 'significant ill will'. The appellant showed no remorse and attempted to place the blame elsewhere. The fire was lit late at night at a time when it would be expected that it would not be immediately detected. Tennent J (with whom Evans J agreed) held that the appellant's conduct could only be described as 'vindictive attacks in no way justified by what she presumably perceived as the wrongs done to her by him. The gravity of her behaviour escalated in that she went from simply smashing things to using fire, a much more dangerous tool' ([44]).

Underwood CJ (with whom Evans J agreed) held that there was nothing to indicate that the trial judge did not give appropriate weight to the fact that the appellant was a mother of three children. His Honour held that family hardship is only relevant in the 'most unusual case' ([11]). In regards to the appellant's 'tariff submission' that the sentence was the longest imposed for arson in the preceding five years, Underwood CJ noted that the appellant was sentenced for arson as well as other crimes. Further, the fact that the arson was intentional made it more serious. The appellant was neither youthful nor remorseful and this was 'calculated' conduct borne out of anger designed to cause maximum distress, such that the totality of the conduct called for a substantial sentence of imprisonment.

***Re S* [2005] TASSC 89 (19 September 2005) – Tasmanian Supreme Court**

'Assault' – 'Bail' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Presumption of innocence' – 'Risk assessment tool' – 'Risk factor - strangulation'

Proceeding: Application for bail

Facts: The applicant was arrested following a complaint that he assaulted his partner. She alleged that he had taken her car keys. When she asked for them back, he verbally abused her, grabbed her throat and pushed her backwards. The complainant stated that the applicant kept a gun on the property (though this was not untoward because it was a farming property with livestock) and that she lived in fear of her partner's threats. The applicant denied the allegations and stated that he did not see the complainant on the day in question. He alleged that the complainant made threats against his safety and that she made the assault complaint maliciously in an attempt to force him to pay her money. Following his arrest, an application for a

family violence order (FVO) was made. The applicant had no history of violence or prior convictions. The police officer completed a 'Tasmania Police Family Violence Risk Assessment Screening Tool'. This involved a subjective assessment provided by the complainant and was part of a whole of government response to domestic and family violence instituted in Tasmania in 2004 ([18]). While the applicant was in the remand centre, the complainant called and asked to speak to the complainant. She indicated that she was willing to drop the assault charge if she was paid money that she was owed.

Issue: Whether bail should be granted.

Decision and Reasoning: Bail was granted. The Court held that various problems with duplication within the risk assessment, the mixture of protective legislation within the criminal law and the mandatory nature of the legislation meant that a court is inhibited in its assessment of future risk, especially in the case of an unrepresented defendant. There was evidence that the phone message from the complainant while the applicant was on remand could be construed, 'as a form of pressure designed to enhance a financial outcome favourable to the maker', which would be contrary to the *Family Violence Act 2004* (Tas). Section 12 of the Act creates a presumption against bail for a person charged with a family violence offence unless the court is satisfied that release, "would not be likely to adversely affect the safety … of an affected person". At [23], Slicer J made some general comments on the effectiveness of the statutory scheme, noting concerns that the public must have confidence in the administration of the scheme and that public confidence is diminished when an arbitrary approach is taken. By tasking the courts to assess the future risk of a person, reliable primary material must be put before the court to deal with issues such as deprivation of liberty and consequences to the family unit. Slicer J also noted the risk that, 'deprivation of liberty is seen as a sanction imposed for unproven conduct.'

The Court held that it is not possible to determine the merits of the domestic violence complaint at first instance and that it remained an issue for trial. His Honour also noted tensions between the presumption of innocence and the need to protect victims. In applying this to the facts, his Honour granted bail on the provision of a surety and the imposition of residential, geographical and contact provisions.

***Olsen v State of Tasmania* [2005] TASSC 40 (13 May 2005) – Tasmanian Supreme Court**

'Aggravated assault' – 'Bail' – 'Legal representation' – 'People with mental illness' – 'Physical violence and harm' – 'Unrepresented litigant'

Charge: Aggravated assault

Proceedings: Bail application

Facts: The applicant was charged with aggravated assault against his former female partner. The Crown case was that the assault consisted of a threatening gesture or gestures with a replica pistol. The applicant vehemently denied these allegations. The Crown informed the court that they would not oppose bail if the applicant was able to produce a suitable surety. The applicant suffered from schizophrenia and would benefit from the supervision of a surety to ensure he did not breach any bail conditions. However, through no fault of his own, the applicant was unable to produce a surety.

Issue: Whether the application for bail should be granted.

Decision and Reasoning: The application for bail was refused. His Honour noted that, *'Were I free of the restraints imposed by the Family Violence Act*, *s12, I would grant bail. I would do so because on the face of it, the assault is not a serious one, because the applicant has been in custody since 10 or 11 April, and because it will be some time before this applicant has his case heard.'* His Honour further noted that the applicant had no relevant prior convictions ([3]).

However, s 12 of the *Family Violence Act 2004* (Tas) provided that the applicant not be granted bail unless his release on bail would not be likely to adversely affect the safety, well being and interests of the complainant. The onus was on the unrepresented applicant to show this but he had no idea of where the complainant was living (so as to ascertain information about her safety). In light of this and in the absence of a surety to monitor the applicant's behaviour, the application for bail was refused. His Honour concluded by stating that, *'I want to say very strongly that this man needs legal assistance and he needs it urgently, otherwise he is likely to stay where he is for a considerable period of time'* ([10]).

***S v White* [2005] TASSC 27 (21 April 2005) – Tasmanian Supreme Court**

'Assault' – 'Bail' – 'Damaging property' – 'Exposing children' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Risk factors'

Charges: Assault (3 counts), Destroying property, Application for a restraint order

Appeal type: Appeal against refusal to grant bail

Facts: It was alleged that the appellant assaulted his former partner and two of her children, and that he destroyed the windscreen of her car. A police officer also applied for a restraint order as a result of this incident. The magistrate refused to grant the applicant bail.

Issue: Whether the release of the appellant on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person (the former partner).

Decision and Reasoning: The appeal was allowed and bail was granted with condition as to surety recognisance and a residential condition. There were a number of factors weighing against the appellant: the prosecution had a strong case; this was a case involving not only physical assault but a threat to kill; the appellant used weapons in the commission of the offence; the *Family Violence Risk Assessment* prepared by the complainant immediately following the incident noted alcohol problems, potential mental health issues, jealousy and possessiveness, threats to kill, violence in the relationship escalating and the relationship had only recently broken down; the proposed surety (the appellant's mother) was not in good health and would be unable to stop the appellant harming his former partner ([14]-[18]).

However, in spite of this, Blow J was satisfied that the release of the appellant on bail would not be likely to adversely affect the safety, wellbeing and interests of his former partner and her children. The appellant had not assaulted his former partner or children prior to this incident. Despite allegations of mental illness, the appellant had not been diagnosed with such a disorder. The appellant's demeanour in court was 'ideal and exemplary,' precautions had been taken to ensure the appellant did not know where his former partner was, and he had a previous good employment history ([19]-[23]).

***Her Majesty's Attorney-General v O* [2004] TASSC 53 (9 June 2004) – Tasmanian Supreme Court**

'Assault' – 'Delay' – 'Exposing children' – 'Indecent assault' – 'Manifestly inadequate' – 'Physical violence and harm' – 'Sexual and reproductive abuse'

Charges: Assault, indecent assault

Appeal type: Attorney-General appeal against sentence

Facts: The responded pleaded guilty to assault and indecent assault against a woman with whom he cohabited for seven years. They had four children together. In March 2001, the respondent assaulted the complainant by raising his fist at her, waving a knife in her face and threatening to kill her. The relationship

ceased some weeks prior to 30th May 2002. On 30th May 2002, the respondent trespassed into the complainant's home and ejaculated over her legs while she was asleep. The complainant reported the incident to police soon after it occurred and, at the same time, reported the assault of March 2001. Considerable time was taken to obtain a DNA analysis of the semen on the complainant's legs. As a result, police did not interview the respondent until a little more than a year after the indecent assault. The respondent was ordered to perform 80 hours of community service.

Issue: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was dismissed by Underwood and Slicer JJ but upheld by Blow J in dissent. The judges provided different reasoning.

Underwood J, in the majority, agreed with Blow J (in dissent) that the sentence imposed was manifestly inadequate. However, he dismissed the appeal. The time in custody the respondent would have to serve would unlikely exceed 6 months and absent some point of principle, *'it was unjust to take away the respondent's liberty and put him in prison because an undefined error, not caused or contributed to by him in any way, infected the sentencing discretion exercised with respect to crimes that occurred two and three years ago*' ([7]).

Slicer J, also in the majority, held that the sentence was not manifestly inadequate. His Honour quoted *Parker v R* [1994] TASSC 94 which in turn quoted from a Canadian case *R v Brown* (1992) 73 CCC (3d) 242, 249 articulating principles for the sentencing of crimes of domestic violence: *'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape'.*

However, His Honour nonetheless held that the circumstances of this case did not show manifest disparity or inconsistency with the sentencing standard (which was not to say that a more severe penalty would not have been appropriate). Here, the original assault (followed by the resumption of cohabitation) and the act of indecency were not charged for a further period of 12 months. There was no material advanced that suggested continuation of harassment or manifestation of aggression. The respondent had successfully completed the order of community service ([19]-[20]).

Slicer J also stated: *'Resolution of the problem of violence within a domestic situation is complex and resumption of cohabitation, as in this case where the complainant had decided to give her partner another chance, makes any assessment of sanction difficult'* ([19]).

Blow J, in dissent, held that the nature of the indecent assault (ejaculating over a former partner's legs) and the circumstances of aggravation in which it occurred made it a particularly serious example of that sort of crime such that a community service order was so inadequate a penalty that the appeal ought to be allowed ([30], [36]). The circumstances of aggravation were that the respondent entered the complainant's house as a trespasser at night, the complainant was asleep, and it was committed in the immediate presence of the couple's four young children which created a strong risk of them witnessing the incident ([26]). A sentence of 11 months' imprisonment, suspended after 8 months, was appropriate.

His Honour disagreed with the comments of Slicer J as to delay insofar as they related to the indecent assault. He noted that, *'Certainly fairness to an offender can require a judge imposing a sentence for a stale crime, long after it was committed, to extend what otherwise might be an undue degree of leniency: R v Todd [1982] 2 NSWLR 517 at 519 - 520. There is also authority that a delay need not be inordinate before it deserves to be taken into account: Miceli v R [1997] VSC 22; (1997) 94 A Crim R 327 at 330. However the respondent was sentenced for the indecent assault some 20 months after committing it, and a delay of that order is now, regrettably, quite normal in this State. I therefore think that the delay in relation to that charge is of little significance'.*

***Waddington v R* [2003] TASSC 21 (30 April 2003) – Tasmanian Supreme Court**

'Manifestly excessive' – 'Murder' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Remorse' – 'Sentencing'

Charge: Murder

Appeal type: Appeal against sentence

Facts: The male appellant and the female deceased lived together for 10 or 12 years. The appellant drank 10 cans of beer on the afternoon of the murder. While the appellant prepared dinner, the deceased telephoned a friend. According to counsel for the appellant, these telephone calls occurred on a regular basis meaning that the deceased would often eat dinner cold or not eat dinner at all. The appellant had become frustrated with these calls over the years. The appellant finished making dinner and told the deceased it was ready. She told

him that she would eat it later. The friend on the other end of the phone then heard the appellant become enraged. He yelled, 'Get off that fucking phone … I've been putting up with it for the last ten years … I'm sick to death of the fucking phone.' The telephone connection was broken. In a rage, the appellant killed his partner. He held a pillow over her face for about three to four minutes, smothering her until she died. An hour later he went to the police and confessed.

Issues:

1. Whether the sentence of 17 years' imprisonment was manifestly excessive.
2. Whether the order fixing a non-parole period of 12 years was manifestly excessive.

Decision and Reasoning: The appeal was allowed on ground 2.

1. A sentence of 17 years' imprisonment was not manifestly excessive in all the circumstances. Although the appellant expressed remorse, confessed to the crime quickly, and pleaded guilty, the appellant maintained his suffocation of the deceased for a prolonged period of time, the deceased did not provoke the appellant's violence in any way, and the appellant had prior convictions ([25]-[27]).
2. However, a non-parole period of 12 years was harsh, particularly when considered in light of orders for parole eligibility in other murder cases. Taking into account the appellant's genuine and deep remorse and his full acceptance of responsibility, a non-parole period of 10 years was substituted ([30]).

***Burton v R* [2002] TASSC 64 (11 September 2002) – Tasmanian Supreme Court**

'Aggravated burglary' – 'Assault' – 'Damaging property' – 'Emotional and psychological abuse' – 'Exposing children' – 'Impact of offence on victim' – 'Manifestly excessive' – 'Physical violence and harm' – 'Risk factor - separation' – 'Sentencing' – 'Unlawful assault causing bodily harm'

Charges: Assault (2 counts), Aggravated burglary with intent to commit murder or assault

Appeal type: Appeal against sentence

Facts: The male appellant and the female complainant resided in a de facto relationship between May 2001 and 20 July 2001. The complainant had a six month old child. However, in July, the complainant informed the appellant she wanted to end the relationship. She went to live with her mother. On the morning of 29 July, the

appellant smashed a window to enter the complainant's mother's flat, holding a large knife (count 1). He yelled, 'where is the fucking slut' and 'where is she'. He entered the complainant's bedroom, where she was sleeping with her child, shouting that he was going to kill her. The appellant dragged the complainant by her hair to the kitchen and started to cut her neck. She grabbed the blade of the knife and it snapped (count 2 and 3). The appellant dragged her outside the house (count 4) before calming down. The complainant sustained a superficial laceration to her neck and ongoing psychological injury.

The appellant was found guilty of assault at a first trial (count 4). At a second trial, he was found guilty of aggravated burglary (count 1) and assault (count 3). The assault subject of count 3 was framed as an alternative to counts alleging the commission of the crimes of attempted murder and committing an act intended to cause bodily harm (wounding). He was sentenced to three years and six months' imprisonment for the offences subject of the second trial. In respect of the assault, he was sentenced to three months' imprisonment cumulative on the first sentence.

Issue: One of the grounds of appeal was whether the sentence of three years and six months' imprisonment was manifestly excessive.

Decision and Reasoning: The appeal was allowed by all judges but with separate reasoning provided. Crawford J (with whom Underwood J agreed) held that the sentence of three years and six months was manifestly excessive. The sentence was well outside the range of sentences typically imposed for these types of offences ([20]-[23]). In light of the need for consistency, the sentence was set aside and a sentence of two years and three months' imprisonment was imposed.

Slicer J also found the sentence of three years and six months' imprisonment was manifestly excessive. The circumstances of the offences warranted the sentence namely, this was a case of 'home invasion' and 'domestic violence,' the appellant had prior convictions, he was not entitled to the benefit of a guilty plea, there was no evidence of remorse, and the impact on the complainant was likely to be long standing ([46]-[50]). However, the problem was not with the sentence but with the verdict. It was strange that the jury found that the evidence supported that there had been a 'cutting of the neck' but returned a verdict of not guilty of wounding. Nevertheless, the sentence was constrained by the jury's finding of assault, not wounding. On that basis alone, the sentence was manifestly excessive ([50]-[52]). His Honour agreed with Crawford J that a sentence of two years and six months' imprisonment was appropriate.

***Rice v McDonald* [2000] TASSC 70 (21 June 2000) – Tasmanian Supreme Court**

'Compulsion' – 'Emotional abuse' – 'Expert evidence' – 'Exposing children' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Stealing' – 'Systems abuse' – 'Where the offender is also a victim'

Charges: Stealing, Making a false report to police

Appeal Type: Notice to review conviction

Facts: The applicant and her partner were in a domestic relationship riddled with violence. For a summary of the history of the violence against her, see paragraphs [4]-[10]. The applicant was charged with stealing a television. She entered into an agreement to rent the television under instructions from her partner, who then arranged for the television to be sold to a friend. He instructed the applicant to tell the purchaser that the television came from her sister. After the applicant did not report that the television was stolen to the police, her partner became very angry. As a result of fearing what her partner would do if she defied him, the applicant then reported the television was stolen to the police and the rental company. After the police located the television in the possession of the purchaser, the applicant fully admitted to the crime and protected her partner by providing a false name.

At trial, the applicant gave evidence that she had acted out of fear that she would suffer grievous bodily harm if she did not follow her partner's demands to commit the offences. She alleged that her partner threatened to kill her if she did not accept full responsibility for the crime and provide a false name to police. That is, she established an evidentiary basis for the court to consider compulsion under s 20 of the *Criminal Code 1924 (Tas)* (the Code) and duress at common law. The magistrate found that neither of those defences applied.

Issues:

1. Whether the magistrate erred by applying the provisions of the Code governing criminal responsibility to the charge of making a false report.
2. Whether the magistrate made legal errors in applying the defences of duress and compulsion.
3. Whether the magistrate erred in failing to sufficiently consider the evidence of a psychologist with extensive experience in domestic violence.

Decision and Reasoning: The appeal was upheld in respect of issues 2 and 3.

1. The respondent conceded that this ground was made out. One difference between the common law

defence of compulsion and the statutory defence is that it is not necessary for the person making the threat to be present at the time the offence is committed. The applicant was entitled to the benefit of the common law defence. However, this was not sufficient to overturn the conviction because the magistrate was satisfied that the prosecution proved that the applicant was not acting under duress.

2. The magistrate concluded that the applicant's contention that her partner would 'bash the hell out of me' contained a qualification and because of a slight hesitation in her response, she had not given credible evidence that she was threatened with serious violence. The Court disagreed, holding that given the history of violence, the words 'bash the hell out of me' amounted to a clear threat of serious harm.

   In referring to the requirement of immediacy under s 20 of the Code, the magistrate concluded that her partner's threat would not be carried out immediately because of the presence of the purchaser of the television. The Court disagreed, holding that immediacy does not mean that the threat will be carried out at the time of compliance or refusal, but that it is 'proximate' to the making of the threat. It requires that the person coerced 'believes that such threats will be executed' at the time when the person making the threats is able to carry them out. The magistrate also erred in concluding that the applicant could not have believed the threats could be carried out immediately. Given the history of violence, she was entitled to believe that the threats would be carried out immediately. In relation to seeking the protection of the purchaser, the Court held that this proposition 'defies logic and experience' ([25]). The magistrate did not sufficiently take into account the history of the relationship in determining the conduct said to give rise to compulsion. Her partner had complete domination over her and had assaulted her in a refuge. The false report was made at the direction of her partner in the face of explicit and implicit threats. While she theoretically could have made a complaint to the officer about her partner when she filed the report, the option of applying for a restraining order was not consistent with complying with the threats.

3. The magistrate concluded that the psychologist's evidence did not assist the defence in establishing duress and compulsion. This amounted to an error and the magistrate was required at least to consider the psychologist's evidence and the history of violence in determining whether the applicant acted under duress or compulsion.

Magistrates' Court

Police v H [2021] TASMC 13 (22 December 2021) – Tasmanian Magistrates' Court

'Breach of protection order' – 'Interpretation of order' – 'Separation' – 'Technology facilitated abuse'

Charges: Breach of police family violence order x 3.

Proceedings: Reasons for decision.

Issues: Whether text messages sent by the defendant fell within an exception to the non-contact condition of the police family violence order; the accused's guilt.

Facts: The male defendant and female victim were married for 14 years and had two children. After the couple separated, the defendant was subject to a protection order that prohibited contact with the victim 'except… for the purpose of discussing matters arising out of their relationship including related to their children by… electronic message' [1]. The defendant was charged with breaching the order by sending three text messages to the victim. The messages invited the victim to the defendant's house and made a statement about the parties' relationship and children [28], [32], [36].

Decision and Reasoning: Two of the three messages constituted a breach of the order.

Magistrate Stanton outlined his approach to construing the order: 'the construction of the clause should be what a reasonable person in the circumstances of the person bound by the order would understand the words to mean', while 'considering the context of the exception within the entire order' [8]-[9]. His Honour found that the 'intention of the order [was] to keep the parties physically separate and to prevent communication generally while allowing limited communication' that was for the purpose of discussing matters arising out of their relationship [11], [18]. His Honour found that the text messages that invited the victim to the defendant's house were invitations 'to engage in an activity which would otherwise be prohibited by the order', and 'not solely a discussion about matters arising out of the relationship' [31]. Therefore, these messages breached the order. His Honour found that the statement about the parties' relationship and children, which read: 'You may hate me but I know my kids love me', was sent during a discussion between the parties about matters related to the children and arising out of the relationship [33]-[35]. Therefore, the message fell within the exception and did not breach the order.

***Purton v Purton* [2016] TASMC 9 (19 October 2016) – Tasmanian Magistrates' Court**

'Management of application proceedings' – 'Procedure' – 'Protection orders'

Case type: Directions in relation to application to revoke a Police Family Violence Order ('PFVO').

Facts: The applicant was served with a PFVO. It stated that the Sergeant was satisfied that the applicant had committed a family violence offence but did not explain why the order was made ([9]). The applicant applied to revoke the order ([10]).

Issues: The parties sought directions in relation to the nature of the application to revoke, the manner in which such an order should be made, and which party bears the onus of proof ([29]).

Decision and Reasoning: Magistrate McKee explained the procedure for challenging a PFVO. The application is not an appeal, nor an administrative review ([40]). It is an application for the court to exercise a discretion to revoke a PFVO ([41]).

The onus of proof is on the applicant to satisfy the Court on the balance of probabilities that it is appropriate to revoke the PFVO ([24]). Since the applicant is unaware of the basis upon which the order was made, the respondents (the police) would have to lead evidence to establish that the applicant committed the offence ([50]).

However, if the police applied to revoke or extend the PFVO, the onus of proof would lie on them ([56]).

***McKenna v Smith* [2014] TASMC 11 (27 March 2014) – Tasmanian Magistrates' Court**

'Assault' – 'Breach of domestic violence order' – 'Conditions of orders' – 'Damaging property' – 'Insanity' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Vulnerable - new partner' – 'Wilfully and unlawful destroying or damaging property'

Charges: Damaging property (3 counts), Breach of police family violence order (2 counts), Assault

Facts: At 2.30pm on 14 July 2013, the defendant smashed the windscreen of her former de facto partner's car. Her former partner saw the incident occur and reported it to the police. A short time later, the defendant went to the police station and said she had smashed the windscreen of a car. At 5.45pm, a police officer who had attended the premises of the defendant's former partner, made and served upon the defendant a police family violence order.

In breach of the police family violence order, at 8.00pm, the defendant again went to her former partner's house. She began to abuse her former partner and his current partner. She threatened them both and at one point pushed the current partner of her ex-partner. Before leaving, she smashed the panels of her former partner's car. The incident was reported immediately to police and the defendant was placed under arrest. She resisted arrest, kicking and screaming. This conduct continued at the police station.

The magistrate was satisfied beyond reasonable doubt that the defendant committed the acts.

Issues:

1. Whether the police family violence order was not validly made because:
    - it was not made by a police officer of the rank of sergeant or above; and/or
    - the officer who made the order was not satisfied, or the evidence available to him was not sufficient to satisfy him, that the defendant had committed or was likely to commit a family violence offence.
2. Whether the defendant was not criminally responsible for any of the acts charged having regard to her mental illness and the provisions of s 16 of the *Criminal Code 1924 (Tas)*.

Decision and Reasoning: The magistrate rejected defence counsel's submissions in relation to the first issue (the validity of the family violence protection order) but upheld submissions in relation to the second issue (insanity).

1. The police family violence order was validly made because the police officer was acting in the rank of sergeant at the time the order was made. The magistrate also rejected counsel submissions in relation to the second limb of the argument. These submissions amounted to a collateral challenge to the validity of the police family violence order. A collateral challenge is a challenge to the validity of an order in proceedings where the existence of the order is an element of the offence (not in proceedings to review or set aside the order). The legislation did not permit collateral challenge at least on the basis alleged here i.e. whether the factual basis of the order was sufficient ([26]-[30]). However, even if collateral challenge were available, the ground would not succeed because there was sufficient evidence to support the making of a police family violence order ([19]-[21], [31]).
2. The defendant was not criminally responsible for any of the acts contained in each charge. On the balance of probabilities the defendant was deprived of the capacity of knowing whether the acts that she

performed in respect of each charge were ones that she ought not to do because of her mental illness, i.e. the Bipolar Disorder that resulted in her entering into a hypomanic or manic state. The defendant clearly knew what she was doing but was not able to rationally think about her actions with a moderate degree of sense and composure. This was because of the impact of her mental illness.

***Howe v S* [2013] TASMC 33 (29 July 2013) – Tasmanian Magistrates' Court**

'Breach of domestic violence order' – 'Charge particulars' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Guilty plea - withdrawal' – 'Protection order'

Charge: Breach of a police family violence order (3 counts)

Proceeding: Application for leave to withdraw a plea of guilty in respect of each charge and substitute a plea of not guilty

Facts: On 4 May 2012, a police family violence order was made against the male defendant that included the following order: *'you must not directly or indirectly threaten, harass, abuse or assault J'.* It was alleged that the defendant contravened this order by harassing the female protected person ('J'). The defendant demanded that the protected person spend the night with him. The defendant threatened to take her child away if she refused to do so. In relation to pending family law court proceedings, the defendant also stated, 'if you take this to court, things will get vicious and you know what happens when things get vicious. So it's up to you. Either come and meet me tonight at the house or we will be enemies' (count 1). This conduct also amounted to a breach of s 9 (emotional abuse or intimidation) of the *Family Violence Act 2004* (Tas) (count 3). The police family violence order included an order that, *'you must not approach (J) directly or indirectly threaten, harass, abuse or assault; by telephone, email, facsimile or letter'* [sic]. It was alleged that the defendant contravened this order by approaching the protected person on numerous times by text messages (count 2).

The defendant pleaded guilty because of advice from his lawyer. He obtained new legal representation and they advised him to lodge an application for leave to withdraw the guilty pleas. His counsel submitted that leave ought to be granted because the particulars alleged of the complaint were insufficient, as a matter of law, to support the allegation contained in each charge. It would be a miscarriage of justice to allow the guilty pleas to stand.

Issue: Whether leave should be granted to withdraw the pleas of guilty.

Decision and Reasoning: The application for leave to withdraw the guilty plea was allowed in respect of counts 2 and 3 but refused in respect of count 1. In relation to count 2, a miscarriage of justice would result if the guilty plea was allowed to stand. The particulars of the charge alleged the defendant approached the complainant on numerous undefined occasions by use of text messages. This breached the requirements of the *Justices Act* because the prosecution failed to set out each matter of complaint in separate numbered paragraphs and because the prosecution failed to provide particulars by which to identify the text messages said to constitute breach. The 'rolling up' of charges meant that the defendant had no real understanding as to what approach and which text message/s constituted the offence. It was impossible to determine what exactly he admitted to in the plea of guilty ([17]-[18]).

Leave was also granted in respect of count 3. The magistrate held that 'the mental element required to amount to a breach of s 9 is that the defendant knew or ought to know that the course of conduct in which he was engaging is *"likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in his spouse or partner".* This is not what has been alleged. That he knew or should have known that his conduct was *"likely to have the effect of abusing or intimidating"* his partner, is a different mental element from that referred to in the section' ([23]).

However, the guilty plea was held to stand in relation to count 1. Counsel for the defence submitted that a person could not be 'harassed', as a matter of law, by one act alone. The magistrate concluded that, *'Whilst I accept that the term "harass" as used in the general community could well include an element of persistence or repetition, I see no reason why a person cannot be harassed within the context of a Family Violence Order, by one act alone. This view is in fact consistent with the definition in s.4 of the Family Violence Act of the word "harassing" … The reference in the definition to "any one or more of the following actions" suggests that a single act might be sufficient. Furthermore, it is appropriate, in my view, to interpret the term having regard to the context in which it is used in the order. The reference to "threaten, harass, abuse or assault" suggests that the order is to be understood as providing protection to a person from contact with the respondent which is unwelcome, and might be in various forms or have variable effect'* ([12]-[16]).

***Kerr v Brown* [2013] TASMC 30 (8 July 2013) – Tasmanian Magistrates' Court**

'Breach of domestic violence order' – 'Interpretation of order'

Charge: Breach of family violence order (FVO)

Facts: A family violence order (FVO) was made in favour of the protected person that prohibited the defendant from approaching the protected person directly or indirectly. After the order was made, she phoned the defendant and caught a bus to Hobart where he was residing and commenced residing at his property.

The defendant submitted that he never approached the protected person, notwithstanding the fact that when she approached him, he allowed her to remain living at his home. The prosecutor submitted that the order should be interpreted to mean that the defendant was not permitted to allow the protected person to come into his presence, and that if she did, he must immediately leave her presence.

Issue: Whether the defendant was guilty of the offence charged.

Decision and Reasoning: The charge was dismissed. '*Clearly the intention of the order is to prevent the respondent from coming near or initiating communication with the person to be protected. However, my impression is that police, and perhaps courts, view the condition as a primary mechanism for keeping persons apart in cases where family violence has been alleged or perpetrated, and may well consider the order to have the more extensive effect contended for by the prosecution in this case.'* ([5]). The ordinary meaning of 'approach' in the context of the FVO is that a person should not intentionally contact or bring themselves into the presence of the protected person. The order should be interpreted in a way that it would be understood by persons in the position of the defendant without legal training and of limited education: *'The defendant cannot, in my view, be said to have approached (the protected person) by simply allowing her into the house, even for an extended stay, once she was there. To hold otherwise would be to give the word an extended meaning which is beyond its ordinary common meaning.'*

***Lusted v MRB* [2013] TASMC 9 (19 February 2013) – Tasmanian Magistrates' Court**

'Assault' – 'Coercive control' – 'Emotional abuse' – 'Evidence' – 'Exposing children' – 'Following, harassing and monitoring' – 'Physical violence and harm' – 'Relationship evidence' – 'Risk factor - strangulation' – 'Tendency evidence' – 'Uncooperative witness'

Charge: Assault (6 counts)

Facts: The alleged assaults involved the defendant grabbing, pushing, striking, punching and pinching the complainant. One count involved the defendant grabbing her throat and pinning her against a table. Another involved pushing hot chicken into her face, grabbing hold of her by the chest and pouring cold water over her head ([17]-[28]). The complainant's relationship with the defendant started when she was 15 and lasted for

about 6 years. The prosecution's evidence indicated that the defendant was controlling and violent towards the complainant throughout their relationship. The complainant was socially isolated and the defendant prevented her from contacting friends. He demanded that she wait on him and would strangle and abuse her if she did not comply with his demands. On one occasion, he threw a bottle at her. For further detail of the 'uncharged acts', see paragraphs [8]-[16]. There was one child of the relationship. The infant daughter witnessed two of the assaults.

Issue: Whether the defendant was guilty of the charged offences.

Decision and Reasoning: The charges were dismissed.

The prosecution adduced various circumstantial evidence from other witnesses ([29]-[42]). This included evidence of witnesses who noticed that the complainant had various physical injuries. The prosecution also sought to adduce evidence of the defendant's tendency to engage in violent conduct against the complainant. Magistrate Pearse admitted this evidence on the basis that it had substantial probative value because it could be inferred that the relationship involved violent and controlling behaviour. The danger of unfair prejudice posed by the evidence was low, particularly in circumstances where no jury was involved. The prosecution also sought to adduce relationship evidence relating to uncharged conduct. This evidence was also admitted on the basis that it removed the implausibility of the assault being isolated. It also supported the assertion that the defendant exercised dominance and control and that the complainant feared the defendant.

This case involved serious and prolonged domestic violence. However, the complainant had not been entirely truthful about the relationship and her evidence was inconsistent with her parents'. She had discussed the possibility of ending the relationship with her parents and decided to leave him at the urgings of her mother once her father returned to town. However, on the day she decided to leave the defendant, she decided to return to him because he seemed remorseful and he offered to buy her dinner. As such, given the gravity of the conduct that was the subject of the complaint, the magistrate found it difficult to believe that the fear of what might happen in her father's absence was a plausible explanation for her not leaving him. While the magistrate acknowledged that other explanations such as the fact that she may have become conditioned to such behaviour could be relevant, her account was doubted. There were no photographs, medical reports, phone records or other corroborating evidence. As such, the complaints were not proven beyond reasonable doubt.

The magistrate nonetheless emphasised the widespread scale and seriousness of family violence. '*It is a*

significant social problem, of concern to the community and the justice system. The parliament saw fit to enact legislation, the Family Violence Act 2004, expressly to "provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence". The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage of by perpetrators and further adding to the reluctance of victims to complain.' ([68]).

***K v K* [2012] TASMC 3 (25 January 2012) – Tasmanian Magistrates' Court**

'Emotional and psychological abuse' – 'Interim intervention order' – 'Physical violence and harm' – 'Risk factor - suicide threat'

Proceeding: Application for revocation of an interim family violence order (IFVO)

Facts: A police family violence order was made against the applicant, which prohibited him from threatening, assaulting or approaching his wife. The order was made on the basis that the police officer was satisfied that family violence was likely to be committed. The applicant and his wife had separated. An argument occurred about the contents of their house but the applicant claimed he was not aggressive and did not threaten or abuse the complainant or threaten to harm himself. He claimed that when he was wheeling a motorbike out of the house, she stepped in front of it to prevent him from taking it and the bike struck her legs which caused her to fall. The complainant claimed that when the applicant attended her home to collect belongings, he was volatile and aggressive and threatened to shoot himself with guns kept on their property. She did not specify what words amounted to these threats or abuse. She claimed he pushed the motorbike against her.

Issue: Whether the order should be revoked.

Decisions and Reasoning: The order was revoked.

A police family violence order cannot be issued only on the basis that the officer believes family violence has been committed. Rather, the officer must be satisfied that a family violence offence has been or is likely to be committed. This is because the definition of family violence includes acts that may not amount to a family violence offence within the meaning of the *Family Violence Act 2004* (Tas).

The protected person's evidence was not corroborated. Family breakdowns can be traumatic so each party tends to perceive events influenced by their own interests. The only way an order could be made would be by proving that the applicant engaged in threats, intimidation, verbal abuse or a course of conduct that amounted to emotional abuse and intimidation. Alternatively, an order could have been made if an assault by pushing the motorbike was proven. Such conduct was not proven: '*It is difficult to characterise or define what words may amount to threats, intimidation or abuse. The same words may in some circumstances amount to a threat or abuse when in other circumstances they may not. Much depends on the background and the context. In some circumstances even the most seemingly innocent words may be highly intimidatory. The court should consider whether one of the parties is in a position of disadvantage, either physically, emotionally, intellectually, socially or economically*' ([29]). The applicant was more credible as a witness than the complainant and the complainant would not be in a position of disadvantage in an exchange with her husband. She demonstrated throughout the course of the hearing that she was capable of protecting her own interests and it was unlikely that she would have felt threatened, coerced or intimidated. She also likely prevailed in the arguments about property and she likely overstated her evidence to paint the applicant in the worst light.

***Buxton v Brinckman* [2011] TASMC (21 July 2011) – Tasmanian Magistrates' Court**

'Bail' – 'Bail – interim family violence order' – 'Breach of temporary protection order' – 'Inconsistency' – 'Statutory interpretation'

Charge: Breach of interim family violence order

Proceeding: Reasons for decision

Facts: An interim family violence order (IFVO) was made against the defendant that prohibited him from entering the premises of the protected persons. The defendant was living with his parents. The agreed facts established that one of the protected persons started living at his parents' address as well. In breach of the

order, the defendant continued to live in his parents' house. However, at the relevant time the defendant was on bail. One of the conditions of the bail order was that he was to reside at his parents' house.

The magistrate found that the elements of the offence were proven. The defendant submitted that given that he was obliged to reside at his parents' house by the bail conditions, this relieved him of criminal responsibility for the breach of the IFVO. That is, because the failure to live at his parents' premises would amount to a breach of bail, this should excuse the breach of the IFVO.

Issue: Whether the defendant was guilty of the offence charged.

Decision and Reasoning: While there may be some circumstances where a person might claim a defence of breaching a statutory obligation on the basis that some other law compels the breach, this was not the situation in this case. Section 6 of the *Family Violence Act 2004* (Tas) (the Act) provides that the Act prevails to the extent of any inconsistency with another act. The Court acknowledged that the defendant's parents made it impossible for him to comply with the bail condition without breaching the IFVO. However, the defendant could have applied for a variation of bail. In the interim period before bringing that matter before the court, the breach of bail may have been excused on the grounds of 'reasonable cause'. As such, he was not relieved of criminal responsibility for breaching the IFVO.

Victoria

Court of Appeal

***Morey (a pseudonym) v The King* [2023] VSCA 153 (23 June 2023) – Victorian Court of Appeal**

'Application for leave to appeal against conviction' – 'Application for leave to appeal against sentence' – 'Evidence' – 'Manifest excess' – 'Open to jury to convict' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual assault' – 'Significant probative value' – 'Strangulation' – 'Tendency evidence' – 'Theft' – 'Whether convictions were unreasonable and unsupported by evidence' – 'Whether probative value of tendency evidence substantially outweighed prejudicial effect'

Charges: Rape x 3; Common assault x 1; Theft of motor vehicle x 1.

Proceedings: Application for leave to appeal against both conviction and sentence.

Facts: Following conviction at trial the male applicant was sentenced to 12 years and 4 months, with a non-parole period of 8 years. The trial judge allowed the prosecution's pre-trial application to adduce tendency evidence to demonstrate the applicant to engaged in a pattern of threats of violence to compel the complainant's compliance. The prosecution's pre-trial tendency notice (s97(1)(a) *Evidence Act 2008* (Vic)) noted their intention to rely on the tendency of the applicant to:

- Act in a particular way, namely:
  - (a) To threaten to assault, or cause harm to [the complainant], if she did not comply with his demands.
  - (b) To threaten to kill [the complainant], or members of her family, if she did not comply with his demands.
  - (c) To assault [the complainant] in order to compel her to comply with his demands. [26]
- Have a particular state of mind, namely:
  - (a) A belief that [the complainant] would do as he demanded if he threatened to assault, or cause harm, to her.

(b) A belief that [the complainant] would do as he demanded if he threatened to kill her or members of her family.

(c) A belief that [the complainant] would do as he demanded if he assaulted, or caused harm to her. [27]

It was asserted that the 'demands' referred to included that the complainant not report his behaviour to police. [28]

Grounds:

Conviction

(1) The convictions are unreasonable or cannot be supported by the evidence; and (3) the judge erred in ruling the tendency evidence admissible, particularised as follows:

(a) The judge erred in finding that the tendency evidence showed the applicant acted in a particular way that was significantly probative of the sexual offences on indictment.

(b) The judge erred in finding that the tendency evidence showed the applicant had a particular state of mind that was significantly probative of the sexual offences on indictment.

(c) The judge erred in finding that the 2017 threats of dumping the complainant in a shit dam was significantly probative of the offences of rape.

(d) The judge erred in finding that the 2018 SMS messages of threats made by the applicant in the context of frustration regarding a friend's marriage breakup were significantly probative of the offences of rape.

(e) The judge erred in finding the 2017 and 2018 threats as not unfairly prejudicial.

(f) The judge erred in finding the 2017 and 2018 threats was not a generalised assertion of general bad character.

(g) The judge erred in finding the 2017 and 2018 threats was probative of committing the rapes with the requisite intent.

Sentence

1. The judge erred in characterising of the objective gravity of his offending as 'serious';

2. the judge erred in applying the standard sentencing regime;
3. the judge erred in finding that offending in 2018 was a relevant sentencing consideration in respect of the rape charges; and
4. the sentence is manifestly excessive.

Reasoning and decision: Leave to appeal granted, appeal was allowed on conviction ground 2 and the applicant's conviction and sentences on charges 5 to 8 will be set aside, retrial ordered.

Beach JA, Forrest JA and Kaye JA refused leave to appeal on conviction ground 1.

Conviction ground 1: Nothing in the evidence relied upon by the applicant required the jury to have a reasonable doubt about the guilt of the applicant on charges 5, 6, 7 and 8 [24].

Conviction ground 3: The court held the prosecution tendency evidence 'barely established the asserted tendency' [47]. The court also identified that charges 5 to 8 did not involve any threat by the applicant [48]. It was held the tendency evidence had no probative value and had a prejudicial effect. It was therefore deemed inadmissible [50].

Sentencing: Due to the court's decision on conviction ground 2, it was not necessary for the court to consider sentencing grounds 1-3. However, the court held that 18 months was for the theft of the complainant's vehicle was manifestly excessive [54]. The sentence was reduced to 1 month of imprisonment [55].

***Giudice v The King* [2023] VSCA 105 (8 May 2023) – Victorian Court of Appeal**

'Adverse effect of imprisonment on mental health' – 'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Damaging property' – 'Denunciation' – 'Deterrence' – 'Extensive criminal history' – 'Intentionally causing serious injury' – 'Just punishment' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Serious consequences for victims' – 'Strangulation'

Charges: Damaging property x 2; Intentionally causing serious injury x 1; Contravention of family violence intervention order x 2.

Proceedings: Application for leave to appeal against sentence.

Facts: The male offender entered his female former partner's bedroom and repeatedly punched her in the face, stomach and head before strangling her until she could not breathe [3]-[5]. The offender then went to

the victim's parent's home and damaged the complainant's car. The offender pleaded guilty to charges of damaging property, intentionally causing serious injury and contravention of protection orders [10].

The offender had an extensive criminal history, commencing in 2011, including offences of violence against other women he had shared relationships with. The seriousness of offending had escalated, and the offender had persistently breached previous community correction orders.

The offender had suffered significant trauma throughout his life and had a diagnosis of borderline personality disorder, post-traumatic stress disorder and major depressive disorder [21].

In the County Court, Dean J held that the offender's borderline personality disorder did not moderate his moral culpability, as he had not taken any steps to address his mental health despite numerous acts of serious violence since 2011 [18]. The offender was sentenced to 8 years, with a non-parole period of 5 years 6 months [10].

Grounds: The sentencing judge failed to give appropriate weight to the adverse effect of an excessive term of imprisonment on the applicant's mental health, particularly given the offender's history of self-harming in prison.

Decision and reasoning: Ferguson CJ, Emerton P and Osborn JA refused the application for leave to appeal.

A psychological report stated the offender required ongoing treatment, which he was receiving in prison. The report confirmed that the offender's mental health was not being exacerbated in prison. The offender was free from stressors, such as alcohol, and was not self-harming [34]-[35].

It was held that Dean J appropriately balanced the requirement to protect the community from the offender per s 6D of the *Sentencing Act 1991* and the adverse effects of imprisonment on the applicant's mental health during sentencing [37].

***Rowan (a pseudonym) v The King* [2022] VSCA 236 (28 October 2022) – Victorian Court of Appeal**

'Appeal against conviction' – 'Battered wife syndrome' – 'Bestiality' – 'Common law duress' – 'Continuing or ever-present threats sufficient' – 'Criminal law' – 'Defence of duress' – 'Duress of circumstances' – 'Expert evidence' – 'Incest' – 'Indecent act with child under 16' – 'Inferred threat' – 'People with an intellectual disability' – 'People with mental illness' – 'Post-traumatic stress disorder' – 'Psychologist evidence' – 'Rape' – 'Relationship evidence' –

'Sexual abuse' – 'Specific, overt threat' – 'Threat by implication' – 'Threat of physical and sexual abuse' – 'Victim as (alleged) perpetrator'

Note: a Crown special leave application to appeal to the High Court of Australia was granted on 16 June 2023 and the matter has been listed for hearing in October 2023. The Crown argues that the Court of Appeal "committed an error in principle by extending the law of duress as it applies to both common law and by operation of statute, to cover what is known as duress of circumstances".

Charges: Incest x 11; indecent act with a child under 16 x 1.

Proceedings: Application for leave to appeal against conviction and sentence.

Facts: The applicant was convicted following trial of 11 counts of incest (s 44(1) and one count of indecent act with a child under 16 (s 47(1)) contrary to the *Crimes Act 1958* (Vic). Her partner, JR, was the father of the two complainant daughters and had previously been convicted of sexual offences against them. At the applicant's trial it was argued that JR had directed the applicant to commit the offences, and she had complied due to an ever-present threat of physical and sexual violence by JR if she did not do what he demanded of her. It was submitted that this constituted duress. The judge, however, ruled that this did not constitute duress, as duress required there to have been a specific or overt threat, not just an ever-present threat. Consequently, duress was not left to the jury and the applicant was convicted of the offences on the basis that she was present and encouraged the daughters to comply with his abuse.

The applicant and JR's relationship commenced when the appellant was 18 years old. They lived on a rural property owned by JR's father and had 4 children. The applicant had a mild intellectual disability and was financially and socially dependent on JR. There was evidence that JR was physically, emotionally and sexually violent to the applicant, he isolated her on the farm, was highly controlling of her movements and had a bad temper. The prosecution accepted that JR's violence towards the applicant was 'severe' [57]. It was reported that the applicant had tried to leave in the past but had returned because she 'would struggle with the kids' and that she had not reported the violence to the police because 'noone would believe her because she was nothing.' [107] A psychologist gave evidence that the applicant suffered from learned helplessness and low self-esteem characteristic of 'battered women's syndrome', a subset of post-traumatic stress disorder. The applicant's counsel submitted that 'JR's conduct created and maintained a serious, standing threat of significant, ongoing harm, namely, angry subjection to the domineering, violent, rape-embracing regime of life imposed by a brute upon a traumatised, vulnerable person. Under that regime, refusal was said

to always have its consequences and this had the effect of overbearing the applicant's will so that she always submitted to the will of JR.' [132]

Grounds: The trial judge erred in ruling that the defence of duress was not open on the evidence and thereby caused a substantial miscarriage of justice.

Decision and Reasoning: Leave to appeal granted; appeal against conviction upheld; new trial ordered; unnecessary to consider appeal against sentence.

Kyrou & McLeish JJA:

Their Honours found there was 'considerable overlap' in the elements of each form of the defence [188].

They made the following remarks regarding element (i) of common law duress in the context of the case:

[155] We accept that no previous case has expressly accepted the proposition that a continuing or ever present threat — whether overt or tacit — as distinct from a specific, overt threat, is sufficient. However, no case has expressly considered that proposition and rejected it. …. Further, the analysis of the Full Court of the Supreme Court of South Australia in *Runjanjic* [(1992) 56 SASR 114] is consistent with the proposition that a continuing or ever present threat may be sufficient.

[156] In our opinion, a continuing or ever present threat which is subsisting at the time an accused committed the charged offence can suffice if, in all other respects, the defence of duress can be made out. We cannot think of any reason in principle or policy that requires exclusion of a continuing or ever present threat where, due to the threat, the accused has lost his or her freedom to choose to refrain from committing the charged offence. In this context, it is relevant to note the additional limiting factors identified in element (iii) [common law duress above] which requires that the threat be present and continuing, imminent and impending at the time each offence is committed.

[169] Having regard to the above features of the relationship between JR and the applicant … it would have been open to the jury to conclude that it was reasonably possible that the applicant understood that there was a continuing or ever present threat of physical and sexual violence (including rape) by JR if she did not do what he demanded of her. If the jury reached this conclusion, it would have been open to them to find that it was reasonably possible that, when JR requested the applicant to be involved in each of the sexual offences against the complainants, she understood that, if she did not comply, he would physically and sexually harm her, including by raping her.

[174] We are also of the opinion that it is not fatal in this case that there is no direct evidence that JR told the applicant shortly prior to each offence that, unless she performed the acts that constitute each of the charged offences, he would physically and sexually abuse her. That is because it would be open to the jury to infer that this was a reasonable possibility based upon the history of the relationship between JR and the applicant as set out in the …[evidence].

Their Honours made the following remarks regarding element (ii) of common law duress in the context of the case:

[180] A person of 'ordinary firmness of mind' in the present case would be a female domestic partner of JR who was of the applicant's age and who has lived with JR in the same circumstances as the applicant and has endured the physical and sexual abuse that she has experienced. That person would also have the same isolated lifestyle as the applicant and possess her knowledge of JR's personality and behaviour. However, that person would not have the applicant's history of sexual abuse as an adolescent or her mild intellectual disability.

There was evidence that the AR suffered 'battered woman syndrome':

[181] In our opinion, upon the basis of the [evidence], it would have been open to the jury to conclude that there was a reasonable possibility that a person of ordinary firmness of mind having the characteristics described… above would have been likely to:

(a) develop a battered woman syndrome with the consequence of learned helplessness, and yield to JR's continuing or ever present threat in the way the applicant did; and

(b) not seek to escape the situation.

Their Honours then briefly considered elements (iv), (v), (vii) and (viii) of Common Law duress in turn but did not consider element (vi) because the accused was not charged with murder, or any other crime excepted from common law duress:

[184] In relation to element (iv), the jury could find that there was a reasonable possibility that the applicant reasonably apprehended that the threat would be carried out based upon JR's history of punishing her if she sought to disobey him.

[185] In relation to element (v), the jury could find that there was a reasonable possibility that the applicant

was induced by the continuing or ever present threat to commit the charged offences based upon our previous analysis regarding her will being overborne by that threat.

[186] In relation to element (vii), the jury could find that there was a reasonable possibility that the applicant did not, by fault on her part when free from the duress, expose herself to its application. That is because the threat was a continuing or ever present threat and the jury could conclude that there was a reasonable possibility that the applicant was not free of the threat at any time during the period of the offending.

[187] In relation to element (viii), the jury could find that there was a reasonable possibility that the applicant did not have the means, with safety to herself, of preventing the execution of the threat. That is because the jury could conclude that there was a reasonable possibility that the applicant's battered woman syndrome rendered her incapable of escaping from her abusive relationship with JR.

McLeish JA agreed with the reasons given by Kyrou and Niall JJA in respect of elements of the defence of duress' both under common law and under 32O.' [228] McLeish JA also observed:

[208] It is not necessary that the threat which underpins a defence of duress be the subject of direct evidence of the accused. There is no reason in principle why the requisite threat might not be found by a process of inference from other evidence. That inference may, in principle, be drawn from evidence about an ongoing course of conduct. The threat may also be conveyed to the accused by implication rather than express words. Naturally, the defence may very well be weaker in the absence of direct evidence from the accused; but that is not the only way it may be raised.

***Shiryar v The Queen* [2022] VSCA 96 (25 May 2022) – Victorian Court of Appeal**

'Appeal against sentence' – 'Attempt to pervert course of justice' – 'Extensive criminal history' – 'History of domestic and family violence' – 'Manifest excess' – 'People with mental illness' – 'Persistent contravention of protection order' – 'Separation' – 'Stalking' – 'Threat to kill' – 'Use of third party'

Charges: 1 x attempting to pervert the course of justice; 1 x persistently contravening a family violence intervention order.

Case type: Application for leave to appeal.

Facts: The applicant pleaded guilty to one charge of attempting to pervert the course of justice and one charge of persistently contravening a family violence intervention order. These offences were committed

whilst the applicant was on remand for separate charges (to which he also pleaded guilty): two charges of criminal damage, one charge of stalking, one charge of making a threat to kill, and two charges of committing an indictable offence while on bail. The charge of stalking related to the applicant's former partner, ES. The charge of making a threat to kill related to her father.

The applicant's relationship with ES ended shortly before the offending. An interim family violence intervention order was made against the applicant. Whilst on remand for the initial offending, the applicant instructed someone to phone ES to ask that she and her father drop the charges against him, and to tell her that if the charges were dropped, he would give her a car that had been the subject of a dispute between him and her family. The sentencing judge imposed a head sentence of 2 years and 6 months imprisonment for attempting to pervert the course of justice.

Issue: Whether the sentence was manifestly excessive?

Held: The Court refused leave to appeal. The applicant had an extensive criminal history, which predominately involved contravening family violence intervention orders and breaching bail. The sentencing judge viewed the applicant's convictions on the initial offending as relevant to the present offending, because the present offending occurred shortly after the applicant was remanded in custody and informed the applicant's prospects of rehabilitation ([19]). The sentencing judge took into account, *inter alia,* the applicant's early guilty plea, mental health difficulties, apparent insight into the offending and support from his family. The offending was described as "premeditated, repeated and persistent, involved enlisting others, and employed veiled threats and inducements" ([25]).

The Court of Appeal found that any attempt to pervert the course of justice is to be denounced, and that, within a family violence context, it is a very serious matter ([38]).

***Frecker v The Queen* [2021] VSCA 331 (2 December 2021) – Victorian Court of Appeal**

'Appeal against sentence' – 'Breach of protection order' – 'Common assault' – 'Following, harassing and monitoring' – 'No prior convictions' – 'People affected by substance misuse' – 'People with mental illness' – 'Sentencing appeal'

Charges: Common law assault x 2, intentionally damage property x 1, intentionally cause serious injury x 1, persistent contravention of family violence intervention order x 1.

Proceedings: Appeal against sentence.

Facts: The 23-year-old appellant received a sentence of 6 years' imprisonment with a non-parole period of 3 years and 8 months, and a 2-year alcohol exclusion order after pleading guilty to offences perpetrated against two of his former female partners. The appellant repeatedly punched and pushed each victim on several occasions, often after consuming alcohol [7]-[11]. On one occasion, the appellant repeatedly punched the second victim's face and neck, which fractured her jaw and seriously injured her left eye [12]-[26]. The appellant persistently contravened a protection order by repeatedly contacting the second victim while she was in hospital, and parking near her house ([28-35]). The appellant had been diagnosed with depression, anxiety and alcohol use disorder, had no prior criminal history, was employed and supported by his family [42]-[45].

Grounds:

The sentencing judge erred in failing to consider:

1. As a form of additional punishment, the alcohol exclusion order imposed upon the appellant.
2. The appellant's youth at the time of the offending.

Decision and Reasoning: Appeal dismissed.

Kyrou and T Forrest JJA dismissed both grounds of appeal. '[T]he judge did not err by failing to explain in his sentencing remarks how any punitive elements of the AEO informed the exercise of his sentencing discretion… because defence counsel did not submit that the AEO had an additional punitive impact upon the appellant which warranted discrete moderation in his sentence' [76]. Furthermore, the j sentencing judge remarked on the applicant's youthfulness as a relevant sentencing consideration, especially in relation to his 'very positive' prospects of rehabilitation [92]while noting the appellant was at the 'upper end of youthfulness', and his offending was of a 'particularly egregious nature' such that the judge appropriately gave more weight to the sentencing considerations of community protection, denunciation, specific deterrence and just punishment [94]).

***Dunford v The Queen* [2021] VSCA 304 (9 November 2021) – Victorian Court of Appeal**

'Appeal against sentence' – 'Attempt to control using extended family' – 'Coercive control' – 'Controlling behaviour' – 'Covid 19 pandemic' – 'Exposing children to domestic and family violence' – 'History of drug and alcohol abuse' – 'Past domestic and family violence' – 'People with mental illness' – 'Step-child' – 'Strangulation' – 'Threats to kill'

Charges: intentionally cause injury x 1; false imprisonment x 2; make threat to kill x 1.

Proceedings: appeal against sentence.

Facts: The applicant pleaded guilty to the charges and received a total effective sentence of 4 years and 9 months ([1]). The sentencing judge reduced the applicant's sentence by 9 months due to his guilty plea because it showed remorse and saved the Court's time ([19]-[20]).

The female victim and male applicant did not reside together. In January 2020, the applicant assaulted the victim in the presence of her nine-year old daughter The applicant punched, kicked and strangled the victim, threatening to kill her or her daughter whenever they attempted to leave, for approximately 2.5 hours ([3]-[6]). While in custody, the applicant told family members to persuade the victim not to cooperate with police and to accuse her of 'just keeping him away from the kids' ([12]). The applicant suffered from a mental health condition and had a history of alcohol abuse ([16]-[17]) and family violence offending([15]).

Grounds: The individual sentences, orders for cumulation, total effective sentence and non-parole period were each manifestly excessive.

Decision and Reasoning: Beach JA dismissed the appeal ([45]). His Honour affirmed her Honour's description of the applicant's behaviour as 'a protracted ordeal of violence… threats and control… that did not cease upon the applicant being remanded into custody' ([25]). His Honour accepted that the applicant's plea of guilty during the COVID-19 pandemic entitled him to a 'more pronounced amelioration of sentence' as in *Worboyes v The Queen* [2021] VSCA 169 (18 June 2021) ([43]). Honour found that the individual sentences could only be described as 'modest' ([38]), and the non-parole period as 'very moderate' ([39]), due to the objective seriousness of each offence. In his Honour's view, '[t]he imprisoning of the victim and her daughter, resulting in the victim's daughter witnessing the acts of violence perpetrated by the applicant against her mother, was undoubtedly very serious offending. Any submission to the contrary is not reasonably arguable.' ([38]).

***Newton v The Queen* [2021] VSCA 207 (29 July 2021) – Victorian Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Breach of protection order' – 'Exposing children to domestic and family violence' – 'Extensive criminal history' – 'History of family violence' – 'People affected by substance abuse' – 'People affected by trauma' – 'People with mental illness' – 'Sentencing appeal' – 'Strangulation' – 'Threats to kill' – 'Verdins principles'

Charges: Persistent contravention of a family violence safety notice, aggravated burglary, intentionally causing injury x 2, making threat to kill, damage property, making threat to inflict serious injury.

Proceedings: Appeal against sentence.

Grounds:

1. The orders for cumulation breached the principle of totality and produced a total effective sentence that was manifestly excessive.
2. The learned sentencing judge was wrong not to find that:
   (a) The Appellant's anti-social personality disorder and clinical depression meant his sentence of imprisonment would weigh more heavily on him compared to a person in normal health; and
   (b) Imprisonment would have a significant adverse effect on the Appellant's mental health [5].

Facts: The 35-year-old male appellant received a sentence of 9 years imprisonment, with a non-parole period of 6 years and 4 months, after pleading guilty to offences perpetrated against his 28-year-old former female partner. The couple had been in a 'volatile' relationship for three years, and shared a 2-year-old son [6]. The appellant made threats to kill or injure the victim via text for several days before forcing entry into her home. Armed with a kitchen knife, the appellant made several 'chilling' threats to kill the victim, before punching, strangling, and eventually pushing her head through a plaster wall. The appellant's conduct constituted persistent breaches of a family violence safety notice and occurred in the presence of a child [6]. The applicant had a 'significant criminal record', and had been diagnosed with a substance abuse disorder, depression, anxiety, and mild psychosis [9],[12]. The appellant identified as Aboriginal [11].

Decision and Reasoning: Appeal allowed, appellant resentenced to 6 years and 6 months' imprisonment with a non-parole period of 4 years and 6 months' imprisonment. The appellant's psychological assessment stated that *R v Verdins* [2007] VSCA 102 'may' apply [43] and on this basis, the appellant's legal counsel had not raised *Verdins* at the plea hearing. Niall JJA (Priest JA concurring) found that this reasoning, which was incorrect, had led the sentencing Judge into a specific error that vitiated the sentence [46]. His Honour stated that 'whether any of the *Verdins* principles' apply 'to mitigate sentence' is 'a matter for the judge to determine on the basis of the evidence' [44].

In resentencing, Their Honours found that psychological evidence of the appellant's 'impaired mental

functioning and his deprived and violent upbringing' reduced his moral culpability and required consideration of whether incarceration would be more onerous [31]. The appellant's substance abuse severely compromised his judgment and capacity to control his behaviour [27] and was caused by 'childhood trauma', which had also impacted on his 'development of empathy and distinction between right and wrong' [28], and had arisen 'through no fault of his own' [61]. Their Honour's noted that the appellant's conduct had 'escalated over a number of days, giving him an opportunity to desist which he failed to take'. However, it was accepted that the appellant's ability to regulate his behaviour was significantly impaired [60].

***Baker (a pseudonym) v The Queen* [2021] VSCA 158 (9 June 2021) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Attempt to pervert the court of justice' – 'Coercive control' – 'Emotional and psychological abuse' – 'Guilty plea' – 'History of domestic and family violence' – 'Intellectual impairment' – 'Manifest excess' – 'People affected by drugs or alcohol' – 'People affected by trauma' – 'People with illness or impairment' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Threat of image abuse' – 'Threat of suicide'

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant pleaded guilty to 14 charges arising out of abuse of his female domestic partner over a period of 18 months. He sought leave to appeal in relation to charges 5, causing injury recklessly, and 8, attempting to pervert the course of justice.

Charge 5 related to causing injury by pushing the victim's face into a pot of boiling water, following which he did not call an ambulance and instructed the victim to conceal his role in her injuries and return home the same day, not remaining in hospital for treatment. There was dispute as to whether permanent injury was caused. The offending was in breach of a protection order, occurred after earlier offending against the same victim and when the applicant had only just been released from prison. Charge 8 related to sending a large number of text messages to the victim demanding the withdrawal of charges against him, threatening variously to keep their stillborn child's ashes and urn from her, distribute intimate images of her and commit suicide stating it would be her fault if he did so.

The applicant had a history of prior violent offending (having only just been released from jail) including against the victim, had intellectual impairment, a traumatic upbringing and was abusing methylamphetamine at the time of the offending. It took place in the context of a history of violence, manipulation and coercion

against the victim and sought to exploit her emotional and psychological vulnerability by threatening her ability to access the ashes of her stillborn child and also threatening her dignity and right to privacy with the exposure of intimate images.

Grounds:

Ground 1: The sentence imposed on indictment charge 5 is manifestly excessive in all the circumstances.

Ground 2: The sentence imposed on indictment charge 8 is manifestly excessive in all the circumstances.

Ground 3: The cumulation order fixed in respect of charge 8 is manifestly excessive in all the circumstances.

Held: leave to appeal refused.

Ground 1: The court held that notwithstanding the mitigating factors raised by the applicant which ought to be taken into account, this was horrific violence inflicted on a woman by her domestic partner in her own home. The offending was at the upper end of the range with a maximum penalty of 5 years imprisonment, and 3 years was within the appropriate range:

> In all the circumstances, the infliction of such horrific violence against a woman at the hands of her domestic partner in their own home called for denunciation, just punishment and general deterrence, especially in the context of persistent defiance of a family violence intervention order and bearing in mind the applicant's criminal history. In that context, specific deterrence also remained a relevant consideration. We accept that the mitigating features to which the applicant referred were matters of weight that fell to be taken into account, as we have discussed. However, even when that is done, we are unable to conclude that the sentence was outside the range available to the sentencing judge. To the contrary, bearing in mind that this was an offence at the upper end of the range, punishable by a maximum term of 5 years' imprisonment, a sentence of 3 years on a guilty plea was well open. [32]

Ground 2: While at the lower end of the scale for attempting to pervert the course of justice, any attempt to pervert the course of justice is serious and should be denounced. The offending occurred in the context of violence, manipulation and coercion of the victim, with "especially unpleasant features of seeking to exploit Ms Anderson's emotional and psychological vulnerability by threatening her ability to access the ashes of her stillborn child and also threatening her dignity and right to privacy with the exposure of intimate images." [36]

Ground 3: The applicant's submission that accumulation of 12 months of the charge 8 sentence on the

balance of the sentences failed to accord with the principles of totality and was therefore manifestly excessive was dismissed:

> An attempt by a perpetrator of family violence to prevent a victim from seeking the full protection of the law and their physical and emotional safety is a very serious matter which calls for general deterrence and denunciation…[37]
>
> Charge 8 involved repeated attempts by the applicant to conceal his wrongdoing over the previous 18 months, by means of emotional and physical threats directed at Ms Anderson. It was distinct offending that called for significant additional punishment. [40]

***Mercer (a pseudonym) v The Queen* [2021] VSCA 132 (14 May 2021) – Victorian Court of Appeal**

'Application for extension of time within which to file application for leave to appeal against conviction and sentence' – 'Attempting to pervert the course of justice' – 'Coercive control' – 'Emotional and psychological abuse' – 'False imprisonment'

Charges: False imprisonment x 1; Attempt to pervert the course of justice x 1; Persistent contravention of a family violence intervention order (FVIO) x 1.

Proceedings: Application for extension of time within which to file application for leave to appeal against conviction and sentence.

Facts: The male applicant was charged with 5 offences against his de facto female partner (the complainant). The applicant instructed her to drop the charges over telephone calls while remanded in custody. At trial, she gave evidence unfavourable to the prosecution case, recanting statements previously made to police, and giving evidence that the applicant had neither imprisoned nor assaulted her. The judge gave the prosecution leave to cross-examine the complainant about prior inconsistent statements she had made and in relation to her evidence on charges 1-4. The applicant was sentenced to a total effective sentence of 5 years and 3 months imprisonment, with a non-parole period of 3 years and 9 months.

Grounds of appeal:

1. The trial judge should not have given any direction on incriminating conduct as: (a) The prosecutor did not rely on the relevant phone calls as incriminating conduct in his final address; and (b) Using phone calls as evidence of incriminating conduct involved the jury engaging in impermissible 'bootstraps'

reasoning.

2. The sentence imposed on the charge of attempting to pervert the course of justice, the total effective sentence and the non-parole period was manifestly excessive.

Held: Application for extension of time within which to file application for leave to appeal against conviction and sentence dismissed.

Re conviction:

Re Ground 1(a), it was difficult to see how there was any miscarriage of justice in the judge giving a direction under s 21. If defence counsel had raised the prosecutor's failure to address the incriminating conduct, the judge would have granted the prosecutor leave to address the jury further and given the same direction.

Re Ground 1(b), it was well open to the jury to conclude beyond reasonable doubt that the applicant was attempting to persuade the complainant to lie in the relevant phone conversations. There was no issue that the applicant told the complainant:

- she should tell the police that she was not in her right state of mind when she made the allegations and that she wished to drop the charges;
- he would pay for a lawyer to make a statutory declaration for her, in which she would state that she was not in her right mind when she made her statement and could not remember making the allegations against him; and
- she should not talk on the phone about him assaulting her, as the calls between them were being recorded.

These words were not neutral as to the applicant's guilt or otherwise of the offending. Nothing he said suggested that the complainant's allegations were false or that the alleged events had not taken place. On the contrary, it was open to the jury to view the statements as demonstrating his belief that he was guilty.

Re sentence:

The court made the following observations relevant to coercive control at [65]:

> In our view, the applicant's persistent and cynical assertion of control over the complainant, and his exploitation of her known vulnerabilities, made this case just as serious as if there had been explicit threats or actual violence. The transcripts of the calls make plain his exertion of coercive psychological

> pressure on her, encouraging her to think that they can 'work things out' between them and asking questions like 'Do you want me to get out or not?' The fact that the conduct about which he was asking her to lie involved his own criminal violence against her was a further aggravating feature. In our view, the applicant's moral culpability for this offence was high.

The sentence could not be said to be manifestly excessive including in light of: the applicant's high moral culpability, not guilty plea, seriousness of the offending, significant prior criminal history, and the importance of general and specific deterrence.

Re delay:

The lack of an adequate explanation for months of delay was unsatisfactory. It provided further basis upon which to refuse the extension of time applications.

***Hardwick (a pseudonym) v The Queen* [2021] VSCA 67 (19 March 2021) – Victorian Court of Appeal**

'Aggravated burglary' – 'Appeal against sentence' – 'Common assault' – 'False imprisonment' – 'Manifest excess' – 'Protection order' – 'Separation' – 'Threat to kill'

Charges: False imprisonment x 1; Common assault x 1; Aggravated burglary x 1; Making a threat to kill x 1.

Proceedings: Appeal against sentence.

Facts: The appellant man pleaded guilty to offences committed against his wife following their separation. The appellant waited until she returned home, restrained her (including using cable ties), prevented her from escaping, and threatened to kill her. The wife managed to escape. The appellant pleaded guilty and was sentenced to a total effective sentence of 4 years and 6 months' imprisonment, with a 3 year non-parole period. He had also breached an order protecting his wife on numerous previous occasions.

Grounds of appeal: The sentence was manifestly excessive.

Held: Appeal was dismissed but noting that the sentence was "very stern" and "at the uppermost extremity of the appropriate range."

The sentence for the aggravated burglary charge was not manifestly excessive. Previous decisions reinforced "the seriousness with which the courts view aggravated burglaries" and identify typical matters that might aggravate a particular instance of the offence. While the offending was not "an act of extreme domestic

violence," as characterised by the sentencing judge, overall the offending was serious. The sentencing judge was entitled to have significant reservations regarding the appellant's remorse and insight which underpinned the importance of specific deterrence. General deterrence was also important in the context of family violence.

The sentences for false imprisonment and threat to kill were also not manifestly excessive. In particular, "[t]he false imprisonment extended over a period of time and involved physical restraint. The imprisonment in her own home, in the context of family violence would have been extremely distressing to the victim. It deserves powerful denunciation. Equally, the threat to kill was serious. The threat was made in circumstances where the appellant told his victim that he was concealing things 'that you don't want to see'. The whole incident did not have an obvious end point and the appellant's behaviour would have instilled a substantial sense of dread and fear." The degree of cumulation was also not manifestly excessive.

***Packard (a pseudonym) v The Queen* [2021] VSCA 56 (15 March 2021) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Forgiveness of victim' – 'Intentionally cause serious injury' – 'Lack of history of domestic violence' – 'Listening to Victims' – 'Mercy' – 'Separation' – 'Weapons and threats to kill'

Charges: Intentionally causing serious injury x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male applicant pleaded guilty to stabbing his wife 5 times. There was no prior history of domestic and family violence. He was sentenced to a total effective sentence of 7 years' imprisonment, with a non-parole period of 4 years and 6 months.

Grounds of appeal:

1. The sentencing judge erred in failing to take into account the victim's full recovery.
2. The sentencing judge erred in treating the victim's forgiveness with extreme caution, and having regard to it only insofar as it boded well for the applicant's rehabilitation, rather than also taking it into account in assessing the impact upon the victim and in considering the application of the principle of mercy. In particular:
   (a) Her Honour took into account irrelevant considerations namely forgiveness of a victim is often attributable to a pattern of behaviour on the part of perpetrators of family violence and her family

had “persuaded” her to forgive the applicant.

(b) Her Honour failed to take into account relevant considerations which indicated that the victim’s forgiveness was genuine/informed.

(c) Her Honour’s conclusion was not reasonable open.

(d) The applicant was denied procedural fairness.

3. The sentence was manifestly excessive in light of all the relevant matters, including that the applicant called emergency services, his confessions, his very early guilty plea, his lack of relevant prior convictions, his lack of history of violence, and the fact that he was of no risk of reoffending.

Held: Application for leave to appeal dismissed.

Ground 1: It was fortunate that the victim had made a good physical and emotional recovery but this did not negate that this was a serious example of the offence causing serious injury. The applicant’s moral culpability was also high.

Ground 2: Counsel for the applicant was plainly on notice that the judge was minded to apply the principles regarding victims’ forgiveness stated by Neave JA in *R v Hester* at [27]. It was not open to argue he was denied procedural fairness.

It could not be reasonably maintained that the judge erred in failing to extend “mercy” to the applicant. This was a serious instance of intentionally causing serious injury, noting “[i]t would be most difficult to comprehend how mercy can be properly extended in a case in which a man has overpowered his wife in her home, and proceeded to violently stab her five times with a knife, thereby penetrating her vital organs and putting her life at risk” at [45].

While it seemed the sentencing judge incorrectly inferred that the victim had been persuaded by male family members to express forgiveness (with reference to *Hester*), that observation “could not materially have affected the question whether her Honour should have extended mercy to the applicant.” Further, the judge correctly took into account the relevance of the victim’s forgiveness to motivating the applicant’s rehabilitation.

Ground 3: Without the compelling mitigating circumstances present in this case, the sentence would have been properly characterised as lenient. Accordingly, the sentence appropriately reflected the mitigating factors referred to by the applicant. In light of the gravity of the offending, and the importance of general

deterrence and denunciation, the sentence could not be said to be manifestly excessive: [53]-[57].

***Edwards v The Queen* [2020] VSCA 339 (23 December 2020) – Victorian Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Appeal against sentence' – 'Dysfunctional upbringing' – 'Female perpetrator' – 'Guilty plea' – 'History of domestic and family violence' – 'Manslaughter' – 'Moral culpability' – 'People affected by substance misuse' – 'Victim as (alleged) perpetrator'

Charges: Manslaughter x 1.

Proceedings: Appeal against sentence.

Facts: The applicant woman stabbed the male victim, her partner for just over 12 months, in the neck and he died of the injuries inflicted. The applicant pleaded guilty to one charge of manslaughter and was sentenced to 9 years' imprisonment, with a non-parole period of 6 years and 9 months: *R v Edwards* [2019] VSC 234 (12 April 2019).

Grounds of appeal:

1. The sentencing judge erred in finding that her moral culpability was not lessened in any way by the violence perpetrated upon her.
2. The sentencing judge erred in finding that her moral culpability was high notwithstanding her severely disadvantaged background.
3. The sentence was manifestly excessive.

Held: The appeal was refused.

Ground 1: The sentencing judge's finding of moral culpability was open on the evidence for the reasons she gave. This included evidence that the applicant and victim had been violent towards each other, but with the applicant as most often the aggressor; the offending took place in the context of heavy methamphetamine use; and the applicant had a traumatic childhood, and a history of controlling and abusive relationships. Had there been evidence of a causal link between the applicant's stabbing of the victim and his acts of violence towards her, the sentencing considerations may have been quite different (at [15]-[23]).

Ground 2: It was well open to the sentencing judge to find that notwithstanding the applicant's severely

disadvantaged background her moral culpability remained high. The applicant's offending was heavily influenced by her drug use at the relevant time (at [24]-[27]). It was also not open for the applicant to contend that her moral culpability was lessened as her offending was causally linked to her drug use. She had expressly disavowed such a causal link on the plea and the submission was not supported by the authorities (which instead related to instances where a person commits an offence to satisfy a drug addiction, relevant to moral culpability and rehabilitation) ([28]-[32]).

Ground 3: The sentence could not be said to be manifestly excessive. The sentencing judge gave proper consideration to all relevant features of the offending and the offender. After finding that high moral culpability was established, it was not reasonably arguable that the sentence was outside the range open to the sentencing judge given the objective seriousness of the offending ("planned and deliberate"), the maximum penalty for manslaughter, and the weight to be given to the sentencing purposes identified by the sentencing judge (particularly "just punishment, denunciation…and general deterrence") ([33]-[39]).

***Shau v The Queen* [2020] VSCA 252 (25 September 2020) – Victorian Court of Appeal**

'Appeal against sentence' – 'No history of domestic violence' – 'People who are pregnant'

Charges: Recklessly causing injury x 1; Reckless conduct endangering life x 1.

Proceedings: Appeal against sentence.

Facts: The appellant man punched, kicked and stomped on his pregnant wife. The attack started in a car, which his wife was driving, and ended up at a service station.

> [18] Footage captured on CCTV at the service station depicts the appellant grabbing and dragging Lee by the hair on at least two occasions; punching and striking her with his hands and fists, mostly in the region of her head, on at least seven occasions; and kicking and stomping her to the head, neck, shoulder and torso region on at least 19 occasions. Lee curled up into a ball to protect her unborn child and raised her hands to protect her face.

The wife suffered extensive injuries. The appellant then drove his car at speed into the service station where his wife had sought shelter, smashing through the wall and wedging the vehicle inside the store. That conduct endangered the life of the service station attendant who had locked the doors of the shop to prevent the appellant from coming in after his wife. The victim gave evidence that there had been 'no earlier instances of

domestic violence' and that the appellant was 'drunk at the time of the offending'.

Issues: (1) Whether the sentence is manifestly excessive.

Decision and reasoning: *Appeal dismissed.*

Aggravating factors considered by the sentencing judge included that:

> [32] … the offending occurred in the context of domestic violence …
>
> [the victim] was five months' pregnant at the time …
>
> It was a lengthy, repetitive and violent bashing of a woman who was considerably smaller and of much lesser strength than you …
>
> You must have been aware of the likelihood of injury to her …
>
> You must have been aware that she would be terrified as a consequence of your attack upon her and terrified of the serious risk of injury to her and to her unborn child.

Priest JA referred to his own comments in granting the application for leave to appeal observing that the seriousness of the offence in this case 'is not only to be gauged by the injuries caused, but also the manner of their infliction (in this case a protracted and very violent assault on a vulnerable victim)'.

Niall JA observed:

> [46] Compounding, to a significant degree, the seriousness of the offence is the fact that it occurred within the context of a family relationship. That fact had two relevant consequences. First, it meant that the offending arose in a relationship of trust. Lee was five months' pregnant and ought to have enjoyed protection and care from her husband. The breach of trust necessarily made the offending more serious.
>
> [47] Next, the courts must respond to the blight of family violence by imposing punishment that denounces the conduct and adequately addresses general deterrence. Unlike in many cases, there was no basis in the evidence to suggest that there had been earlier incidents of violence. In her evidence, Lee said that the appellant had never assaulted her before. For that reason, the conduct was, on the evidence, an aberration. Lee expressed support for her husband on the plea. However, there remains a very high public interest in punishing family violence, both for its denunciatory and deterrent effect, even where the victim seeks leniency and incarceration would place great pressure on the domestic

relationship.

…

[50] Accommodating all of the relevant factors, both aggravating and moderating the sentence, may result in a sentence that represents a high proportion of the maximum, even on a plea of guilty.

***Hardwick (a pseudonym) v The Queen* [2020] VSCA 227 (7 September 2020) – Victorian Court of Appeal**

'Aggravated burglary' – 'Application for leave to appeal against sentence' – 'Breach of protection order' – 'False imprisonment' – 'History of domestic and family violence' – 'Manifestly excessive' – 'Separation' – 'Strangulation' – 'Technology-facilitated abuse' – 'Threats to kill'

Charges: False imprisonment x 1; Common assault x 1; Aggravated burglary x 1; Making threats to kill x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant man, who was subject to a protection order, entered the marital home and repositioned the CCTV cameras away from the house. When his female former partner (the victim) came home, he grabbed and restrained her, putting her in a headlock, then pinning her to the ground. The applicant tried to tape the victim's mouth with duct tape and bound her hands with cable ties before forcing her inside the house. The applicant locked the door and bound the victim's feet with cable ties. The applicant threatened to kill her. When one of the children arrived at the house, the victim was able to escape from the house. A neighbour called the police.

Grounds: (3) Whether the sentence was manifestly excessive.

Decision and reasoning: *Leave to appeal granted for Ground 3.*

[55] Coincidentally, on the very day that this application was argued before me, this Court delivered judgment in *Hill v The Queen*. That case concerned a home invasion by a woman who had been left by her former partner. She armed herself with a knife, forced her way into the house, and stabbed both her former partner and his new girlfriend. She faced charges not only of aggravated burglary, but also two counts of intentionally causing injury. The offending seemed to have been premeditated, and was described by the judge as 'grievance driven' and 'purposeful'. The total effective sentence is 6 years and

> 3 months, with a non-parole period of 3 years and 6 months. In effect, the motive for the applicant's conduct in was anger at abandonment, and animosity towards her husband's new partner.
>
> …
>
> [57] It is noteworthy that the offender in *Hill* received a non-parole period which was only 6 months greater than that fixed for the applicant. That minimal disparity, of itself, raises a question in my mind as to whether he was treated in accordance with current sentencing practice. It is of some interest to note that the sentencing judge in *Hill* was the same judge who sentenced the applicant in the present matter. I recognise, of course, that this Court described the sentences imposed in *Hill* as 'moderate', as indeed they were. Be that as it may, I regard the offending in *Hill* as far more serious than that in the present case.

***Hill v The Queen* [2020] VSCA 220 (3 September 2020) – Victorian Court of Appeal**

'Aggravated burglary' – 'Appeal against sentence' – 'Causing injury intentionally' – 'Female perpetrator' – 'Home invasion' – 'Separation' – 'Threats to kill' – 'Weapon'

Charges: Threat to kill x 1; Aggravated burglary x 1; Causing injury intentionally x 2.

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant and her husband separated seven months earlier, when the husband formed a relationship with his new partner. The applicant regularly accused her former partner of infidelity and made disparaging comments about his new partner. The applicant occasionally made threats about killing her former partner and his new partner to the applicant's daughter, but the daughter did not take these seriously. On 19 October 2017, the applicant assaulted her daughter. The applicant was charged with assault and a protection order was taken out against her to protect her daughter. On the same day, the applicant threatened to kill her former husband, his new partner and his next-door neighbour. Later that day, the applicant carried out the violent home invasion.

The female applicant armed herself with weapons (a length of pipe and a knife) and smashed a window to enter the home of her ex-husband and his new partner. The applicant attacked her ex-husband and his new partner, stabbing them both.

Grounds: The sentencing judge erred in (a) failing to find, on the balance of probabilities, that the applicant

had experienced protracted family violence; and (b) finding that the offending was 'purposeful and grievance-driven'.

Decision and reasoning: *Leave to appeal refused.*

> [4] In seeking leave to appeal, the applicant disputed the judge's characterisation of the offending as 'purposeful and grievance-driven'. According to the submission, the true explanation for the applicant's conduct lay in the history of violence inflicted on her by [former partner] during the marriage. Instead of aligning the case with those involving male-to-female violence following a relationship breakdown, it was said, the judge should have viewed the applicant's conduct as reflecting the 'very different psychological pathway' which results from protracted domestic violence.

That submission was rejected as there was no objective evidence to establish a link between the offending and violence experienced by the applicant during the marriage. All of the evidence before the sentencing judge supported the conclusion that "what drove this very serious offending was the applicant's distress at having been 'abandoned' by her former partner and anger towards [his new partner] for 'taking' her husband".

> [37] … in *Filiz* [*v The Queen* (2014)], the Court said:
>
> Senior counsel for the applicant rightly conceded that general deterrence is a significant sentencing factor in this case, not only in relation to aggravated burglary generally, but most particularly in relation to violent offending against a former domestic partner. … Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This Court has made it clear that such offending will attract serious consequences …
>
> [38] In the present case, the offending was perpetrated by a female against her former male partner (and his new partner). But, in our respectful view, the judge was quite correct to view it as falling into the same category of post-separation, anger-driven violence.
>
> [39] In our view, no other conclusion was reasonably open on the material before the Court but that it was that anger — directed both at [her former partner and his new partner] — which was the driving force behind this offending. This was well illustrated by the applicant's having said to [the victim] that she would 'never stop' stabbing her. It may be accepted that the applicant was not making 'an assertion of possession and control'. But that seems to us to be immaterial. What matters is that, seemingly unable to

accept the fact of the separation, the applicant gave vent to her anger and distress by this appallingly violent invasion of [her former husband's] home.

[40] The position would have been entirely different had there been any evidence before the sentencing judge that prior violence (or threats of violence) by [her former partner] towards the applicant had so affected her as to provide an explanation for the offending. The profound and long-lasting psychological effects of domestic violence are well-established and, where a proper evidentiary basis is established, can have a very significant impact on the court's view of the culpability of an offender and may even preclude criminal responsibility.

[41] But that was not this case. As defence counsel properly conceded on the plea, there was no such evidence. There was no suggestion, for example, that the applicant had been driven to act in this way by things done to her *during* the marriage. On the contrary, all the evidence showed that what prompted this attack was the *ending* of the marriage and [her former partner's] commencement of a relationship with another woman.

***Freeburn v The Queen* [2020] VSCA 155 (17 June 2020) – Victorian Court of Appeal**

'Application for leave to appeal against conviction' – 'Controlling, jealous, possessive behaviour' – 'Intention' – 'Past domestic and family violence' – 'People affected by substance misuse' – 'People with disability and impairment' – 'Physical violence and harm'

Charges: Murder

Case type: Application for leave to appeal against conviction

Facts: The applicant man was convicted of the murder of his female intimate partner and sentenced to 25 years' imprisonment, with a non-parole period of 20 years. The victim was mildly intellectually disabled and had been the victim of domestic violence in a prior relationship. The applicant acted in a jealous and possessive manner towards her, which sometimes included acts of violence. After the assault which resulted in the victim's death the applicant left the victim alive, but in a debilitated state and failed to seek assistance. He admitted to having "lost control" and seriously injuring the victim. An autopsy showed the victim suffered around 43 injuries, mostly soft tissue injuries caused by moderate blunt force trauma. Toxicology testing revealed the presence of GHB in her body. Expert witnesses disagreed as to whether the assault caused the victim's death: one forensic pathologist believed the victim died as a consequence of soft tissue injuries

sustained in an assault in the context of her using GHB; another said that the cause of death could not be determined.

Grounds:

1. The jury's verdict of guilt was unreasonable and cannot be supported having regard to the evidence.
   Particulars:
   (a) The evidence failed to prove beyond reasonable doubt that the applicant had caused the death of the deceased.
   (b) The evidence failed to prove beyond reasonable doubt that the applicant had intended to cause grievous bodily harm to the deceased.

2. The trial miscarried due to the admission of prejudicial evidence that a closed circuit television system had been deactivated prior to the death of the deceased.

Held: Ground 1 was allowed, the murder conviction was set aside, and the Court substituted a verdict of manslaughter. Ground 2 was dismissed.

The Court found that whilst it was open for the jury to be satisfied beyond reasonable doubt that the applicant's actions, in assaulting the victim, were the substantial and operative cause of her death, it was not reasonably open to be satisfied beyond reasonable doubt that the applicant intended to cause her really serious injury ([106]). Taken at its highest, the admission the applicant made to Witness A was that as a result of causing her death, he had enjoyed or experienced a significant rush of adrenalin ([93]). Further, the Court accepted that a jury could not reasonably conclude that Witness A's evidence was either truthful or reliable ([94]). Whilst the assessment and credibility of a particular witness is essentially a matter for the jury, that proposition does not preclude the assessment by an appellate court of the evidence given by that witness (*Pell v The Queen* [2020] HCA 12 (7 April 2020)) ([95]).

The verdict of manslaughter was substituted because the applicant caused the victim's death by an unlawful and dangerous act and it was inevitable that the jury would conclude that a reasonable person in the applicant's position would have realised they were exposing the victim to an appreciable risk of serious injury [104]. Leaving the victim in a severely debilitated state and refraining from obtaining medical or other assistance constituted criminal negligence for the purpose of the offence of manslaughter. The evidence was that the applicant was well-aware that the victim required assistance and treatment. It was inevitable that the

jury would have been satisfied the applicant's actions fell so far short of the standard of care which a reasonable person would have exercised in the circumstances, and involved such a high risk of death or really serious bodily injury, as to merit criminal punishment ([105]).

Ground 2 failed because the prosecution did not put to the jury that the evidence could or should be used as evidence of incriminating conduct by the applicant ([120]) and the judge gave a clear and specific direction to the jury that it should not rely on the evidence, and explained why it was of no probative value ([121]).

Note: The applicant was subsequently resentenced to 12 years imprisonment, with a non-parole period of 9 years: *Freeburn v The Queen (No 2)* [2020] VSCA 176 (1 July 2020) – Victorian Court of Appeal.

***Carter v The Queen* [2020] VSCA 156 (15 June 2020) – Victorian Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Children' – 'Covid-19 pandemic' – 'Double punishment' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Weapon'

Charges: Recklessly cause injury x 1; intentionally damage property x 1; possess a firearm while a prohibited person x 1; attempt to pervert the course of justice x 1; persistently contravene a family violence intervention order x 1

Case type: Application for leave to appeal against sentence

Facts: The applicant pleaded guilty to recklessly causing injury (grabbing her by the throat causing bruising and breathing difficulty), intentionally damaging property, possessing a firearm while a prohibited person, attempting to pervert the course of justice (a number of phone calls demanding the victim retract her statement), and persistently contravening a family violence intervention order. He also pleaded guilty to a series of related summary charges, including failing to store a firearm in a secure manner, possessing cartridge ammunition while unlicensed, and committing an indictable offence while on bail. The offending occurred in the context of family violence within a domestic relationship. The applicant was sentenced to 3 years' imprisonment with a non-parole period of 2 years.

At the time of the offending, the applicant lived with his former partner (the victim). They had been in a 'turbulent "on again, off again"' relationship for around 16 years. The applicant had been subject to 3 intervention orders and a family violence safety notice prior to the present offending. The relationship came to

an end, however, the victim and their daughters had continued to visit the applicant in custody until the recent COVID-19 pandemic.

In relation to the most serious charge of attempting to pervert the course of justice, the sentencing judge noted the fear that the victim must have experienced as a result of the applicant's threats over the phone ([20]). The offences involving the possession of the firearm were linked to, and committed "because of [the applicant's] mental state with the intention of self-harm" ([22]). With regard to the applicant's prospects of rehabilitation, his Honour accepted that the offending occurred "in the context of a daily methamphetamine habit". The applicant had a long history of addiction to drugs, and his prospects of rehabilitation were considered guarded ([25]). The applicant's guilty pleas, however, entitled him to a reduction in sentence ([26]). His criminal history related mainly to driving or drink-driving offences ([27]). With regard to the applicant's Indigenous background, the judge took into account the fact that he came from a disadvantaged background, experienced deprivation and poverty, suffered from learning difficulties, and had been exposed to substance abuse and mental health issues ([28]).

- The sentence was manifestly excessive.
- The applicant had suffered double punishment in that the base sentence of 2 years imposed on charge 4 (attempt to pervert the course of justice), and the sentence of 6 months imposed on charge 5 (persistent breach of intervention order), had resulted in 3 months cumulation.
- The totality principle was offended in cumulation of sentencing.
- Insufficient weight was given to prospects for rehabilitation based on the applicant's limited history of prior offending, his not having served a previous term of imprisonment, Aboriginal background, difficulties faced while in prison and efforts made to participate in programs while on remand.

Held: The Court of Appeal held that the sentence imposed on the charge of attempting to pervert the course of justice was not manifestly excessive. The applicant's conduct was persistent and involved repeated threats of violence to the victim ([69]). "An attempt to pervert the course of justice is a substantive, and not an inchoate offence", and "any conduct that meets [its] description must be viewed seriously and denounced appropriately" ([70]). The submission in relation to double punishment was rejected as the elements of charges 4 and 5 were separate and distinct: "The criminality involved in attempting to persuade [the victim] to withdraw her complaint against the applicant, through the use of threats, harassment, and a form of emotional blackmail, was conceptually, and practically, separate from the deliberate and persistent contraventions of the family violence intervention order". The judge was therefore entitled to order some degree of cumulation

between them ([72]). Ground 4 also failed as the judge considered all relevant matters, and it was open, on the evidence, to conclude that the applicant's prospects of rehabilitation were guarded ([73]). As there was no error by the sentencing judge, the Court refused leave to appeal.

***Stapleton v The Queen* [2020] VSCA 147 (4 June 2020) – Victorian Court of Appeal**

'Aggravated burglary' – 'Application for leave to appeal against sentence' – 'Gambling' – 'Guilty plea' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Separation' – 'Theft'

Charge(s): Aggravated burglary x 1; intentionally causing injury x 1; intentionally damaging property x 1; theft x 1; unlawful assault x 1

Case type: Application for leave to appeal against sentence

Grounds: The sentence was manifestly excessive, in particular:

1. the sentences imposed on the charges of aggravated burglary, intentionally causing injury and unlawful assault were manifestly excessive;
2. the learned sentencing judge placed excessive weight on a finding of a lack of remorse, and insufficient weight on compelling mitigating factors (such as his guilty plea, prior good character and the absence of prior convictions); and
3. the orders for cumulation infringed the totality principle and produced a manifestly excessive total effective sentence and non-parole period.

Facts: In 2018, the applicant man pleaded guilty to a series of offences committed against his wife of 20 years (the victim). The offending occurred in the context of the breakdown of their domestic relationship, in the early hours of the morning at the victim's home. He broke into the house, pushed the victim against the wall, and assaulted her boyfriend. When the victim sought to intervene, the applicant verbally abused her and threw her against the bedroom wall, causing her head to go through the plaster. The applicant continued to punch the victim's boyfriend, and after another attempted intervention by the victim, he threw her across the room. He also damaged her boyfriend's car. The applicant left the premises but returned about half an hour later. Once again, he barged through the front door, entered the bedroom, grabbed the victim's hair and threw her against the wall, and continued to physically abuse her boyfriend. He also punched the victim in the face. While she

was attempting to contact her friend, the applicant snatched her phone and left the house with it. The applicant was arrested later the same morning.

At sentence, the judge noted that the applicant had been drinking heavily and told police that there had been a slow build-up of emotion. His account to police was also seen as an attempt to minimise his conduct ([23]-[25]). Further, the sentencing judge stated that "offending of this nature is all too often perpetrated by men who respond to difficulties in a relationship, with possessive, violent rage" ([27]). Mention was also made to the victim impact statements which detailed the applicant's history of domestic violence towards the victim, specifically in the form of mental abuse ([28]-[29]). The applicant had a lengthy history of heavy drinking and extensive difficulties with gambling, which resulted in the sale of the family home in order to pay his debts ([32]). The judge characterised the motive for the applicant's offending as a desire to exact revenge for the victim's having interfered in his relationship with another woman, and observed that his return to the house on the second occasion demonstrated a degree of premeditation. The applicant had no prior convictions ([33]). His guilty plea was not made at the earliest opportunity, and in his record of interview, he sought to downplay the gravity of the offending, blamed the victim for his behaviour, and falsely denied having punched her boyfriend ([34]). In these circumstances, her Honour was not persuaded that the applicant "deeply regretted his wrongdoing and desired to atone for it". While there was some level of remorse, this was not given much weight ([36]). Her Honour also explained that a combination sentence was inappropriate as the offending was too serious ([38]). He was sentenced to a total effective sentence of 3 years' and 7 months' imprisonment, with a non-parole period of 2 years.

Held: The Court of Appeal granted leave to appeal and dismissed the appeal. It stated that "aggravated burglary, where the offender's intent is to assault and injure a former domestic partner, must always be regarded as an offence of a serious nature" ([60]). The appeal ground of manifest excessiveness was difficult to maintain in light of the aggravated burglary and serious assaults committed on that second occasion ([62]). The Court held that the sentencing judge took into account and gave weight to all relevant mitigating factors. The applicant did not succeed in his submission that the judge erred in her finding that little weight should be given to his remorse, as she "took great pains to explain why, putting to one side the remorse associated with the plea of guilty, she could give little weight to what the applicant had told various third parties about how he felt" ([64]-[65]).

***Johns v The Queen* [2020] VSCA 135 (29 May 2020) – Victorian Court of Appeal**

'Application for leave to appeal against conviction' – 'Application for leave to appeal against sentence' – 'Female perpetrator' – 'Manifestly excessive' – 'Mental element' – 'Obsessive behaviours' – 'Physical violence and harm' – 'Threats to kill' – 'Unsafe and unsatisfactory verdict'

Offences: Recklessly cause serious injury in circumstances of gross violence; Intentionally destroy property

Proceedings: Application for leave to appeal against conviction; Application for leave to appeal against sentence

Grounds (conviction):

1. The jury verdict was unsafe and unsatisfactory, where there was a marked disparity between the size and weight of the appellant's car and the victim's truck and trailer such that it was not open to the jury to find that by consciously voluntarily and deliberately colliding with the truck and trailer she:
   (a) Foresaw the likelihood that the collision would cause serious injury, or
   (b) When planning her conduct, either intended, was reckless that or foresaw it was more likely than not that her conduct would cause serious injury to the victim.

2. The judge incorrectly directed the jury that the Intentionally destroy property charge could be established by an intent to damage or destroy the truck, when the indictment alleged that the appellant intended to destroy the truck, resulting in a miscarriage of justice.

Grounds (sentence):

1. The judge erred by applying the wrong test under s 10A(2)(e) Sentencing Act 1991 (Vic) when considering whether "special reasons" existed to justify imposing a non-parole period of less than four years.
2. The judge should have imposed a large, if not complete, degree of concurrency in relation to the sentences for the two charges.
3. The head sentence imposed was outside the permissible range, the non-parole period was excessive, and the judge failed to give sufficient weight to the appellant's previous good character and prospects of

rehabilitation.

Facts: The female applicant was driving a Toyota Camry car when it collided with a truck and tanker trailer which was driven by the male victim. The vehicles were travelling in opposite directions on an open stretch of highway; the applicant's car crossing the centre line and colliding with the front right-hand side of the truck. The truck rolled, causing the victim serious injury (a severe laceration to his scalp and two fractured vertebrae in his neck) and extensive damage ($900,000 worth) to the truck and trailer (which were later written-off). The applicant sustained minor injuries.

The applicant and victim had been in a sexual relationship for some time and had a daughter together, although they disagreed as to the nature of the relationship (the victim believed it to be only sexual/physical while the applicant was "besotted" with the victim). When the victim was driving his truck, the appellant would often follow him in her car and turn up at his home. On the day of the offending, the victim had stopped for a break at a parking bay and was approached by the applicant who threw the remote control to the victim's garage at him, told him she was pregnant and yelled "I'll kill you" before driving off. The applicant had stated on numerous occasions that "if she couldn't have [the victim], nobody would" and that she should "take him out" by "driving straight into him".

The applicant was convicted of recklessly causing serious injury in circumstances of gross violence and intentionally destroying property, and sentenced to seven years' imprisonment with a non-parole period of five years.

Judgment: The court dismissed the application for leave to appeal against conviction. The court rejected Ground 1, finding that it was open to the jury to conclude that the appellant knew the collision would probably cause serious injury to the victim because of the nature of the collision (high speed, head-on, on an open road) and the threats made by the applicant [40]. The court noted that "The issue for the jury was not which of the two drivers bore the greatest risk of injury but whether the applicant knew the truck driver would probably be seriously injured" [39]. The court also rejected Ground 2, finding that the applicant did not seek to make a distinction between damage and destruction at trial [48] and in any event, any disconformity between the indictment and the way the case was run at trial could have been resolved by amending the indictment [49].

The court also dismissed the appeal against sentence. The court rejected Ground 1, finding that while the judge incorrectly approached s 10(1) as if it called for an assessment of a non-parole period for the s 15B offence alone, the answer the judge gave to that assessment demonstrated that "there was never any

possibility of a non-parole period for the whole of the offending of less than four years" and that there was no basis to consider that the judge could have found substantial and compelling circumstances justifying a non-parole period of less than four years [94]. The court further held that, "When regard is had to the additional criminality of the conduct underpinning [the Intentionally destroy property charge], we are satisfied that any error in applying the 'special reasons' provisions could not have played any role in the sentence imposed on the individual charges or in setting the non-parole period" [94].

The court also rejected Ground 2, holding that the two charges were very serious, and separate, offences and the extent to which the sentences were to be made concurrent was the discretion of the sentencing judge [99]. The court further rejected Ground 3, holding that neither the sentence nor its constituent parts were wholly outside the permissible range [100]. The court noted that the offending was grave and "exceptionally dangerous conduct" that had "very serious consequences" for which the conduct needed to be denounced and punished [103]. The appellant did not have the utilitarian benefit of a plea and there was no evidence of remorse [103].

***Laa v The Queen* [2020] VSCA 136 (28 May 2020) – Victorian Court of Appeal**

'Appeal against sentence' – 'Children' – 'Manifestly excessive' – 'Misuse of alcohol' – 'Non-fatal strangulation' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Separation' – 'Threats to kill'

Offences: Using a carriage service to menace, harass or cause offence; Aggravated burglary; Common assault; Making a threat to kill.

Proceedings: Application for leave to appeal against sentence

Grounds:

1. The sentence was manifestly excessive.
2. The findings by the judge concerning the applicant's level of remorse, and his prospects for rehabilitation, were not supported by the evidence.

Facts: The male applicant commenced a relationship with the female victim in 2006 and the couple had two children together. Their relationship involved periods of separation and reconciliation. During the periods of separation, the applicant would stay at the victim's house overnight on the days he would see the children.

However, the overnight stays and the regular visits to see the children ceased after several arguments between the applicant and the victim. One night, the applicant sent the victim 14 text messages, threatening to come after her and kill her. The next morning, the applicant went to the victim's house and banged on the front door repeatedly. The victim told the applicant to leave and that she had called police. The applicant tried to break open a sliding door with an outdoor chair but failed, so smashed two front windows and entered the house through the unlocked front door. The victim secured herself and the children in her bedroom by placing a wedge under the door but the applicant forced the door open. The victim was on the phone to 000, so the applicant took the phone, terminated the call and hit the victim repeatedly on the head, face and neck with the phone. The children were crying as this occurred.

The victim fled outside but the applicant followed her and dragged her indoors where he forced her to the ground, choked her and told her he would kill her and her family. The applicant took the children and placed them in the car, then returned and punched the victim in the face, knocking her to the ground. He drove off (during which time the victim called 000) but returned and started banging on the front door again. The victim let him in because she did not want to antagonise him. The applicant locked the front door and punched her in the face a number of times, telling her that he would kill her whole family. Police arrived and arrested the applicant who denied the assaults and the threats to kill. He was convicted on all charges and sentenced to four years' imprisonment with a non-parole period of two years and two months.

At trial, the court accepted that the applicant was a refugee from South Sudan [20] and that he began drinking excessive quantities of alcohol due to his financial struggles and it was in this context that the offending occurred [23].

Judgment: The court dismissed the appeal. In rejecting Ground 1, the court held that the offending was particularly serious and the applicant's moral culpability was high [53], despite the mitigating factors being "quite substantial" [55]. The court noted that "confrontational aggravated burglaries, in the setting of an underlying domestic dispute, are all too prevalent in our society. They are calculated to cause lasting and serious physical and emotional harm to the victim. By their nature, such offences have the potential to escalate into incidents that result in serious harm and, on occasion, human tragedy" [50]. As a result, general deterrence is of significance in such cases [50], as is condemnation by the courts of such conduct [51]. The court further noted that "The courts have made it clear that acts of violence in a domestic setting, and in particular by men towards women, are utterly abhorrent and unacceptable" and the fact that the assaults occurred in the presence of the couple's children was a serious aggravating factor, a "serious breach of [the

applicant's] duty as a parent towards his own children" and an "appalling example" of behaviour for the children, particularly the son [52].

The court also rejected Ground 2, finding that the delay between the date of offending and the date the applicant entered a guilty plea (22 months) was a sufficient basis for the judge to entertain genuine reservations about the applicant's level of remorse, and his prospects of rehabilitation [42], despite a plea of guilty often being an indicator of genuine remorse [45].

***Ballantyne v The Queen* [2020] VSCA 115 (11 May 2020) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Early plea' – 'Loaded firearm' – 'People with mental illness' – 'Physical violence and harm' – 'Remorse' – 'Substance abuse' – 'Suicide threat' – 'Threat to kill'

Offences: Carrying a loaded firearm in a place with reckless disregard for the safety of another x 1; Making a threat to kill x 1; Possessing drug of dependence x 1; Contravention of family violence intervention order x 2; Failing to store a category A/B long arm correctly x 1; Failing to store category A/B long arm ammunition correctly x 1; Possessing a prohibited weapon x 1

Proceedings: Application for leave to appeal against sentence

Issue: Whether sentence was manifestly excessive.

Facts: The appellant man and female victim had been in a relationship for 14 years and were married at the time of the offending. The appellant threatened to kill himself in front of the victim, leaving the house and returning with a shotgun. He swung the shotgun in front of the victim like a baseball bat, then touched the barrel to her forehead before pushing it into her eye socket and threatening to kill her "slowly" [25]. The appellant fired a shot into the TV then pointed the gun back at the victim's head and threatened to shoot her again [25]. The victim was held like this for around three hours. The appellant plead guilty and was sentenced to four years and three months' imprisonment, with a non-parole period of three years and six months. At the sentencing hearing, the appellant alleged that he did not remember the incident. Medical evidence was also tendered showing that the appellant had a history of depression and alcohol abuse, but that he had committed to make improvements and had ceased alcohol and prescription medication [17].

The appellant appealed against this sentence on the following grounds:

1. The individual sentences on charges 1 and 2 and the total effective sentence are manifestly excessive.

2. The non-parole period is manifestly excessive and in particular:
   i) The ratio of 17.65% of the head sentence is manifestly low having regard to the fact that the applicant had no relevant prior convictions and his prospects for rehabilitation were relatively good;
   ii) The purported reason for this ratio that '… there is potently no remorse …' … was not a good reason for denying the applicant a greater period of parole; and
   iii) The learned sentencing judge erred in finding that in the circumstances there was '… potently no remorse …' … .
3. The learned sentencing judge erred in finding that there was a complete absence of remorse, and as a result the individual sentences, the total effective sentence and the non-parole period are manifestly excessive.

Held: The court refused to uphold ground 1 as the sentences were not manifestly excessive. The conduct founding the Making a threat to kill charge "constituted a very serious example of the offence" [25] and that, balancing the seriousness of the offending with the mitigating factors (see [24]), the sentence was proportionate [26] and punished the appellant to an extent just in all the circumstances [28]. Even though the sentence imposed was more lengthy than the general trend for the offence of threat to kill in recent cases, "[s]entences in comparable cases … are not precedents which must be applied", but each case must turn on its own facts [28].

However, the court upheld ground 2, providing that the finding by the sentencing judge that the appellant was not remorseful did not justify the imposition of a relatively high non-parole period [32]. The purpose of fixing a non-parole period is to "provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate" (*Power v The Queen* (1974) 131 CLR 623 at 629). The court substituted a non-parole period of two years and six months [33].

Furthermore, the court partially upheld ground 3, finding that the trial judge erred in finding that there was a complete absence of remorse. The court provided that it considered "that there was some evidence of remorse to be drawn from the early pleas of guilty and from the applicant's insight and incipient commitment to reform" [19]. The court referred to its reasons for finding against the remainder of ground 3 (namely, whether the sentences and non-parole period were manifestly excessive).

***Zakkour v The Queen* [2020] VSCA 72 (26 March 2020) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Breach of protection order possession of weapon' – 'Separation'

Charges: Criminal damage x 1; attempt to pervert the course of justice x 1; possess prohibited weapon x 1; contravene family violence intervention order x 1

Case Type: Application for leave to appeal against sentence for possess prohibited weapon

Facts: In 2019, the applicant went to his former partner's property and caused damage. He was arrested the next day, and police searched his vehicle and found a home-made laser pointer. While in custody, he made telephone calls whereby he attempted to have people call his former partner and ask her to withdraw her police statement. The applicant pleaded guilty to criminal damage, and attempting to pervert the course of justice. He also pleaded guilty to 2 summary offences, carrying a prohibited weapon and contravening a family violence intervention order. The applicant was sentenced to a total effective sentence of 2 years' imprisonment, with a non-parole period of 15 months. The individual sentence imposed on the weapon offence was 2 months' imprisonment to be served cumulatively on the sentences for the other offending.

Ground: The sentence and the order for cumulation on this charge was manifestly excessive because, inter alia, the offending was not aggravated in any material way and the accused pleaded guilty to the offence at the earliest available opportunity.

Held: The Court allowed the appeal, set aside the sentence on the weapon offence, and ordered that the applicant be convicted and discharged on that charge. The applicant's counsel submitted that the laser pointer had not been used as a weapon, and that it was not used in connection with any of the other offending. Despite the fact that the applicant had prior convictions for possessing controlled and prohibited weapons, it was clear that the sentence for the weapon offence was "egregiously excessive", given the intrinsic nature of the weapon, the lack of material as to whether the applicant had or would have used it, and the complete absence of evidence supporting the sentencing judge's findings that it was potentially dangerous and could cause injury ([18]). As a consequence, the total effective sentence was amended to 22 months' imprisonment with a non-parole period of 13 months.

***Tedford v The Queen* [2020] VSCA 71 (26 March 2020) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Attempted murder' – 'Guilty plea' – 'Manifestly excessive' – 'Motor vehicle' – 'Older people' – 'Physical violence and harm' – 'Separation' – 'Suicide attempt'

Charges: Attempted murder x1; Reckless conduct endangering persons of serious injury x1.

Appeal Type: Application for leave to appeal against sentence

Ground: The individual sentence on Charge 2, order for cumulation, total effective sentence and non-parole period are manifestly excessive, having regard to the five-year maximum penalty for the offence, the fact that it was committed in the context of a suicide attempt, and the significant factors in mitigation, including the applicant's early pleas of guilty, advanced age and ill health, and prior good character.

Facts: The applicant was sentenced to eight years' imprisonment on the charge of attempted murder of his wife and two years and six months' imprisonment on the charge of reckless conduct endangering persons of serious injury for driving his vehicle into a train. On year of the sentence or chare 2 was cumulative on the sentence for charge 1, resulting in a total effective sentence of nine years' imprisonment.

The applicant 77 year old man and female victim were married but had separated at the time of offending, the wife moving out of the family home into a bungalow at the back of the property. On the day of offending, the applicant and victim had consumed a large amount of alcohol together and the applicant became argumentative [5]. The victim suggested the applicant see a psychologist. That evening, the applicant told a friend that he felt depressed, he needed his wife to look after him to survive and that "if anything were to happen to him, [the friend] should make sure he claimed a Holden Kingswood motor car presently garaged at the applicant's home" [5]. Two hours later, the applicant entered the wife's bungalow and deadlocked the door behind him before saying "I've got something for you" and producing a large knife [6]. He proceeded to stab the victim 13 times, including defensive injuries, mostly to the chest and arms. The applicant stated that he was going to kill both himself and the victim during the attack. The victim also suffered blunt force trauma and other lacerations before managing to escape the offender when he fell over and struck his head.

The applicant then drove away from the property. "A dash camera recorded him in a confused, angry and emotional state of mind. He expressed disbelief that he had not killed his wife [and] then discussed with himself how he could kill himself" [8]. The applicant then proceeded the drive his car into a train. "The train struck the driver's side of the applicant's car, pushing it for a considerable distance. No one on the train was

injured" [8] and the applicant did not sustain substantial injuries.

Judgment: Leave to appeal against sentence was refused [41]. To demonstrate manifest excess "an applicant must demonstrate that the impugned sentence is 'wholly outside the range' of sentences available for that particular offence in the relevant circumstances" [29]. Likewise "arguments for excessive cumulation must fail unless an applicant can demonstrate that the order for cumulation is manifestly excessive" [30]. The sentence for the reckless conduct charge was not manifestly excessive: "[w]hilst a sentence of 50 per cent of the maximum available upon a plea of guilty to a man in the applicant's circumstances can reasonably be viewed as 'stern', we are not persuaded that it is beyond the range of sentences reasonably available to his Honour." [36] The cumulation of one year upon the base sentence for attempted murder was also not manifestly excessive. The sentence for attempted murder "represents less than a third of the maximum penalty available for what was an appalling example of domestic violence, committed with homicidal intent. Whilst old age, ill health and an almost pristine criminal history all counted in the applicant's favour, in the face of his conduct towards his wife, it could not count for a great deal" [38]. The sentence was moderate in all the circumstances. In considering the appropriate degree of cumulation the sentencing judge appropriately considered "the temporal and circumstantial relationship between the offences" and specifically considered the sentencing factors such as overall criminality, general deterrence and the principle of totality.

The court also rejected Ground 2, finding that the delay between the date of offending and the date the applicant entered a guilty plea (22 months) was a sufficient basis for the judge to entertain genuine reservations about the applicant's level of remorse, and his prospects of rehabilitation [42], despite a plea of guilty often being an indicator of genuine remorse [45].

***Guirguis v The Queen* [2020] VSCA 48 (13 March 2020) – Victorian Court of Appeal**

'Appeal against sentence' – 'Children' – 'Community correction order' – 'Family violence' – 'Guilty pleas' – 'People affected by substance misuse' – 'Sexual and reproductive abuse' – 'Threats to kill' – 'Uncharged act'

Charges: Sexual assault x 1; Make threat to kill x 1

Case type: Application for leave to appeal against sentence

Facts: The applicant man and the female victim were in a relationship for 11 years and had 2 children. The relationship terminated in 2016. Before the relationship ended the applicant allegedly forced the victim to

engage in oral sex (Charge 1) and, months later, told the victim that he would 'slit her throat' if she ever left with the children (Charge 2). The applicant also said he would 'take [the children] out too' which constituted an uncharged act. In 2016, an interim protection order was granted in favour of the victim and the children, and in 2017 a final intervention order was made for an indefinite period. Relevantly, the applicant had been sentenced at the Magistrate's Court in early-2017 to 91 days' imprisonment, combined with an 18 month Community Correction Order for other offending against the victim that occurred on the same date on which the offending giving rise to Charge 2 in the present matter occurred ([3]-[14]).

In sentencing the applicant, the judge recognised that the victim suffered profound trauma as a result of the applicant's degrading, cruel and humiliating treatment of her. These adverse effects continuously and significantly affected her. Given the seriousness of the offending, there was a need for stern punishment to achieve general and specific deterrence and denunciation ([22]). The applicant, on pleas of guilty, was sentenced to 23 months' imprisonment in combination with a 3-year Community Correction Order (CCO). The sentence imposed in early-2017 and time that the applicant had spent in a residential drug rehabilitation clinic were relevant to totality.

Issue: The applicant completed the term of 23 months' imprisonment in February 2019 and sought leave to appeal on the grounds that the sentence of imprisonment followed by a 3-year CCO is manifestly excessive.

Held: The Court refused leave to appeal ([38]). The two offences constituted serious acts of family violence and the offending was not isolated ([33]). Further, a CCO was necessarily and properly punitive, and was structured towards advancing the applicant's rehabilitation and community protection ([34]). It could not be said that the decision to attach a CCO to the term of 23 months' imprisonment was clearly or wholly outside the range open to the sentencing judge, and there was no error of principle ([36]). The offending was 'grave' as the applicant's conduct towards the victim was 'cruel and degrading', 'designed to be humiliating and hurtful', and resulted in substantial trauma ([37]). The sexual assault was described as a 'humiliating and degrading act'. Further, the threat to kill was 'chilling and menacing, and had a traumatic and ongoing effect' on the victim ([33]). The conduct resulted in profound trauma.

***Vu v The Queen* [2020] VSCA 59 (23 March 2020) – Victorian Court of Appeal**

'Appeal against sentence' – 'Physical violence and harm' – 'Remorse' – 'Totality principle'

Offences: manslaughter x1; attempted murder x1and recklessly causing serious injury x1.

Proceedings: Appeal against sentence

Facts: The applicant man and the female victim lived together in a domestic relationship for many years and had two children together. In 2013 the applicant was charged with drug-related offences and imprisoned for three years. During this time, the female and male victims commenced a relationship and were married. Shortly before the applicant was released, the male victim moved out of the female's house and into a nearby residence. They continued their relationship in secret after the applicant was released and resumed living with the female victim.

The applicant was later informed of the victims' relationship and confronted them about it. The victims' stated they were just friends, but the applicant refused to accept their denials. The applicant then grabbed a hunting knife he had previously hidden and stabbed both victims in the chest. The male victim died at the scene and the female was seriously injured, though there was no evidence of any permanent or ongoing impairment as a result of the injury.

Applicant was charged with murder of the male victim and attempted murder of the female victim and in the alternative either intentionally or recklessly causing serious injury. Prior to trial the applicant offered in writing to plead guilty to manslaughter. No offer was made in respect to the charges relating to the female victim's injuries. Following trial he was convicted of the manslaughter of the male victim and recklessly causing serious injury to the female victim. He was given a total effective sentence of 15 year's imprisonment with a non-parole period of 11 years.

Grounds of appeal:

- The order for cumulation was excessive and thereby infringed the totality principle.
- The learned sentencing judge erred by granting the applicant only a modest benefit for the utilitarian value of his plea offer.
- The learned sentencing judge erred by granting the applicant no benefit for his plea offer other than for its utilitarian value.
- The learned sentencing judge erred by not treating the applicant's post-offence conduct as mitigatory.
- The individual sentences imposed for both offences, the order for cumulation and the total effective sentence were manifestly excessive, particularly in light of:

  The totality principle (see ground 1 above);

  The finding that the recklessly causing serious injury was mid-range example of the offence;

The applicant's offer to plead guilty (see grounds 2 and 3 above);

The mitigatory effect of the applicant's conduct immediately after the offending (see ground 4 above);

There being, it is argued, some evidence of remorse, acceptance of responsibility and a willingness to facilitate the course of justice;

The finding that the applicant's prospects of rehabilitation are 'quite good';

The finding that specific deterrence 'does not loom large' in this case.

Held: The Court allowed the appeal on against sentence on grounds 1 and 5 (in part), limited to the order for cumulation only. The order for cumulation was quashed and ordered a total effective sentence of 13 years and six months' imprisonment with a non-parole period of 10 years.

In regard to Grounds 2 and 3, the Court held the sentencing judge was entitled to consider the utilitarian value of the applicant's offer to plead guilty as 'relatively modest' given the overall circumstances of the case and rejected the second ground. While the offender offered to plead guilty, this is not necessarily a sign of remorse and agreed with the sentencing judge's conclusion that the offer was most likely motivated by pragmatic considerations [40], thus also rejecting the third ground. In light of the Court's rejection of an inference of remorse, they noted that the sentencing judge's reasoning "embraced a consideration of the entirety of [the] post-offence conduct, favourable and unfavourable to the applicant" and rejected the fourth ground [44].

Turning to Grounds 1 and 5, the Court noted that while the individual sentences were each particularly stern but not wholly outside the range of sentencing discretion [48], this was not the case for the order for cumulation. "Given the very significant overlap in time, context and conduct, and particularly, the high sentences imposed on both charges, [the Court] consider[s] that the principles of totality and proportionality ought to have operated to moderate the order for cumulation to a considerably greater extent" [54]

***Brown v The Queen* [2020] VSCA 26 (20 February 2020) – Victorian Court of Appeal**

'Credibility' – 'Fair trial' – 'Fresh evidence' – 'Lack of disclosure' – 'Physical violence and harm' – 'Retrial'

Charges: Charges 1 and 2 (intentionally causing injury and alternatively recklessly causing injury – acquitted following trial); Charges 3 and 4 (intentionally causing injury – acquitted - and alternatively recklessly causing injury - convicted); Charge 5 (common law assault - acquitted)

Case Type: Application for leave to appeal against conviction on charge 4

Facts: The charges related to two occasions on which the applicant man was alleged to have assaulted the complainant woman, with whom he was then in a de facto relationship. Charges 1 and 2 (intentionally causing injury and alternatively recklessly causing injury) concerned an allegation that the applicant threw the complainant, causing her to hit her head. Charges 3 and 4 (intentionally causing injury and alternatively recklessly causing injury) related to an allegation that the applicant, on a different day, grabbed the complainant's arms and held her down, causing bruising to her arms and back. It was alleged that immediately after that incident, the applicant also pushed her, constituting the basis of Charge 5 (common law assault). The applicant was found guilty of Charge 4, acquitted on the other charges and, following a plea, was convicted and fined $4,000 ([1]-[4]).

After verdict, the prosecution served a victim impact statement from the complainant, to which a document called 'Initial report - Recommendation for more than five hours of counselling' was attached. The report noted that the complainant consulted a psychologist and recounted events the subject of Charges 3 and 4. The appellant submitted that this was the first occasion, known to him, that the complainant had given a different account in which it was suggested that he had thrown her across the room against the wall ([9]-[10]). Applying the principles in R v Nguyen and Tran to the relevant evidence, the appellant submitted that although the report existed at the time of trial, he exercised reasonable diligence in obtaining relevant records and this had failed to result in the production of the report. It was argued that his legal representatives sought disclosure of various documents which would have included the report; that he sought production of the victim impact statement during committal proceedings and the complainant refused to provide it at that time; and that he obtained a subpoena to compel the complainant to produce the victim impact statement. The appellant contended that as he was acquitted on Charges 1, 2 and 5 and given the case largely turned on the complainant's evidence, the existence of a different version of events as evidenced in the report potentially further undermined the complainant's credibility ([12]-[13]).

Grounds of appeal:

1. The prosecution failed to disclose relevant information in its possession; and
2. fresh evidence that is now available since the time of conviction would have led the jury to hold a reasonable doubt as to the applicant's guilt or would have given rise to a significant possibility that the jury would have held such doubt.

The respondent conceded Ground 2, and in light of this, the applicant did not press Ground 1 ([5]-[6])

Held: Having decided Ground 2 was established, the Court was required to determine whether to order a new trial or enter a judgment of acquittal. The report met the threshold for fresh evidence and, had the evidence been before the jury, there was a significant possibility that the appellant would have been acquitted on Charge 4 ([18]).

In determining whether to order a new trial, the Court considered that the appellant would be compromised in his ability to test the complainant's evidence on Charge 4 by reference to the inconsistencies in the complainant's account of events which underpinned Charges 1, 2 and 5. Any disadvantage to the appellant would be particularly acute in relation to Charge 5 which was so closely tied in time and context to Charge 4 ([35]). The Court drew an analogy with R v Bartlett ([37]), and held that a retrial of Charge 4 alone would be 'unfair'. Consequently, the Court allowed the appeal, set aside the conviction on Charge 4 and entered judgment of acquittal on that charge ([39]).

The Court emphasised the public interest in seeing allegations of domestic violence, where there is sufficient evidence to sustain a conviction, being prosecuted in accordance with the law ([25]). The gravity of domestic violence is not solely measured by the extent of the physical injury. Women and children 'who suffer the brunt of domestic violence' are entitled to feel safe and secure in their own homes. Other 'very important factors' the Court will consider in assessing the severity of a particular offence include the breach of trust reposed in a domestic partner and the compromising of the security of the home ([26]).

***Director of Public Prosecutions v Ristevski* [2019] VSCA 287 (06 December 2019) – Victorian Court of Appeal**

'Manifestly inadequate' – 'Remorse'

Offence: Manslaughter

Proceedings: Crown appeal against sentence

Issues: Whether sentence was manifestly inadequate;

Whether sentence was manifestly inadequate;

(a) failed to fix a sentence commensurate with the circumstances of the offending, giving too much weight to

the lack of information about the unlawful and dangerous act;

(b) failed to have sufficient regard to significant aggravating features when determining the nature and the objective gravity of the offending (cf the circumstances of the killing), particularly in the context of family violence and the breach of trust;

(c) failed to have sufficient regard to the impact of the Respondent's offending on the victims;

(d) failed to give sufficient weight to the principles of general deterrence, specific deterrence, denunciation and just punishment;

(e) failed to have sufficient regard to the maximum penalty for the offence; and

(f) placed too much weight on the matters in mitigation, particularly in light of the lack of remorse, including the Respondent's plea of guilty and prospects of rehabilitation.

Facts: The exact events surrounding the offence are unclear. What is known is that the respondent husband "killed [the victim (his wife) by unlawful and dangerous act(s); put her body into the body of her car; and disposed of [and concealed] her body in a remote location" [4]. When later questioned about his wife, the offender lied to relatives and police by claiming that she "had left the family home after they had an argument saying that she was going to clear her head" but never returned [5].

There was no evidence of earlier domestic violence in the relationship. He was convicted on his plea of guilty to manslaugter following a contested committal where the charge was murder.

Held: The offender was resentenced by majority to 13 years' imprisonment with non-parole period of 10 years.

The sentence was held to be manifestly inadequate, with Priest JA stating the "sentence imposed on the respondent was far too low to reflect the needs of general deterrence, denunciation and just punishment". The disposal of the wife's body was treated as a significant aggravating factor and "emblematic of [the offender's] complete lack of remorse" [73]. The domestic setting of the offence was also an aggravating circumstance, with Ferguson CJ and Whelan JA providing that while "there was a time when the seriousness of such domestic violence offences was not properly recognised. That is no longer the case…[The wife] should have been able to live without any fear in her own home. It should have been a safe place for her" [10]. General deterrence and denunciation were particularly significant. These factors were not sufficiently outweighed by the offender's previous good character, prospects of rehabilitation or the utilitarian value of his

guilty plea.

***DPP v Smith* [2019] VSCA 266 (21 November 2019) – Victorian Court of Appeal**

'Intervention order' – 'People affected by substance misuse' – 'People with disability and impairment' – 'Physical violence and harm' – 'Sexual and reproductive abuse'

Charges: 3 x causing injury intentionally; 1 x false imprisonment; 1 x rape; 1 x make a threat to kill; 2 x contravention of Final Family Violence Intervention Order (FVIO)

Case type: Appeal against sentence.

Facts: The offending involved intentionally causing physical injury, threatening to kill, false imprisonment, rape and breaching FVIOs. The respondent and complainant were in an intermittent de facto relationship for a few years prior to the offending. The respondent was sentenced to 7 years and 6 months' imprisonment with a non-parole period of 5 years.

Issue: The appellant appealed against the sentence on the grounds that it was manifestly inadequate, and that the learned sentencing judge failed to:

- Properly consider the objective gravity of the offending;
- Give sufficient weight to the sentencing principles of just punishment, denunciation, general deterrence, specific deterrence and community protection;
- Give sufficient weight to the maximum penalties for the offences; and
- Give sufficient weight to the impact of the offending on the victim.

Held: Manifest inadequacy is difficult to establish ([28]). Nevertheless, the respondent was re-sentenced to 10 years and 6 months' imprisonment with a non-parole period of 8 years. Notwithstanding the factors relied upon in mitigation ([21]), several of the individual sentences imposed and the orders for cumulation were found to be inadequate, and therefore produced a total effective sentence that was below the range of sentences available to the sentencing judge so as to reveal an error of principle ([28]). Personal factors included: history of drug and alcohol abuse; criminal history which included a number of dishonesty and drug matters, assault and robbery, intentionally and recklessly causing injury, and failure to comply with court orders; a disadvantaged and dysfunctional upbringing; and low cognitive functioning. However, in the Court's view, there was a need for both specific and general deterrence, given the respondent's long history of

violence, especially towards the complainant ([34]-[35]). The offending in question was ‘brutish, cowardly… and calculated to humiliate and degrade a powerless, diminutive woman’ ([32]). The Court also noted that ‘people considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of [the] community and will not hesitate to impose stern punishment upon wrongdoers’ ([35]).

***DPP v Evans* [2019] VSCA 239 (25 October 2019) – Victorian Court of Appeal**

‘Attack on former partner's new partner’ – ‘General deterrence’ – ‘Manifestly inadequate’ – ‘Mitigating factors’ – ‘Physical harm and violence’ – ‘Separation’ – ‘Weapon’

Charges: Causing serious injury intentionally x 1

Proceedings: Appeal against sentence

Facts: The respondent pleaded guilty following a self-serving confession 4 years after the assault having previously denied all involvement several times. The DPP appealed the sentence and non-parole period. The complainant, who had been involved in a domestic relationship with the respondent’s estranged wife, sustained life-altering and life-threatening injuries as a result of being struck with a metal bar. The original sentence was 5 years and 6 months with a non-parole period of 2 years and 9 months.

Issues: Whether the individual sentence and non-parole period are each manifestly inadequate.

Decision and reasoning: Appeal allowed and resentenced to 7 years and 6 months with non-parole period of 4 years 6 months. The discount given for the respondent’s confession was too great, as the respondent’s admissions did not go so far as to warrant a full discount.

The court also considered that the seriousness of offending called for a stern response and strong denunciation, as this was a case of extraordinary violence which had a devastating impact on the victim ([83]).

"[84] There is a further important consideration, that of general deterrence. This was a violent act of reprisal following the breakup of the respondent’s marriage, expressing his animosity and anger towards the person who had been his wife’s partner. Although there are differences between a case like this and a direct attack against a former partner, they are closely related. Violence of this kind is alarmingly widespread, and extremely harmful. It is never justified. The sentences imposed must convey that message strongly.

[85] For similar reasons, nothing should be said in sentencing reasons to suggest that statements by such an offender to the effect of ‘I just snapped’ or ‘I’d had enough’ in any way mitigate the seriousness of the offending or reduce the offender’s moral culpability. Such self-justifying statements are, regrettably, all too common in cases of family violence. Marital breakdown is stressful and upsetting for all concerned. But a resort to violence can never be condoned.

***Tan v The Queen* [2019] VSCA 226 (14 October 2019) – Victorian Court of Appeal**

‘Manifestly inadequate’ – ‘Physical harm and violence -separation’ – ‘Sentencing’ – ‘Strangulation’

Charges: Recklessly causing serious injury x 1

Proceedings: Application for leave to appeal against sentence

Facts: The applicant was sentenced to 5 years 6 months imprisonment with a non-parole period of 3 years 6 months. The applicant sought leave to appeal against sentence on the ground that the sentence imposed was manifestly excessive given that the offending was not at the median of offending for the type of offence.

The victim of the incident was the applicant’s de facto partner. Around the time of offending, the applicant sent the victim a series of text messages asking for money, which the victim refused. The applicant was angered by the refusal and when he returned to the couple’s home, he started verbally abusing her. He pushed her off the bed, injuring the victim’s knee, before pulling back on to the bed with his hand around her throat. Threatening to kill the victim, the applicant obtained a knife from the kitchen and pushed it against the victim’s throat while she was still on the bed. This caused a superficial laceration. The owner of the apartment became aware of the altercation and called the police. While the owner was on the phone the victim tried to push the applicant off her, causing him to slash her on the left arm with the knife.

The applicant pleaded guilty prior to the committal hearing despite previously denying he was the aggressor. The judge "accepted this plea as being ‘indicative of some remorse’" [19].

Issue: Whether sentence was manifestly excessive

Decision and reasoning: The sentence was manifestly excessive. A sentence of 4 years 3 months was substituted.

There was no finding that the wound to the victim's arm was deliberately inflicted, unlike the laceration to her neck. When compared to more serious cases (Marrah, Nolan [63]) of the same offence this was significantly less serious. Ashley and Weinberg JJA state that 'it is the fact that, despite the limited utility of raw sentencing statistics, the sentence imposed in this case was not far short of twice the median length of imprisonment for the offence over the 2016/2017 year, and that over the five-year period ending 2017 only a very small number of those imprisoned for this particular offence were subject to a sentence exceeding five years. Underlining the severity of the sentence imposed here, by no means did all persons sentenced for this offence in the five year period receive a custodial disposition.'[65]

Nevertheless, the court also pointed out that despite the sentence being manifestly excessive, this conclusion "does not gainsay the need for sentences for this offence, committed in a domestic setting, to reflect the need for general deterrence, specific deterrence … and protection of the community as pertinent sentencing considerations" and noted that "sentences for this offence, committed in a domestic setting, have increased in recent years." ([63]).

***Ivanov (A Pseudonym) v The Queen* [2019] VSCA 219 (8 October 2019) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Exceptional circumstances' – 'Manifestly excessive' – 'Perpetrator self-reported to police' – 'Rape' – 'Remorse' – 'Separation' – 'Victim testified in favour of perpetrator'

Offences: Rape x 2

Proceedings: Application for leave to appeal against sentence

Issues: Whether the individual sentences, the total effective sentence and non-parole period were manifestly excessive

Facts: The male appellant and female victim had been partners for 22 years and had three children together. The appellant found out that the victim had been having an affair for the last five years. He lost self-control and raped the victim, verbally abusing her during the assault while she just lay there. Afterwards, the appellant felt terrible and apologised. Two days later, the appellant discovered more details of the affair and lost control and raped the victim again. The couple cried together afterwards and the appellant apologised many times. The day after this, the appellant became concerned that the victim would try to harm herself and the appellant felt guilty about what he had done, so he reported his actions to a mental health clinician. The clinician alerted police and arrested the appellant who plead guilty immediately. The victim never intended to

report the offending and saw police involvement in their marriage as ridiculous.

At the sentencing hearing, the victim gave evidence in support of the appellant and told the court that this was a private matter for the appellant and the victim to work out together. She testified that she wanted the appellant to be released as soon as possible so that the couple could start repairing what had happened, but that this had not been allowed to occur because of the imposition of an Intervention Order. Despite this, the judge sentenced the appellant to nine and a half years' imprisonment with a non-parole period of seven years.

Grounds:

1. The sentencing judge failed to synthesise properly the sworn and mostly unchallenged evidence of the victim. Specifically, the sentencing judge made findings on the impact of the offending that:
   (a) were not open to the judge or not properly founded on the victim's evidence, and
   (b) failed, in the circumstances, to accord the appellant procedural fairness.

2. The sentencing judge's discretion miscarried as a result of the judge's findings regarding remorse and the circumstances of the appellant's own reporting of his crime. Specifically, the judge erred by:

3. The individual sentences, the total effective sentence and non-parole period were manifestly excessive.
   (a) departing from the agreed statement of facts, and
   (b) denying the appellant, in the circumstances, procedural fairness.

Judgment: The court allowed all grounds of appeal, holding that the sentences were manifestly excessive and resentencing the appellant to four years' imprisonment, with a non-parole period of two years. The court held that while the appellant's behaviour was reprehensible [2] and involved a "grave breach of trust and violation of … bodily integrity" [153], "the prison sentences in this case must be much shorter than would ordinarily be required" [10]. This was because of two exceptional factors: 1) the appellant's self-reporting and confession (without which he never would have been prosecuted), and 2) the victim's "remarkable and powerful evidence" [10]. The court stressed that this was "an exceptional case" [1] and "these are wholly extraordinary circumstances calling for an equally extraordinary response" [10]. However, the court noted that denunciation and just punishment were relevant sentences factors in this case [153].

The court noted that a twelve-month Intervention Order was previously taken out against the appellant on behalf of the victim for smashing food into the victim's face. However, the couple remained living together and their sexual relationship continued [17]. The court noted that the couple got divorced (because the appellant was frustrated that the victim worked so much), but continued to live together as if nothing had changed [20]. They did not tell the children of the divorce. The victim testified that she was the "Alpha female" and "glory parent" and would only see the children two or three times a week, and that the appellant was the sole carer of the children, the one who did all the hard work [21].

Regarding Ground 1, the court accepted that the sentencing judge erroneously found that the impact on the victim (who would now have to arrange for care of the children and explain the appellant's absence to them) was an aggravating factor, as opposed to a mitigating factor [84]. The court also accepted that it was not open to the judge to have qualified the mitigation resulting from the reduced psychological and emotional impact of the offending on the victim in the way the judge did [95] and that the judge erred in qualifying the mitigatory effect of the victim's evidence by being "mindful of the complex nature of the potential damage resulting from sexual offences committed in the context of family violence, which may not be readily apparent" [102]. While the court accepted the sentencing judge's comments regarding the nature of sexual violence in a family setting and held that it was "therefore appropriate for sentencing judges to be cautious when confronted with evidence of forgiveness by victims of violence, whether sexual or otherwise" [103], the court held that each case turns on its own facts. In this case, there was no evidence that the relationship was afflicted by family violence or that the victim was persuaded to reconcile by the appellant [106]. The court noted that "There is not the slightest suggestion that [the victim] gave this evidence as woman ground down by years of ill-treatment and ensnared in a relationship from which she found it impossible to escape" [5].

The court also upheld Ground 2, finding that the fact that the appellant could not remember certain things was "not inconsistent with a high level of remorse" in part because the appellant consistently make extensive admissions about his conduct to police but also consistently told police that there were parts he could not remember [123]. The court accepted that there was overwhelming positive evidence of remorse [124]. The court considered that it was not open to qualify the level of the appellant's remorse on the basis that his reporting of the offending was about the victim, not the appellant's crimes [125].

The court further upheld Ground 3, holding that the individual sentences, the total effective sentence and the non-parole period were manifestly excessive because they failed to reflect all relevant considerations (including the appellant's early pleas, remorse, previous good character, hardship involved in his

imprisonment, and strong prospects of rehabilitation) and the sentencing judge failed to give sufficient weight to the two exceptional factors outlined above [139].

The court noted that the resentenced non-parole period was shorter than what otherwise might be imposed, but that this would still adequately reflect all of the sentencing purposes mentioned [166].

***Degney v The Queen* [2019] VSCA 183 (19 August 2019) – Victorian Court of Appeal**

'Appeal' – 'Family violence' – 'Guilty plea' – 'Physical violence and harm'

Case type: Appeal against sentence

Facts: The applicant sought leave to appeal against the sentence imposed for the offence of attempted aggravated burglary (3 years' and 6 months' imprisonment) on the ground that it was manifestly excessive. The applicant and victim lived together at the time of the offending, and were in a relationship 'on and off' for around 6 years.

Issue: The issue for the Court was whether the sentence was manifestly excessive, having regard to the objective gravity of the offending, the applicant's limited criminal history and youth, the early plea of guilty and current sentencing practices.

Held: The applicant submitted that his criminal history was 'limited and relatively minor' ([32]). He had previously been sentenced, without conviction, to a community correction order ('CCO') for offences, including a charge of unlawful assault, charges of possession and use of cannabis and descending onto a railway track ([26]). He did not complete the CCO and was subsequently fined ([27]). The applicant contended that the offending was not towards the 'serious end of the spectrum' as it was brief, was not committed in company, and there was limited evidence of planning. He argued that there was only an intention to assault, not an intention to inflict actual physical harm ([31]).

The Court held that the seriousness of the offending was increased by factors, such as the fact that it involved 'an attempted forced intrusion into a residence' during the night, while possessing a 'menacing weapon … with an intention to assault a terrified and vulnerable domestic partner' by creating fear ([45]). His efforts to enter the premises were persistent and threatening ([46]), and his conduct could not be described as brief or short-lived as had been submitted by the applicant ([48]). His conduct was viewed within the context of his earlier abusive behaviour towards the victim ([47]). The absence of an intention to physically harm the victim

and of a history of family violence was found not to diminish the inherent gravity of the offending ([49], [53]). Significantly, the offending was committed in circumstances of family violence, which aggravated the offending ([50]). His conduct was motivated by a sense of entitlement, which reflected on his moral culpability and exemplified 'the very worst of male attitudes towards women' ([51]). As a result, general deterrence was an important sentencing purpose ([52]).

Mitigating factors included the applicant's early guilty plea, relative youth, limited prior history and remorse ([62]); however, when balanced against the objective gravity of the offending, these factors did not persuade the Court that the sentence was wholly outside the range of sentences reasonably available to the sentencing judge ([62]). The Court also noted the dearth of sentencing decisions involving attempted aggravated burglary ([58-[59]). Nevertheless, the Court dismissed the appeal against the sentence.

***Lim v The Queen* [2019] VSCA 182 (16 August 2019) – Victorian Court of Appeal**

'Assault' – 'Contravening a family violence order' – 'Exposing children' – 'Manifestly excessive' – 'Mitigating circumstances' – 'Obsessive behaviour' – 'Past domestic and family violence' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Step-child in the family' – 'Threat to kill'

Offences: Aggravated burglary; intentionally causing injury x2; threat to kill x2; persistently breaching a family violence intervention order; summary assault x1; summary offence of using a drug of dependence; and unlawful assault.

Proceedings: Application for leave to appeal against sentence

Grounds:

- Whether sentence on summary assault exceeded maximum penalty;
- Whether the individual sentences and orders for cumulation, the total effective sentence and the non-parole period were manifestly excessive;
- Whether the sentencing judge paid insufficient regard to the principle of totality; and
- Whether the sentencing judge erred in treating the applicant's prior convictions as relevant to the assessment of the gravity of the applicant's offending.

While drunk and drug-affected, the applicant forced his way into the home of his female ex-partner, the protected person in a FVIO to which he was the respondent. Upon entering, he grabbed KC's father,

threatened to kill him and chocked him in a sleeper hold to the point of unconsciousness. He followed KC as she fled the home and similarly choked and threatened her in the presence of her young daughter, continuing the choke hold until a police officer struck him with a torch and placed him in a headlock, having failed to subdue him with pepper spray. An elderly neighbour tried to comfort those at the scene but was also threatened by the applicant. When police arrived, they were only able to subdue the applicant with force.

The applicant persistently breached a family violence intervention order during the month leading up to the offence and had previously committed violent offences against KC and her father. He entered pleas of guilty and was sentenced to a total effective sentence of nine years and seven months' imprisonment with a non-parole period of seven years. The sentencing judge described the offending as "very grave", "sustained and dangerous", "gratuitous" and "cruel and chilling". Sentencing considerations were general deterrence, specific deterrence, denunciation and protection of the community. Weight was placed on the applicant's significant criminal history and "selfish and cowardly" approach to relationships. Significant mitigating factors were raised on his behalf including his early pleas of guilty, remorse, medical conditions causing particular hardship in custody, and reasonable prospects of rehabilitation.

Held: The first ground was conceded by the Crown. In respect to the second and third grounds, it was held that the sentence for aggravated burglary, cumulation, base sentence and resulting total effective sentence were all manifestly excessive and in breach of totality, providing that it is "likely that the judge placed too much weight on Mr Lim's prior criminal history, was overwhelmed by the gravity of the offending or gave insufficient weight to the mitigating factors, or that some combination of these factors was operative" [122]. The sentence for unlawful assault was also held to be manifestly excessive.

The Court rejected the fourth ground of appeal as they considered using the offender's prior convictions to inform an 'assessment of the gravity of his crimes [was] not the same "as speaking of an assessment of the objective gravity of a crime" [53].

***Nicholson (a Pseudonym) v The Queen* [2019] VSCA 177 (14 August 2019) – Victorian Court of Appeal**

'Appeal' – 'Damaging property' – 'Intervention order' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Social abuse'

Charges: 1 x stalking; 1 x damage property; 1 x intentionally causing injury; 1 x sexual assault; 1 x commit indictable offence on bail; 3 x contravention of Family Violence Intervention Order (FVIO)

Case type: Appeal against sentence

Facts: The appellant and victim were in a relationship for about 3 years, and had married. They separated in 2016 due to infidelity and domestic violence issues. The charges to which the appellant pleaded guilty were contained in 2 separate indictments. 2 summary charges were brought against him. The appellant was subject to a Final FVIO in 2016 which he breached by attending the victim's address, damaging her car, and coming within 5 metres of her on two occasions. He also stalked the victim by contacting her in breach of the Intervention Order ([9]-[17]), damaged her car ([21]), pinned her to the ground, and choked and sexually assaulted her by kissing her on the lips ([25]-[26]). The appellant also wrote the victim letters and emails over a period of several months that were threatening in nature. At the time of committing the offences, the appellant was on bail for other matters ([29]). The victim was injured as a result of the attack ([30]).

The sentencing judge concluded that the offending was serious, 'protracted, violent and terrifying', and sentenced the appellant to 6 years' imprisonment with a non-parole period of 4 years.

Issue: The issue for the Court was whether the sentence and orders for cumulation were manifestly excessive, given the mitigating factors of the applicant's health issues and the characterisation of offences.

Held: The Court dismissed the appeal as the total effective sentence imposed by the sentencing judge was not manifestly excessive and did not fail to adequately reflect the principle of totality ([75]-[81]). The offences were committed over a period of many months within the context of family violence. The damage caused to the victim's property was found to be significant, planned and executed to cause harm ([56]). At [62], the Court noted that the sentencing judge correctly emphasised the seriousness of the offence of intentionally causing injury. The victim was frightened and threatened with words, such as 'You are going to get it' and 'Just die' ([61]). Further, the context of the sexual assault was considered to be 'significant and inextricable', as it occurred during a 'frightening physical attack', and was motivated by hatred and contempt ([66]). As for the 2 charges of contravention of the FVIO on the separate indictment, the Court did not consider the individual sentences to be manifestly excessive and that despite the applicant having no ability to carry out the threat as he was in custody, the fact that they contained death threats and were sent by someone who had previously employed threats of death made it very serious offending ([69]-[74]). As each offence was committed over an extended period of time, directed at the one person within the context of family violence, and escalated and continued even in custody, the overall criminality meant that the orders for cumulation was not manifestly excessive ([79]-[80]).

***Kiril (A Pseudonym) v The Queen* [2019] VSCA 133 (14 June 2019) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Delay' – 'Elder abuse' – 'Manifestly excessive'

Offences: Reckless conduct endangering life

Proceedings: Appeal against sentence

Issues: Whether the sentence was manifestly excessive, in particular that the Learned Sentencing Judge gave insufficient weight to the delay in these proceedings being finalised.

Facts: The male appellant and his wife severely neglected the 83-year-old victim, the appellant's mother, who relied entirely upon them for care. The victim previously lived in a supported residential service where she was very healthy and active, and would routinely visit the doctor. However, her visits to the doctor (which included filling her prescriptions) declined and ceased altogether when she returned to live with the appellant. The victim was found dead in her bed in squalid conditions. She died as a result of bronchopneumonia in a setting of cerebral infarction, weighing only 34kg and covered in bruises and abrasions. The appellant plead guilty to the charges and was sentenced to 18 months' imprisonment, with a non-parole period of 12 months. The appellant appealed this sentence on the ground that it was manifestly excessive because the sentencing judge failed to give sufficient weight to the delay in the proceedings being finalised.

Judgment: The court refused to allow the appeal, holding that the sentence was not manifestly excessive but could even be regarded as "lenient" [49], [54]. The court noted that "the proper approach for this Court to adopt is to consider the circumstances of the offence and those of the applicant, instinctively synthesising the aggravating features and those going in mitigation – including the considerable delay – to determine whether the sentence imposed by the judge is wholly outside the range open in the sound exercise of discretion" [41]. While the delay had been considerable (five years from the offending to sentencing) and the court held that "ordinarily, a delay of that order would constitute a very powerful mitigating factor" [43], in this case, the appellant did not have a lengthy period of rehabilitation (the court accepting that he had developed no insight into his offending and did not have good prospects of rehabilitation) nor did he suffer stress or anxiety as a result of the delay [43]-[45]. Beyond the delay, the court emphasised, there was little that mitigated the offence [46].

The court noted the seriousness of the offending, holding that the victim was in such poor condition "because of the applicant's callous disregard for her welfare" [48]. It further accepted that the appellant's treatment of

his mother was "cruel, heartless and inhumane" [48]. Forrest JA held that the appellant "admitted he foresaw that his conduct placed [the victim] at an appreciable risk of death, and yet he continued to neglect her … I consider that conduct to be truly reprehensible" [53].

***Milosev v The Queen* [2019] VSCA 121 (3 June 2019) – Victorian Court of Appeal**

'Breaches of community correction order' – 'Domestic violence' – 'Drug dependency' – 'History of abuse of accused'

Charges: Aggravated burglary x 1; theft x 1; recklessly causing serious injury x 1; conspiracy to commit theft x 1; breach of community correction order (CCO) x 1.

Case type: Appeal against sentence.

Facts: The applicant pleaded guilty to charges of aggravated burglary, theft, recklessly causing serious injury and conspiracy to commit theft. She was ordered to serve a community correction order (CCO), but was later charged with breaching that order and the mandatory terms contained in it. The applicant was sentenced to a total effective term of 15 months' imprisonment, with a non-parole period of 9 months.

Issue: The applicant sought leave to appeal against the sentence on two grounds. The first ground was that the sentences imposed were manifestly excessive. It was also contended that the sentencing judge failed to give sufficient weight to 1) the impact of family violence suffered by the applicant, which compromised her ability to comply with the CCO; and 2) the applicant's prospects of rehabilitation. The second ground was that the sentencing judge erred by not deferring sentencing before making a finding that the applicant was 'unwilling and unable' to comply with a further CCO.

Held: The application for leave to appeal against the sentence was refused. The applicant's counsel contended that the applicant's capacity to fully comply with the terms of the CCO was affected by the domestic violence perpetrated on her by her partner ([20]). It was argued that the applicant was the 'captive of her partner throughout the term of the [CCO]', and found it difficult to leave him and the drug infected environment in which she was then living ([25]). Although the Court recognised that the applicant was clearly subjected to domestic violence by her ex-partner, their Honours noted that the materials placed before the sentencing judge did not sufficiently explain her substantial and repeated failures to comply with the conditions of her CCO ([48]). While it was understandable that the applicant, under the pressure of the domestic circumstances in which she was living, relapsed into drug use, it appeared that she sometimes

managed to remove herself from the abuse. Taking those matters into account, and giving full weight to the impact of her partner's conduct towards her, their Honours did not accept that the sentencing judge erred in concluding that the applicant was either unwilling or unable to comply with a further CCO ([49], [56]). No sufficient circumstances were put to the sentencing judge which would require him to defer sentencing ([56]).

***Neil v R* [2019] VSCA 64 (25 March 2019) – Victorian Court of Appeal**

'Children' – 'Factors affecting risk' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing'

Charges: Murder x 1.

Case type: Application for leave to appeal against sentence.

Facts: For about four months leading up to the victim's death, the applicant and the victim were in an intimate relationship. In the period leading up to the incident, the applicant, Marmo (the applicant's co-accused) and the victim were heavy ice users. On the day of the incident, the applicant was angry with the victim because she made a family violence complaint against him to police. The victim was savagely beaten by the applicant for 'snitching and dobbing' ([9]). Marmo and two other people were present. The applicant's attack on the victim escalated, and involved kicking her to the head and body with extreme force. The victim later died and the applicant and Marmo agreed that Marmo should 'dispose of her', by dumping her body down a mineshaft and then burning it using petrol ([12]). The trial judge sentenced the applicant to a term of 26 years' imprisonment, with a non-parole period of 22 years. Marmo was sentenced to a term of 24 years' imprisonment ([3]).

Issues: The applicant seeks leave to appeal against his sentence on the following grounds:

- The judge erred in applying the parity principle, for example, in that she imposed a greater sentence on the applicant than Marmo, even though the applicant pleaded guilty and Marmo pleaded not guilty, and where the applicant offered to give evidence against Marmo.
- The non-parole period is manifestly excessive.

Decision and reasoning: The Court refused the applicant's application for leave to appeal against the sentence. In determining the first ground of the appeal, the Court found nothing wrong with the trial judge's conclusions about the respective roles of the applicant and Marmo. It was the conduct of the applicant that

was ‘at the heart’ of the horrific offending and but for his anger with, and treatment of, the victim, her death would not have occurred ([42]). The Court was also unpersuaded that the applicant’s late plea of guilty required the trial judge to impose a lesser sentence than the sentence she imposed on Marmo ([43]). Overall, her Honour correctly differentiated the cases of the applicant and Marmo, and the Court therefore rejected the first ground of appeal ([44]).

The Court found that there was no substance in the applicant’s second ground of appeal, that the non-parole period was manifestly excessive. The fact that the non-parole period was almost 85% of the head sentence did not indicate any error. The higher the head sentence, the higher the percentage of the head sentence the non-parole period will likely be, and often it will exceed 80% ([46]). The non-parole period was not manifestly excessive in light of the circumstances of the applicant’s offending. The Court also held that the trial judge’s conclusions that a lower non-parole period need not be fixed on the basis that the applicant’s prospects for rehabilitation ‘appear reasonable’.

***DPP v Elfata* [2019] VSCA 63 (21 March 2019) – Victorian Court of Appeal**

‘Factors affecting risk’ – ‘Following, harassing and monitoring’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’ – ‘Stalking’

Charges: Rape x 1; reckless conduct endangering serious injury x 1 (acquitted); common law assault x 1 (acquitted); stalking (intent to cause physical harm) x 1.

Case type: Appeal against sentence.

Facts: The respondent was convicted of rape and stalking with intent to cause physical harm. He was acquitted of reckless conduct endangering serious injury and common law assault. The respondent and the complainant had been in a relationship for two years before the offending conduct. In relation to the charge of rape, it was alleged that the respondent placed his fingers inside the complainant’s vagina, so as to constitute digital, rather than penile, penetration ([5]).

The respondent was sentenced to two years and three months’ imprisonment with a non-parole period of one year. The Crown appealed on the ground that the individual sentence imposed for the rape charge (two years), the total effective sentence and the non-parole period were manifestly inadequate, and that the sentences imposed failed to:

- Have sufficient regard to the maximum penalty for the prescribed offences;
- Properly reflect the objective gravity of the offending;
- Have sufficient regard to the impact of the offending on the victim;
- Give sufficient weight to principles of community protection, general deterrence, specific deterrence, denunciation and the need for just punishment; and
- Give weight to mitigating factors that was not excessive ([28]).

Issues: Whether the sentence and non-parole period were manifestly inadequate.

Decision and reasoning: The Court (Priest AP, Beach and Forrest JA) noted the difficulty in establishing a ground of manifest inadequacy as it requires the Crown to show that it was not reasonably open to the sentencing judge to come to the sentencing conclusion reached, and that the sentence imposed was 'wholly outside the range of the sentencing options available' ([35]). The appeal was dismissed because the objective gravity of the offending was lower than is often seen for rape offences. The Court distinguished *Shrestha v The Queen* [2017] VSCA 364 as the respondent did not display the same degree of criminality as the offender in that case ([36]). The Court agreed with the sentencing judge's findings that the incident was a single, impulsive act, which did not appear to be premeditated. Excessive violence was not involved and the duration of the incident was relatively brief. Further, as the rape involved digital, rather than penile, penetration, 'the offence could properly be described as a breach of an agreement as to the limits of intimacy, in the context of a longstanding relationship in which intimacy occurred throughout.' ([37])

Moreover, the Court, agreeing with the sentencing judge, held that the fact the respondent exhibited little remorse and ran a trial was an important mitigating factor ([38]). Their Honours also did not disagree with the sentencing judge's finding that the respondent had 'relatively good' prospects for rehabilitation ([27]). Although the sentence imposed was lenient, the Court held that is was within the range of available sentencing options.

***DPP v Weaver (a Pseudonym)* [2019] VSCA 26 (21 February 2019) – Victorian Court of Appeal**

'Emotional and psychological abuse' – 'Evidence issues' – 'Physical violence and harm' – 'Pretext call' – 'Sexual and reproductive abuse' – 'Suicide threats'

Charges: Rape x 2; common assault x 1.

Case type: Application for leave to appeal.

Facts: At the time of the offending, the respondent and the complainant were in a relationship. Their relationship was characterised by physical and emotional abuse. On two separate instances, the respondent raped the complainant ([2]-[3]). He also assaulted her by punching her in the face ([4]). In the past, the respondent had generally acted in a possessive and aggressive manner towards the complainant ([8]). He had previously made threats to commit suicide if she left him and had insisted on having sex with her on many occasions ([6]-[7]). An important piece of evidence in this application was a pretext call between the respondent and complainant. In the pretext call, the respondent made an admission to one or more of the allegations made by the complainant. Before the empanelment of the jury, the trial judge made a ruling excluding the admission into evidence of the contents of the pretext call.

Issues: Whether leave to appeal should be granted. Whether the exclusion of the evidence would eliminate or substantially weaken the prosecution's case.

Decision and reasoning: The Court held that the trial judge did not err in considering that the jury could not reasonably conclude that the complainant specifically referred to either of the incidents subject to the two rape charges in the pretext call ([45]). Further, it was held that the trial judge correctly accepted that the jury could conclude that the respondent did make an admission of sexual misconduct in the pretext call. However, this admission was of limited probative value in the context of the case. The trial judge did not err in concluding that the probative value of the evidence would be outweighed by its prejudicial effect ([54]). Consequently, the Court concluded that the applicant should not be granted leave to appeal the decision of the trial judge to exclude the contents of the pretext call from evidence ([55]).

***DPP v Missen* [2019] VSCA 32 (4 February 2019) – Victorian Court of Appeal**

'Murder of parent' – 'People affected by substance abuse' – 'People with mental illness' – 'Sentencing'

Charges: Murder x 1.

Case type: Sentence.

Facts: The offender pleaded guilty to the murder of his father (the victim). The offence took place at the offender's house that he occupied with the victim and his then girlfriend. The offender had an argument with the victim which erupted into a violent altercation, leading him to physically assault the victim until he was

dead. Following the murder, the offender and his then girlfriend approached two men to help remove the body from the house and take it to a disused mineshaft for disposal. The offender's relationship with his father at the time of the offending was 'intensely troubled'; however despite the difficulties, they had a close and co-dependant bond. Further, he suffered from a range of emotional and psychological problems and was prone to drug abuse ([9], [57]).

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: Dixon J sentenced the offender to 21 years' imprisonment with a non-parole period of 17 years. The offender had a limited criminal history which included contravening a family violence safety notice and offences against police ([74]). Further, he pleaded guilty late and therefore was not entitled to the same degree of mitigation as if he had pleaded guilty at the earliest possible stage. There was also delay in the finalisation of proceedings which was due to factors beyond the offender's control. For example, his then girlfriend changed legal representation more than once, and he was also diagnosed and treated for testicular cancer. As a result of these matters, the offender had been on remand since March 2016 ([75]-[78]). Her Honour noted that he had used this time productively, having enrolled in several programs open to remand prisoners, and received training in drug education ([79]). The offender's prospects of rehabilitation were found to be reasonable, particularly if he remained on stabilising medication and avoided illicit drugs upon release ([82]-[83]).

The objective gravity of the crime was aggravated by the way the offender continued to assault the victim when he was already severely incapacitated. It was further increased by the nature of the physical violence, together with his efforts to dispose of the body and involve other people in that conduct. The concealment of the offence meant that the victim's relatives did not learn of his death for some time after it occurred. Regardless of the pressures that the offender may have endured, her Honour found him to be solely responsible for the victim's death 'in an episode of appalling brutality' ([84]-[85]).

The offending was not premeditated but arose in circumstances of sudden rage in the context of a highly dysfunctional household. Her Honour accepted that the offender was contrite but noted that expression of sincere remorse gave way to self-interest in the aftermath of the murder. She gave weight to denunciation, just punishment, general and specific deterrence, and the need for rehabilitation. However, specific deterrence was somewhat diminished as a factor given his limited criminal history and conduct on remand ([86]-[90]).

The parties only referred to a small number of cases involving the murder of a parent, none of which were comparable to the present case. A notable feature of this case was that despite the history of conflict between the offender and the victim, he 'accepted responsibility for murdering the person [he] had come to depend on most' ([91]-[93]).

***Forbes (a Pseudonym) v The Queen* [2018] VSCA 341 (18 December 2018) – Victorian Court of Appeal**

'Factors affecting risk' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse'

Charges: Multiple counts of assault and rape.

Appeal type: Appeal against sentence.

Facts: The applicant was charged with 12 counts of assault and rape. The first five charges involved intentionally causing injury and rape against his former domestic partner. The remaining seven charges concerned offences of assault, rape, making a threat to kill and intentionally causing injury against the same domestic partner, however, the parties had separated at the time these particular offences were alleged to have been committed. The applicant pleaded not guilty to the offences. The sentencing judge imposed a sentence of 10 years 10 months' imprisonment, with a non-parole period of seven years and three months.

Issues: The applicant sought leave to appeal because the sentence imposed was manifestly excessive in that:

- The individual sentence imposed for one of the counts of rape (count 11) was excessive; and
- The sentencing judge incorrectly characterised each offence as a serious example of that kind of offence; and
- The sentencing judge gave insufficient weight to the applicant's prospects of rehabilitation.

Decision and reasoning: The Court emphasised that the ground of manifest excess will only succeed if it can be proven that the sentence imposed fell wholly outside the range of sentencing options available to the sentencing judge. Their Honours considered the applicant's limited criminal history to be relevant, but given his lack of remorse, denial of the offending and the circumstances of the offending, the sentencing judge was open to conclude that his prospects of rehabilitation were 'guarded' ([39]). The offending was found to be very serious, and the context of domestic violence significant ([42]). The applicant's personal circumstances were also considered, including his previous experiences as a victim of sexual abuse, and his medical and

psychological history (including brain damage and bipolar disorder). Ultimately, the Court refused the appeal as the total effective sentence imposed by the sentencing judge was not outside the range of sentencing options available to him.

The Court observed that the context of domestic violence is also very important. The Court quoted from *Pasinis* [2014] VSCA 97:

> Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.

The Court noted the importance of general deterrence in this context.

***Hayden Samuels (a pseudonym) v The Queen* [2018] VSCA 251 (1 October 2018) – Victorian Court of Appeal**

'Cumulative sentence' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Women'

Charges: Rape x 2; make a threat to kill x 1.

Case type: Application for leave to appeal against sentence. Determined 'on the papers'.

Facts: The victim was the applicant's wife of many years. The applicant and the victim married in 1996 and have 2 children. The family emigrated from Egypt in 2009, and practise the Coptic Christian Orthodox faith. The rape offences involved penile-anal penetration, contrary to the Coptic religious faith (charges 3 and 4). The applicant also threatened to kill the victim, telling her that if she saw a counsellor he would kill her and tell everyone that she was mentally unstable and had committed suicide (charge 5). The victim suffered an anal injury as a result of the rape the subject of charge 4. The applicant was sentenced to 10 years and 6 months' imprisonment, with a non-parole period of 7 years and 9 months. For the charge of making a threat to kill, the individual sentence was 2 years, and for the two rape charges, the individual sentences were 8 years each. The applicant was also sentenced as a serious sexual offender in respect of charge 5.

Issue: The applicant sought to appeal against the sentence. One ground of appeal was that the sentences imposed on each of the individual counts, and the order for cumulation of the sentence imposed on charge 4, were excessive.

Held: Tate JA refused leave to appeal as she was not persuaded that it was reasonably arguable that the sentences imposed against the applicant went beyond a sound exercise of the sentencing discretion ([48]). The sentences imposed against the applicant in relation to the rape charges were 'very stern'. However, the offending was 'extremely serious' and, as the sentencing judge acknowledged, there has been a recent shift towards sterner sentencing for rape and other sexual offences. This has been a conscious decision of the courts to reflect the seriousness of domestic violence and sexual crimes committed against women in Victoria ([39]).

Her Honour noted the extreme seriousness of the offending and the absence of remorse. Therefore, there was a need for specific and general deterrence in the context of protecting the community from a serious sex offender in respect of charge 5 ([43]). Having regard to the facts, circumstances and available data regarding current sentencing practices, the sentence of 2 years' imprisonment in respect of charge 5 was not manifestly excessive nor was the relatively modest cumulation of 6 months ([46]). Further, the order for cumulation with respect to charge 3 was found to be necessary to reflect the fact that the 2 rape offences occurred as 'distinct and separate episodes' ([47]).

***McLean v The Queen* [2018] VSCA 209 (24 August 2018) – Victorian Court of Appeal**

'Damaging property' – 'Factors affecting risk' – 'Sentencing'

Charges: Aggravated burglary x 1; Criminal damage x 1; Resisting an emergency worker on duty x 1.

Appeal type: Applicant for leave to appeal.

Facts: The applicant and his ex-partner argued by text message, culminating in the applicant's text: 'Addie won't had no mother from today' and 'I'll have the last laugh I promise you that'. Addie was their six-month old daughter. On the same day, the applicant broke into his ex-partner's home, causing damage and turning on the gas before leaving. The applicant was charged with aggravated burglary, in that he entered as a trespasser, intending to destroy property with reckless disregard as to the presence of another person. He was also charged with causing criminal damage and resisting an emergency worker. He was sentenced to two years and six months' imprisonment, with a non-parole period of two years.

Issues: The applicant sought leave to appeal on the basis that (1) the sentencing judge erred by imposing a manifestly excessive non-parole period of 80% of the total effective sentence; and (2) his Honour did not explain the necessity for the imposition of the relatively high non-parole period.

Decision and reasoning: The high ratio between the non-parole period and the head sentence was such that leave to appeal was granted, but the appeal was dismissed ([27]). Given the nature of the offending and the applicant's criminal history, the sentences imposed (leaving to one side the non-parole period) were very modest and not excessive. The Court found that the explanation for the moderate sentence was largely the significance placed by the judge on the prospect of deportation. As the sentence exceeded two years' imprisonment, the sentencing judge was required by s 11(1) of the *Sentencing Act 1991* (Vic)to fix a non-parole period, unless he considered it inappropriate to do so, having regard to the nature of the offence or the offender's past history. Clearly, his Honour considered it appropriate to fix a non-parole period. s 11(3) required that period to be at least six-months less than the term of the sentence. Here, the non-parole period fixed was, in a sense, the 'maximum' period that could be fixed. In determining the non-parole period, the judge was required to take into account the purpose of parole, namely, to provide for mitigation of punishment in favour of rehabilitation after the offender had served the non-parole period (see *Power v The Queen* [1974] HCA 26). The seriousness of the offending was such that justice required a non-parole period of at least two years. Therefore, the high ratio between the head sentence and the non-parole period was explicable by the very modest sentences imposed (and cumulation ordered) for the offences. There was no error in his Honour fixing the non-parole period.

***Sawyer-Thompson v The Queen* [2018] VSCA 161 (22 June 2018) – Victorian Court of Appeal**

'Battered woman syndrome' – 'Emotional and psychological abuse' – 'Manslaughter' – 'Physical violence and harm' – 'Sentencing'

Charges: Defensive homicide x 1

Appeal type: Appeal against sentence

Facts: The female appellant had been in an abusive and violent relationship with her male partner for 12 months prior to her offending. Her partner threatened to kill her family unless she killed the victim. Acting under the fear of this threat, she killed the victim. The appellant pleaded guilty to defensive homicide.

Issues: Whether the sentence imposed was manifestly excessive.

Decision and Reasoning: Maxwell ACJ and Tate JA held that the sentence of 10 years' imprisonment with a non-parole period of seven years was manifestly excessive. The appellant was re-sentenced to six and a half years' imprisonment, with a non-parole period of five years.

The sentencing judge accepted that the killing took place at the direction of the appellant's violent and abusive partner who had threatened to kill her family unless she killed the victim. She had been subjected to 'repeated acts of violence, degradation and humiliation at the hands of her partner, who was… a highly dangerous person'. The fact that she proceeded to kill the victim rather than attempting to flee, and that she used excessive violence, 'could only be understood through the lens of the sustained family violence she had experienced' ([7]).

Maxwell ACJ and Tate JA held that the sentence imposed reflected a mischaracterisation of the gravity of the offending and of the appellant's culpability. Insufficient weight was also given to the mitigating factors of cooperation with authority and youth ([65]).

The appellant's undertaking to assist, and the provision of her statement, reflected remorse and a genuine desire to bring a person to justice ([55]). As a result, discount for cooperation was necessary because 'there [was] some personal risk' to the applicant, as a result of which she had already spent some time in protective custody.

Beach JA held that whilst the sentence was stern, it was not manifestly excessive ([133]).

***Lewis (a pseudonym) v The Queen* [2018] VSCA 40 (27 February 2018) – Victorian Court of Appeal**

'Admissibility of evidence' – 'Hearsay rule' – 'Interlocutory appeal' – 'Physical violence and harm' – 'Tendency evidence'

Charges: Aggravated burglary x 1; Intentionally cause injury x 2; Recklessly cause injury x 2; Intentionally damage property x 1; Extortion with a threat to kill x 1; False imprisonment x 1; Making threat to kill x 1; Contravening family violence intervention order x 1; Attempt to pervert the course of justice x 2.

Case type: Application for leave to appeal against interlocutory decisions.

Facts: The charges related to an incident of violence committed by the applicant against the aggrieved, his

partner. The aggrieved was to be the central witness for the prosecution ([5]-[7]). The aggrieved invoked s 18 *Evidence Act 2008* (Vic), which provides that a person can avoid giving evidence against their partner if there is a sufficient likelihood that harm would be caused to the person ([9]-[11]). The prosecution then gave notice under s 65 *Evidence Act 2008* that they would rely on statements that the aggrieved had made to the police as tendency evidence as an exception to the hearsay rule ([16]).

Issues: The applicant appealed against 3 main interlocutory decisions made by the judge. First, admitting the statements the aggrieved made to the police. Second, refusing to certify the appeal, which is a precondition to appeal against an interlocutory decision under s 295(3) of the *Criminal Procedure Act 2009* (Vic). Third, refusing to sever the proceedings for each of the applicant's charges.

Decision and Reasoning: The Court dismissed all grounds of the appeal. On the first ground, it was reasonably open for the judge to admit the evidence as an exception to the hearsay rule. The applicant argued that admitting the evidence might lead to prejudice because the aggrieved could not be cross-examined (since she had invoked the protection against giving evidence against a de facto partner) ([58]). The Court held that there were sufficient protections available to ensure a fair trial, including directions against giving too much weight to untested statements ([59]). Accordingly, in relation to the second ground, it was reasonably open for the judge to refuse to certify ([64]). On the third ground, the Court held that many charges stemmed from the same factual basis, so there was no basis to sever the charges ([68]).

The Court observed that the applicant did not seek to challenge the judge's ruling that the tendency evidence satisfies the requirements of ss 97 and 101, 'presumably' because 'he regards a submission of that kind as foredoomed to fail, based upon the recent decision of the High Court in *Hughes v The Queen*' [2017] HCA 20 (14 June 2017). [72] The Court stated at [73] that:

> It is, however, worthy of note that the general evidence of the history of domestic violence, which forms the basis of the tendency notice, may not have quite the probative force in relation to the allegation of the threat to kill and extortion, as it does in relation to the other charges brought against the applicant.

The Court concluded by cautioning trial judges about the use of tendency evidence: '[if the tendency] evidence were led, the judge would have to give a careful direction as to how it could be used and, more importantly, how it could not be used' ([75]).

***Saxton v R* [2017] VSCA 357 (5 December 2017) – Victorian Court of Appeal**

'Appeal against sentence' – 'Assault' – 'Controlling behaviour' – 'Financial abuse' – 'Mental health' – 'Suicide threat' – 'Women'

Charges: Recklessly cause injury x 4; Common law assault x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and victim were married and had two children. The applicant worked as a solicitor and the wife, the victim, as a librarian. The applicant had an epileptic seizure, which caused him to stop work and his mental health to decline. The applicant became increasingly controlling of the victim, forcing her to relinquish her financial independence and remain at home with him rather than going to work. The 'recklessly cause injury' charges occurred when the applicant punched and hit the victim at home and in their bed. The common assault charge occurred when the applicant twisted her arm so violently that her arm broke. The applicant threatened suicide, and the victim went to the police (see [5], the remarks of the sentencing judge).

The applicant was sentenced to 7 months and 14 days' imprisonment and a 2-year community correction order ([1]).

Issues: Whether the sentence was manifestly excessive.

Decision and reasoning: The appeal was dismissed (see [28]). The applicant argued that the injuries sustained were at the lower end of the scale, and the broken arms was not intended ([21]). The Court did not accept that submission. Justices Santamaria and Coghlan JJA stated that the offending was 'serious' and stemmed from an 'abusive relationship between the applicant and the victim, who was vulnerable and frightened of the applicant' ([29]). The Court quotes *Kalala v The Queen* [2017] VSCA 223, discussing the scourge of domestic violence:

> The trial courts of this State are imposing sentences for family violence offences with increasing frequency. This Court has repeatedly emphasised the need to condemn family violence, in line with community expectations. In *Filiz v The Queen* [2014] VSCA 212 [23], the Court acknowledged the 'shameful truth' that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44.

The Court concluded that the principles of general deterrence and denunciation loomed large in the present

case, and the sentence was, if anything, merciful ([31]).

***DPP v Lade (a pseudonym)* [2017] VSCA 264 (21 September 2017) – Victorian Court of Appeal**

'Attempting to pervert the course of justice' – 'Breach of family violence intervention order' – 'Family law' – 'Intimate photos' – 'Post-separation violence' – 'Property proceedings' – 'Sexual assault' – 'Stalking' – 'Suicide threats' – 'Technology and abuse'

Charges: Sexual assault x 1; Stalking x 2; Attempting to pervert the course of justice x 1; Contravention of family violence intervention order ('FVIO') x 1; Making threats to kill x 1; threatening to distribute intimate images of another person x 1.

Appeal type: Appeal against sentence.

Facts: The victim was the defendant's ex-wife. The offences occurred over an 18-month period after they had separated ([7]). The offences included: the defendant forcing the victim onto her bed and ejaculating on her; threatening to distribute intimate photos to the victim's father and employer if she did not agree to his terms for their property settlement; entering her house and leaving videos of himself; and sending mail to her house ([7]-[22]); threatening to kill himself if the victim did not drop the charges (attempting to pervert the course of justice). The defendant was originally sentenced to 16 months' imprisonment (see table at [2]).

Issues: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed.

The Court (Priest, Hansen and Coghlan JJA) re-sentenced the defendant to 2 years and 11 months imprisonment with a non-parole period of 2 years. The primary judge treated the offences as 'situational in the sense that it was based within a relationship, not that that condones it in any way, shape or form' [34]. But the Court of Appeal placed more emphasis on the fact that the domestic context, breach of FVIO and offending while in jail were all aggravating factors [49].

The Court appeared to endorse the DPP's description of the sexual assault as 'particularly serious … being violent, non-consensual and humiliating for C who was treated as though a marital chattel' [40].

***Nolan v The Queen* [2017] VSCA 240 (6 September 2017) – Victorian Court of Appeal**

'Aggravating factor' – 'Causing serious injury' – 'Gratuitous violence' – 'Manifest excess' – 'Not manifestly excessive' – 'Presence of children' – 'Sentence' – 'Youth'

Charges: Recklessly causing serious injury x 1; False imprisonment x 1; Making threat to kill x 1.

Appeal type: Application for leave to appeal against sentence.

Facts: The appellant and complainant were in a de facto relationship with two children. Over one afternoon, the appellant inflicted the following actions on the complainant in the presence of the children: throwing a pot of boiling water over her; punching and kicking her; whipping her with a kettle cord; hitting her with a broom; rubbing salt and curry powder into her wounds; and threatening to kill her (see [3]-[11]). The applicant pleaded guilty and was sentenced to 8 years' imprisonment with a non-parole period of 5 years and 6 months. The applicant had previously been refused leave to appeal against sentence, but renewed the application to the full Court.

Issues: First, whether the sentencing judge erred in not applying principles relevant to young offenders; and second, whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

The Court (Beach, Ferguson and Coghlan JJA) dismissed the first ground on the basis that the judge took into account the applicant's age, but also took into account the seriousness of the offences, the fact that the offences took place in a domestic relationship and in the presence of the applicant's and victim's children, and the serious injuries inflicted on the victim ([30]-[31]).

The Court dismissed the second ground on the basis that the sentencing judge took into account the applicant's disadvantaged upbringing, lack of relevant antecedents, plea of guilty and remorse, and no comparable case established that the sentence fell outside the reasonable range ([38]). The Court appeared to endorse the sentencing judge's comments that this was an unusual case with many aggravating factors ([24]), and that the use of weapons, boiling water and salt as 'gratuitous and sickening behaviour' ([22]).

***Kalala v R* [2017] VSCA 223 (30 August 2017) – Victorian Court of Appeal**

'Approaching "worst category of case"' – 'Current sentencing practices' – 'Incitement to murder' – 'People from culturally and linguistically diverse backgrounds' – 'Sentencing' – 'Women'

Charges: Incitement to murder x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and victim were in a de facto relationship ([4]). While the victim was visiting relatives in Burundi, the applicant became suspicious that she was seeing another man ([7]). The applicant arranged and paid for the victim to be killed ([8]). While speaking with the victim on the phone, the applicant told her to go outside ([9]). Upon walking outside, the victim was forced into a vehicle, held captive for 2 days and told that she would be killed. However, the kidnappers did not kill her because she was a woman ([10]). The victim returned to Australia. The applicant pleaded guilty and was sentenced to 9 years' imprisonment with a non-parole period of 6 years ([1]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The main argument advanced by the applicant was that the sentence was the highest yet imposed for the offence, and the circumstances of the offending were not more serious than previous offences ([3]).

President Maxwell and Redlich JA ('the joint judgement') made some general conclusions ([3]), including:

- previous sentences do not impose an upper limit on a sentencing judge (see [51]-[54]);
- the circumstances of the offending were more serious than previous sentences (see [44]-[50];
- inciting the murder of a partner is an extreme form of family violence; and
- previous sentences for incitement to murder have not reflected the objective gravity of the crime, and must be increased (see [66]-[70]).

The joint judgement remarked that the case had many aggravating factors, including the fact that the applicant played an active role in initiating the plan and delivering her into the hands of the kidnappers ([24], [46]). Since it was not suggested that the case warranted the maximum penalty, it was inappropriate to classify the case was a 'worst category' case (citing *R v Kilic* [2016] HCA 48) ([28]). However, the sentence

was reasonably open to the sentencing judge ([54]).

The joint judgement stated at [62]:

> The applicant's motivation — to have NR killed as punishment for perceived infidelity — is expressive of the very worst of male attitudes towards women … It follows that this offending must be viewed as involving moral culpability at the highest level.

Justice Osborn agreed with the joint judgement, but was reluctant to express a global view on the adequacy of current sentences for incitement to murder ([92]).

***Fitzpatrick v The Queen* [2016] VSCA 63 (6 April 2016) – Victorian Court of Appeal**

'Common assault' – 'Criminal damage' – 'Exposing children' – 'Following, harassing, monitoring' – 'Persistent contravention of a family violence intervention order' – 'Physical violence and harm' – 'Protection orders' – 'Repeated breach of protection orders' – 'Risk factors' – 'Strangulation' – 'Theft' – 'Threat to kill' – 'Women'

Charge/s: Persistent contravention of a family violence intervention order, common assault, threat to kill, theft x 2, criminal damage.

Appeal Type: Appeal against sentence.

Facts: The principal victim of the offending was the applicant's former female domestic partner. After the relationship broke down, the victim obtained a family violence intervention order, which the applicant repeatedly breached. One night, the applicant broke into the victim's house and wrapped a telephone cord tightly around her neck. He threatened to kill her and cut off 40cm from her hair, saying he wanted to disfigure her to the point that no-one else would find her attractive. He then took the victim's phone, house and car keys and drove away. The applicant was sentenced to a total effective sentence of four years and nine months with a non-parole period of two years and nine months.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The objective gravity of the offending warranted severe punishment, certainly extending to a sentence of the overall length here. In that regard, Beach JA noted that the persistent contravening of a family violence intervention order was itself extremely serious and was *'no mere breach of an intervention order of the kind so frequently seen'*. The conduct on the night of 29 October

2014 was also extremely serious because it must have been terrifying for the victim, the applicant knew there were children in the house, and the assault was not spontaneous. This was not an act brought about by a temporary loss of self-control, resulting from something said or done by the victim. His Honour stated that instead, 'it was an act of wanton cruelty intended to humiliate and terrify a defenceless woman in her own home' (See [37]-[41]).

***Byrnes v The Queen* [2015] VSCA 341 (10 December 2015) – Victorian Court of Appeal**

'Contravening a family violence intervention order' – 'Denunciation' – 'Deterrence' – 'False imprisonment' – 'People with mental illness' – 'Physical violence and harm' – 'Pregnant women' – 'Sexual and reproductive abuse' – 'Threat to kill'

Charge/s: False imprisonment, threat to kill, contravening a family violence intervention order, assault with a weapon, assault police, resist police.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female victim were in a relationship and the victim was 17 weeks pregnant with their child. The applicant wanted the victim to terminate the pregnancy and had made numerous threats against the victim and the baby. A family violence intervention order was made. On the day of offence, the applicant locked the victim inside the house, held a knife against her, and threatened to kill her if she screamed or called the police. He then tried to force the victim into the bath, saying that he was going to abort the baby. He continued to threaten the victim and the baby until he became tearful. The applicant was sentenced to a total effective sentence of three years and nine months imprisonment with a non-parole period of two years and six months.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. In light of the applicant's mitigating circumstances (his mental condition, his lack of prior convictions and his steps towards rehabilitation), the sentences imposed were high. However, the circumstances of the offence were particularly serious and required the imposition of a sentence that was sufficient to reflect the gravity of offending and to serve the purposes of sentencing including general deterrence and denunciation (See [24]). In particular, at [22]-[23], Kaye JA held:

'The applicant's offending had a number of very serious characteristics. As the respondent has pointed out, it

was premeditated, and the applicant had clearly prepared for it. The victim was vulnerable. She was carrying the applicant's baby. The applicant took advantage of his greater strength, and the fact that he had a weapon, to overwhelm her. The threat to abort the baby was, as the judge correctly said, a 'most ugly' aspect of the false imprisonment. The whole experience, to which the applicant subjected her, must have been extraordinarily terrifying. She was justifiably in grave fear for her own life and that of her baby. While the imprisonment did not extend for hours or days, it lasted for over one hour, during the whole of which the applicant terrorised his victim.

In those circumstances, the offending by the applicant, comprising charge 1, called for a stern sentence. In such a case, involving wanton domestic violence, general deterrence, specific deterrence, and denunciation were important considerations: Filiz v The Queen [2014] VSCA 212 *at [21] and Mercer v The Queen* [2015] VSCA 257 *at [54]. While the judge accepted that the applicant's psychological condition moderated the weight to be given to those considerations, nevertheless, they rightly remained important factors in the determination of the applicant's sentence: R v Yaldiz [1998] 2 VR 376, 381'.*

***DPP v O'Neill* [2015] VSCA 325 (2 December 2015) – Victorian Court of Appeal**

'Appeal against sentence' – 'Arson' – 'Coercive control' – 'Male victim' – 'Murder' – 'People who are gay, lesbian, bisexual, transgender, intersex and queer' – 'People with mental impairment' – 'Physical violence and harm' – 'Principles in R v Verdins' – 'Sentencing' – 'Strangulation'

Charge/s: Murder, arson.

Appeal Type: Crown appeal against sentence.

Facts: The male respondent and the male deceased were in a relationship. The trial judge accepted that the deceased had a dominant and controlling personality while the victim was submissive and often demeaned and belittled by the deceased in public. On the morning of offence, the respondent rejected the deceased's sexual approach and the deceased called him a 'frigid bitch'. The respondent tried to apologise but the deceased repeated his abuse. The respondent snapped. He hit the deceased over the head with a steel pan and strangled him with a dog lead. The respondent acted if the deceased was alive for several days before setting fire to their home with the deceased's body inside. He acted as if the deceased had died accidently until he was arrested.

At sentence, Dr Barth, a psychologist, provided evidence of the respondent's psychological condition. He

diagnosed the respondent as having a maladaptive personality adjustment and as suffering from pervasive feelings of worthlessness, inadequacy and insecurity. The sentencing judge accepted that the respondent's personality disorder played some role in his offending, and therefore operated to reduce his moral culpability and to moderate to some extent the need for general and specific deterrence. A total effective sentence of 18 years imprisonment, with a non-parole period of 13 years, was imposed.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was dismissed.

In setting out the background to the matter the Court observed:

> The deceased was the dominant partner in the relationship, with the respondent by and large acquiescing to the deceased's directions. Over the term of the relationship there was regular verbal conflict which intensified with time. The respondent told his psychologist how he was abused and humiliated in front of others by the deceased. Sometimes the conflicts involved verbal abuse and sometimes pushing and shoving. He also told the psychologist that the deceased was sexually demanding of him and if he declined the deceased's approaches he would call him a 'frigid bitch'. The respondent said he felt as if the deceased treated him as his own property. Despite all this, the deceased was regarded by the respondent as being loving and affectionate towards him. [7]

The Court also quoted from the earlier sentencing judgment of the Supreme Court, for example:

> 27 The personalities of both the deceased and the respondent were considered by the judge. Her Honour said this:
>
> Mr Rattle was strong, confident and successful. He also had a dominant, controlling personality; everything had to be done his way, both personally and professionally. No doubt that was part of the key to his professional success. And, because of your own psychological make-up, you felt inadequate; it suited you to be with someone who took control and made all the decisions. But many of your mutual friends have described how Mr Rattle used to demean and belittle you in public. He frequently complained to them that you were not satisfying him sexually. In front of others, he would call you lazy, a parasite; he would threaten to send you back to where you came from. He was critical of your lack of business acumen. There were financial and business pressures on the relationship. In the work context, he treated you like the office boy, not his partner.

The Court provided extensive consideration of the six circumstances identified in *R v Verdins* in which impaired mental functioning is considered relevant to the appropriate sentence to be passed on an offender (See [66]-[84] in particular). The Court rejected a purely mechanistic approach and they emphasised that careful consideration must be given to whether the evidence establishes that mental capacity has been impaired and which of the circumstances in *Verdins* are engaged. This requires rigorous evaluation of the evidence (See [68]). Here, the respondent did not establish on the balance of probabilities that he suffered from a mental impairment. As the principles in *Verdins* do not extend to personality disorders such as those relied upon, the relevant principles (in particular, the moderation of the need for general and specific deterrence, and the reduction of moral culpability) were not engaged (See [85]).

Nevertheless, the respondent's mental condition was still of some relevance to sentence, it just did not attract the level of mitigation of sentence that must be allowed where *Verdins* principles are applicable. First, the sentencing judge did not err in accepting that the respondent's personality disorder operated to moderate, to some extent, the need for general and specific deterrence. Second, the Court also held that on the evidence it was open to the sentencing judge to conclude that the murder of the deceased was not premeditated, vindictive or gratuitous but rather the result of a very complex and conflicted personality structure. In that way, the sentencing judge was correct in taking the respondent's disorder into account in making an assessment of the moral culpability of the respondent (See [99]-[100]).

The appeal court noted that the sentence was mid-range in light of the trial judge's rejection of the Crown's characterisation of the crime as premeditated; the trial judge had noted that while the controlling and belittling behaviour that had characterised Rattle's relationship with O'Neill did not justify killing him, it did mean that the sentence to be imposed for murder should be towards the lower end of the range for that offence.

***DPP v Barnes & Barnes* [2015] VSCA 293 (12 November 2015) – Victorian Court of Appeal**

'Aggravated burglary' – 'Denunciation' – 'General deterrence' – 'Intentionally cause serious injury' – 'Just punishment' – 'Physical violence and harm' – 'Protection of the community' – 'Protection order' – 'Sentencing' – 'Specific deterrence' – 'Women'

Charge/s: Aggravated burglary, intentionally cause serious injury x 2.

Appeal Type: Crown appeal against sentence.

Facts: Trevor Barnes ('the first respondent') and his younger brother ('the second respondent') entered into the premises of the first respondent's estranged wife, without her consent. Three days prior to the home invasion, the first respondent had been released from prison for offences including assaulting his wife and multiple breaches of an intervention order she had in place against him. The first respondent saw his wife and her new partner in the shower together and smashed the door of the shower. He struck his wife's new partner and his wife with a jemmy bar before pulling out a Stanley knife. He only stopped when his wife said she loved him. The first respondent was sentenced to six years imprisonment with a non-parole period of three years.

Issue/s: One of the issues was that the sentence imposed on the first respondent was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. First, in relation to the charge of aggravated burglary, Redlich JA noted that this was a very serious offence of 'intimate relationship aggravated burglary'. The first respondent entered into the house, uninvited and in company, carrying a jemmy bar, with the intention to assault his estranged wife, whom he knew was frightened of him because of his past instances of violence. He had just been released from prison and committed these offences in breach of an intervention order and a partly suspended sentence. As Redlich JA stated at [48]-[49]:

'General deterrence, denunciation and just punishment are important purposes in sentencing for such an offence … Specific deterrence and protection of the community are also important in this case, given that Trevor had not long since been released from prison for offences that included assaulting Ms Bethune and breaching an intervention order in her favour'.

However, the sentence here failed to adequately reflect these purposes.

Second, in relation to the charges of intentionally causing serious injury, in sentencing the first respondent for these offences, the sentencing judge stated: (See [68])

'I make it plain that I consider that you are the main offender in this criminal enterprise and the whole appalling saga was dictated by your immaturity and inability to control your anger in the context of your possessive and controlling behaviour of Ms Bethune, whom you had subjected to domestic violence on earlier occasions. In sentencing you, the court must denounce your conduct, give emphasis to general deterrence, and impose just punishment. A strong message needs to be sent to males in the community who are inclined to be violent towards their female partners. You do not own them. You have no right … menacingly [to] control them. If you lay a hand on them in anger, the law will not spare you punishment. Men who are bullies

towards women usually have some psychological inadequacy. They need to look long and hard at themselves to try to understand why they are inclined to behave with anger and brutality, and seek professional help to overcome such inclinations.

In your case, emphasis must also be placed upon specific deterrence because of your prior history of violence towards Ms Bethune. As I have indicated, your history of offending whilst on a suspended sentence, and breaching an intervention order, do not inspire optimism'.

Redlich JA noted that while the sentencing judge was clearly alive to the need to place considerable weight on the need for general deterrence, denunciation, just punishment, specific deterrence and protection of the community, the sentences imposed did not adequately reflect these purposes (See [69]).

***Uzun v The Queen* [2015] VSCA 292 (27 October 2015) – Victorian Court of Appeal**

'Aggravated burglary' – 'Common assault' – 'Community education' – 'Contravening a family violence intervention order' – 'General deterrence' – 'Making threat to kill' – 'Persistent breach' – 'Physical violence and harm' – 'Protection order' – 'Reckless conduct endangering a person' – 'Sentencing' – 'Tendency evidence'

Charge/s: Aggravated burglary, making a threat to kill x 3, common assault, contravening a family violence intervention order, reckless conduct endangering a person x 2.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male applicant and his wife were married and had three children together but separated in 2007. A family violence intervention order was later made against the applicant. In 2013, the applicant went to his wife's home and committed a number of offences including aggravated burglary, breach of a family violence intervention order, threatening to kill and common assault. At trial, evidence was adduced of three previous incidents where the applicant had been physically and verbally abusive towards his wife and their children. It was adduced as tendency of the applicant to act in a particular way namely, to make threats to kill family members, to assault family members, to falsely imprison family members, and to contravene family violence orders. The applicant was sentenced to a total effective sentence of ten years imprisonment, with a non-parole period of eight years.

Issue/s:

1. The trial judge erred in admitting tendency evidence sought to be adduced by the prosecution.

2. The sentence was manifestly excessive or ‘crushing’.

Decision and Reasoning: Priest JA (Maxwell P and Beale AJA agreeing) dismissed the appeal against conviction. The principles governing the admissibility of tendency reasoning were formulated in *Velkoski v The Queen* where it was said that:

‘The features relied upon must in combination possess significant probative value which requires far more than ‘mere relevance’. In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal ‘underlying unity’, a ‘pattern of conduct’, ‘modus operandi’, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength’.

Here, consistent with the principles in Velkoski, *’the evidence impugned by the applicant met the necessary high threshold of admissibility. Indeed, the conduct revealed by the tendency evidence was, as I have mentioned, conceded to be strikingly similar to the charged conduct. Given that the live issue for the jury was whether the charged conduct occurred, the evidence introduced as tendency evidence had the potential to shed considerable light on that issue, in circumstances where it could hardly be realistically contended that the probative value of the evidence did not substantially outweigh its prejudicial effect’* (See [27]).

Priest JA (Maxwell P and Beale AJA agreeing) also dismissed the appeal against sentence. The total effective sentence and non-parole period could not be said to be excessive in light of the applicant’s extensive and persistent history of criminal offending, the need for general and specific deterrence, his lack of remorse and rehabilitation, and the need for denunciation of his conduct. In particular, Priest JA stated that: *‘general deterrence is important in cases such as this of violence against domestic partners, so as to deter other like-minded individuals from similar offending’* (See [32]-[40]).

Maxwell P (Beale AJA agreeing) made some additional observations at [48]-[50]:

‘Priest JA has referred to the importance of general deterrence and this Court’s repeated statements that sentences imposed for family violence should be set at a level which will send a message to those — predominantly men — who might offend violently against domestic partners or former partners or family members.

Plainly enough, the sentences which the courts impose will not serve that purpose unless the sentences and

the reasons for them are properly publicised. As the Court said last year in DPP v Russell (in relation to sentences for random street violence) at [5] and [6]:

'Obviously enough, … a prison sentence can only have that wider deterrent effect if it is publicised across the community, especially amongst those … who are at risk of offending in this way. Courts have neither the expertise nor the resources to engage in the kind of sustained community education which is necessary if general deterrence is to be a reality. That is a task for government.

After all, it is the responsibility of government to ensure public safety. And government must therefore take responsibility for communicating the deterrent message to those who need to hear it. That requires sustained effort and the commitment of substantial resources. Without that, the community simply will not derive the benefit — in greater public safety — which should flow from the painstaking work of sentencing judges and magistrates in this State. Self-evidently, if the message is not getting through no change in sentencing law can make the difference'.

In view of the community concern about domestic violence and the importance of deterring it, those considerations are particularly pertinent in this area. A copy of the Court's decision in this matter will be forwarded to the Royal Commission on Family Violence for its consideration'.

***Mercer (a pseudonym) v The Queen* [2015] VSCA 257 (17 September 2015) – Victorian Court of Appeal**

'Assault' – 'Deterrence' – 'False imprisonment' – 'Intentionally causing injury' – 'Physical violence and harm' – 'Sentencing' – 'Serious consequences' – 'Threatening to inflict serious injury'

Charge/s: Assault x 5, intentionally causing injury, threatening to inflict serious injury, false imprisonment.

Appeal Type: Appeal against sentence.

Facts: The female victim was the male applicant's domestic partner. The applicant accused the victim of concealing drugs, becoming increasingly angry and aggressive. He slapped her, punched her to the side of the face, threw her to the floor, and whipped her with a coat hanger. The applicant then accused the victim of having a relationship with another man. He banged her head against a wall, punched her and threatened to physically harm her. The victim managed to escape but only after she had been confined for several hours. The applicant was sentenced to a total effective sentence of three years and six months imprisonment, with a non-parole period of 2 years and six months.

Issue/s: One of the issues was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. This was a serious example of serious offending. As per Maxwell P and Beach JA at [54]:

'This Court has said on many occasions that domestic violence will not be tolerated, and that general deterrence is a very important sentencing principle in the sentencing disposition which must be, and must be seen to be, condemned by the courts: R v Gojanovic [2002] VSC 467, [31]; R v Robertson [2005] VSCA 190, [13]; DPP v Smeaton [2007] VSCA 256, [21]–[22]; R v Hester [2007] VSCA 298, [19]. To borrow from what this Court said recently in Filiz v The Queen, offending of this nature is too often perpetrated by men whose response to conflict with a partner is one of violent rage. Such a response is utterly unacceptable. This Court has made it clear, and will continue to make it plain, that offending of this kind will attract serious consequences'.

The sentence imposed could not be regarded as manifestly excessive. Indeed, in light of the objective seriousness of the applicant's conduct and giving full effect to considerations of totality, the sentence imposed by the judge was entirely appropriate (See [55]).

***Portelli v The Queen* [2015] VSCA 159 (22 June 2015) – Victorian Court of Appeal**

'Aggravating features' – 'Assault police officer' – 'Denunciation' – 'Deterrence' – 'Effects of family violence' – 'Intentionally cause serious injury' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Statistics' – 'Women'

Charge/s: Intentionally cause serious injury, assault police officer x 3.

Appeal Type: Appeal against sentence.

Facts: The male applicant was in a de facto relationship with the female victim. A week prior to the offending, the applicant became enraged and, fearful of violence, the victim obtained an interim intervention order. Despite the intervention order, the victim let the applicant stay at her place. On the day of the offence, the applicant cut the complainant's throat with a razor blade. He then tried to suffocate the complainant with a pillow before producing a serrated knife and trying to cut her throat again. After some time, the applicant stopped attacking the complainant and she asked him to cuddle her because she did not want to die alone. Police arrived and the applicant attacked them with knives in both hands. The applicant was sentenced to a

total effective sentence of 11 years and six months imprisonment with a non-parole period of eight years and three months.

Issue/s: The sentencing judge erred in making adverse findings about the seriousness of the applicant's offending namely,

1. that because of the applicant's prior experience with drugs, he was aware when he ingested drugs at the time of offending that he was more likely to behave in an abusive, violent manner;
2. and that there had been an element of planning in the attack on the victim.

Decision and Reasoning: The appeal was allowed. Neither finding had been sought by the prosecutor on the plea and the applicant's counsel were not given notice that the sentencing judge was considering making such findings. Further, there was insufficient evidence to establish beyond reasonable doubt that the applicant had the relevant foreknowledge of the effect the drugs would have on him (See [4]). The court also made a number of observations about family violence at [29]-[30]:

'The sentencing judge described the attack on C as 'extremely vicious and intolerably abhorrent'. It was clear, His Honour said, that C was terrified:

You made her believe she was going to die. To ask you, her attacker, to comfort her after your attack because she thought she was going to die reveals how frightening the experience must have been for her. Yet she was in her home in the presence of an intimate partner and entitled to feel safe and secure. She was doing no more than going about her ordinary life. I do not think that she trusted you; rather, she was in fear of your confrontations when denied what you wanted. Undoubtedly, your vicious attack will be an ongoing nightmare for her. It is clear that the community is intolerant of violent behaviour in such circumstances and expects the courts to send a strong message that behaviour of this kind is totally unacceptable. Women in domestic situations are entitled to feel safe from the violently abusive behaviour of their ex-partners. This circumstance is a significant aggravating feature.

We respectfully agree. What his Honour said accords with recent statements of this Court on the subject of violent attacks by men on their current or former domestic partners. In Filiz v The Queen , the Court said:

It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners.

In Pasinis v The Queen, the Court said:

Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.

General deterrence is of fundamental importance in cases of domestic violence. The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm.

Most recently, in Director of Public Prosecutions v Meyers, the Court said:

Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking'. See also *DPP v Portelli* [2013] VSC 588.

***Hopkins v The Queen* [2015] VSCA 174 (19 June 2015) – Victorian Court of Appeal**

'Aggravating circumstances' – 'Mitigating circumstances' – 'Murder' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Worst category of offending'

Charge/s: Murder.

Appeal Type: Application for extension of time for leave to appeal against sentence.

Facts: Following a plea of guilty, the applicant was sentenced to life imprisonment with a non-parole period of 30 years for the murder of his de facto partner. Both the applicant and the victim were heavy users of illicit drugs and the relationship was characterised by violence committed by the applicant against the victim. On the day of the offence, the applicant poured petrol over the victim at a petrol station and set her alight. The victim was conscious and screaming the entire time while the applicant taunted her. He actively prevented

bystanders from helping the victim by threatening them with a knife. In sentencing the applicant, the judge concluded that the applicant's behaviour was an example of 'the worst kind of viciousness and sadistic behaviour that a court is likely to ever see'.

Issue/s: The head sentence and the non-parole period were manifestly excessive. In particular, the sentencing judge erred in placing this murder in the worst category of the offence.

Decision and Reasoning: The application was refused. While the applicant's conduct arose out of a drug-fuelled rage, it was very clear the applicant understood what he was doing. In this context, his drug consumption did not reduce his moral culpability in any way (See [42]). Further, significant aggravating circumstances were present which explained why the objective gravity of the offence was elevated namely, the circumstances of the death, the applicant's conduct at the time of offence, and the fact that others were exposed to this horrific event (See [45]). The applicant's guilty plea and criminal history were given adequate weight.

***DPP v Maxfield* [2015] VSCA 95 (12 May 2015) – Victorian Court of Appeal**

'Community correction order' – 'Intentionally causing serious injury' – 'People with disability and impairment' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Intentionally causing serious injury.

Appeal Type: Crown appeal against sentence.

Facts: The female respondent stabbed her male partner four times: twice in the shoulder, once in the lower back and once in the chest. The respondent suffered from a mild intellectual disability and PTSD. She was sentenced to a Community Correction Order (CCO) for 12 months, with conditions including mental health treatment, compliance with a justice plan and the supervision of a community corrections officer.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. In light of the respondent's intellectual disability and mental illness, her moral culpability was reduced, as was the significance of general and specific deterrence. However, even allowing for the respondent's reduced moral culpability, the sentence imposed was insufficient to satisfy the requirements of just punishment and denunciation, given the objective gravity of the offence (See [36]-[38]).

In re-sentencing the respondent, the Court had regard to the Court's guideline judgment in *Boulton v The Queen*. The Court praised the trial judge for imposing a CCO, which was appropriate in an unusual case such as this. The objective of community protection was more likely to be achieved – through the reduction of the risk of reoffending – by making such an order with appropriate conditions attached, rather than imposing a prison sentence (See [34]-[35]). However, the length of the CCO was increased to three years and greater conditions imposed.

***Marocchini v The Queen* [2015] VSCA 29 (25 February 2015) – Victorian Court of Appeal**

'Alternative sentencing orders' – 'Assault police' – 'Community correction order' – 'Criminal damage' – 'Damaging property' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Reckless conduct endangering serious injury' – 'Recklessly causing serious injury' – 'Sentencing' – 'Threat to kill'

Charge/s: Criminal damage x 2, reckless conduct endangering serious injury, recklessly causing serious injury, threat to kill, assaulting police, various summary offences.

Appeal Type: Appeal against sentence.

Facts: The applicant and one of the victims were married. The applicant suspected his wife was having an affair with their neighbour. Accordingly, he placed a tracking device on his wife's car, located her, drove dangerously, threatened to kill her and damaged her vehicle. The total effective sentence was 3 years and 3 months, with a non-parole period of 2 years.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. The Court considered whether the imposition of a 'Community Correction Order' (CCO) would have been more appropriate than imprisonment. Beach JA quoted extensively from *Boulton v The Queen*, an important guideline judgment about CCO's. In *Boulton,* it was noted that imprisonment should always be the last resort, and that a CCO is an alternative punitive option, even for 'relatively serious offences which might previously have attracted a term of imprisonment' (See at [23] – [26]).

While Beach JA acknowledged that this was a serious offence, with a number of aggravating features, a CCO should have been ordered here. The offending occurred over a relatively short time, the appellant was married with four children, had no criminal history and he had the support of his wife who was the principal

victim. The sentence was set aside and substituted for a sentence of four months' imprisonment and a CCO of three years' duration with conditions including 300 hours of unpaid community work (See at [30]). This case confirms that where such mitigating factors exist (particularly a lack of criminal history), the sentencing objectives can be achieved by combining a short term of imprisonment with a CCO. However, Beach JA noted that this would not have applied if the appellant had a criminal history.

The relevant passage in *Boulton* that his Honour referred to is – '*The availability of the combination sentence option adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending'.*

***DPP v Meyers* [2014] VSCA 314 (4 December 2014) – Victorian Court of Appeal**

'Aggravated burglary' – 'Damaging property' – 'Deterrence' – 'False imprisonment' – 'Intentionally causing injury' – 'Physical violence and harm' – 'Risk factor - strangulation' – 'Sentencing' – 'Seriousness'

Charge/s: Damaging property, aggravated burglary, false imprisonment, intentionally causing injury, possessing an unregistered firearm.

Appeal Type: Crown appeal against sentence.

Facts: The female victim was the male respondent's ex-partner. On the day of the offence, the respondent drove to the victim's premises with a double-barrelled shotgun, a power nail gun, a crow bar, cable ties and rolls of gorilla tape, various knives and cutting tools, and a plastic drop sheet. He smashed his way into the house and attempted to restrain the victim with cable ties. The victim struggled and the applicant struck her with the shotgun and started strangling her. He eventually managed to restrain the victim. After three and a half hours, police attended the premises and the applicant let the victim go. The respondent was sentenced to three years and six months imprisonment with a non-parole period of 18 months.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed and the respondent re-sentenced to five years and six months imprisonment with a non-parole period of three years. For the fourth time in six months, the Court here was concerned with sentencing for an offence of aggravated burglary committed by a male offender

against his former domestic partner, 'intimate relationship aggravated burglary' (See [3]-[4]). At [5]-[6] the Court said:

'On this appeal, as in each of the previous appeals, the offender submitted that what was said by the Court in Hogarth — about the need to increase sentences [for confrontational aggravated burglary] — had little or no application to aggravated burglary where the victim was a former domestic partner. That submission failed on each previous occasion, and we likewise reject it.

As these reasons demonstrate, the task of applying Hogarth does not require the classification of offences into categories. Put simply, Hogarth established that current sentencing practices ('CSP') for serious forms of aggravated burglary needed to change, as they did not reflect the objective seriousness of such offending. Aggravated burglaries which involve confrontation and violence, or threats of violence, should be viewed very seriously, whether the target of the attack is a former domestic partner or a person against whom some other grievance is held'.

In reaching this decision, the Court made some observations about domestic violence offending. At [45]-[46] they stated:

'We would wish to endorse the remarks in Filiz at [21]-[23] about the particular seriousness of offending involving former domestic partners. Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking. Although the cases under consideration do not fall into that worst category, they are symptomatic of what can fairly be described as an epidemic of domestic violence.

General deterrence is, accordingly, a sentencing principle of great importance in cases such as these. Those who might, in a mood of anger or frustration or bitterness, contemplate this kind of violent entry into the home of a former spouse or partner must realise that, if they do so, they will almost certainly spend a long time in prison'.

***Filiz v The Queen* [2014] VSCA 212 (11 September 2014) – Victorian Court of Appeal**

'Aggravated burglary' – 'Contravention of family violence intervention order' – 'Deterrence' – 'Intentionally cause serious injury' – 'Physical violence and harm' – 'Protection order' – 'Relevance of prior relationship to sentencing' – 'Sentencing' – 'Theft'

Charge/s: Aggravated burglary with intention to assault, intentionally causing serious injury x 2, theft, contravening a Family Violence Intervention Order.

Appeal Type: Appeal against sentence.

Facts: The male applicant had been in a relationship with the female complainant for ten years and they had three children together. A Family Violence Intervention Order was made against the applicant in relation to the complainant and their children. On the night of the offence, the complainant was lying in bed with her new partner. The applicant kicked open her bedroom door and started striking the complainant and her partner with a curtain rod. The complainant telephoned the police and the applicant fled. Another intervention order was obtained which prohibited the applicant from contacting the complainant. He breached this order on two occasions. The applicant was sentenced to three years and six months imprisonment with a non-parole period of one year and ten months.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Redlich JA's comments at [21]-[23] have often been cited in subsequent cases:

'Senior counsel for the applicant rightly conceded that general deterrence is a significant sentencing factor in this case, not only in relation to aggravated burglary generally, but most particularly in relation to violent offending against a former domestic partner: Felicite v The Queen at [20]; DPP v Pasinis at [53]. Of particular significance is the fact that the applicant was already subject to a Family Violence Intervention Order. Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This Court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves the breach of an order which exists for the victim's protection: Cotham v The Queen at [14]; DPP v Johnson at [38]-[49].

At the oral hearing it was said that the complainant's fear would have been greater if her home had been invaded by strangers seeking to steal personal property. It was suggested that the context of the offending affected its seriousness. We do not accept that these matters affect the objective gravity of the offences. The level of fear engendered by the applicant, in kicking in the locked bedroom door and proceeding to beat the victims with an iron rod, did not have to be evaluated according to such niceties. The attack the applicant launched upon his ex-partner was strongly suggestive of a desire to do her and her partner serious harm, and

anybody in their position would have feared that such harm would occur. The complainant's victim impact statement makes clear that the physical and emotional effects will be lasting.

It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners. In such circumstances, the submission that the complainant's level of fear when being attacked by her ex-partner was less than it might have been if she had been attacked by a stranger should be rejected'.

Although there were a number of relevant factors in mitigation – that is, the applicant's relatively early plea (but absent any remorse), his previous good character, his rehabilitation, both actual and prospective, work history and solid family support, and the difficulties he would suffer in prison when separated from his children, these had to be balanced against the aggravating factors of the offending and the need for general deterrence discussed above, as well as the need for specific deterrence, just punishment and denunciation. In light of this, it could not be said that the sentence was manifestly excessive (See [29]).

***Curypko v The Queen* [2014] VSCA 192 (29 August 2014) – Victorian Court of Appeal**

'Context evidence' – 'Delay' – 'Denunciation' – 'Deterrence' – 'Intentionally causing serious injury' – 'Just punishment' – 'Physical violence and harm' – 'Sentencing' – 'Victim impact statement'

Charge/s: Intentionally causing serious injury.

Appeal Type: Appeal against sentence.

Facts: The female complainant was the male applicant's de facto partner. The applicant repeatedly and brutally assaulted the complainant over a four year period. The charged offence occurred in 1989 and concerned a ten hour assault by the applicant which included striking the complainant multiple times and breaking her jaw, hitting her with various objects, heating up a knife and dragging this across her neck, and stabbing her with a syringe. The applicant was sentenced to five years imprisonment, with a non-parole period of two and a half years. There was a substantial delay between the offending and the applicant being charged – some 24 years.

Issue/s:

1. The sentence was manifestly excessive in light of the maximum penalty, the long delay and the

applicant's rehabilitation during that period, the guilty plea, the applicant's youth when he offended, and sentencing practice at the time of offence.

2. The sentencing judge erred in concluding that the gravity of the offending required the applicant's youth at the time of offending, the delay and his rehabilitation in the interim must 'give way'.
3. The sentencing judge erred in departing from the agreed statement of facts and in relying on the Victim Impact Statement as evidence of uncharged offending providing context for the charged offence.

Decision and Reasoning: The appeal was dismissed. First, the sentence was not manifestly excessive. Ashley JA acknowledged that the delay was substantial and as such merited substantial consideration as a matter of fairness to the accused. During that period, the applicant had 'reformed' (at [65]), was in a stable relationship, had a child, and was able to demonstrate rehabilitation. Notwithstanding this, the sentence imposed at trial, though harsh, was within the discretion of the primary judge.

Second, the sentencing judge did not fall into error by concluding that mitigating factors including delay, rehabilitation and the applicant's youth, 'had to take a back seat to circumstances which favoured a greater sentence' (at [41]). The seriousness of the offending as an example of severe domestic violence meant that just punishment, denunciation and general deterrence took prime consideration. An argument that the delay in bringing the proceedings reduced the need for general deterrence was dismissed. The delay here was connected to the complainant's fear and trauma and then further delay was caused by change in investigators (See [53]-[56]).

Third, the sentencing judge did not err in referring to statements made by the victim to the police, in supplementing the general description of the assaults relied upon for contextual purposes by recourse to statements made by the complainant, and by referring to the victim impact statement. In particular, the circumstances of earlier assaults were, as the judge repeatedly stated, admitted for contextual purposes only (See [34]-[39]).

***Marrah v The Queen* [2014] VSCA 119 (18 June 2014) – Victorian Court of Appeal**

'Aggravating factor' – 'Animal abuse' – 'Contravening an intervention order' – 'Physical violence and harm' – 'Protection order' – 'Rape' – 'Recklessly causing serious injury' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Threat to kill'

Charge/s: Recklessly causing serious injury, rape, threat to kill.

Appeal Type: Appeal against sentence.

Facts: There numerous family violence incidents between the male applicant and the female respondent during their relationship. A family violence intervention order was active at the time of offending. On the day of offence, the applicant and the complainant were arguing after the applicant accused her of having sexual relations with other men. The applicant punched the complainant, picked her up by her hair and threw her to the floor, kicked her several times, and banged her head on the floor. He also grabbed her around the neck such that she could not breathe and the applicant repeatedly shoved his fingers in the complainant's vagina. He retrieved two knives and said he would kill her and her dog. The applicant was sentenced to 12 years imprisonment with a non-parole period of ten years.

Issue/s: One of the issues was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. The gravity of the applicant's conduct was aggravated by the fact the applicant was subject to a family violence intervention order. As Tate JA said at [25]:

'The gravity of the offending was aggravated by the fact that the applicant was at the time the subject of an intervention order, which he flagrantly disregarded. Offending of this nature is too often perpetrated by men whose response to difficulties in a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. The sentences must convey the unmistakeable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship'.

However, the orders for cumulation did not produce an aggregate sentence that was commensurate with the gravity of the whole of the offending (See [21]-[22], [27]-[28]).

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

'Coercive control' – 'Deterrence' – 'Effects of family violence' – 'Intentionally causing serious injury' – 'Physical violence and harm' – 'Sentencing' – 'Serious consequences for victims'

Charge/s: Intentionally causing serious injury (ICSI) x 2.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant were in a de facto relationship. On the day of the first offence, the applicant began punching the complainant and went to kick her in the face. The complainant put up her left arm to protect herself and the applicant's kick broke her arm. After some delay, the applicant took her to the hospital. Three months later, the applicant started hitting the complainant and again the complainant put her arm up to defend herself and the applicant broke her right arm. Despite her excruciating pain, the applicant did not take the complainant to the doctor until the following day.

When the incidents were first charged, the applicant and the complainant had resumed their relationship and concocted a false version of events to exonerate the applicant. The relationship subsequently ended and the complainant went to the police. They were both charged with conspiracy to pervert the course of justice. The applicant was also charged with two counts of ICSI and sentenced to eight years imprisonment with a non-parole period of six years.

Issue/s: The sentence was manifestly excessive and the sentencing judge failed to give appropriate consideration to the totality principle.

Decision and Reasoning: The appeal was dismissed. The sentence imposed could not be said to be manifestly excessive. Further, the totality principle was appropriately applied. Kyrou AJA made a number of observations about family violence that have been cited in a number of subsequent judgments. The Court considered the serious consequences of violent domestic assaults and emphasised the importance of general deterrence in cases involving offences committed in the context of family violence. As at [53]-[54]:

> 'Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.
>
> The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable… Victims who have been dominated,

> controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

His Honour reiterated at [57]:

> 'General deterrence is of fundamental importance in cases of domestic violence. The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm'.

***Benson v The Queen* [2014] VSCA 51 (28 March 2014) – Victorian Court of Appeal**

'Exposing children' – 'Miscarriage of justice' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape.

Appeal Type: Appeal against conviction and sentence.

Facts: The male appellant and the female complainant had been in a relationship for 13 years. The complainant alleged that in April 2011 the appellant hit her after she refused to have sex with him. She described this as the 'last straw' and told the appellant she was leaving him. They remained living in the same house. One month later, the intoxicated appellant forced her into bed and penetrated her with his penis. Their son saw the incident and called the police.

At trial, the Crown sought to admit evidence of physical assaults by the appellant against the complainant that occurred between 1999 and 2003 (none of these assaults happened after the complainant refused to have intercourse with the appellant). The Crown argued that this evidence explained the context in which the alleged rape occurred, and was relevant to whether the complainant had freely agreed to have intercourse with the appellant and whether the appellant was aware that the complainant was not consenting or might not be consenting on the night of the alleged offence. The trial judge took account of the highly prejudicial nature of the evidence but considered that it was both relevant to and probative of the facts in issue and should be admitted for the limited purpose described in her ruling (see [19]-[23]).

Issue/s: The trial judge erred in admitting evidence of past conduct by the appellant because the evidence was not relevant.

Decision and Reasoning: The appeal was allowed. Neave JA held (Bongiorno and Coghlan JJA agreeing) that the evidence was inadmissible. Bongiorno and Coghlan JJA also held that there was a miscarriage of justice (Neave JA in dissent). Neave JA first considered whether the 'relationship evidence' (evidence of physical assaults) was relevant. Her Honour stated generally at [29]:

'Evidence of the relationship between an accused and the alleged victim of an offence may be relevant and admissible for the purpose of placing the event which is the subject matter of the offence in context, where such evidence may assist the jury to evaluate the conduct of the complainant and the applicant on the occasion which gave rise to the charge. Where the evidence is of criminal or other disreputable acts committed by the accused, so that there is a danger that the jury will treat it as evidence that the accused has a propensity to commit acts of the kind charged, the judge must warn the jury of the limited purpose for which the evidence can be used. In particular the jury must be told that the relationship evidence cannot be regarded as a substitute for the evidence that the accused committed the charged acts, or for the purpose of showing that the accused is 'the kind of person' likely to have committed that offence (R v Grech (1997) 2 VR 609)'.

Neave JA went on to consider the circumstances in which relationship evidence may be relevant. At [31], Her Honour noted that relationship evidence of prior violence by the accused towards the complainant may be admissible in sexual offence cases 'because it assists the jury to evaluate whether the complainant had freely agreed to sexual activity on the occasion to which the charge relates, or whether the accused knew that the complainant had not consented or might not have consented to having sex on that occasion': see, for example, *R v Loguancio* [2000] VSCA 33; (2000) 1 VR 235, 23 (Callaway JA).

At [33], Her Honour noted that relationship evidence of prior acts of violence by the accused 'may also be admissible where a person is charged with homicide or an offence arising out of the infliction of injury on a victim, because such evidence is relevant in evaluating the accused person's claim that he or she had an amicable relationship with the victim, or that he or she acted in self-defence': see, for example, *Wilson v The Queen* [1970] HCA 17; (1970) 123 CLR 334 and *R v Mala* (Unreported, Court of Appeal, Brooking, Ormiston, Batt JJA, 27 November 1997).

In this case, the appellant correctly conceded that evidence of the April 2011 assault when she refused to

have sexual intercourse with him only a month before the alleged rape was relevant in assessing the likelihood that she had in fact voluntarily agreed to have intercourse with him or he believed that she had done so (see [35]). However, Neave JA held at [36]-[37] that:

'[D]espite the appalling nature of the earlier assaults, I consider that the evidence of those assaults was not sufficiently relevant to the nature of the relationship which existed at the time of the alleged rape to the admission of that evidence. There was a lengthy time lapse between the earlier assaults and the alleged rape. Of itself, that time lapse might not have made the evidence irrelevant…'

'However in this case there was not only a significant time delay between the alleged rape and the earlier assaults, but the complainant remained with the applicant despite the assaults and bore him children after those assaults had occurred. It may be that she did not leave him earlier because she was afraid of him, but there was no evidence that he had assaulted her because she refused to have sex with him, prior to April 2011'.

Bongiorno and Neave JJA agreed with the reasons set out by Neave JA as to why the evidence was inadmissible. However, they also held that there was a substantial miscarriage of justice as a conviction in this case was not inevitable: see *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469. Neave JA in dissent at [52]-[61].

***Freeman v The Queen* [2011] VSCA 349 (9 November 2011) – Victorian Court of Appeal**

'Children' – 'Desire to inflict emotional harm on another parent' – 'Murder' – 'Physical violence and harm' – 'Relationship killings' – 'Sentencing'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The applicant had recently divorced from Ms Barnes, the mother of his four year old daughter (the victim). Consent orders were made in the Family Court which reduced the applicant's share of custody. The applicant was distressed by this outcome. A few days later, he was driving with his three children and had a telephone conversation with Ms Barnes, telling her that she would never see her children again. He pulled the car over and threw his four year old daughter off a bridge.

Issue/s: One of the issues was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. There were a number of aggravating circumstances on the facts including that the applicant killed an innocent child, the circumstances of the killing were horrendous and the child's death would have been painful and protracted, the applicant's conduct was a fundamental breach of trust, the killing was in the presence of his two sons, the applicant killed his daughter in an attempt to hurt his former wife as much as possible, the crime was committed in a public place, the applicant offended the public conscience, and the applicant threatened his ex-wife in the presence of their children (see [15]). The most heinous nature and gravity of the applicant's offending, his lack of remorse and poor prospects for rehabilitation, meant that a non-parole period of 32 years was not manifestly excessive.

***DPP v Johnson* [2011] VSCA 288 (23 September 2011) – Victorian Court of Appeal**

'Aggravated burglary' – 'Assault' – 'Breach involving a child' – 'Contravening/breaching a family intervention order' – 'Exposing children' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Aggravated burglary, assault, contravening a family intervention order.

Appeal Type: Crown appeal against sentence.

Facts: The male respondent entered the house of his former female partner, the complainant, with two knives and with the intention of killing himself in front of her. The complainant awoke and started screaming. This woke their daughter and the respondent left the premises (aggravated burglary and assault). The applicant was also charged with breach of a family violence intervention order which included conduct of a home invasion four days prior to the aggravated burglary, telephoning the complainant and threatening her and her family, and by coming within 200 metres of the complainant's house on the night of the offence.

He was sentenced to 15 months imprisonment for aggravated burglary, six months imprisonment for assault, and six months imprisonment for contravening a family intervention order. The sentencing judge took the view that the circumstances surrounding the burglary and assault were 'almost identical' to those surrounding the breach and ordered the sentence for breach to be made wholly concurrent with these sentences. After cumulation, a head sentence of one year and nine months imprisonment was imposed, with a non-parole period of ten months.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed, with Redlich, Neave and Bongiorno JA providing separate reasoning. The judges gave detailed consideration to matters relevant to sentencing for breach of an intervention order.

Neave JA (Bongiorno JA agreeing) agreed with Redlich JA in part but held that the sentence imposed for the breach of the intervention order was manifestly inadequate. Her Honour stated that the frequency with which intervention orders are breached – and the potentially tragic consequences of this – warrants strong judicial condemnation of the contravention of such offences. As per Her Honour at [4]-[5]:

'All Australian states have enacted legislation which is intended to protect potential victims of family violence from physical injury and from being placed in fear by harassment or threats. Family violence is a serious problem in Australia. In 2004, it was reported that family violence is 'the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years'. Breach of intervention orders is relatively common. In its Report on Breaching Intervention Orders, the Sentencing Advisory Council said that, between July 2004 and June 2007, the Magistrates' Court of Victoria and the County Court of Victoria imposed on average approximately 14,000 intervention orders per year. Over a quarter of all intervention orders imposed were breached.

Further, offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them. As was recognised during parliamentary debates on the Family Violence Protection Bill 2008, intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. The Victorian Law Reform Commission, in its report which 'underpin[ned]' many of the changes in the Bill, observed:

The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – 'not worth the paper they are written on' – by victims and perpetrators alike'.

Here, the respondent's conduct that formed the basis of the breach was conceptually distinguishable from the other offences, including the aggravated burglary. The respondent also had a significant history of breaching these orders and displayed contempt for such orders. Accordingly, the sentence imposed for breach an intervention order was manifestly inadequate.

Redlich JA (with whom Neave JA and Bongiorno JA agreed in part) held that the sentence imposed for the aggravated burglary was manifestly inadequate. In dissent, His Honour held that the sentence for the breach of the intervention was not manifestly inadequate. However, upon re-sentencing the respondent, the sentence imposed for breach of an intervention order was lenient and thus a substantially higher sentence was warranted in the circumstances.

Redlich JA concluded that the sentencing judge erred by having regard to the respondent's claims that his previous breaches were 'innocuous or insignificant' (at [49]). In reaching this conclusion, His Honour noted that it was an aggravating feature of the offending that the respondent had repeatedly contravened intervention orders. Accordingly, the principles of general and specific deterrence had to assume particular importance here (See [42]-[43]). As per the Court in *R v Cotham* at [14]:

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

It was also an aggravating feature that the breach involved a child who was protected by the order because such orders are granted pursuant to a legislative regime that places *'particular emphasis on the protection of children from family violence'* (See [45]).

Redlich JA also concluded that the sentencing judge erred in ordering the sentence for the breach to be wholly concurrent. The offence of breach was not part of a single episode of offending (See [52]-[53]). As per the comments in *R v Maher* at [16] relating to cumulation and concurrency:

'I turn to the relationship between, on the one hand, the stalking counts and the burglary and aggravated burglary, and, on the other hand, the breaches of the intervention order. It appears to me that the distinct criminality of the offending means that there should be some cumulation between the sentences imposed. Breaches of the intervention order, were in terms, disobedience of a court order. It would be inappropriate if that was not reflected in the breaches having real impact upon sentence. But, to meet the totality point, some amelioration of the individual sentences for the breaches and on the other counts is, in my view, required'.

***Felicite v The Queen* [2011] VSCA 274 (9 September 2011) – Victorian Court of Appeal**

'Denunciation' – 'Deterrence' – 'Just punishment' – 'Murder' – 'Physical violence and harm' – 'Relationship killings' – 'Sentencing'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The relationship between the male applicant and his wife, the victim, was characterised by the applicant's 'inability to control his anger' (at [2]). The victim met another man and said she was ending her relationship with the applicant. A few days later, during the course of an argument, the applicant stabbed the victim repeatedly in the neck and throat. At least part of the attack was witnessed by their four year old son. He was sentenced to 19 years imprisonment, with a non-parole period of 16 years.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. As per Redlich JA at [20]:

'The taking of a domestic partner's life undermines the foundations of personal relationships and family trust upon which our society rests. The sentence must reflect both the sanctity of human life and societies' abhorrence of violence towards vulnerable and trusting partners who could legitimately have expected the offender to be the protector, not the perpetrator of violent abuse. An outburst of homicidal rage in such contexts is totally unacceptable. The community expectation is that the punishment assigned to such conduct must be condign so as to denounce in the strongest terms the abhorrent nature of domestic murder and to deter others from taking a similar course. Accordingly the principles of general deterrence, denunciation and just punishment will ordinarily be given primacy in sentencing for the murder of a partner in a domestic setting even where there are present, circumstances of provocation or great emotional stress'.

The sentence could not be said to be manifestly excessive. It appropriately reflected the considerable weight given to the principles of general deterrence and just punishment arising from the spousal relationship between the applicant and the victim (See [36]).

***El Tahir v The Queen* [2011] VSCA 46 (4 March 2011) – Victorian Court of Appeal**

'Breach of intervention order' – 'Exposing children' – 'Intentionally causing serious injury' – 'Mitigating circumstances' – 'Non-parole period' – 'Physical violence and harm' – 'Protection orders' – 'Sentencing' – 'Women'

Charge/s: Intentionally causing serious injury, breach of intervention order.

Appeal Type: Appeal against sentence.

Facts: The complainant was the applicant's estranged wife. The complainant obtained an intervention order against the applicant. In the presence of their two children, the applicant stabbed the complainant in the back, slashed her fingers, punched her, kicked her and pulled some of her hair out.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The Court held at [23] that *'the sentence was not manifestly excessive and, indeed, properly reflected the gravity of the offence after taking into account all mitigatory factors including the plea of guilty. The Court rightly treated with the utmost seriousness the appellant's knife attack on his defenceless wife in the presence of their children and in circumstances which included the invasion of her home in breach of a court order. Further, the relative brevity of the non-parole period might be thought to properly and adequately take into account the personal circumstances of the appellant'.*

***Kane v R* [2010] VSCA 213 (23 August 2010) – Victorian Court of Appeal**

'Assault' – 'Breach of intervention order' – 'Criminal damage' – 'Damaging property' – 'Intentionally causing serious injury' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Specific deterrence'

Charge/s: Intentionally causing serious injury, intentionally causing injury, common assault, criminal damage, breach of an intervention order.

Appeal Type: Appeal against sentence.

Facts: The offending was spread over two indictments. The male applicant and Rachel Delaney were in a de facto relationship. She was married to, but separated from, Daniel Smyth. During the applicant's relationship with Ms Delaney, there were repeated incidents of tension and conflict between him and Mr Smyth. After Ms

Delaney informed the applicant that their relationship was over, he broke into her house and attacked Mr Smyth (who was also present). He bit of a large part of Mr Smyth's nose and held Ms Delaney by the throat. The applicant was sentenced to eight years imprisonment.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. Nettle JA cited with approval the sentencing judge's remarks that, *'it is incumbent on a sentencing judge to impose condign punishment in a case like this in order to send a clear message to likeminded people that a civilised society does not condone people using physical violence to take the law in their own hands to settle disputes and deal with domestic partners in a violent way. Her Honour also observed, correctly, that inasmuch as these attacks were cowardly, unprovoked and unexpected attacks, there was a particular need for specific deterrence'.*

However, as the Crown conceded here, the sentence was manifestly excessive (See [24]-[25]). Nettle JA further noted that, although this was not the case in which to do so, there was a need to revisit sentencing practices in relation to offences of intentionally causing injury (See [25], [29]-[30]).

***Smith v The Queen* [2010] VSCA 192 (29 July 2010) – Victorian Court of Appeal**

'Attempting to pervert the course of justice' – 'Deterrence' – 'Need to condemn family violence' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Recklessly causing serious injury' – 'Relevance of victim's wishes' – 'Sentencing' – 'Victim contribution'

Charge/s: Recklessly causing serious injury, attempting to pervert the course of justice.

Appeal Type: Appeal against sentence.

Facts: The male applicant and female complainant were in a relationship. They were arguing and the applicant started punching and striking the complainant. The applicant was sentenced to three years and three months imprisonment with a non-parole period of two years and three months.

Issue/s:

1. The sentencing judge erred in failing to have any regard or sufficient regard to the attitude of the victim.
2. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. There was an assertion from counsel for the applicant that the complainant did not want these charges to be pursued (but no evidence from the complainant to substantiate these assertions). Beach AJA held that the sentencing judge was not bound to give any weight to the unsupported assertions made about the complainant's attitude to the prosecution. His Honour referred to Neave JA in *R v Hester* at [27] and held that*, 'even in cases where there is evidence of forgiveness of the victim of domestic violence, this evidence should be treated with extreme caution'* (See [8]).

Further, notwithstanding the applicant's attempts to deal with his drug and violence problems since being remanded in custody, the sentence imposed was well open and could not be said to be manifestly excessive. The sentencing judge properly took into account the personal circumstances of the appellant, the appellant's bad criminal record, principles of general deterrence, specific deterrence and denunciation. As per Beach AJA, '*this Court has said on many occasions that domestic violence will not be tolerated and that general deterrence is a very important sentencing principle in the sentencing disposition which must be, and must be seen to be, condemned by the courts'.* In the circumstances, the sentence could not be said to be manifestly excessive (See [11]).

***Kanakaris v The Queen* [2010] VSCA 120 (28 May 2010) – Victorian Court of Appeal**

'Aggravated burglary' – 'Aggravating factor' – 'Breach of protection order' – 'Common assault' – 'Deterrence' – 'Exposing children' – 'Intentionally causing injury' – 'Intentionally causing serious injury' – 'Kidnapping' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Threat to kill'

Charge/s: Common assault x 4, intentionally causing injury x 3, threat to kill x 2, aggravated burglary, kidnapping, intentionally causing serious injury.

Appeal Type: Appeal against sentence.

Facts: The male applicant pleaded guilty to 13 offences, involving appalling physical violence, humiliation and abuse committed against his female de facto partner, sister, mother and four year old daughter. The total effective sentence was nine years and three months' imprisonment, with a non-parole period of seven years.

Issue/s: Some of the grounds of appeal included –

1. The sentencing judge failed to give sufficient weight to the applicant's plea of guilty.
2. The sentencing judge erred in fixing the non-parole period.

Decision and Reasoning: The first ground of appeal was dismissed but the second ground of appeal allowed. The applicant's contention that the sentencing judge failed to give sufficient weight to his plea of guilty was dismissed. The offending here was extremely serious. The conduct involved constituted breach of an intervention order, it was well planned and involved the use of an accomplice, the applicant was armed and threatened his partner, he took away her children, and she was unable to escape for six hours. His Honour also noted the that maximum penalties for aggravated burglary and intentionally causing serious injury as 25 years and 20 years respectively (See [70]-[72]). It was clear that the trial judge incorporated the discount for the plea of guilty in her orders of accumulation, which were only 12 months on the base sentence.

However, the appeal was allowed on the basis of the non-parole period. It was noted that a seven year non-parole period is 'very substantial'. Coghlan JA concluded that the primary judge must have imposed such a substantial non-parole period because of a 'guarded view taken of the applicant's prospects of rehabilitation' (at [83]). However, the applicant had no criminal history and had pleaded guilty. As such, His Honour concluded that the primary judge erred in imposing such a long non-parole period on the basis of her conclusion on rehabilitation alone. The non-parole period was reduced to six years.

Neave JA agreed with Coghlan AJA but made some brief remarks about the complaint of manifestly excess. She noted at [4]:

'Notwithstanding the mitigating circumstances to which the learned sentencing judge referred, the shocking violence which the offender inflicted on those he professed to love required strong denunciation and considerable emphasis on both general and specific deterrence'.

***R v Bastan; DPP v Bastan* [2009] VSCA 157 (4 August 2009) – Victorian Court of Appeal**

'Arranged marriage' – 'Rape' – 'Relevance of prior relationship' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape.

Appeal Type: Appeal against conviction and sentence; Crown appeal against sentence.

Facts: The complainant gave evidence that her marriage to the applicant was arranged by her parents. After the applicant was aggressive, she fled to a women's refuge. They were divorced and the complainant obtained a family violence intervention order. The applicant began sending text messages to the complainant, masquerading as another man. The complainant invited this man to her house but told the applicant to leave

when he arrived. He then dragged her to the bedroom, forced her onto the bed and penetrated her vagina with his penis. The applicant was found guilty after a trial and sentenced to four years imprisonment, with a non-parole period of two years and three months.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The Crown appeal against sentence was allowed. In upholding the appeal, Buchanan JA said at [36]:

'I consider that the sentence would generally be regarded as inadequate if imposed upon an offender who tricked his way into the house of a stranger and raped her. The fact that the applicant and the complainant, in the past, had shared a consensual sexual relationship may have played a part in producing this sentence. In my opinion it should have played no part save insofar as those who have been in a relationship should be deterred from asserting any right or power in a like fashion against their former partners. This rape constituted an act of dominion by the applicant over the complainant's body, which is not to be tolerated. In my opinion, the sentence, and in particular the non-parole period, was manifestly inadequate and represents an error that warrants interference by this Court'.

***Earl v The Queen* [2008] VSCA 162 (25 August 2008) – Victorian Court of Appeal**

'Deterrence' – 'Offences at home' – 'People with disability and impairment' – 'Physical violence and harm' – 'Recklessly causing injury' – 'Sentencing' – 'Women'

Charge/s: Recklessly causing injury.

Appeal Type: Appeal against sentence.

Facts: During the course of an argument, the applicant punched his wife, the complainant, six times in the head. The complainant did not seek medical attention for two days. She was admitted to hospital and found to have a large sub-arachnoid haemorrhage. She was also discovered to have carotid aneurysms. As a result of the carotid aneurysms, the complainant suffered permanent changes to her life and could no longer live independently. It was acknowledged by the sentencing judge that, on the basis of medical evidence, it was not possible to know for certain whether there was a causal link between the applicant's attack and the serious medical events that followed. The applicant was sentenced to 14 months imprisonment suspended after 10 months for a period of 12 months.

Issue/s: One of the issues was whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The sentence could not be said to be beyond the range of sound sentencing discretion. Despite the limited nature and extent of the attack, and the injuries which it was shown to have caused, the offence was still serious. The complainant was a person with limited cognitive impairment and, to that extent, she was vulnerable and in need of care and support. The complainant was entitled to the applicant's love and protection as his wife but was instead assaulted by the applicant in their own home. Nettle JA said at [23]:

'As such, the offence involved a gross breach of trust in the place where the victim was most entitled to feel safe. General deterrence is of real importance in cases of domestic violence, especially in cases where victims are particularly vulnerable. And because of the applicant's prior convictions, aged as they were, it was apparent that there was a need for some measure of specific deterrence'.

***R v Hester* [2007] VSCA 298 (29 November 2007) – Victorian Court of Appeal**

'Deterrence' – 'Difficulty of leaving' – 'Evidence of forgiveness' – 'False imprisonment' – 'Intentionally causing injury' – 'Intentionally causing serious injury' – 'Need to condemn' – 'Physical violence and harm' – 'Relevance of victim's wishes' – 'Sentencing' – 'Victim contribution' – 'Victim impact statements' – 'Women'

Charge/s: Intentionally causing injury, intentionally causing serious injury, false imprisonment.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant were in an intimate relationship. On two occasions the applicant physically assaulted the complainant while intoxicated. On the second incident of assault, he also detained the complainant for 45 minutes and refused to let her seek medical attention. At sentence, a victim impact statement was tendered in which the complainant said she was partly to blame for the second incident and that she wanted to resume a relationship with the applicant. The applicant was sentenced to four years imprisonment, with a non-parole period of three years.

Issue/s:

1. The sentencing judge erred in ignoring the victim impact statement for sentencing purposes.
2. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. First, the sentencing judge did not err in not taking into account the part of the victim impact statement in which the complainant assumed blame for the second offending. There was also no substance in the claim that the sentencing judge failed to have regard to have proper regard to the complainant's attitude to her relationship with the applicant (see [13]). Second, the sentences imposed were balanced, if not lenient, in all the circumstances. The offending was very serious – it was a savage, brutal and cowardly act on a victim who was physically much weaker than the attacker. Chernov JA also noted that the Courts have stated on a number of occasions that *'such domestic violence will not be tolerated and that general deterrence is a very important sentencing principle in the sentencing disposition'* (see [19]-[20]).

Neave JA agreed with Chernov JA and added at [27]:

'It is a common pattern of behaviour for perpetrators of domestic violence to express penitence and persuade their victims to reconcile. For a number of complex reasons which have been discussed in the social science literature dealing with this issue, many victims are assaulted on several occasions before they summon the courage to leave an abusive relationship. Often they require considerable support in order to do so. In my view, these are matters which should be given considerable weight by a judge who is considering the weight that should be given to a victim impact statement made by a person who has been the victim of domestic violence. I therefore agree with the comments of Simpson JA in R v Glen at 4 that evidence of forgiveness of the victim of domestic violence should be treated with extreme caution'.

***DPP v Smeaton* [2007] VSCA 256 (15 November 2007) – Victorian Court of Appeal**

'Blaming the victim' – 'Intentionally causing serious injury' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentencing' – 'Women'

Charge/s: Intentionally causing serious injury.

Appeal Type: Crown appeal against sentence.

Facts: The respondent saw the victim, his ex-girlfriend, at a Shopping Centre and became abusive and aggressive after she refused to help him 'score' heroin. He punched her and kicked her repeatedly in the head when she fell to the ground. The respondent was sentenced to three years imprisonment, with a non-parole period of 20 months.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. It was possible to infer that after being refused heroin, the respondent 'snapped' and his moral culpability was therefore less than it otherwise might have been. However, having said that, *'this was a vicious, cruel and unprovoked attack on a small and virtually defenceless woman. To kick anyone in the head is grossly dangerous. To do it more than once, deliberately, is courting the worst kind of disaster. Fortunately, that did not occur. But her injuries were serious, and they are to some extent likely to be permanent'.* The offence was aggravated by the fact that it was committed in a busy shopping centre and it represented a gross breach of trust the victim reposed in the respondent. Accordingly, the respondent's moral culpability was high (See [13]). Given the nature and gravity of the offending and the extent of the respondent's criminal history, Nettle JA held the sentence was manifestly inadequate (See [16]).

Dodds-Streeton JA added further comments regarding some particularly troubling features of this offending. At [21], Her Honour stated:

'Violence, and in particular violence by men against women as a means of control in current relationships or in relationships which have ended, is a prevalent and even critical social evil. As in the present case, the perpetrator not uncommonly expresses remorse immediately after a violent assault, but nevertheless seeks to blame the victim for causing the attack. Although the respondent did appear to regret the assault, as the sentencing judge observed, his letter to the court denigrated the victim's character and effectively sought to blame her for his backsliding into drug use and for provoking the attack. In the police interview, he denied the crime, at one point apparently claiming that the victim had assaulted him, and called her a lying dog'.

***R v Gojanovic (No 2)* [2007] VSCA 153 (14 August 2007) – Victorian Court of Appeal**

'Deterrence' – 'Murder' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Murder.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The female deceased entered into a de facto relationship with the applicant. The relationship deteriorated, in part due to the deceased's gambling habit. The relationship ended and the deceased moved into separate premises. The applicant started stalking her, largely to monitor her treatment of his son. The

applicant followed her home one evening, clubbed her on the head a number of times with a rubber mallet and strangled her with cord. The applicant was found guilty by a jury of murder and was sentenced to 20 years imprisonment, with a non-parole period of 15 years.

Issue/s: One of the issues was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The sentencing judge was justified in concluding that the applicant was not remorseful for killing the victim. The evidence before the judge was of a vicious, determined and brutal attack by a person with a significant advantage in size and weight over his victim. The sentencing judge was further entitled and correct to regard general deterrence as a significant factor in such a case in the exercise of his sentencing discretion. As per the Court at [140]:

'[O]ur courts have stated on more than one occasion that in cases of killings of the type which occurred here in a "domestic" setting, the concept of general deterrence is an important and weighty sentencing consideration. The sentence, in such cases, must be such as to provide a strong message that outbursts of homicidal rage, in contexts such as this case are totally unacceptable and will be dealt with by stern sentences of the type imposed upon the applicant'.

The Court continued at [141]:

'As (the sentencing judge) correctly observed many individuals have to confront circumstances of difficulty in the course of the breakdown of relationships. The Court must send a clear message to estranged parents that custody and other such disputes are to be resolved by proper processes and not by horrendous violence such as that imposed on the deceased in this case. In all the circumstances it cannot be said that the sentence imposed in this case is manifestly excessive'. See also *R v Gojanovic* [2005] VSC 97 (27 January 2005).

Note: the High Court refused special leave to appeal (see *Gojanovic v The Queen* [2011] HCATrans 66).

***R v Duncan* [2007] VSCA 137 (22 June 2007) – Victorian Court of Appeal**

'Aggravating factor' – 'Breach of intervention order' – 'Breach of intervention orders' – 'Damaging property' – 'Deterrence' – 'Double punishment' – 'Following, harassing, monitoring' – 'Intentionally causing injury' – 'Physical violence and harm' – 'Protection orders' – 'Sentencing' – 'Totality'

Charge/s: Damaging property, intentionally causing injury, breach of an intervention order.

Appeal Type: Appeal against sentence.

Facts: The male applicant engaged in protracted stalking of the female complainant for a number of years, in an attempt to initiate a relationship. The complainant obtained an intervention order against the applicant. In breach of this order, the applicant attended the complainant's workplace, smashed her car's windscreen and caused injury.

Issue/s: Some of the issues were that –

1. The sentencing judge failed to have sufficient regard to the need to avoid double punishment and thus the sentences imposed were excessive. This was based on the principle of double jeopardy i.e. where two offences of which an offender stands convicted contain common elements, it is wrong to punish the offender twice for the commission of the elements that are common (*Pearce v The Queen*).
2. The trial judge failed to have sufficient regard to the principle of totality.

Decision and Reasoning: The appeal was dismissed. Vincent JA remarked at [37] that:

'I would add that the sentencing judge was clearly correct in attributing a high level of seriousness to the appellant's conduct and reflecting that in the sentences imposed. Not only did the appellant's conduct involve a savage and sustained attack upon his unfortunate victim but, it must not be forgotten she had sought the protection of the law against his continued and frightening criminal harassment. He responded to her endeavours, and to the imposition of a sentence of imprisonment upon him, by seeking to punish her and damage her property. Obviously the community cannot accept that those who avail themselves of its protection may be subject to revenge or retribution if its structures and that protection are to possess credibility and operate to deter potential offenders'.

***R v Elias* [2007] VSCA 125 (19 June 2007) – Victorian Court of Appeal**

'Battered woman syndrome' – 'Theft' – 'Verdins principles' – 'Where the victim is an offender'

Charge/s: Theft x 19.

Appeal Type: Appeal against sentence.

Facts: The offending took place between 2000 and 2004 when the female applicant was employed as an

accountant at a firm. She diverted funds paid by bankrupt estates for creditors to her own accounts. The applicant was sentenced to a total effective sentence of 20 months imprisonment, with a non-parole period of 12 months. The sentencing judge accepted evidence that the applicant's offending behaviour was symptomatic of 'battered woman syndrome'. There was a history of physical and sexual abuse at the hands of the applicant's husband.

Issue/s: One of the issues was that the sentencing judge erred:

(a) In failing to sufficiently reduce the weight to be accorded to specific deterrence and moral culpability on account of the applicant's psychological condition; and

(b) In failing to sufficiently reduce the weight to be accorded to general deterrence on account of the applicant's psychological condition.

Decision and Reasoning: The appeal was dismissed. The sentence imposed did not suggest that the sentencing judge failed to give any or sufficient weight to the impact of the applicant's mental state upon the significance of general deterrence, specific deterrence or moral culpability. His Honour's sentence, reflecting moderation in individual sentences, and a small extent of cumulation, was in fact merciful (See [16]-[28]).

In obiter, Ashley JA observed that the *Verdins* principles had not as of yet been applied in respect of offences of this kind, where the offender asserts battered woman syndrome, as the relevant mental impairment, reduced moral culpability and the weight to be accorded to specific and general deterrence in sentencing. The battered woman/learned helplessness situation had typically been raised in homicide cases in relation to the question – why the offender did not leave their abusive partner? His Honour left open the possibility of the *Verdins* principles applying in a case where learned helplessness is given as the explanation for the commission of, for example, property offences. But this case was not an appropriate vehicle for making such a determination because there was insufficient evidence of the impairment to the applicant's functioning arising from the history of abuse (See [12]-[14]).

***R v Roach* [2005] VSCA 162 (8 June 2005) – Victorian Court of Appeal**

'Battered woman syndrome' – 'Burglary' – 'Conduct endangering persons' – 'Deterrence' – 'Negligently causing injury' – 'Physical violence and harm' – 'Sentencing' – 'Theft' – 'Where the victim is an offender'

Charge/s: Burglary, theft, conduct endangering persons, negligently causing serious injury x 2.

Appeal Type: Appeal against sentence.

Facts: The female applicant and Mr O'Neill, her partner and co-offender, broke into a milk bar and stole goods and cash. The applicant drove off from the store with Mr O'Neill as her passenger. They were chased by police, with Mr O'Neill threatening to kill her if she slowed down. The applicant crashed the car into another vehicle driven by Mr Hahn. The impact caused both vehicles to be engulfed in flames, trapping Mr Hahn inside his vehicle. He suffered extensive burns to his body. Mr O'Neill also suffered injuries as a result of the crash. The applicant was sentenced to a total effective sentence of six years imprisonment, with a non-parole period of four years.

Issue/s: One of the grounds of appeal was that the sentencing judge erred in his assessment of the applicant's moral culpability by giving insufficient weight to the threats made to her by her partner.

Decision and Reasoning: The appeal was dismissed. As per Callaway JA at [15]:

'the judge did accept that O'Neill's threats motivated the appellant to drive as she did and that she took those threats seriously because of the history of violence directed towards her. There was an element of "battered woman" syndrome. Nevertheless, His Honour said, the police were present and protection would have been immediately available to her. I appreciate that she would have feared what O'Neill might do subsequently, but it is one thing to engage in shop-lifting or the like under a threat of violence; it is another thing altogether to engage in conduct so dangerous that it results in the kind of injuries sustained by Mr Hahn. General deterrence is not excluded by threats. On the contrary, general deterrence may provide a counter-threat. The judge was not in error in saying that general deterrence must be the paramount sentencing consideration for offences of the kind the subject of counts 3 to 5 and that a substantial period of imprisonment was required to deter others minded to act in a similar way. I do not consider that his Honour undervalued the threats from O'Neill, particularly when the sentences he imposed on counts 3 to 5 are taken into account'.

***R v Pham* [2005] VSCA 57 (7 March 2005) – Victorian Court of Appeal**

'Children' – 'Deterrence' – 'Intentionally causing serious injury' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Intentionally causing serious injury x 2.

Appeal Type: Appeal against sentence.

Facts: The male applicant was in a relationship with the female victim and lived with her and her son, the other victim, for a few months. The relationship ended but they maintained an association. The applicant married the victim's sister but started to harass both the victim and her sister. The victim obtained an intervention order protecting her and her children. In breach of the intervention order, the applicant entered into the victim's house. He stabbed her with a knife to the face, mouth, chest and neck approximately eight times (count 3). The victim's son tried to intervene but the applicant struck him with the knife twice times, almost severing the child's hand (count 4). The applicant was sentenced to a total effective sentence of ten years imprisonment, with a non-parole period of seven years.

Issue/s: The sentencing discretion miscarried as the judge was required to sentence the applicant on the basis that the verdict on count 4 rested not upon a finding by the jury of the deliberate infliction of serious injury to the victim but upon their application of the instructions of the trial judge concerning the concept of transferred malice.

Decision and Reasoning: The appeal was dismissed. There was no error on the part of the sentencing judge. His Honour did not impose a sentence on the basis that the applicant deliberately stabbed the victim (See [14]-[19]). Vincent JA further noted that the proper exercise of the sentencing discretion in this case required an order that effectively cumulated part of the sentence imposed on count 4 upon the sentence imposed on count 3. This was necessary to reflect the seriousness of the two separate offences and the particular aggravating features attaching to each, some of which were common and other not. In this context, it was particularly serious that the applicant act in flagrant violation of an intervention order the female victim had obtained to protect herself and her children. This is because the intervention order is:

'… designed by parliament to provide the protection of the law to vulnerable individuals, usually, as in this case, women and children, who legitimately fear for their safety. Offenders who disregard such orders and occasion injury to persons whose personal security is intended to be guaranteed through this means must anticipate that an extremely stern view will be adopted by the courts of their conduct and, save in the most unusual circumstances, will be subject to condign punishment' (See [21]-[22]).

***DPP v Muliaina* [2005] VSCA 13 (2 February 2005) – Victorian Court of Appeal**

'Aggravated burglary' – 'Causing serious injury recklessly' – 'Common assault' – 'False imprisonment' – 'Indecent assault' – 'Need for denunciation' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual and reproductive

abuse' – 'Threat to kill'

Charge/s: Presentment 1 – false imprisonment; Presentment 2 – causing injury recklessly, indecent assault x 2, rape; Presentment 3 – aggravated burglary, common assault, false imprisonment, making a threat to kill, causing injury recklessly.

Appeal Type: Crown appeal against sentence.

Facts: The primary victim was the male respondent's former de facto partner and mother of their child. The circumstances of the first presentment were that the victim said she wanted to end their relationship. The respondent dragged her to his house and tied her to a chair. The false imprisonment ended when she was able to convince the respondent to call her mother because their daughter needed feeding. The second presentment related to the respondent's offending after he had resumed living with the victim. He slapped the victim and hit her with a leather strap. He then tried to force the victim to perform oral sex on him and engaged in penile-vaginal intercourse with her without her consent. The victim obtained an intervention order against the respondent. The offences that were the subject of the third presentment occurred when they had ceased co-habitation and the respondent forced his way into her parent's home. He assaulted the victim's friend who was there at the time, threatened to kill the victim, and punched and hit her. The respondent was sentenced to a total effective sentence of four years imprisonment.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed, The sentence imposed did not equate with the gravity of the crimes. As per Chernov JA at [21]:

'It seems plain enough that the respondent's offending conduct had the aggravating features for which the Director contended. It was brutal and cowardly and was, in the relevant sense, ongoing. It involved, in the main, ferocious physical attacks by the respondent on a much weaker victim whom the respondent claimed to love. On those occasions he treated her as if she were his slave who had to do his bidding or be severely punished if she refused. Such conduct is clearly unacceptable to this community and must be denounced by the courts. That the respondent experienced the brutal upbringing for which he contended does not make his behaviour, even though it may have been a manifestation of his uncontrolled anger, any more acceptable'.

***R v Sa* [2004] VSCA 182 (7 October 2004) – Victorian Court of Appeal**

'Aggravated burglary' – 'Cautious approach to victim forgiveness' – 'Exposing children' – 'Intentionally causing serious injury' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Role of apology' – 'Sentencing' – 'Victim contribution' – 'Victim's wishes'

Charge/s: Aggravated burglary, intentionally causing serious injury.

Appeal Type: Appeal against sentence.

Facts: The applicant and the victim, his cousin, were born in Western Samoa. They had a heated argument over the phone, in which the applicant said he would 'chop [the victim's] head off'. The applicant armed himself with a machete and went to the victim's home. The applicant entered through an unlocked door and struck the victim twice with the machete to the back of the head and neck, in front of two small children. After the offence, a cultural ceremony of apology and reconciliation was performed. At sentence, the victim expressed his desire that the applicant not be imprisoned, his forgiveness of the applicant and that they now had a very good relationship. The applicant was sentenced to a total effective sentence of four years imprisonment, with a non-parole period of two years.

Issue/s: Some of the grounds of appeal included that the sentencing judge erred in that he failed to take into account the attitude of the victim and the remorse of the offender.

Decision and Reasoning: The appeal was dismissed. As per Eames JA at [38]-[40]:

'The statement of his Honour that the attitude of the victim could not 'govern' the sentencing approach was consistent with the principles stated in Skura. In the present case, however, there was good reason why the judge would be cautious in evaluating the weight to be given to the evidence of the victim. In the first place, he was not the only victim of the appellant's crime; the two children also witnessed what must have been a horrifying incident, although there was no evidence of any long lasting adverse effects on the children. Crimes of violence frequently create alarm and distress to people other than the immediate victims, and in assessing the need for general deterrence a sentencing judge must have regard to the impact of crime more broadly than merely upon the immediate victim.

An additional reason for being cautious about the weight to be given to the evidence of the victim related to the nature of [the victim's] evidence. One reason why courts do not allow the wishes of the victim to

determine the sentence to be imposed is that the victim might not always be able to assess what is in his or her own best interest. For example, when considering what weight to give to factors of general and specific deterrence in a case of a woman assaulted by her partner a sentencing judge would be minded to have regard to the imperatives which might motivate a battered wife to plead for leniency towards her attacker. In such circumstances the sentencing judge might be cautious about giving undue weight to such a plea for leniency.

In the present case, the victim was himself in a difficult position among other members of the Samoan community, and his acceptance of the apology might have been motivated by a range of considerations'.

The sentencing judge accepted that the ceremony was of great cultural significance and that it represented a traditional apology of the most humble and sincere kind. He further accepted that the applicant had expressed genuine contrition and remorse. These statements reflected that the sentencing judge did in fact give weight to the performance of the cultural ceremony and to the factors of remorse and forgiveness (See [43]). Eames JA was not persuaded that the weight given to these factors displayed error in the sentencing judge's approach. On the contrary, having regard to the seriousness of the offences, the sentences imposed were merciful (See [44]).

***R v Skura* [2004] VSCA 53 (7 April 2004) – Victorian Court of Appeal**

'Incitement to murder' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Victim impact statements'

Charge/s: Incitement to murder.

Appeal Type: Appeal against sentence.

Facts: The female applicant pleaded guilty to a single charge that she incited Jason Dorrian, an undercover police officer, to murder her husband, the complainant. She was sentenced to seven years imprisonment, with a non-parole period of four years and six months. At trial, her husband submitted a victim impact statement that stated his forgiveness of the applicant, his desire that she return to live with the family and his willingness to offer her support to enable her to re-enter society. The sentencing judge stated that the relevance of the victim's attitude was doubtful.

Issue/s: The sentence was manifestly excessive in light of the way the sentencing judge dealt with evidence

of a number of factors including the victim impact statement of her husband.

Decision and Reasoning: The appeal was allowed, with the judges providing separate reasoning. Smith AJA stated at [48] that:

'So far as the attitude of the victim to the degree of sentence is concerned, that is generally irrelevant. But evidence that the victim has forgiven the offender may indicate that the effects of the offence had not been long-lasting. It may mean that 'psychological and mental suffering must be very much less in the circumstances. Accordingly, some mitigation must be seen in that one factor': R v Hutchinson (1994) 15 Cr App R (S) 134, 137. Where the offence occurs in a domestic situation, the attitude of the victim may also be relevant to the question of rehabilitation'.

Here, the sentencing judge considered one aspect of the victim impact statement – the attitude of the victim and whether it could affect the sentence. His Honour did not appear to consider the impact of the crime on the victim or the relevance of the victim impact statement, and the attitude shown in it, to the question of rehabilitation. However, *'the evidence revealed by the victim impact statement was in fact significant and, in particular, showed that there was no adverse impact on the victim'.* Further, the applicant's prospects of rehabilitation were enhanced because of the willingness of the victim and the daughter to help the applicant deal with her serious personality disorders. Accordingly, the sentencing judge erred in failing to have regard to this relevance of the victim impact statement (See [50]).

Eames JA also held that the sentencing judge did not give sufficient weight to the victim impact statement of the applicant's husband (See [13]). His Honour stated at [12]:

'This Court has often acknowledged that the introduction of victim impact statements has served an important purpose of ensuring that sentencing judges have a full appreciation of the consequences of criminal conduct to the victims of the crimes, thereby ensuring that judges properly weigh the factors relevant to victims which must be considered by virtue of s.5 of the Sentencing Act 1991. The courts have also warned that the victim impact statements should not be misused so as to produce a sentence which is unfair, and that an articulate or emotional victim impact statement could not justify a sentence being imposed which was not just in all the circumstances'.

However, while judges must ensure the contents of victim impact statements do not unbalance the sentencing process so as to cause a miscarriage of the sentencing discretion, Eames JA held that there may be many instances where the victim impact statement may have the effect of producing a more severe

sentence. Likewise:

'If a victim impact statement can have that effect in encouraging a view of the case which would justify a more severe sentence, then in my view sentencing judges ought to give equally appropriate weight to a victim impact statement where the victim positively expresses support for the accused and argues for a more lenient sentence' (See [13]).

***R v MFP* [2001] VSCA 96 (15 June 2001) – Victorian Court of Appeal**

'Aggravating factor' – 'Domestic context as an aggravating factor' – 'Physical violence and harm' – 'Recklessly causing serious injury' – 'Risk factors' – 'Sentencing' – 'Strangulation' – 'Women'

Charge/s: Recklessly causing serious injury.

Appeal Type: Appeal against sentence.

Facts: The applicant was married to the victim and they had three children together. The applicant forcibly dragged his wife out of the house and into the shed, where he had set up a noose. There was a struggle and he placed a noose so tightly around her neck that she passed out. The applicant was sentenced to four years imprisonment with a non-parole period of one year.

Issue/s: One of the grounds of appeal was that the sentencing judge erred in finding that the offence was aggravated because it occurred in a domestic context.

Decision and Reasoning: The appeal was dismissed. The sentencing judge in fact stated that the legislature and the community regarded the offence of recklessly causing serious injury as serious, an attitude that was correct particularly in a domestic context. Ormiston JA held that the sentencing judge was entirely justified as seeing this as a factor to be born in mind (See [19]). His Honour further stated that:

' I think [the domestic context] can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish. Now it was not suggested that there were special advantages which the applicant had in the present case, but he was certainly able to know whether the children would be up or asleep and where they would be, and where

to take his wife to gain privacy for this cruelly devised attack. The matter need not be examined any further, for in truth the advantages that he had, including that of surprise, justified the judge in holding that it was proper to view more seriously this attack occurring in the domestic context of this family. The consequences for both his wife and children were manifest, as fairly could have been expected' (See [20]).

***R v Mason* [2001] VSCA 62 (2 May 2001) – Victorian Court of Appeal**

'Common assault' – 'Digital rape' – 'Existence of prior relationship not mitigating' – 'Indecent assault' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Indecent assault, common assault, digital rape.

Appeal Type: Appeal against sentence.

Facts: The offences were committed by the applicant against his estranged wife, the complainant, with whom he had two children. During the course of an argument, the applicant grabbed the complainant by the crotch and lifted her up, slamming her into the bed on a number of occasions. Three days later, the applicant broke into the complainant's house and started to choke and slap her. She struggled against him and he pushed her to the floor and penetrated her vagina with his finger. The applicant was sentenced to a total effective sentence of three years and four months, with a non-parole period of 14 months.

Issue/s: One of the issues was that the sentencing judge erred by failing to give sufficient weight to a number of factors including the pre-existing relationship between the applicant and his wife.

Decision and Reasoning: The appeal was dismissed. Winneke P addressed the submission that where the rape occurs against the background of a previous settled sexual relationship, it should generally be regarded by a sentencing court as less serious than a rape by a total stranger. Winneke P considered the authorities led in support of this submission and at [7] and [8] expressed the following conclusions:

'I do not regard them as laying down a sentencing principle of inflexible or universal application. A rape committed in the context, and against the background, of a previous settled relationship may in certain circumstances be a factor which a court can take into account in mitigation where it can be seen that the impact upon the victim has, for that reason, been less traumatic than otherwise it might have been. But, equally, it is not difficult to imagine a rape, committed by a man who has been in a previous relationship with his victim, which would be every bit as frightening as a rape committed by a stranger. The one thing which the

authorities to which this Court has been referred demonstrate is that the crime of rape, whatever the circumstances, and upon whomsoever committed, is regarded by the courts as a grave insult to its victim and a crime which can rarely give rise to a non-custodial sentence.

It should not be forgotten that the crime of rape is an intensely personal crime which, for sentencing purposes, cannot be divorced from its effects on the victim. But the effects include not only those which flow from the physical invasion of the victim's person and security, but also those which flow from the violation of the more intangible intellectual properties of the victim's rights and freedoms. In a society in which there is an increasing number of couples becoming estranged, the courts have a heightened obligation to deter those who have previously lived in a stable relationship with a wife or partner from regarding such wife or partner as akin to a chattel devoid of rights or freedoms, and as an object readily available for their sexual gratification'.

***R v Boaza* [1999] VSCA 126 (5 August 1999) – Victorian Court of Appeal**

'Attempted murder' – 'Denunciation' – 'Deterrence' – 'Domestic homicide' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Attempted murder.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant formed a relationship, which the complainant subsequently ended. One evening, the applicant tailgated the complainant, forcing her to stop her vehicle. He dragged her out of the car and threw her down an embankment. Stating that he was going to kill her, the applicant punched the complainant and stabbed her multiple times before he was restrained by passers-by. Despite losing massive amounts of blood, the complainant survived. The applicant was sentenced to 14 years imprisonment with a non-parole period of 11 years.

Issue/s:

1. The sentence was manifestly excessive.
2. The sentencing judge failed to give sufficient weight to the applicant's plea of guilty and other matters put in mitigation on his behalf.

Decision and Reasoning: The appeal was dismissed, with separate reasoning provided by Chernov JA and

Winneke P but each concurring with the final orders. Chernov JA found that the sentence could not be said to be manifestly excessive in the circumstances. The offence was in the upper range of the scale of seriousness for the crime of attempted murder – it was a brutal, cowardly and unprovoked attack induced because the complainant had left their relationship. The applicant showed no remorse and repeatedly lied to police. A sentence reflecting the principles of denunciation and general and specific deterrence was warranted in the circumstances. Further, without the intervention of others the applicant would have killed the victim. Finally, it was clear the sentencing judge took into account all relevant mitigating factors (See [27]-[31]).

Winneke P similarly held that the sentence could not be said to be manifestly excessive. His Honour said at [50]:

'[T]his was truly a case where the court's sentence must mark the community's condemnation of the applicant's conduct and must be such as to deter others like-minded from resorting to such conduct as a means of resolving emotional disputes. The type of conduct engaged in by the applicant, reflecting as it does a lack of self-discipline and self-centred lack of respect for the freedom of choice of his victim, was rightly viewed by his Honour, I think, as a serious example of this crime'.

R v Harris [1998] 4 VR 21 (3 December 1997) – Victorian Court of Appeal

'Deterrence' – 'Existence of a prior relationship' – 'Physical violence and harm' – 'Rape' – 'Recklessly causing serious injury' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape, recklessly causing serious injury.

Appeal Type: Crown appeal against sentence.

Facts: The respondent was convicted of raping and recklessly causing serious injury to his estranged wife. During the assault, which lasted one and a half hours, the respondent punched the complainant over 200 times, predominately to the face. He was sentenced to two years imprisonment, with a non-parole period of one year. The sentencing judge relied on four matters in deciding to impose a sentence at the lower end of the scale: (a) the offender was unlikely to reoffend, (b) the confusion in his mind as to where his relationship with the complainant was going, (c) the offender's previous good record (which indicated the actions were out of character), and (d) the fact that, since the complainant was his wife, she would not have suffered the long-term traumatisation endured by other rape victims.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Charles JA (Phillips JA agreeing) held that the sentences imposed were manifestly inadequate. None of the first three factors (a), (b) or (c) identified by counsel justified the low penalty for the rape of the complainant. Charles JA did not accept the Crown's submission that factor (d) disclosed a significant error of principle. The sentencing judge's statement as to traumatisation was no more than a finding of fact in the circumstances of this particular case, and not purely premised on the fact that the complainant was his former wife. Notwithstanding this, a substantially heavier sentence was warranted in the circumstances.

Charles JA further held that the imposition of such a lenient sentence here undervalued two important sentencing considerations. First, general deterrence plays an extremely important role in warning the community that rape, within or outside of marriage, will not be tolerated and will attract condign punishment. Second, the considerations which influenced the sentencing judge to impose a lower sentence suggested that His Honour gave little weight to specific deterrence. In light of the respondent's lack of remorse for his actions, specific deterrence ought to have played a significant role in the construction of an appropriate sentence. Error was also shown in the sentencing judge's decision not to direct any cumulation of sentence for the serious physical violence inflicted upon the complainant (See 27).

Tadgell JA also agreed with Charles JA but provided some additional observations. In particular, at 28-29, His Honour stated:

'In particular, it cannot be said that [the sentencing judge] purported to apply any principle to the effect that rape by a man of his wife or former wife or of a person with whom he is or has been in a close relationship is to be treated more leniently than a rape by a stranger. The authorities do not appear to support any such principle. The most that can be said, in my opinion, is that the penalty to be imposed for the crime of rape cannot be regarded as necessarily conditioned by the relationship of the parties to it. Any relationship or lack of it between them will no doubt usually fall to be considered as one of the circumstances to be taken into account in a determination of the appropriate penalty. In some circumstances a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence'.

There was no error of that kind here but the sentence was still manifestly inadequate for the reasons articulated by Charles JA.

***R v Cotham* [1998] VSCA 111 (17 November 1998) – Victorian Court of Appeal**

'Breach of intervention order' – 'Community protection' – 'False imprisonment' – 'Physical violence and harm' – 'Protection order' – 'Repeated and contemptuous breaches of intervention orders' – 'Sentencing' – 'Theft'

Charge/s: False imprisonment, theft x 3, breach of intervention order x 5, unlicensed driving.

Appeal Type: Appeal against sentence.

Facts: The male applicant and female complainant were divorced and the complainant had obtained multiple intervention orders against the applicant over a period of time. The applicant broke into the complainant's home, threatened the complainant with a knife and tapped the complainant's mouth and legs and tied her to the bed. He then took the complainant's credit cards and left the premises in the complainant's car. Some days later, the applicant again broke into the complainant's house. The complainant fled the premises and the applicant took credit cards and various other items. On a final occasion, the applicant telephoned the complainant at work, trying to persuade her to drop the charges against him. All these incidents were in breach of an intervention order. The applicant was sentenced to a total effective sentence of two years and six months imprisonment, with a non-parole period of 15 months.

Issue/s: One of the grounds of appeal was that the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Charles JA held that the sentence could not be said to be manifestly excessive. The applicant committed serious crimes which adversely affected the victim and her children quite significantly. The applicant was contemptuous of the intervention order, disregarding it and its terms as and when he pleased. And he had been in court on two previous occasions for breaching the same order (See [16]). As per Charles JA at [14]:

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

***R v Yaldiz* [1998] 2 VR 376 (9 October 1997) – Victorian Court of Appeal**

'Attempted murder' – 'Background of emotional and physical abuse' – 'Exposing children' – 'Manifestly inadequate' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Attempted murder.

Appeal Type: Crown appeal against sentence.

Facts: The respondent was convicted of the attempted murder by stabbing his wife. He attacked her in a frenzy in public in front of their children. At the time of the incident, the respondent was suffering from post-traumatic stress disorder. He was sentenced to six years imprisonment, with a non-parole period of four years.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Batt JA stated that *'general deterrence is not eliminated but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap'* at 381 (See also *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102 (23 May 2007) and *R v Tsiaras* [1996] 1 VR 398 (28 November 1995)). His Honour held that the sentence failed manifestly to meet the gravity of the respondent's crime. The fact the offence occurred in a domestic situation did not decrease its heinousness. The crime warranted a sentence reflective of the considerations of general and specific deterrence, the community's expectation of proper punishment and the possibility of rehabilitation (See 381).

Winneke P agreed with Batt JA but added his own observations. His Honour agreed at 382 that the sentence was manifestly inadequate and stated:

'[T]his was a very serious example of the crime of attempted murder. It was premeditated and vicious and carried out upon a defenceless woman, in a public place, in the presence of the terrified children of both the respondent and the victim. I agree with the learned sentencing judge that the crime is not to be regarded as any the less heinous because it was committed against the background of an emotional domestic dispute. That is merely an explanation and not an excuse for the crime.

Winneke P also held at 383 that '*whether in the particular case a psychiatric condition should reduce or eliminate general deterrence as an appropriate purpose of punishment will depend upon the nature and*

severity of its symptoms and its effect upon the mental capacity of the accused'.

***R v Towns* [1992] VCCA (unrep, 21 September 1992) – Victorian Court of Criminal Appeal**

'Murder' – 'Physical violence and harm' – 'Relationship killings' – 'Sentencing' – 'Seriousness'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The victim was the applicant's wife. Throughout the marriage, there were episodes where the applicant drank to excess and subjected the victim to mental and physical abuse. The victim obtained an intervention order against the applicant. The applicant stabbed the victim in the throat on a train. The applicant was sentenced to 20 years imprisonment, with a non-parole period of 15 years.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. The sentence imposed on the applicant was outside the range of sentences imposed for comparable offences. In re-sentencing the applicant, Phillips CJ stated at 7:

'[T]here appears to be an implication in counsel's submissions on behalf of the applicant that, in some way, cases involving a murder arising out of a relationship, or arising out of a domestic situation are less heinous as a class than other types. There is no doubt in my mind that the court must set its face against such an implication'.

Supreme Court

DPP v McDonough [2023] VSC 352 (23 June 2023) – Victorian Supreme Court

'Expert evidence' – 'Extensive criminal history' – 'High moral culpability' – 'History of domestic and family violence' – 'Homicide' – 'Manslaughter' – 'People affected by drug and alcohol misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Poor prospects of rehabilitation' – 'Post-offence conduct' – 'Sentencing'

Charges: Manslaughter x 1.

Proceedings: Sentencing.

Facts: The male offender pleaded guilty to manslaughter of his female partner. In the course of assaulting the victim, the offender punched the victim in the face, causing her to fall over and hit her head. The fall caused bleeding to the brain, resulting in the victim's eventual death.

Issues: Sentence to be imposed.

Reasoning and decision: Fox J sentenced the offender to 11 years and 6 months' imprisonment with a non-parole period of 8 years and 6 months.

In assessing the offender's personal circumstances, Fox J acknowledged the offender's drug abuse led to an unstable lifestyle and significantly contributed to his offending behaviour [27]. Fox J also recognised the offender had a very lengthy and relevant criminal history, dating back to 2001. The offender breached good behaviour bonds, suspended sentences and community correction orders imposed by the courts [29]. The offender was on bail for other matters when he committed manslaughter, aggravating his offending [29].

Mental illness diagnoses were not consistent, but experts discussed schizophrenia, substance use disorder, depression, personality disorder, and a mild acquired brain injury [30]-[34]. However, Fox J held Verdins has no application as there was no evidence prison would be a burden on the offender's mental health [35].

Fox J provided a sentencing discount for the early-stage guilty plea [36] and accepted prison COVID-19 restrictions as a mitigating factor [38]. The judge also regarded the offender's post-offence conduct as relevant; he called an ambulance, expressed he knew what he did was seriously wrong, and handed himself into police the same day [41].

However, Fox J considered the offender's remorse limited [40]. The judge also held the offender's prospects

of rehabilitation were poor, as he had declined to engage in prison-based services and had a long-history of breaching court orders [43]. Fox J held that neither the offender's drug use nor mental health issues mitigate his offending. His moral culpability for the crime was high [45].

Fox J stated when sentencing violence against female partners, 'the courts must send a message to other would-be offenders that if you commit such crimes, you should expect to receive a substantial term of imprisonment' [48].

Re Thompson **[2023] VSC 274 (17 May 2023) – Victorian Supreme Court**

'Application for bail' – 'Compelling reason' – 'Expert evidence' – 'No prior criminal history' – 'Past defence service' – 'Physical abuse' – 'Psychologist evidence' – 'Rape' – 'Separation' – 'Serious alleged offending' – 'Sexual abuse' – 'Stalking' – 'Suicide threat by perpetrator' – 'Technology facilitated abuse' – 'Unacceptable risk'

Charges: rape x 7; rape by compelling sexual penetration; attempted rape x 2; assault x 6; sexual assault x 3; assault with intention to commit sexual offence x 2; recklessly causing injury; false imprisonment x 6; criminal damage x 4; stalking; installation use and maintenance of optical surveillance devices; threatening to distribute intimate image; theft. (Also unrelated charges of driving under the influence of alcohol x 3).

Proceedings: Bail application.

Facts: The applicant man and complainant woman had been in a relationship since 2015. Following unsuccessful IVF treatment their relationship deteriorated and it is alleged the applicant's violence towards the complainant commenced. The relationship ended in 2021 but despite this, the couple continued a sexual relationship, while agreeing to also see other people, which the complainant commenced to do. They agreed the complainant could keep storing belonging's in the shed of the home and stay in the shed when visiting Bendigo (he had moved to Melbourne). It was during this period that the offending occurred.

The applicant allegedly broke into the complainant's house on multiple occasions, including while she was sleeping with another man, and on one occasion secretly filmed her having sexual intercourse with someone else and threatened to distribute the resulting film. The applicant also came to the complainant's house and tampered with and damaged her car, came into her bedroom while she slept, monitored her phone and sent her images of a cut on his arm, insinuating that he would kill himself.

After the complainant told the applicant she needed space apart from him, he became aggressive, verbally

and physically, grabbing the complainant and ripping a door off its hinges. On another occasion, the complainant came home to find the applicant hiding under her bed and there were multiple instances of rape. While the complainant left her house for a period and changed the locks, the applicant later confronted her at her home again and attempted to rape her again, chasing her out onto the street and physically assaulting her.

The applicant admitted to stalking but denied the sexual offences and was initially denied bail. A ten-year protection order was made with a full no-contact condition. The applicant relied heavily on evidence from his psychologist (Cummins) to demonstrate his lack of risk. Cummins opined that the offending was 'situationally motivated,' having arisen in the context of a relationship breakdown in which the agreement to see other partners was 'very provocative' and difficult for the applicant [82], [87]. Cummins undertook a risk assessment using the 'Risk for Sexual Violence Protocol' guidelines (and not the Static-99R), concluding that the applicant displayed none of the markers of re-offending. He was not able to complete a full assessment of the applicant's risk profile for violence, as he felt limited by the need to distinguish allegation from established fact. The prosecution challenged Cummins' characterisation of the offending and finding of low risk, which they saw as being largely based on his focus on the applicant's lack of criminal history and lack of completion of the risk-assessment tests.

Reasoning and decision: Bail refused.

There was no contention that the offender had compelling reasons for bail and Champion J accepted this based on his stable accommodation, possible future employment, substantial surety, ongoing treatment opportunities and lack of criminal history.

Champion J found that the applicant demonstrated an unacceptable level of risk given the degree and protracted, premeditated nature of the offending, his disturbing surveillance of the complainant and his willingness to travel significant distances for the offending, consistent with the prosecution's rejection of the offending as 'situationally motivated.' The complainant had an entitlement to live in peace and privacy which would be undermined by his bail.

While there was no mental health diagnosis, Champion J noted Cummins' lack of access to historical records, refusal to draw connection between the offending and the applicant's military history, and limited ability to commit a full sexual offending risk-assessment. Given the arrangement for the committal hearing in a few weeks, the judge concluded that the prosecution case and thus his bail could more realistically be assessed

at that time. The applicant relied heavily on evidence from his psychologist (Cummins) to demonstrate his lack of risk. Cummins opined that the offending was 'situationally motivated,' having arisen in the context of a relationship breakdown in which the agreement to see other partners was 'very provocative' and difficult for the applicant [82], [87]. Cummins undertook a risk assessment using the 'Risk for Sexual Violence Protocol' guidelines (and not the Static-99R), concluding that the applicant displayed none of the markers of re-offending. He was not able to complete a full assessment of the applicant's risk profile for violence, as he felt limited by the need to distinguish allegation from established fact. The prosecution challenged Cummins' characterisation of the offending and finding of low risk, which the court saw as being largely based on Cummin's focus on the applicant's lack of criminal history and lack of completion of the risk-assessment tests.

***DPP v Tan (Ruling No 1)* [2023] VSC 296 (2 May 2023) – Victorian Supreme Court**

'Allegations of infidelity' – 'Application to lead hearsay evidence' – 'Evidence' – 'Evidence of accused accessing text messages of victim' – 'Hearsay' – 'Monitoring' – 'Murder' – 'Relevance' – 'Short relationship'

Charges: Murder.

Proceedings: Prosecution pre-trial application to lead hearsay evidence.

Facts: The accused objected to the admissibility of two statements in the Crown's noticer of hearsay evidence filed pursuant to s67 of the *Evidence Act 2008* (Vic) ('the Act'). The deceased woman was in a relationship with the accused which commenced on 1 January 2021. She was killed on 1 February 2021, after the accused became aware that she was friendly with another man.

The prosecution submit the hearsay representations for part of the evidence detailing the relationship evidence, and relevant and admissible as an exception to the hearsay rule pursuant to s65(2)(b) and/or s65(2)(c) of the Act.

Issue: The admissibility of the disputed evidence, two hearsay statements of the deceased to the deceased's friend Ms Chi, namely:

1. 'That the accused deliberately ejaculated in her vagina without her permission, and that she was angry as a result' (the parties agree 'deliberately' and 'without her permission' should be deleted); and
2. 'The accused had been accessing her mobile phone and reading her messages'.

Objections: The defence objects to the admission of the statements on the following bases:

1. The first statement is not relevant, does not come within a recognised exception to the hearsay rule, and in any event should be excluded pursuant to s 137 of the Act.
2. The second statement does not come within a recognised hearsay exception.

Reasoning and decision:

1. The first statement is not relevant pursuant to s 55 and therefore not admissible pursuant to s 56(2):

   In my view, the evidence that the deceased told Ms Chi that the accused ‘came inside my vagina’, and she was very angry and yelled at him about it, could not rationally affect (directly or indirectly) the assessment of the probability of whether the accused killed the deceased, and if so, whether he killed her with murderous intent. The evidence does not provide a motive or reason for the killing. It does not assist a jury to determine whether the accused in fact killedthe deceased. It does not provide necessary context or background. It is not relevant and therefore not admissible. [53]

2. The second representation is hearsay and admissible pursuant to s 65(2(c):

   Turning to s 65(2)(c). The phrase, ‘made in circumstances that make it highly probable that the representation is reliable’ creates a stringent test. It may be contrasted with the language employed in s 65(d)(ii), which provides that the representation must be ‘made in circumstances that make it likely that the representation is reliable’. Clearly, s 65(d)(ii) sets a lower bar than s 65(2)(c).[59]

   There are a number of relevant circumstances which bear upon the question of whether it is ‘highly probable’ that the representation is reliable. The deceased and Ms Chi were close friends, and the evidence shows the deceased shared intimate and personal information with Ms Chi. The deceased told Ms Chi a number of things about her relationship with the accused, and not only things that portrayed the deceased positively and the accused negatively. For example, the deceased told Ms Chi that she was not in love with the accused, but liked his money and that he cleaned her house. She said she did not really want to have sex with him, but did it so he would keep paying for things. These disclosures suggest Ms Chi and the deceased had an honest and frank relationship. [60]

   The deceased had no reason to lie or embellish, or mislead her friend Ms Chi. She was not drug or alcohol affected. She did not suffer from any physical or mental illness or other issues that would have impacted her reliability. The event about which she spoke had occurred recently, in circumstances

where she was still seeing the accused. This was a simple, uncomplicated narrative, made to a close friend who she communicated with multiple times a day. [61]

R v Basham (Sentence) **[2023] VSC 79 (27 February 2023) – Victorian Supreme Court**

'Coercive control' – 'Controlling, jealous or obsessive behaviours' – 'Monitoring' – 'Murder' – 'Past domestic and family violence' – 'Physical violence' – 'Protection order' – 'Rape' – 'Sentencing' – 'Separation' – 'Sexual abuse' – 'Stalking' – 'Tracking'

Proceedings: Sentencing hearing for a conviction of murder (Category 1 offence).

Issue: Was the murder in the 'worst category' of offending such as to justify the imposition of a life sentence?

Facts: The male defendant and female deceased separated after 10 years of a marriage in which the defendant subjected the deceased to physical and emotional abuse.

The victim lived in 'abject fear' of the defendant, who monitored her movements and communications and made threats to destroy her. The victim obtained a protection order following the separation, installed security in her home and made two allegations of rape against the defendant, who was charged.

One week before the committal hearing for the rape offences, the defendant hid himself outside the victim's house while she took her children to school. When she returned into the garage, he brutally beat her (inflicting 41 separate blunt force injuries) and hanged her, attempting to stage the scene as a suicide.

Reasoning and decision: Taylor JA imposed a life-sentence with a non-parole period of minimum 30 years describing the offence as an instance of the 'worst case' of murder.

Taylor JA considered both the objective seriousness of the crime itself and the personal circumstances of the criminal (*R v Kilic*). The premeditated and vicious nature of the attack, the defendant's motivations of rage, jealousy and preventing the victim giving evidence at his rape trial, and the background of sustained family violence supported the conclusion that the offence was in the most serious category of murders.

Taylor JA was satisfied beyond reasonable doubt that the murder was a 'long held, sustained goal,' apparent in the defendant's attempts to conceal his presence in the area, stalking of her house and the immediate nature of the attack. Taylor JA rejected the defence suggestion that the attack was a result of a momentary loss of temper, as the victim's fear of the defendant meant she would not voluntarily have remained in his

presence.

Taylor JA was further satisfied that a large part of the defendant's motive was to prevent the victim from giving evidence in the rape proceedings against him, as well as his rage and jealously at no longer being in control of her.

The defence argued that the defendant's good character, lack of prior conviction and good prospects for rehabilitation made specific deterrence and community protection of limited relevance. However, Taylor JA refused to accept that equal weight should be given to the criminal's personal circumstances and the 'objectively heinous' nature of the crime. Importantly, Taylor JA drew attention to the fact that domestic violence is pernicious due to its invisibility and frequent perpetration by men with otherwise good reputations.

The defendant was also found to lack remorse – continuing to deny responsibility and remaining impassive during the victim impact statements – and have no ameliorating personal circumstances.

The defendant's moral culpability was at 'the highest end' and the sentence must reflect 'the abhorrence with which society regards violence towards domestic partners.' The principles of general deterrence, denunciation, community protection and just punishment guided the decision:

"such violence is pernicious largely due to the fact that it is often invisible in public life, committed disproportionately by men who might otherwise enjoy a reputation for being good fathers, hard-working providers, reliable friends or community minded citizens" [94]

***DPP v Cormick* [2022] VSC 786 (16 December 2022) – Victorian Supreme Court**

'Appeal on a question of law pursuant to s272 criminal procedure act 2009' – 'Breach of protection order' – 'Emotional and psychological abuse' – 'Mens rea' – 'Protection order' – 'Separation'

Matter: Appeal on a question of Law pursuant to s272 *Criminal Procedure Act 2009*.

Facts: The male respondent was subject to an interim protection order in which the protected person was the respondent's female former partner made on 12 May 2021. On 2 September 2021 charged with 1 x persistently contravening a protection order section 125A *Family Violence Protection Act 2008* (Vic) and 4x contravening a protection order s 123 *Family Violence Protection Act 2008* (Vic) (the factual basis of charge 1 was the contraventions alleged in charges 2-5).

The alleged contraventions involved committing family violence against the protected person in the form of telephone calls and text messages that amounted to emotionally and psychologically abusive behaviour.

The magistrate found that the messages were emotionally and psychologically abusive, making the protected person feel unsafe and threatened. However, the magistrate rejected the prosecution's argument that contraventions were strict liability offences and determined that the prosecution had been unable to prove the respondent's intention to breach.

Issue: An appeal was brought by the DPP on two grounds, the first of which was withdrawn.

1. Contraventions of protection orders are strict liability offences
2. The learned magistrate erred when construing the relationship between the physical element and the fault element under s 123.

At issue was whether the offence created by s 123 was concerned only with prohibited conduct and not whether the result of that conduct was intended.

Reason and decision: Appeal dismissed. The Magistrate properly directed themselves as to whether the order had been breached.

Niall JA premised the construction of the nature of the mens rea under s 123 on the general principle that mens rea is an essential ingredient and considered authorities that distinguished between specific and general intent offences.

In relation to the offence of contravening a protection order (s 123(2)) by engaging in family violence in the form of emotional or psychological abuse (ss5, 7), it was observed that divorcing the physical act from its impact was impossible and excluding consequences from the mental element would 'substantially alter the nature of the offence' [54].

It was concluded that a 'person must intend to commit an act that has the physical or emotional consequences which form part of the offending conduct' [61]. In this case, the prosecution was required to prove the accused sent the messages 'with the intent to torment, intimidate, harass or be offensive to the recipient' [62]. Niall JA observed that this construction would not undermine the statute's protective purpose or be unduly burdensome, as intent 'will be proved inferentially'.[58]

***The Queen v Surtees* [2022] VSC 124 (11 March 22) – Victorian Supreme Court**

'Burning' – 'Covid-19' – 'Dousing' – 'Exposing children to domestic and family violence' – 'History of domestic and family violence' – 'Immolation' – 'Immolation threat' – 'Manslaughter' – 'People affected by substance misuse' – 'People affected by trauma' – 'Physical violence and harm' – 'Post traumatic stress disorder' – 'Sentencing' – 'Victims as (alleged) perpetrators'

Charges: manslaughter by unlawful dangerous act x1.

Proceedings: Sentencing.

Facts: The female offender pleaded guilty to the manslaughter of her husband. The offender and her husband had been in a relationship for 10 years and had two daughters, aged six and four. The offender's 11-year-old son from a previous relationship also lived with the couple. The couple would often argue, at times have screaming matches and sometimes hit each other.

In 2016 Victorian Child Protection Services received a report of children being exposed to violence, but an investigation was not pursued [7]. In 2017 the victim pleaded guilty to unlawful assault against the offender [8].

On the night of the offence the victim had been drinking and yelling at people at a party they attended. After returning home he continued to yell at the offender. After the victim had calmed down and was sitting on the couch the offender, angry about the victim's behaviour through the day, doused the victim in petrol and threatened him with a lighter by igniting it near him. He 'burst into flames' leading to serious injuries which resulted in his death [15]. The three children all witnessed their father in flames.

Proceeding: Sentencing.

Decision and Reasoning: 12 years imprisonment with a fixed non-parole period of 8 years [132].

Justice Tinney noted that 17 victim impact statements were filed, and all detailed the kind and decent nature of the victim. His Honour specifically noted the ongoing financial and emotional impact on the victim's brother and his wife, who took in the children [111].

The offence was a serious example of manslaughter and the objective gravity of the offence as very high [85], [125]. There was a very high and obvious level of dangerousness inherent in the offender's actions [90], aggravated due to it occurring in such proximity to her young children [92].

His Honour significance of family violence and provocation [71], however it was not a relationship "marked by frequent violence and controlling behaviour" [81]. The offence was not a long-considered crime; however, it involved several deliberate steps and was not unpremeditated [83]. There was no evidence that justified any contention the victim was physically abusive the day or night of the offence [72] and the offender's actions were a "very extreme overreaction" [82].

Justice Tinney considered the offender's PTSD diagnosis as cumulative from childhood sexual abuse, and violence in previous relationships but found no realistic or causal connection between the PTSD and the offence [61]. The victim deliberately attempted to shift a degree of blame onto the victim by giving conflicting accounts [67].

***DPP v Kingdon* [2021] VSC 858 (21 December 2021) – Victorian Supreme Court**

'Guilty plea' – 'Impact of covid-19 pandemic' – 'Murder' – 'No criminal history' – 'Older people' – 'People with mental illness' – 'Remorse' – 'Sentencing' – 'Separation' – 'Verdins principles'

Charges: Murder x 1.

Proceedings: Sentencing.

Facts: The 65-year-old male accused pleaded guilty to the murder of his female de-facto partner of three years. The accused stabbed the victim with a kitchen knife 11 times in the chest and neck following an argument about the accused's divorce settlement, during which victim had attempted to end the relationship.

Decision and Reasoning: 23 years imprisonment, with a non-parole period of 16 years and 3 months).

Lasry J considered victim impact statements of the victim's family, which referred to the 'lifelong' and 'severe' impact of the accused's actions (20). His Honour explained that while the accused intended to cause really serious injury, and was being sentenced on that basis, his moral culpability would be 'determined by the nature of the killing… rather than the… intent' behind the conduct (55). The accused's moral culpability was high (56). The 5th and 6th limb of *R v Verdins* [2007] VSCA 102 applied due to the accused's diagnosis of major depressive disorder, and likelihood of internalising 'the punitive aspects of sentencing', age, and 'demographic divergence from… other prisoners' (43). His Honour stated that general deterrence is an important sentencing principle in the context of domestic violence (60), noting the accused's explanation for the crime "carries the implication "Look what you made me do"[58]:

> People are entitled to leave relationships and, men in particular, who are told their relationships are finished do not have any form of licence, rationale or excuse to then inflict fatal violence as a reaction in order to quell their feelings of rejection [59].

The accused had no prior criminal convictions, was of an 'advancing age' and had previously been 'of good character' (62) and the utilitarian value of his guilty plea was 'very high' due to the Covid-19 pandemic (34), (62).

***Re Strachan* [2021] VSC 538 (31 August 2021) – Victorian Supreme Court**

'Bail' – 'Breach of protection order' – 'Children' – 'Exceptional circumstances' – 'History of family violence' – 'People with mental illness' – 'Separation'

Charges: Persistent contravention of a family violence intervention order ('FVIO') x 1, contravening a FVIO x 7, committing an indictable offence whilst on bail x 1, contravening a conduct condition of bail x 7.

Proceedings: Application for bail.

Issues:

1. Whether there were exceptional circumstances to justify the grant of bail.
2. Whether the applicant posed an unacceptable risk.

Facts: The male applicant and female victim were married for 10 years and shared four children. They separated in March 2021. The victim reported to police that throughout the relationship the applicant was frequently verbally abusive, intimidating towards the children, and physically abusive two to three times per year, strangling her on one occasion. The applicant was charged with various offences and bailed on those offences. An interim protection order and then a final protection order was made. The applicant allegedly breached these orders on numerous occasions by contacting the victim via phone and being near his daughter's school. On one occasion the applicant visited his daughter at school and asked her to leave with him. The applicant suffered from severe mental health issues, including depression and anxiety, and a pain condition. He was charged in relation to the breaches of bail and protection orders and sought further bail.

Decision and Reasoning: Bail refused.

Lasry J found that the applicant had not established exceptional circumstances. His Honour found that the

applicant could receive treatment for his mental health issues while in custody and that his pain condition, while serious, had not prevented him from engaging in community sports. Therefore, 'special vulnerability' had not been established. Furthermore, it had not been established that without bail the applicant's time in custody would be 'far in excess' of any likely sentence.

***Re Windley* [2021] VSC 432 (20 July 2021) – Victorian Supreme Court**

'Assault' – 'Bail' – 'Breach of protection order' – 'Covid-19' – 'Exceptional circumstances' – 'Extensive criminal history' – 'History of family violence' – 'Homeless applicant' – 'Sexual and reproductive abuse'

Charges: Sexual assault x 2; unlawful assault x 2; persistent contravention of a family violence order; contravention of family violence orders x 9.

Proceedings: Application for bail.

Issues:

1. Whether there were exceptional circumstances to justify the grant of bail
2. Whether the applicant posed an unacceptable risk

Facts: The applicant was charged with persistently breaching a Family Violence Intervention Order ('FVIO') by refusing to move out of his female former partner's house [1], harassing the victim via phone [25], and perpetrating sexual and unlawful assaults against the victim [3]. The applicant had an extensive criminal record and a history of contravening bail conditions and community corrections orders.

Decision and Reasoning: Bail granted.

Coghlan J found that there were exceptional circumstances, and that by the imposition of appropriate conditions, the risk represented by the applicant was not unacceptable [24]. His Honour acknowledged that conditions of imprisonment had become more difficult due to quarantine requirements [18], and noted that if released the applicant would reside with his aunt, Ms Terri Brown, at a location 'significantly removed from… the complainant' and with very few means of transport [21]. Ms Brown had agreed to report any breaches of the applicant's bail conditions. His Honour highlighted that the applicant had complied with court orders and requirements while previously residing with Ms Brown, and that 'it was in part due' to the applicant being homeless 'that he continued to impose upon the complainant' [7-8]. The conditions of bail included that the

applicant reside with Ms Brown and not leave the house unless accompanied by her and produce his phone to police for inspection [29].

R v Margolis **[2021] VSC 341 (15 June 2021) – Victorian Supreme Court**

'Murder' – 'People affected by trauma' – 'People with disability and impairment' – 'Sentencing' – 'Strangulation'

Proceedings: Sentencing.

Charge: Murder.

Facts: The male offender killed the female victim, his domestic partner of one week, by applying force to her neck by holding her in a chokehold. A jury convicted him of murder following a trial in which the issues were whether the victim was killed by a conscious, voluntary and deliberate act and, if so, whether the offender had murderous intent. The offender was diagnosed with long-term Post Traumatic Stress Disorder and alternately borderline or severe personality disorder by psychiatric experts. There was evidence he had mental health issues dating from his teens. He argued he killed the victim in the course of a flashback provoked by the behaviour of the victim, in pushing and haranguing him in the course of an argument which extended over a number of hours. Following the murder, the offender sent text messages to the victim's family purporting to be from the victim. The offender had no prior history of violent offending and alleged he had been a victim of abuse as a child.

Held: Sentenced to 23 years imprisonment with a minimum term of 17 years. It was noted that this was less than the standard 25 year head sentence to take into account the offender's prior good character and *Verdins* principles.

Re Charlton **[2021] VSC 342 (11 June 2021) – Victorian Supreme Court**

'14 year gap between alleged offence and laying of charge' – 'Alleged murder of partner' – 'Bail' – 'Exceptional circumstances' – 'No relevant criminal history' – 'No unacceptable risk posed by applicant' – 'Poor mental and physical health of the applicant' – 'Separation'

Matter: Application for bail.

Facts: The applicant is alleged to have killed his female domestic partner in 2007, approximately 6 months after they had commenced residing together in her unit. He was arrested but released the day after his

partner's death. A coroner found the applicant likely contributed to the death of the deceased in 2011 but the applicant was not re-arrested until 6 January 2021 and has been in custody since then. There is some evidence of a history of violence by the applicant towards the deceased, including an incident where he drove dangerously with the deceased in a vehicle in the days prior to her death which allegedly was a source of arguments between them. There is evidence the deceased asked the applicant to move out of her apartment the day of her death.

Issues: Unacceptable risk and exceptional circumstances.

Held: Bail granted. The fact the applicant remained in the jurisdiction for the many years before he was charged, including while being dealt with for earlier historic offending, and failed to reoffend went a long way to establish that there was no unacceptable risk posed by a grant of bail. The applicant's counsel's assertion the prosecution case was weak was rejected, but exceptional circumstances were established by the passage of years and the good behaviour of the applicant during the delay, his lack of relevant prior offending or breach of bail, his serious physical and mental health issues and the effect of incarceration thereon, the conditions he would likely spend remand in, the likely future delay in reaching trial, his stable relationship and accommodation, and the availability of substantial surety.

R v Dellamarta **[2021] VSC 220 (4 May 2021) – Victorian Supreme Court**

'Impact of covid 19 pandemic' – 'Imprisonment' – 'Manslaughter' – 'People with disability and impairment' – 'People with mental illness' – 'Sentencing'

Charges: Manslaughter.

Proceedings: Sentencing.

Facts: The female offender, who had an intellectual disability, pleaded guilty to the manslaughter of her male partner. She stabbed her partner once to the upper chest during the course of an argument. She admitted to stabbing the deceased but was unable to say why she had done so. She said that she had never been scared that he would physically hurt her, but that he had called her abusive and hurtful names.

Issues: Sentence to be imposed.

Decision and reasoning: A sentence of 7 years and 6 months imprisonment was imposed, with a non-parole period of 5 years.

The following factors were relevant to objective seriousness: First, the offender deliberately stabbed the deceased with a large kitchen knife. Second, the deceased was her partner, and the offence took place in her home. Third, she grossly overreacted to whatever feelings of hurt and anger she was experiencing in the face of the deceased's aggression. Fourth, she immediately attempted to revive the deceased, called for help and assisted police.

The offender's moral culpability for the offending, and the relevance of general deterrence, were somewhat reduced by her intellectual disability and depressive disorder (notwithstanding the lack of a causal link established by expert evidence). Specific deterrence was also modified by her personal factors (genuine remorse, ability to manage the limitations of her intellectual disability and fair prospects for rehabilitation). The guilty plea was also taken into account.

Finally, the court recognised the burden of prison on her at [45]:

> "I accept that your deficits mean that your will find prison more burdensome than a person without your disability. Mr Newton described you as a vulnerable prisoner at risk of victimisation and other negative attention in the custodial environment. It seems that this risk has, in fact, materialised. Mr Newton further stated that there is some risk that the intensity of your depressive symptoms will increase as a result of your incarceration. I accept these opinions. I also accept that your experience of custody to date has been difficult given the lack of physical visits between March and December 2020 consequent upon the COVID-19 pandemic."

***Re Dinatale* [2021] VSC 104 (9 March 2021) – Victorian Supreme Court**

'Animal abuse' – 'Bail application' – 'Breach of protection order' – 'Children' – 'Exceptional circumstances' – 'Impact of covid-19 pandemic' – 'Strangulation' – 'Threats to kill' – 'Unacceptable risk' – 'Weapons'

Charges: Numerous family violence charges and protection order breaches.

Proceedings: Application for bail.

Facts: The applicant was charged with numerous family violence offences and intervention order breaches over multiple years, but principally in 2019 and 2020, in respect of his wife (the complainant) and their 2 young children. The alleged offending involved physical violence (including use of weapons and

strangulation), exposing the children to family violence, animal abuse, threats to kill (including if the complainant failed to revoke a protection order), and repeated breaches of intervention orders. Due to the delays brought about by the COVID-19 pandemic, there was a real prospect that the applicant's trial would not proceed until 2023.

Issues:

1. Whether exceptional circumstances existed to justify the grant of bail.
2. Whether there was an unacceptable risk.
3. Whether there would be a risk that the applicant would commit family violence if released on bail, and whether such risk might be mitigated.

Decision and reasoning: Application for bail was allowed on strict conditions.

At the outset, counsel for the respondent informed the court that "the children of the applicant are apparently petrified of him, and that Child Protection have indicated an intention of stepping in should the applicant make any attempt to have contact with them. She pointed out that the two children are eye witnesses to some of the offending, and that the risk of interference with them as well as with the complainant herself is a live concern.

Further, counsel for the respondent emphasised that the applicant's conduct while incarcerated "showed his malevolence towards his wife and aggression towards some other individuals which would itself raise concerns about the safety of his family and others." The charges were serious, "notwithstanding that no serious injuries had been caused. This was more by good luck than good management, and there was still the risk of psychological harm and ongoing consequences for the children. The seriousness of the offending was amplified by the constant undertone of family violence, encompassing control and actual violence."

Exceptional circumstances existed. In particular, the possible period of remand due to the COVID-19 delay (2-3 years) would highly likely exceed any term of imprisonment. The obvious risk of the applicant endangering the safety and welfare of any person or committing an offence while on bail could be mitigated by stringent bail conditions so as not to be an unacceptable risk noting: "Any attempt to contact in any way, much less, harm, his wife or children, would have the inevitable consequence that he would be taken again into custody, with little hope of release until the resolution of the charges he faces."

Re Application for Bail by Wilson **[2021] VSC 22 (29 January 2021) – Victorian Supreme Court**

'Application for bail' – 'Covid-19' – 'Exceptional circumstances' – 'Female perpetrator' – 'Mild traumatic brain injury' – 'Murder' – 'No unacceptable risk' – 'People affected by substance misuse' – 'People affected by trauma' – 'People with mental illness' – 'Support services'

Charge: Murder.

Proceedings: Application for bail.

Facts: The female applicant killed her male domestic partner by stabbing him in the back during the course of a domestic dispute. At trial, the applicant intended to argue that she acted in self-defence and that she did not intend to cause death or really serious injury. The applicant had a history of drug addiction, mental illness, and had been in a car accident a few weeks prior to the offending, potentially resulting in a mild traumatic brain injury.

Decision and reasoning: The applicant was granted bail.

There were sufficient matters to establish exceptional circumstances. The two central issues that would arise at trial (self-defence and intent) were "live" and needed to be finely judged, in combination with the delay in the matter (which in itself would not be sufficient) and the circumstances of detention due to COVID-19 (unable to receive visits with her mother or daughter) ([45]-[48]).

The respondent had not demonstrated that the applicant was an unacceptable risk of endangering the community, offending whilst on bail or failing to answer bail. The applicant had a criminal record but this included relatively minor offences and the more serious conviction had no particular resonance in relation to the present offending. There was evidence that she would receive support with accommodation, and in relation to any ongoing problems of drug addiction and mental health from Women's Housing Ltd. The applicant had further motivation in restoring her relationship with her mother and re-engaging with her young daughter, supported by the Department of Health and Human Services ([50]-[56]).

Re Chambers **[2020] VSC 758 (17 November 2020) – Victorian Supreme Court**

'Application for bail' – 'Compelling reason' – 'Misuse of alcohol or drugs by perpetrator' – 'Past domestic and family violence' – 'Pregnancy of victim' – 'Protection orders' – 'Strangulation' – 'Stringent bail conditions' – 'Unacceptable

risk’

Charges: Reckless conduct endangering life x 2; Aggravated assault of a female x 6; Contravening a family violence intervention order (FVIO) x 1; Recklessly causing injury x 1; Making a threat to kill x 1.

Proceedings: Application for bail.

Facts: The applicant man and complainant woman were in a domestic relationship, and she was 3 months pregnant with their child. The applicant was subject to two FVIOs, one involving his ex-wife and child, and one involving the complainant. The charged offending involved the application of pressure to the complainant’s neck until she lost consciousness on the first occasion, and until she sustained a fractured larynx on the second occasion. The applicant owned his own business, had no criminal history (but been the subject of a number of reports of family violence), and had a history of depression/anxiety and substance abuse issues.

Issues:

1. Whether the applicant had demonstrated a “compelling reason” to justify the grant of bail.
2. Whether the respondent had demonstrated that there was an “unacceptable risk”.

Decision and reasoning: The applicant was granted bail.

First, on “compelling reason”, the offending alleged was very serious. It involved a man in the context of an ongoing intimate relationship applying pressure on 2 occasions to the neck of his pregnant partner rendering her unconscious and fracturing her larynx. The case against the applicant was of reasonable strength in view of the objective evidence ([50]-[51]).

Nevertheless, his Honour was satisfied that a compelling reason existed to justify the grant of bail ([53]). The applicant had no prior convictions or adverse bail history, stable employment and accommodation, and the situation of the offending had ended. There was no evidence to suggest he would further attack the complainant, with a traumatic period in custody being a strong disincentive to do so. The applicant was seeking treatment for his drug problem. He also stood to spend significant time in custody in difficult circumstances in the absence of bail ([52]).

Second, the court was not satisfied that the risk posed by the applicant (that he would contact and possibly harm the complainant) was unacceptable. This was in light of the very stringent bail conditions imposed to mitigate the risk including a curfew, requirement to comply with a full FVIO that had been put in place

concerning the complainant, prohibition on drug use (including testing), requirement to undergo drug treatment, and a broad geographical exclusion to further protect the complainant ([54]).

***Application for bail by LP* [2020] VSC 764 (16 November 2020) – Victorian Supreme Court**

'Attempts to dissuade victim' – 'Bail application' – 'Exceptional circumstances' – 'History of abuse' – 'Misuse of alcohol or drugs by perpetrator' – 'Perpetrator interventions' – 'Perverting the course of justice' – 'Protection orders' – 'Unacceptable risk'

Charges: Four groups of charges, including alternative charges. Group 1: Reckless conduct endangering serious injury x 1; Unlawful assault x 1. Group 2: Intentionally causing injury x 2; Recklessly causing injury x 2; Unlawful assault x 2. Group 3: False imprisonment x 1; Intentionally causing injury x 2; Recklessly causing injury x 2; Theft x 1; Unlawful assault x 2; Unlawful assault with a weapon x 1. Group 4: Common law assault x 1; Common law charge of attempting to pervert the course of justice x 1.

Proceedings: Application for bail.

Facts: The applicant man was charged with a number of family violence offences against the female complainant. The charges related to a series of incidents in November 2017 and subsequent text messages aimed at dissuading her from pursuing the complaints. At the time of the bail application, there were three Family Violence Intervention orders (FVIOs) in force (protecting the complainant, another former intimate partner, and the applicant's further former partner/children). The applicant had expressed a desire to change submitting evidence of, inter-alia, the support of his sister and rehabilitative programmes undertaken in custody.

Issues:

1. Whether exceptional circumstances existed to justify the grant of bail.
2. Whether there was an unacceptable risk.
3. Whether, if the applicant were released on bail, he would pose a risk of committing family violence and whether that risk could be mitigated by the imposition of bail conditions or the making of a FVIO.

Decision and reasoning: Bail refused.

While the matter was finely balanced, the applicant met the threshold of exceptional circumstances through a

combination of factors namely, the death of his mother whilst in custody and deferral of her funeral until his release, the likely delays in the matter proceeding to trial, the legitimate criticism levelled at aspects of the prosecution case, and the overall delays in the matter being prosecuted which were not attributable to the applicant (at [78]-[80]).

Nevertheless, there was an unacceptable risk that that the applicant would endanger the safety or welfare of a person, commit offences on bail, interfere with a witness (the complainant), or fail to answer bail. The applicant's most recent conduct on bail showed that despite awaiting court for family violence charges (including those alleged by the complainant) he was prepared to engage in very similar conduct towards another partner (at [81]-[84], [88]).

Further, the risks the applicant posed not only of committing further family violence but also of trying to dissuade the complainant from proceeding with her complaint could not be mitigated by FVIOs or additional bail conditions. The court noted: "Preventing family violence in the community can be difficult because victims are often reluctant to come forward and/or may be easily dissuaded from pursuing complaints" (at [86]). Risks could not be ameliorated with bail conditions given the applicant's poor history of compliance with previous bail orders, CCOs, and other court orders, his family violence history committed against different partners and his persistent drug use and offending (at [87]).

***OP v XY* [2020] VSC 754 (16 November 2020) – Victorian Supreme Court**

'18-year period for protection order' – 'Coercive control' – 'Culturally and linguistically diverse (cald) people' – 'Judicial review' – 'Protection order' – 'Unborn child added to protection order' – 'Whether child in utero at the time of offending is a child who has been 'subjected to family violence''

Proceedings: Application for judicial review.

Facts: In protection order proceedings in the County Court, XY (female partner) claimed that her husband OP (male partner) had committed numerous instances of family violence during their relationship. This ranged from physical violence and unwanted sex to psychological manipulation and humiliation.

> [28] XY alleged that, over the course of the marriage, OP emotionally controlled her, isolated her (from others), and continually abused her — for example, by writing on a whiteboard numerous ways in which she was a bad wife and stepmother. She claimed that OP made her sleep on the floor, limited her food intake and gave her no money. XY said that she felt pressured to have sex and that she could not say no

> as OP would say that she was a bad wife. She said she made numerous attempts to leave the relationship, but that OP would contact her and manipulate her to return. XY alleged that OP physically assaulted her on several occasions. He also ejected her from the home numerous times, including without shoes. He abused her for being selfish and using money on herself instead of the children. [Also see paragraphs [47]-[51] and [57]].

While OP denied these claims, and made his own against XY, he ultimately consented (without admissions) to a protection order. OP's claims against XY included 'falsified and exaggerated claims of being assaulted by her' [29], also see [79]-[80]. The magistrate made mutual protection orders against OP and XY for a period of two years. OP filed a notice of appeal against the protection order made against him. XY did not appeal the order made against her. On appeal, her Honour extended the length of the DFV protection order against OP from a two-year term to one of 18 years' duration. Her Honour also added XY's child to the order on the basis that the child had been subjected to family violence *in utero*. OP now applies to this court for judicial review of the judge's decisions and orders.

Decision and reasoning: *Application for judicial review dismissed.*

The County Court judge's reasons for extending the DFV protection order to 18 years' duration and including the child in the order are set out at [221]. The applicant (self-represented) made submissions with respect to, but was unable to demonstrate, actual or apprehended bias, a denial of procedural fairness, inadequacy of the judge's reasons, *Wednesbury* unreasonableness, illogicality or irrationality in the judge's decision, and a failure to apply the *Briginshaw* test to the serious claims of DFV made against him [373].

> [17] The difficulty for OP, however, is that this application is not an appeal of the kind in which I am entitled or required to substitute my views on the evidence for those of the County Court judge. Instead, this Court's jurisdiction on an application for judicial review is merely supervisory, not appellate, and is strictly confined in consequence. In exercising this jurisdiction, I am not to assess the merits of the decision, but must consider only whether the court below exceeded its jurisdiction and whether it observed the law in reaching the relevant decisions. Perhaps counter-intuitively, as I have already intimated, even if the judge below erred, but did so within jurisdiction, still there would be no relief by way of judicial review.
>
> [18] In my opinion, while aspects of the judge's decision are very close to being afflicted with Wednesbury unreasonableness, illogicality or irrationality, in the end, those high hurdles for relief are not

cleared. Nor am I satisfied that OP's claims of actual or apprehended bias are established, whether examined with or without the fresh evidence. Instead, I am persuaded by [counsel for the complainant] that the asserted errors (except perhaps one) are not established or are otherwise within jurisdiction. While it is, I think, plain that the judge exceeded her jurisdiction by including the child in the order by reliance on a power that was not available on the evidence, that order is supported by another power which turns upon OP's lack of opposition, and the consent XY implicitly gave, at the hearing.

…

[449] I do not accept that, for the purposes of the first limb of s 77(2) (or its later equivalent), it can be said that the child [*in utero*] "has been subjected to family violence". While, as I have said, strictly, I need not decide whether there ever could be a case in which a child-to-be in utero may come within the provision, I very much doubt it. Indeed, given that a "child" is "a person who is under the age of 18 years" and that the words "has been subjected to family violence" connote the present tense, I think it is extremely unlikely that the definition of family violence in s 5(1)(b) could extend to behaviour directed at or experienced solely by the mother when the child-to-be is *in utero*.

***Re Busari* [2020] VSC 572 (7 September 2020) – Victorian Supreme Court**

'Application for bail' – 'Breach of protection order' – 'Child' – 'History of abuse' – 'Misuse of alcohol' – 'People with mental illness' – 'Strangulation' – 'Unacceptable risk'

Charges: Reckless conduct endangering life x 1; Reckless conduct endangering serious injury x 1; Aggravated assault x 1; Common law assault x 1; Unlawful assault x 1.

Proceedings: Bail application.

Facts: The complainant is the male applicant's female partner. It is alleged that the present charges occurred against a background of long-term, largely unreported domestic violence by the applicant against the complainant. In March 2018, the applicant is alleged to have threatened to burn down the family home resulting in the issuing of a protection order (the applicant is alleged to have breached the DFV protection order on numerous occasions, but these breaches were not reported at the time). In June 2020, the applicant is alleged to have been aggressive and verbally abusive. In July 2020, the applicant is alleged to have verbally abused the complainant. Later, he is alleged to have become increasingly aggressive and assaulted the complainant in front of their child, including pulling chunks of her hair out before allegedly strangling her.

After a ‘prolonged period of strangulation’, the complainant managed to free herself and escape. The applicant is alleged to have been intoxicated during the various offences. Bail was previously refused on the basis that the applicant posed an unacceptable risk of committing an offence while on bail.

Issues: Whether risk can be mitigated by imposition of condition.

Decision and reasoning: *Bail granted.*

[56] There is no question that the applicant does pose a risk of contacting the complainant, and interfering with her as a witness and exposing her to danger. The question is whether there are conditions of bail which could be imposed so as to mitigate that risk so that it is not unacceptable.

…

[60] Taking into account all of the surrounding circumstances of this case, I am not satisfied that the applicant poses an unacceptable risk of any of the matters prescribed in s 4E of the Act. He does certainly pose a risk but I believe that the risk can be ameliorated to an acceptable level by the imposition of the stringent conditions [including residential requirements, curfew, prohibition against drugs or alcohol, mental health care plan, no-contact order for the protection of the complainant and their daughter and compliance with an interim DFV protection order].

***R v Sturt* [2020] VSC 317 (10 June 2020) – Victorian Supreme Court**

‘- people affected by substance misuse’ – ‘Cannabis-induced psychosis’ – ‘Controlling behaviour’ – ‘History of sexual violence’ – ‘History of abuse’ – ‘Mitigating and aggravating circumstances’ – ‘Murder’ – ‘Non-fatal strangulation’ – ‘People with mental illness’ – ‘Personality disorders’ – ‘Physical violence and harm’ – ‘Strangulation’ – ‘Suffocation’

Charges: Murder x 1

Case type: Sentence

Facts: The accused murdered his long-term intimate partner by suffocating and strangling her while he was in a cannabis-induced psychosis. He surrendered himself to police the same day as the killing, made a full confession and pleaded guilty to murder at the first available opportunity. The offence was not an isolated instance of domestic violence, as the accused had been physically and sexually violent towards the deceased in the past. He had also been previously admitted to a psychiatric unit, on which occasions the deceased

reported that his mental state had deteriorated in the context of substance abuse, and that he had tried to strangle her in her sleep. He also assaulted the deceased in 2010.

Issue: Whether the voluntary drug taking was an aggravating circumstance; whether his Schizotypal Personality Disorder was a mitigating circumstance.

Held: After an assessment, a forensic psychiatrist made several observations about the accused, including that he used various coercive behaviours, such as violence and threats of violence and suicide, to mitigate the persistent likelihood of the deceased abandoning him. It appeared that the fatal attack was motivated by delusional beliefs. The psychiatrist also found that notwithstanding his prior history of domestic violence, the killing would not have occurred in the absence of the psychotic episode ([26]). In the police interview, the accused described his childhood as "troubled". His stepfather physically and emotionally abused his mother, and the accused used cannabis for many years, and has "dabbled" with other drugs ([52]-[58]).

The Court did not accept the prosecution’s submission that the accused’s cannabis use was an aggravating feature, as it could not be established beyond reasonable doubt that he knew that he was likely to become violently psychotic from the cannabis use during the relevant period ([27]-[30]). Further, his moral culpability was not reduced by his psychosis at the time of the offending, because he had voluntarily taken the cannabis in the knowledge that it might make him violently psychotic ([32]). His forensic psychiatrist considered that his Schizotypal Personality Disorder indirectly contributed to his offending because (1) his problems with social anxiety and depression predisposed him to the heavy use of cannabis, and (2) it lowered the threshold for developing psychosis following ingestion of psychotogenic substances ([37]). The defence counsel’s submission that his personality disorder was a mitigating circumstance was also rejected by the Court ([40]). Cannabis was not the only way to deal with his anxiety. The accused should have undertaken a drug rehabilitation program instead, particularly since he was aware that cannabis might cause him to become violently psychotic ([39]).

Aggravating circumstances included the fact that the deceased was the accused’s long-term intimate partner, she was murdered in her own home, and the offence was not a "one-off instance of domestic violence". The fatal conduct, however, was not motivated by the same considerations which led to the earlier domestic violence instances, and was not planned ([45]-[50]). Mitigating circumstances included the accused’s cooperation with authorities, remorse, and his reasonable prospects of rehabilitation, given his excellent insight into his psychological issues and his positive response to medication while in custody ([65]-[71]). Consequently, he was sentenced to 22 years’ imprisonment, with a non-parole period of 16 years.

***R v Cameron* [2020] VSC 334 (5 June 2020) – Victorian Supreme Court**

'Controlling behaviours' – 'Drug misuse' – 'Murder' – 'Non-fatal strangulation' – 'People with mental illness' – 'Sentencing' – 'Suicide threats by perpetrator' – 'Weapon'

Charges: Murder x 1

Proceedings: Sentencing

Facts: The male offender and female victim had been in a relationship for three months and lived together. The couple argued in the days leading up to the offending and the victim appeared nervous and scared to those she met. She told several friends that she could not leave, even though the offender had choked her. On the night prior to the offending, the victim visited her friend after a fight with the offender. The victim received text messages from the offender saying that he would kill himself if the victim did not come back. The offender went to the friend's house and spoke to the victim, but the victim said she was not ready to come back home now but would come soon. The offender left the house and travelled to the house of a friend. On the way, he slashed his right forearm repeatedly; the friend wrapped the offender's arm in a tea towel. In the meantime, the victim returned home but did not find the offender there, so she texted her friend, indicating that she thought she would be okay. A text message exchange then occurred between the offender and the victim in which the offender asked the victim if he could come home and told her that he loved her, but the victim said she did not want to talk and that "If you love someone you would not harm them and control them". The victim exchanged text messages with other people but these ceased abruptly around 4:55am.

At this time, the offender returned home and stabbed the victim numerous times to the face, scalp, neck and arms with a kitchen knife while she was on her bed. She died quickly after this attack. The offender tried to clean the scene with bleach and hid the body and bloody sheets under the bed. He then tried to burn down the house by lighting a fire in a cabinet next to the bed, but this only smouldered as the cabinet was closed and the fire was starved of oxygen. The offender went to his friend's place and told him that he had killed the victim, but only because she had attacked him in his sleep. He repeated this account of events to police, claiming that the victim had attacked him when he refused to get her more ice.

Judgment: The judge sentenced the offender to 29 years' imprisonment, with a non-parole period of 23 years. His Honour noted that the offender's "crime of murder is a very serious example of that always serious crime"

[118]. In addressing the offender, his Honour emphasised the aggravating features of the offending: "In the context of an ongoing domestic relationship which left your partner strongly fearing you, at least in the days leading up to her death, for reasons which have not in any honest way been explained by you, you took to her with a dangerous knife while she was in the sanctuary of her own bed in her own home … You ignored her futile and desperate attempts to ward off your blows. Having killed her, you showed your lack of regard for her by hiding her under her bed, conducting a cursory clean-up, then setting the fire in the cabinet intent on burning the crime scene. Then you left her, dead on the floor, covered in blood" [118]. And further, "Yours was a sustained and outrageously violent attack upon a helpless woman," such that his Honour held that the lack of planning or premeditation "said nothing about its seriousness" [121]. His Honour further stated that "You were in a position of trust where she was concerned. She should have been able to look to you for love and protection. You chose, however, to kill her by extravagant, protracted and shocking acts of violence. Each single act of stabbing her entailed serious danger to the welfare of your helpless victim. You carried out many such individual acts" [123] and that "Your breach of trust and lack of normal human decency are simply stunning" [140].

His Honour held that rehabilitation would have little part to play in the sentence, because the offender's prospects of rehabilitation were "exceedingly dim," given he had not honestly acknowledged his crime nor dealt with his drug and other issues [131]. Instead, just punishment, denunciation, general deterrence, specific deterrence and protection of the community were important to the sentence [141]. His Honour noted that "The sentence of this Court must make it perfectly clear that the Court deplores violent crimes of this sort, especially against a domestic partner" and that "the sentence I pass must bring it clearly home to any person who might be minded to inflict extreme violence upon a domestic partner, for whatever reason, that such conduct will be met with strong punishment" [141]. His Honour was satisfied beyond reasonable doubt that the physical altercation did not commence as the offender claimed and that his account was a complete fabrication; that is, it did not begin with the victim attacking the offender because the victim was evidently very scared of the offender and "would have known that to [attack the offender] would only serve to inflame [the offender] and might trigger a violent reaction from a person of whom she was in fear" [50], [51], [55]. In rejecting the offender's claim, his Honour held that there was no explanation for the shocking crime [56].

His Honour rejected that the plea of guilty was made at a reasonably early stage, having been made 16 months after the offending [59], but noted that there was still a significant utilitarian benefit to the plea, which would constitute a mitigating factor [61]. His Honour also rejected that the offender was remorseful [64], taking into account his conduct after the offending (in attempting to clean the scene and hide the body), his

false assertions of the victim attacking the offender first, and his obvious sorrow for his own position, not the death of the victim. His Honour accepted that the offender had a substantial history of methylamphetamine use, and that the offender was using that drug at the time of offending [80]. However, his Honour also noted that the offender had an extensive criminal history for matters of violence, dishonesty, weapons and driving, and that he had been imprisoned numerous times and received numerous community-based dispositions which were frequently breached [83]. His Honour was not convinced that the offender actually suffered from PTSD and noted that even if he did, this would not result in any term of imprisonment weighing more heavily on the offender than a person in normal health [102]. His Honour therefore held that the principle enunciated in the fifth limb of R v Verdins [2007] VSCA 102 did not have any application in this case [103].

***Re Brzezowski* [2020] VSC 294 (28 May 2020) – Victorian Supreme Court**

'Animal abuse' – 'Bail application' – 'Compelling reasons' – 'Past domestic violence' – 'Physical violence and harm' – 'Protection order' – 'Relevance of covid-19 pandemic' – 'Sexual assault' – 'Strangulation' – 'Unacceptable risk'

Offences: Common assault x 2; Unlawful assault x 2; Sexual assault x 2; Criminal damage; Threaten to commit a sexual offence; False imprisonment; Contravention of a Family Violence Intervention Order (FVIO) x 4; Persistent contravention of a FVIO; Committing an indictable offence whilst on bail; Contravening condition of bail.

Proceedings: Bail application

Issue: Whether compelling reasons exist justifying the grant of bail.

Facts: The applicant and complainant commenced a 'romantic' relationship in August 2019. The applicant moved into the complainant's home which she shared with her 23-year-old daughter. On the day of the offending, the complainant came home from work and found the applicant intoxicated. They argued before the applicant told the complainant to join him in the shower. The complainant initially refused but eventually agreed to appease the applicant who appeared angry. The applicant suggested they have sexual intercourse but the complainant refused. The applicant became violent towards her, pushing her into the shower door. The complainant tried to leave the shower but the applicant pushed her onto the bed, held her wrists above her head and thrust his knee into her thigh. The complainant kicked the applicant in the genitals. The applicant then punched the complainant in the abdomen about ten times. The applicant left the house but came back shortly later, yelling "Right, time for round two". The complainant attempted to leave in her car but

was initially blocked in by the applicant's car. She managed to leave but returned to the house to collect her dogs as she was fearful the applicant would harm them.

The complainant went to the toilet when she arrived but found the applicant in there. The applicant rubbed faeces over the complainant's face and hair, then pushed her up against a wall using his forearm under her chin. She broke free and called 000, while the applicant began hitting things in the house. The applicant grabbed the complainant, threw her onto the bed, pushed his forearm to her throat and punched her in the abdomen, stating he was going to give her anal with his clenched fist. The applicant got off the complainant when she grabbed his genitalia with her fingernails. She cancelled the police request but asked her sister to come and help her. The complainant's sister and daughter arrived, followed by police.

A full and final non-contact FVIO was granted after this incident which the applicant breached by texting and calling the complainant. On one occasion though, the complainant visited the applicant at a motel room for about five minutes.

Judgment: The judge granted bail on the applicant's own undertaking with strict conditions (including he: provide a $3000 surety, reside at his parent's residence, abide by a curfew, comply with the FVIO, not contact any prosecution witness, not enter the suburb the complainant lives in, not consume alcohol or drugs), finding that the applicant had established that a compelling reason exists to justify the granting of bail, despite the offending being "serious and distasteful" [65]. The applicant argued that the following were compelling reasons to justify bail: the applicant's limited criminal history (he has only come before court twice); his first time in custody; weakness of the prosecution case (the complainant's credibility is likely to be successfully challenged); delay (one year on remand); implications of the COVID-19 pandemic (lockdowns and the possibility the virus could enter prisons); availability of stable accommodation with the applicant's parents; his ties to the jurisdiction, including his parents and children; $3000 surety from his mother; other conditions to reduce the magnitude of risk (for example, imposition of a curfew) [32].

His Honour noted that the applicant conceded that the offending was serious, finding that "the offending alleges multiple acts of family violence committed by a more powerful male upon a relatively vulnerable female who would have been entitled to look to him for protection, rather than physical violence and threatening conduct" [49] and that the applicant "flagrantly breached requirements" of the FVIO [50]. While his Honour did accept that the complainant's credit "will be subject to strong and justifiable attack", he found that the prosecution case could not be described as weak due to other things supporting the complainant's account [52]-[53].

His Honour further found that the applicant's criminal history included a finding of guilt for an assault upon a previous domestic partner and that the applicant had "deliberate and flagrant disregard" for previous grants of bail. As such, his Honour held that there was a "real concern as to [the applicant's] willingness to abide by conditions of bail" that might be imposed in the future [57]. Furthermore, his Honour noted the existence of the FVIO and that the complainant was very frightened of the applicant and dreaded his release on bail [60].

His Honour accepted that a full year on remand would be a significant period of time for a case which would remain in the summary stream [61] and that such a period would be particularly significant in light of the onerous conditions as a result of the COVID-19 pandemic [62]. Additionally, his Honour held that the applicant was likely to receive a sentence lower than the period of time he would spend on remand if not bailed [63]. In considering the "unacceptable risk" test, his Honour noted that there was a legitimate concern that the applicant would try to contact the complainant again, but that, since his arrest, the applicant had not attempted to contact the complainant and had not been violent towards her. His Honour considered that the risk posed by the applicant could be ameliorated with imposition of strict bail conditions.

***Re Ilpola* [2020] VSC 578 (21 May 2020) – Victorian Supreme Court**

'Allegations of family violence' – 'Application for bail' – 'Breach of orders' – 'Charges of schedule 2 offences while subject to community corrections order for schedule 2 offences' – 'Community corrections order for schedule 2 offences' – 'Covid-19' – 'Exceptional circumstances' – 'History of domestic and family violence' – 'Physical abuse' – 'Protection order' – 'Separation' – 'Sexual abuse' – 'Unacceptable risk'

Proceedings: Bail application.

Charges: attempted rape, sexual assault, persistent contravention of FVIO, making a threat to inflict serious injury x 3, false imprisonment, intentionally causing injury, common law assault.

Facts: The male applicant and female complainant had been married and had one daughter together but were separated at the time of the offending. A protection order was in place prohibiting the applicant from contacting the complainant or their daughter, or coming within 100m of them or 200m of their home.

The offences predominantly arose on one day. It was alleged the applicant first telephoned the complainant while she was at home with her son and threatened them, following which they left the house. When the complainant returned home later that day, the applicant was inside her house and grabbed her, punching her

head and face, and later attempting to anally penetrate her. The following day he returned to her house and was further verbally abusive. The complainant reported the incident to the police.

The applicant denied all the allegations apart from having attended the complainant's residence on three occasions. At the time of the offending he was subject to a 12-month CCO following convictions for recklessly causing injury, contravening an FVIO, intentionally damaging property and failing to answer in relation to the same complainant.

Reasoning and decision: Lasry J had regard to the serious nature of the attempted rape offence, his view that the strength of the prosecution case was not compromised by his dependence on the complainant's evidence, the accused's criminal history and existence of the CCO at the time of the offending, the lack of evidence of the availability of treatment opportunities and his view that if bail were refused the applicant would not be likely to spend more time in custody than the likely sentence.

Exceptional circumstances were found to exist in the substantial delay of the trial of two and a half to three years, owing to the COVID-19 pandemic. However, Lasry J found that there was an unacceptable risk of reoffending and that this risk would not be sufficiently mitigated by imposing bail conditions. Given that the applicant had been subject to a CCO for similar offences at the time of the incident and a protection order had already been put in place seeking to protect the complainant, it was concluded that bail was not acceptable.

***Re Mazzitelli* [2020] VSC 288 (21 May 2020) – Victorian Supreme Court**

'Bail application' – 'Covid-19 pandemic' – 'Exceptional circumstances' – 'People with mental illness' – 'Physical violence and harm' – 'Pregnancy of victim' – 'Protection order' – 'Separation' – 'Substance abuse' – 'Threats to kill' – 'Unacceptable risk' – 'Weapons'

Offences: Intentionally cause injury x 3; Common assault x 8; Making a threat to inflict serious injury x 2; Attempt to pervert the course of justice x 2; Being a prohibited person in possession of an imitation firearm x 2

Proceedings: Bail application

Issues: Whether exceptional circumstances exist justifying the granting of bail; Whether there is an unacceptable risk that the applicant would reoffend or endanger the community if released.

Facts: The male applicant and female complainant were in a relationship from November 2017 until September 2018, during which there were a number of separations and reconciliations. From February 2018,

there were numerous instances of violence by the applicant towards the complainant. These included: using a chain like a whip to hit the complainant; pushing her out of the car; splashing hot wax on her hair, face and arms; tasering her; hitting her on the back of the head; throwing drinking glasses at her; kicking her hard in the stomach when she was pregnant; burning her on her back with a blow torch; and hitting her with a metal pole. The applicant also made several threats towards the complainant, including: a threat to cut her hands off; threatening to kill her (while holding a gun); threatening to shoot different limbs; threatening her so that she would recant her testimony to police. The applicant's sister told the complainant that she had to tell police that she made up the allegations, and the complainant later made a statutory declaration to this effect. However, she maintained the allegations at the committal hearing and explained why she made the statutory declaration.

Judgment: The judge refused the bail application, holding that the applicant failed to establish exceptional circumstances existed that justified the granting of bail and even if this had been established, the risk posed by the applicant of reoffending or endangering the community if released would be unacceptable. The applicant relied on the following matters as proof of exceptional circumstances: delay (about two years from arrest until trial), onerous nature of remand due to the COVID-19 pandemic, weakness of the prosecution case, absence of any contact with the complainant while on bail, availability of support through CROP (a drug intervention program), family support and stable accommodation, modest criminal history (no convictions for violence), first time in custody, no pending matters other than the trial, and the applicant's medical condition [43]-[44].

His Honour found that the applicant did not challenge the proposition that the offending was serious, noting that "Whilst not anywhere near the higher end of the range of seriousness of offences of family violence, the alleged attacks by the applicant upon his then partner were repeated, nasty, and had some disturbing elements to them, including the use of weapons and the infliction of a kick to the abdomen of a pregnant woman" [58]. His Honour considered that the complainant was scared of the applicant and a FVIO was in place with her as a protected person [71].

His Honour also found that the prosecution case was not weak, the applicant's criminal history "reveal[ed] some signs of a lack of respect by the applicant for the orders of the court", and the applicant had already been imprisoned in the past for failing to answer bail. His Honour noted that the applicant's conduct in respect of bail "paint[ed] a picture of a person who is entirely unwilling to comply with the requirements of bail when they do not suit him" and that this was an important consideration when assessing exceptional circumstances

[67].

While his Honour accepted that the applicant had an extensive history of illicit drug use as a form of pain relief for an accident the applicant suffered eight years ago, his Honour held that it was completely unacceptable for the applicant to do this, particularly where the applicant knew this would breach his bail conditions [69]. Furthermore, his Honour held that the provision of family support was "not an important matter in the overall mix of circumstances in this case" where the applicant had family support in the past but still offended [70]. His Honour noted that the applicant was likely to spend 17 months on remand before trial, but that this "is not, on its own, or in combination with other factors, exceptional" [72]. In any event, any sentence imposed was likely to exceed this period anyway [73].

***Re Sepehrnia* [2020] VSC 247 (6 May 2020) – Victorian Supreme Court**

'Bail application' – 'Controlling behaviours' – 'Extensive criminal history' – 'Firearm' – 'History of abuse' – 'Non-fatal strangulation' – 'Physical violence and harm' – 'Rape' – 'Relevance of covid-19 to bail application' – 'Separation' – 'Step-children in home' – 'Substance abuse' – 'Threat to kill' – 'Weapon'

Offences: Rape x 2; Infliction of injury; Threats; Damaging property.

Proceedings: Bail application

Issue: Do exceptional circumstances exist justifying the grant of bail; does the applicant pass the unacceptable risk test.

Facts: The male applicant threatened to kill and physically harm his female ex-partner, MZ, on multiple occasions, including by pointing a firearm at her and threatening to throw acid in her face. Following an argument between the couple, the applicant punched MZ in the face and kicked her in the middle of her back, before pushing her on the bed, covering her face with a pillow and stating that he was going to rape her. He removed the pillow and grabbed MZ around the throat before raping her. The assault lasted several minutes before the applicant left MZ alone at his house. MZ reported the assault (but not the rape). When the applicant learnt of this, he threatened to kill MZ's family. A Family Violence Intervention Order ('FVIO') was issued to protect MZ.

The applicant also threatened to kill and physically harm another female ex-partner, SB, and her children, and frequently damaged her property. On a number of occasions, the applicant slapped, spat on, choked,

scratched, pulled SB's hair and threw her to the ground. He also physically assaulted SB's 16-year-old daughter and one of SB's friends, and detained SB in her home on one occasion. SB ended the relationship, but the applicant continued to abuse her until he was remanded for other matters. After his release, the applicant attended SB's house, forced her onto her bed, threatened to kill her if she was ever with another guy, and raped her.

The applicant applied for bail twice in relation to the charges arising out of these events, but both applications were refused as the applicant failed to establish exceptional circumstances and there was an unacceptable risk of further offending.

Held: The judge refused to grant bail as the applicant failed to establish that exceptional circumstances existed justifying bail and if the applicant were released, there was a high risk that he would endanger the safety of the public, commit offences while on bail, interfere with witnesses and/or fail to answer bail. The applicant contended that various matters, when considered together, constituted exceptional circumstances. These included: delay (his trial was unlikely to occur until next year because of the COVID-19 pandemic and he already spent 252 days in custody); the onerous circumstances of his custody (he has been held in protection due to physical attacks upon him and receives no visitors due to COVID-19 restrictions); lack of strength of the prosecution case; his criminal history occurred in the context of drug use; he has used his time in custody well (by completing courses and maturing); the availability of stable residence, employment and family supports; and the availability of a surety of $500,000 [33].

His Honour held that the offending was very serious [47], the cases against the applicant were not weak [48], his criminal history (violence, dishonesty and weapons offences, breaches of FVIOs, failing to answer bail) rose questions as to his character and ability to abide by any court orders [49], he had previously been convicted for failing to answer bail [50], at the time of offending he was already subject to bail and CCOs [51], he was very unlikely to be willing and able to comply with any bail conditions [52], there were already several FVIOs against the applicant [53], the proposed living arrangements if he were to be released were unsatisfactory as the applicant has committed family violence against his mother and sister in the past (with whom it was proposed he should live) [54], there was no evidence he had taken major steps towards dealing with his drug issues [55], both victims were frightened of the applicant [56], and he would receive a much longer term of imprisonment if convicted for even one rape offence than he would on remand [57].

His Honour also noted the implications of the COVID-19 pandemic, but approved Re Tong [2020] VSC 141 in which the court held that the pandemic is "simply part of the surrounding circumstances required to be taken

into account in a consideration" of steps in the bail process. His Honour therefore was "far from satisfied that the applicant … discharged the onus resting on him to establish the existence of exceptional circumstances" [59].

Even if the applicant had established exceptional circumstances, His Honour concluded that the risk of the applicant harming the victims and/or their families was so high that His Honour would have refused bail in any event [62].

Re Bertucci **[2020] VSC 88 (2 March 2020) – Victorian Supreme Court**

'Bail application' – 'Children present' – 'Contravention of protection orders' – 'History of domestic violence' – 'No exceptional circumstances' – 'Physical violence and harm' – 'Separation' – 'Uncharged acts'

Charges: Various offences, including contraventions of FVIO, recklessly causing injury, unlawful assault, failing to answer bail and committing an indictable offence on bail

Case type: Application for bail

Facts: On 19 April 2019, the applicant man was charged with contravention of a FVIO and persistent contravention of a FVIO ('the informant Sidorovska matter'). He was released on bail, however, after failing to appear in the Sunshine Magistrates' Court, an order was made forfeiting his bail and a further bench warrant was issued for his arrest. On 2 October 2019, the applicant was charged with recklessly causing injury, unlawful assault (x 2), contravention of a FVIO, failing to answer bail and committing an indictable offence on bail ('the informant McKay matter'). The applicant had been refused bail twice in the Sunshine Magistrates' Court in relation to both sets of charges.

The applicant and complainant woman were in a relationship and have 3 children together. At the time of the relevant alleged offending in the informant Sidorovska matter, the applicant and complainant were separated and a final no-contact FVIO was in place against the applicant, listing the complainant and the children as the affected family members. In relation to the informant McKay matter, the applicant allegedly assaulted the complainant woman by striking her to the leg with an implement, as well as to the head. This occurred in contravention of a FVIO and in close proximity to the children.

Issue: The issue for the Court was whether exceptional circumstances existed to justify bail and whether the previous history of family violence towards the complainant not resulting in findings of guilt should be taken

into account.

Held: The Court refused bail as the applicant failed to discharge the onus to prove the existence of exceptional circumstances to justify his release on bail ([64]). In considering the submissions for a finding of exceptional circumstances, the Court found that:

- the decision on bail would not interfere long-term with the prospects of the family being reunited ([49]);
- allowing the applicant to live with the complainant and children would do nothing to mitigate the risk of reoffending as such a living environment was 'far-from stable' ([50]);
- the applicant's two-months of part-time employment leading up to the date of the contested hearing was relatively insignificant ([51]);
- the prosecution's case in respect of the two sets of charges was not weak ([52]);
- the multiple breaches of the intervention order indicated a deliberate disregard and lack of respect for the court order imposed to protect his partner and children from him ([53]); and
- striking a female with an implement cannot be described as trivial offending ([54]).

Although the applicant's criminal history was not lengthy, it was deemed highly significant. For example, he had previous convictions for persistent contravention of a FVIO, and had previously acted with violence towards another female partner, both of which resulted in imprisonment ([57]). This indicated that he had not been adequately deterred and showed a lack of regard for court-imposed sanctions and for the importance of bail ([63]). There had also been a number of alleged incidents of family violence towards the complainant, which did not result in findings of guilt. The Court considered these matters as relevant to whether the applicant posed a risk of future endangerment to the complainant and her children ([58]-[59]).

***R v Eckersley* [2020] VSC 22 (30 January 2020) – Victorian Supreme Court**

'Children exposed' – 'Controlling behaviour' – 'Domestic homicide' – 'Guilty plea' – 'Misuse of drugs and alcohol' – 'Mitigating circumstances' – 'Moral culpability significantly reduced by psychosis' – 'Murder' – 'People with mental illness' – 'Physical violence and harm' – 'Verdins principles'

Offences: Murder

Proceedings: Sentencing

Issue: Appropriate sentence

Facts: The male offender and female victim had been in a domestic relationship from 2001 until the victim was killed in July 2018. They had three children together. There was a history of controlling behaviour by the offender towards the victim. The offender's mental health had deteriorated in the lead up to the offence, with his GP recording that the offender was "struggling with depression due to a loss of income and employment, and that [he] had been self-medicating with alcohol and cannabis but had stopped consuming these substances" [9]. The GP did not observe any homicidal ideations or psychosis symptoms at the time.

The morning of the offence, the neighbours heard a large argument ensuing within the offender's home. The offender threw food and cleaning products into the rubbish and damaged items in the kitchen with a hammer before suddenly attacking the victim by punching her in the face. The victim fell to the ground and was kicked by the offender before he grabbed a knife and stabbed her in the head, neck, chest and upper body. The attack was witnessed by two of their children, one of whom unsuccessfully tried to stop the attack. The offender then proceeded to set fire to a near-by fabric couch and applied the lighter flame to the older daughter's shoulder. He then forced the children and family dog into a car and drove away. Police later found the offender and children unharmed.

The offender suffered from 'severe, acute and transient' drug-induced psychosis at the time of offending [62]. The offender's psychosis meant that his degree of moral culpability was of significant dispute.

Held: Eckersley was sentenced to 22 years' imprisonment with a non-parole period of 18 years.

The judge provided that ordinarily, "a drug-induced psychosis does not commonly result in the application of the Verdins principles and a mitigatory outcome" [88]. However, as the offender was prescribed the drug by his GP and was not aware that they could cause psychotic symptoms, the judge was satisfied of the offender's low moral culpability [92]. This lower culpability lessened denunciation and deterrence as sentencing factors, however the judge noted that this did not "take away from the fact that the killing of an intimate partner is an inherently terrible act" [108]. The judge also noted that while the murder did not occur in the context of a history of family violence, "the killing of an intimate partner is a most serious form of offending which must again be tragically emphasised by the Court" [112].

In sentencing Eckersley, Justice Champion considered the children witnessing the offence, the offender's destruction of the victim's body and fleeing the scene as aggravating factors. The unreasonable delay in sentencing was also accounted for.

Re Rodgers [No 2] **[2019] VSC 760 (20 November 2019) – Victorian Supreme Court**

'Bail' – 'Delay' – 'Emotional and psychological abuse' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Strangulation'

Charges: 33 offences, including strangulation

Case type: Bail application

Facts: The applicant was charged with 33 offences, 32 of which arose out of incidents alleged to have occurred over 3 days. The other charge involved the contravention of an undertaking given to the Magistrates' Court. The primary complainant was the applicant's wife, however, the alleged offending also involved the complainant's children. It was alleged, among other things, that the applicant grabbed the complainant's throat and pushed her head through a wall, while threatening her that he would 'drain' their bank account and take their daughters to the United States ([6]).

The applicant was refused bail in August 2019, and applied for bail again ([3]-[4]). The applicant contended that a compelling reason to justify a grant of bail could be established based on his personal and financial circumstances, the strength of the charges against him, the likely delay until determination of the charges, and the lawful sentencing range open to the sentencing court. He also submitted that, without being granted bail, he was likely to spend a significantly longer period of time on remand ([11]-[12]). On the issue of unacceptable risk, the respondent pointed to the applicant's 'history of contravention of court orders' and his addiction to illicit substances which appeared 'to be linked to his offending and violence against the complainant and [her] children' ([17]-[21]).

Issue: The issue for the Court was to determine whether a 'compelling reason' existed in favour of bail.

Held: The applicant was admitted to bail on strict conditions. In the Court's view, bail conditions, such as daily reporting to police, prohibition from approaching the vicinity of the complainant's residence and curfews, would sufficiently mitigate any risk posed by the applicant ([33]). The applicant was 33 years of age, and had a limited prior criminal history and no prior criminal history involving violence. He had no prior convictions for breaching court orders, however, he previously admitted to breaching a family violence order ([26]-[27]). The applicant ran a trucking business, which would likely suffer financially if he was not granted bail. Factors militating against the applicant included the seriousness of the allegations of strangulation and the fact that

the complainant was afraid of him. Nevertheless, the Court found that the applicant had established a compelling reason to justify the grant of bail, given his lack of a negative bail history, the modesty of his criminal history, his personal and financial circumstances, the time already spent in custody, the period of any likely sentence and the material and recommendations in the CISP Remand Outreach Program (CROP) report ([30]).

***The Queen v Karatzas* [2019] VSC 658 (26 September 2019) – Victorian Supreme Court**

'Depression' – 'Evidence' – 'Mitigating factors' – 'Murder' – 'Past domestic violence' – 'People with mental illness' – 'Remorse' – 'Sentencing' – 'Strangulation'

Charges: Murder

Proceedings: Sentencing

Facts: The accused and victim were married. After an argument with the victim, the accused strangled her with an electrical extension cord until she collapsed and fled the scene. Expert evidence that the accused was suffering from a major depressive episode at the time of the offence 'which may have clouded [his] thought processes and [his] appreciation of the consequences of [his] actions' [24] was accepted at trial along with evidence that the accused loved his wife and had been violent to her before.

Issues: Appropriate sentence

Decision and reasoning: The accused was sentenced to 16 years' imprisonment with a fixed non-parole period of 11 years.

The court accepted that the fact the accused was suffering from a major depressive episode significantly reduced the accused's moral culpability [24]. Beale J said '[d]omestic violence murders are often upper range examples of the offence of murder, particularly where there has been a history of domestic violence. This is not your case. The fact that you killed your wife of nearly 50 years was a gross breach of trust which elevates the seriousness of your offending but, having regard to all circumstances, and particularly your mental illness, I find that yours is a mid-range example of the offence of murder' [25]. The other mitigating factors considered by his Honour include the accused's: remorse; previous good character; excellent prospects of rehabilitation; age; and 'the punishment [the accused will] continue to experience knowing you killed your beloved wife' as other mitigating circumstances [54].

***The Queen v Bufton* [2019] VSC 621 (13 September 2019) – Victorian Supreme Court**

'Controlling, possessive, jealous behaviour' – 'Female perpetrator' – 'Lack of remorse' – 'Murder' – 'Protection order' – 'Separation'

Charge: Murder

Proceedings: Sentencing

Facts: The female offender was found guilty following trial of the murder of her male domestic partner, her various offers of a guilty plea to negligent manslaughter, then dangerous driving causing death (following the death of the sole living witness to the offence), and then again negligent manslaughter having been rejected. The pleas offered appeared to relate to the Crown's perceived prospects of proving their case with the evidential difficulties occasioned by the death of the witness.

The offender and victim had a turbulent relationship involving many arguments and periods of separation from January 2016 until his death in October 2017. The victim was attempting to remove his caravan from the offender's property when the offender became verbally abusive and refused to let the victim move it. The victim walked away to call police for assistance but was followed by the victim in her car and struck by the vehicle. The call to 000 remain connected during the accident and picked up the ensuing conversation between the offender and a witness in which the offender claimed that the victim jumped in front of her car and she was unable to avoid him. This false story was later repeated to police.

The offender was 68 years of age and had no prior criminal convictions. She had been diagnosed with cancer. She was subject to an intervention order prohibiting the commission of family violence against the victim at the time of offending.

Held: Bufton was sentenced to 24 years' imprisonment with a non-parole period of 18 years.

The Court treated this protection order as an aggravating feature along with the use of a dangerous weapon and noted that the 'crime occurred in the context of [Bufton] having been in a domestic relationship with [the victim], and of [Bufton] having acted out of anger and frustration at the state of the relationship [36]. Her persistence in the false account of events and the fluctuating pleas were considered to be indicative of a lack of contrition or remorse[46-52]. Assistance rendered by the offender to the accused was conduct which could be explained by the crime being carried out in full view of the witness[53]. The judge said at [52]:

> "For completeness, I make it clear that you are not to be punished for your refusal to admit what you had actually done, or for pleading not guilty to murder. Rather, these facts point to the absence of a possible mitigating feature of your crime which would have existed were you to have been willing to accept the true criminality of your conduct."

Just punishment, denunciation and general deterrence were treated as the most important sentencing purposes, with the significance of specific deterrence being reduced in light of Bufton's age and cancer diagnosis.

***Re Rodgers* [2019] VSC 553 (20 August 2019) – Victorian Supreme Court**

'Bail' – 'Children' – 'Intervention order' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Protection order' – 'Unacceptable risk'

Charges: Multiple charges of causing injury intentionally and recklessly, a charge of recklessly causing serious injury, charges of reckless conduct endangering life and endangering person, a charge of making a threat to kill, drugs charges, a charge of criminal damage, and numerous breaches of Family Violence Intervention Orders (FVIO)

Case type: Bail application

Facts: The applicant applied for bail on a number of charges, which arose out of family violence related incidents. The complainants include his former wife and children.

Issue: The issue for the Court was to determine whether a 'compelling reason' existed in favour of bail.

Held: The Court refused the bail application as there would be an unacceptable risk that the applicant would endanger the safety and welfare of the complainant and her children, or commit further offences while on bail ([65]). The nature and seriousness of the offending was considered to be the most important matter for the Court. Tinney J described the offending as 'quite disturbing, with a significant and worrying risk of causing serious injury or death' ([51]). Some of the alleged violence occurred in the presence of one or more of the children, and occurred in the family home ([54]). Although the applicant's criminal history was limited, he had been found guilty of assaulting the complainant in the past. Further, he was on an adjourned bond for that assault ([56]), and was also subject to a FVIO at the time of the alleged offending ([57]).

There were many personal circumstances favourable to the applicant. For example, he had a supportive family and was the operator of a company which, in his absence, struggled financially ([58]). According to Tinney J, the applicant's prolonged drug use had a significant impact on the alleged offending, and would increase the risk of failure to comply with his bail conditions ([59]). The complainant's attitude to bail was also a relevant consideration. She was afraid of the applicant and did not want him to be released on bail ([60]). His Honour concluded that there were sufficiently compelling reasons to deny the applicant a grant of bail ([63]).

Additional matters of concern included ([64]):

- The applicant allegedly repeatedly and violently assaulted his wife;
- The offending allegedly occurred in the context of ongoing drug use by both the applicant and the complainant;
- The offending occurred despite there being an intervention order in place and the fact that he was subject to an adjourned bond for a previous assault on the complainant; and
- If bail was granted, the conditions imposed on the applicant would not have sufficiently reduced the risks to a level where they would be acceptable.

Note: An appeal against this decision to refuse bail was rejected by the Victorian Court of Appeal - Rodgers v The Queen [2019] VSCA 214 (26 September 2019)

***The Queen v Solmaz* [2019] VSC 530 (12 August 2019) – Victorian Supreme Court**

'Arranged marriage' – 'Denunciation' – 'Domestic violence' – 'Expert evidence' – 'Lack of remorse' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Physical violence and harm'

Charges: 1 x murder

Case type: Sentence

Facts: The offender pleaded guilty (shortly before the trial was due to commence) to the murder of his former wife, with whom he entered into an arranged marriage when he was 18 years of age. They had 2 children. The murder occurred in the context of an unhappy relationship which had subsisted for many years leading up to her death. The offender claimed that the deceased attacked him with a broken leg of a table and that he took the piece of wood from her and hit her repeatedly. He then used an extension lead to strangle her ([10]).

In the aftermath, the offender left the deceased dead on the floor and went to his step-sister's home where he confessed to the killing. He then fled Melbourne, and was intercepted by Queensland police two days after the killing.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: The Court sentenced the offender to 25 years' imprisonment with a non-parole period of 20 years. The offender was 60 years of age and was born in Bulgaria. He had one prior conviction of unlawful assault, but this had limited significance to his case ([33]). Medical evidence indicated that he was diagnosed with Adjustment Disorder, and was likely depressed at the time of the deceased's death. One expert considered that his Adjustment Disorder contributed to his offending by diminishing his ability to reason and make sound judgment ([45]). The Court, however, noted several deficiencies in this expert's evidence, such as the fact that he heavily relied on the truthfulness of the offender's account to him about his relationship with the deceased and that it conflicted with other expert evidence ([86]-[94]). Consequently, the Court did not accept this expert evidence and rejected the defence's submissions in respect of the Verdins principles to reduce the sentence, other than for the purpose of the hardship of imprisonment ([95], [99]). According to the Court, the offender's conduct could not be connected to any defect in his reasoning abilities or be characterised as an impulsive crime. He inflicted multiple, forceful blows to the deceased. The 'shocking and protracted nature of the crime' indicated that any impairment to mental functioning was not causally connected to the offending, and that he intended to kill her ([96]-[97]). The crime was described as one of 'extravagant and drawn-out violence committed against a physically weaker person whom [the offender] apparently detested and who had offered some provocation to [him] by striking [him] with the leg of the table' ([97]).

While the offending was not premeditated, the Court considered it to be at the high end of the range of seriousness. The crime was an extreme overreaction to modest provocation by the deceased and the challenges of their 'sad and troubled relationship' ([102]). The Court also found that the offender had not exhibited true remorse ([111]). His prospects of rehabilitation, however, were found to be good ([117]).

Relevant sentencing principles included just punishment, denunciation and general deterrence. The Court found it necessary to make 'perfectly clear' that it deplores violent crimes of this nature, particularly those committed against domestic partners. The deceased's life was 'precious', and was brutally and deliberately taken away by the offender as a result of his anger, resentment and frustration. He had full knowledge of the severity and criminality of his actions ([121]-[122]).

***R v Stone* [2019] VSC 452 (12 July 2019) – Victorian Supreme Court**

'Exposing children' – 'Female perpetrator' – 'History of abuse' – 'Murder' – 'Physical violence and harm' – 'Sentence' – 'Separation'

Offences: Murder

Proceedings: Sentencing

Issue: Appropriate sentence

Facts: The male victim and female offender (Stone) had been married for 22-years and had five children together. Evidence tendered during trial was that the male victim had reported an incident of the offender chasing him from the house with a knife. Neighbours also reported sounds of arguing and physical violence coming from the home prior to the incident that lead to the victim's death. There was evidence that the victim told members of his extended family that he intended to leave the relationship the day of the incident that lead to his death.

The Crown case was that Stone doused the victim with highly flammable enamel thinner and set him on fire. While none of the children saw the victim committing the offence, one of the daughters saw their father engulfed in flames and heard him say that he was going to die. Another daughter saw the trail of debris left by the victim as he ran to the bathroom after being set alight.

The victim was found conscious by paramedics despite sustaining burns to 95% of his body, including his airways. He was placed on life-support and interviewed but did not recover. Both the victim and Stone gave false versions of the events, claiming that the victim had been attacked by three men. Stone provided the names of the alleged offenders but failed to identify them during police interviews and was subsequently arrested herself.

Held: The accused was sentenced to 34 years' imprisonment with a non-parole period of 28 years. The Court provided that murder is "the ultimate act of family violence", with the offender's 'vicious and barbarous' conduct constituting a "a violation of the security of the sanctity of the home and a massive breach of trust" [32]. With the offender's conduct being 'a most serious example of murder', the Court found the objective gravity of the offence and offender's moral culpability to be 'extremely high'. As such, denunciation and deterrence were the primary sentencing considerations along with protection of the community [42].

Note: Subsequent applications for leave to appeal against conviction (on grounds that the trial judge erred in finding the applicant's alleged lies were reasonably capable of amounting to 'incriminating conduct'; (2) the verdict was unsafe and unsatisfactory or cannot be supported having regard to the evidence; and (3) a substantial miscarriage of justice occurred because of the failure of the prosecution to disclose telephone records); and sentence on the ground that the sentence was manifestly excessive were dismissed: *Stone v The Queen* [2021] VSCA 186 (24 June 2021) – Victorian Court of Appeal.

See also *R v Stone (Ruling No 1)* [2018] VSC 625 (19 October 2018) – Victorian Supreme Court and *R v Stone (Ruling No 2)* [2018] VSC 626 (19 October 2018) – Victorian Supreme Court.

***R v Willis* [2019] VSC 398 (20 June 2019) – Victorian Supreme Court**

'History of family violence' – 'Murder of parent' – 'People with mental illness' – 'Sentencing' – 'Verdins'

Charges: Murder x 1.

Case type: Sentence.

Facts: The offender pleaded guilty to the murder of his mother. The case raises important community issues and the connection between drugs, mental health and family violence. The evidence showed that the offender and his mother had significant mental health issues, which strained their relationship and ultimately led him to stab her to death ([2]). The offender admitted to killing his mother to police, and made further admissions to his father and former partner. Lasry J described the murder as 'grave and tragic'. The victim was vulnerable and defenceless in the face of the attack, and her death was the culmination of a lengthy history of hostility and family violence between them ([17]).

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: Lasry J noted the offender's personal circumstances at [21]-[25], and the issue of mental health and substance abuse at [26]-[33]. He started using drugs as a teenager, however remained drug free for several years. His deteriorating mental health and increasing drug use led to the breakdown of his relationship with his former partner and the loss of his job. The offender had also been diagnosed with Delusional Disorder and subject to various treatment orders. A forensic psychiatrist gave evidence of the offender's long history of major mental disorder and substance misuse, but noted that he had no history of being violent or anti-social other than when he was psychotic or affected by drugs. The offender also suffered from paranoid

schizophrenia which was likely precipitated by his cannabis use and aggravated by his methamphetamine use.

The offender pleaded guilty at a relatively early stage of the proceedings. An element of remorse was identified in his post-offence conduct; however his Honour noted that the offender's hostility towards his mother had not completely abated ([41]-[43]).

Further, the offender had no criminal history and made efforts to improve himself while in custody through education and work opportunities. Lasry J was satisfied that there was some evidence that he was capable of leading a law-abiding and productive life, and that his prospects of rehabilitation depended on his compliance with treatment for his mental health and substance misuse ([44]-[45]).

Lasry J was satisfied that the principles arising from *Verdins* meant that the offender's moral culpability was significantly reduced. Community protection was not a significant sentencing consideration provided that his serious mental health issues were properly managed ([53]). The offender was sentenced to 20 years' imprisonment with a non-parole period of 14 years.

***R v Considine & Anor* [2019] VSC 386 (31 May 2019) – Victorian Supreme Court**

'History of abuse of accused' – 'People affected by substance misuse' – 'People with disability and impairment' – 'Sentencing' – 'Strangulation'

Charges: Murder x 1.

Case type: Sentence.

Facts: The offender pleaded guilty to murdering the victim. The offender's partner of around 9 years, Hogan, pleaded guilty to assisting him. The relationship between the offenders involved homelessness, drug use and domestic violence. In 2015, while the offender, Considine, was serving a term of imprisonment, Hogan and the victim met on Facebook and commenced an intimate relationship. When the offender was released from prison, Hogan and the victim ended their relationship, but resumed social media communication in 2017. The offender, Considine, became aware of this relationship. Considine and Hogan arranged a threesome with the victim. The offender became jealous of the sexual activity between Ms Hogan and the victim, and strangled the victim to death. Ms Hogan assisted the offender to dispose of the body.

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: The offender, Considine, began consuming alcohol and taking drugs as a teenager. A forensic psychiatrist diagnosed the offender with Borderline Personality Disorder and believed that he likely had an acquired brain injury (ABI). He therefore concluded that it was likely the offender was experiencing severely impaired impulse control at the time of the offending due to his intoxication with multiple substances and Borderline Personality Disorder and probable ABI ([49]). Champion J accepted this opinion at [71]. The offender also had an extensive criminal history, however very few of his convictions involved violence ([52]). The offender's moral culpability was reduced by various factors, including his intellectual impairment and personality disorder ([71]). The offender's guilty plea showed a willingness to accept responsibility for the victim's death and spared the victim's family and friends from the traumatic effects of a contested trial ([73]). His Honour also accepted that the offender was remorseful for having killed the victim, even though this took some time to develop ([76]). The offender was sentenced to 21 years' imprisonment with a non-parole period of 16 years ([115]).

Ms Hogan also commenced using drugs at an early age and had a minor criminal history ([56]-[57]). It was submitted that her role in the offending could not be separated from the nature of her relationship with the offender which was 'marred by domestic violence, control and drug use'. It was also submitted that these circumstances reduced her culpability ([86]). Champion J considered that her experience of domestic violence was a factor relevant to the establishment of her state of mind, and mitigated the circumstances of her offending to some extent ([90]). She also decided to cooperate with the police and offered to plead guilty at an early stage ([94]). His Honour accepted that she was genuinely remorseful for the victim's death ([96]). Ms Hogan was sentenced to one year and 10 months' imprisonment ([118]).

***R v Davsanoglu* [2019] VSC 332 (24 May 2019) – Victorian Supreme Court**

'Children' – 'Imprisonment' – 'Physical violence and harm' – 'Sentencing' – 'Suicide pact'

Charges: Murder x 1.

Case type: Sentencing.

Facts: The accused '[inflicted] his will on a woman [the deceased] by the use of fatal violence in her home'. They had maintained a relationship over several years, which ended as a result of her family's disapproval. The deceased later remarried and had a child. The accused and the deceased later re-established their relationship, but it was 'marked by periods of instability' [8]. In 2017, the deceased became engaged to

another man. On 13 July 2017, the accused visited the deceased's residence, where they 'apparently had a sexual encounter' while her child was asleep [10]. The accused killed the deceased by holding her underwater in a bath. The accused then removed her body from the bath, partially dressed her in clothes, and placed the body in his car. He drove the deceased's body from Melbourne to South Australia, as he intended to deposit it in the ocean. He also purchased 2 knives and inflicted superficial incisions to his wrist. The accused decided to return to Melbourne where he deposited the body in the garage of an unoccupied property that he had previously leased. He confessed to killing the deceased to his friends and family, but said that she had told him to kill her and that he had tried to kill himself. At the police station, the accused gave conflicting evidence on his feelings about the deceased's relationships with other men.

Issue: The Court determined the appropriate sentence for the offence in the circumstances.

Held: Lasry J inferred that the appellant's self-inflicted injuries were not a genuine attempt to suicide, but a means of explaining his involvement in the killing by reference to a 'suicide pact' ([14]). By reference to *Ron Felicite v The Queen* [2011] VSCA 274, his Honour noted that the seriousness of the offending required the imposition of significant punishment ([27]). It represented the accused's endeavour, through the use of fatal violence, to control the deceased, and to overpower her rejection of their relationship ([23]). Relevant sentencing principles included general deterrence, denunciation and just punishment. His Honour also noted aggravating circumstances, including the fact that the killing occurred in the deceased's home while her child was asleep in the nearby room, and that he abandoned the child when he drove off with the deceased's body ([26]).

Lasry J also considered the peculiarity of the accused's guilty plea. It was given in circumstances which made it difficult for his Honour to determine whether it was a sign of genuine remorse over the deceased's death. The accused would have derived a greater benefit had he pleaded guilty at an earlier time ([31]-[34]). Personal circumstances of the accused were also considered. He was born in Turkey, raised in an environment of domestic violence, lived in foster homes, did not receive any formal education in Australia, maintained employment since the age of 18, and had no prior convictions for violence ([35]-[37]). The accused's steady employment throughout his adulthood and lack of prior criminal convictions indicated positive rehabilitation prospects ([38]). The sentence was also determined in light of victim impact statements ([28]-[30]).

His Honour sentenced the accused to 23 years' imprisonment with a non-parole period of 18 years ([42]). He

allowed some discount for the accused's guilty plea. As his Honour was not satisfied that the accused's guilty plea reflected significant remorse or acceptance of responsibility for his conduct, only a small discount was made ([44]).

***DPP v Jensen* [2019] VSC 327 (17 May 2019) – Victorian Supreme Court**

'Attempted murder' – 'Binge drinking' – 'Intentionally causing serious injury' – 'Sentencing'

Charges: Attempted murder x 2; intentionally causing serious injury x 1.

Case type: Sentence.

Facts: The offender had maintained an incestuous relationship with his sister since he was 17 years old, and they have a child together. While they were still living together, but after their relationship ended, his sister began an intimate relationship with the first victim. The offender, while intoxicated, entered the first victim's house which he shared with his mother. The offender found the first victim and his sister asleep in bed together, and stabbed them both repeatedly and also stabbed the first victim's mother who intervened. The offender pleaded guilty to 3 offences: the attempted murder of the first victim (charge 1) and his own sister (charge 2), and intentionally causing serious injury to the first victim's mother (charge 3).

Issue: The Court determined the appropriate sentence for the offences in the circumstances.

Held: Beale J sentenced the offender to 19 years' imprisonment, with a non-parole period of 14 years. The offender was sentenced as a Serious Violent Offender on charges 2 and 3 pursuant to the *Sentencing Act 1991*.

Notwithstanding the offender's relative youth, good work history, limited prior convictions and guilty plea, his Honour could not accept the submission that the offender had good prospects of rehabilitation. The violence was extreme and sustained, and the offender had a history of binge drinking. Even though his intimate relationship with his sister had ended, his ability to cope with any future relationship difficulties and to control his drinking was uncertain ([48]).

The offender's personal history is discussed at [29]-[41]. He was born in the Cook Islands and raised by his grandparents after his parents abandoned him as an infant. He moved to Australia in 2009 with his parents and his sister. Beale J noted the possibility that he would be deported from Australia at the end of his sentence. This was a relevant factor in determining the sentence ([52]).

The mitigating factors of the case were summarised at [56]-[64]. The offender had a difficult childhood which partly caused him to develop an incestuous relationship with his sister. A lack of parental supervision when they were teenagers was also found to be a contributing factor. The offender pleaded guilty at a relatively early stage, showed remorse, is relatively young, and has a limited criminal history and no violent antecedents.

Aggravating circumstances, noted at [65]-[70], were that the offending involved a 'terrifying' home invasion; the attack with knives was not momentary, but sustained; the offending against his sister was an instance of domestic violence given their long-term incestuous relationship; the injuries inflicted on his sister and the first victim were life-threatening; and the offender had a prior conviction for incest, which clearly did not lead him to end his intimate relationship with his sister.

A useful table of summaries of various sentencing cases in respect of attempted murder is also annexed to the judgment. In addition to these cases, his Honour also had regard to the Judicial College of Victoria Sentencing Manual's attempted murder case collection and the Court of Appeal overview regarding intentionally causing serious injury ([54]).

***DPP v Gibson* [2019] VSC 328 (16 May 2019) – Victorian Supreme Court**

'Dementia' – 'Guilty plea' – 'Life expectancy' – 'Murder' – 'No prior convictions' – 'People with mental illness'

Charges: 1 x murder

Case type: Sentencing

Facts: The accused pleaded guilty to the murder of his wife to whom he had been married for 44 years. The accused was 65 years old and had retired. He had four children with the victim, as well as grandchildren. The accused regarded his relationship with the victim as having 'broken down'. He shot her twice in the head and then attempted to kill himself. The accused's sister and their grandson were present at the time of the offending.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Held: To determine the appropriate sentence, Coghlan JA took into account the accused's personal circumstances. He suffered from depression and anxiety since he was a teenager ([27]). He had stopped

working a few years prior to the offending, and experienced financial difficulties ([28]). He was resentful of the amount of time his wife was spending with her parents ([6]), and over time, he started to scrutinise her spending habits, including the cost of caring for their grandchildren and her parents ([29]). Further, the accused and victim had made significant contributions to their local community ([30]-[31]).

The accused's mental health was a major consideration for the Court. There was medical evidence indicating that he suffered recurrent depressive disorder of moderate severity ([38]), and that aspects of his processing speed, working memory, complex new learning skills, executive and language skills, and impulse control had deteriorated ([40]). There were suggestions by medical professionals that he might have suffered from either frontotemporal dementia or Alzheimer's related dementia. Another expert suggested that his frontal lobe might have been damaged as a result of his attempted suicide ([43]). It was important to determine the precise cause of the brain damage as his life expectancy differed depending on his diagnosis ([45]). His Honour sentenced the accused on the basis that he had been diagnosed with frontotemporal dementia, which had a life expectancy of 8 years ([51]). This diagnosis affected the weight to be attributed to sentencing principles, such as just punishment, denunciation and deterrence ([52]). As a result of the accused's 'complex medical condition', there was a significant delay in sentencing ([2]), which was also taken into account ([3]).

Coghlan JA was satisfied that the accused's mental condition would render his prison sentence more onerous than it would for a prisoner without his condition ([54]), and that his moral culpability and the need for denunciation, general and specific deterrence were reduced ([53]). The accused pleaded guilty, had no prior convictions and was found to have led a 'worthwhile and…blameless life' ([56]). Taking into account all relevant matters, the accused was sentenced to 15 years' imprisonment with a non-parole period of 10 years.

***R v Eustace* [2019] VSC 189 (26 March 2019) – Victorian Supreme Court**

'Factors affecting risk' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Sentencing'

Charges: Murder x 1.

Case type: Sentence.

Facts: The offender and victim met while visiting Australia from India, and eventually married. Three months later, the offender killed the victim in a knife attack in their shared home ([3]). On the night of the murder, the offender and victim argued, which ultimately resulted in the offender obtaining a knife and stabbing the victim

([9]-[14]). She suffered 12 wounds to her chest, abdomen, arm and leg. The offender's actions were described as 'sustained, purposeful and ruthlessly determined'. Even after the offender was restrained in a head lock and dragged from the bedroom by a man with whom they lived, he returned to the room to resume the attack ([15]).

Issues: The Court determined the appropriate sentence for the offence of murder in the circumstances.

Decision and reasoning: Taylor J took into account the offender's personal circumstances at [26]-[31]. He was 43 at the time of the offending and his work history showed him to be 'a man of industry' ([29]). However, his father was an aggressive alcoholic ([28]). Prior to meeting the victim, he had been in two significant relationships, one of which was an arranged marriage ([31]).

The offending was found to be 'self-evidently extremely serious', as the killing of a domestic partner violates a fundamental principle underpinning society, namely, that all persons have the right to safety, respect and trust in intimate relationships. Whether or not the marriage was one of convenience, his Honour noted that the offender had voluntarily entered into a relationship in which he owed the victim kindness and safety. Rather, the offender betrayed her trust and the expectation that, even where issues in family relationships arise, violence is not tolerated. Even if the offender was fearful, angry, intoxicated or frustrated, he should have just walked away ([33]). Women should not fear or suffer physical harm because their partner loses their temper. The offender's actions were found to be at the extreme end of the scale of 'abominable acts' ([34]). Aggravating circumstances included the fact that the victim was his wife, that she was murdered in their home, that a knife was used, and that despite the number of wounds already inflicted, the offender continued his attack, even after being physically restrained by another person ([35]-[36]). The public has an interest in matters involving family violence. Principles of general deterrence, denunciation and just punishment are relevant to sentencing ([35]). The objective gravity of the offending and the moral culpability of the offender was also found to be very high ([38]).

The offender pleaded guilty after the committal hearing, demonstrating a willingness to facilitate the course of justice ([39]). He also surrendered himself to the police station and admitted the killing. His remorse was further expressed in a letter of apology to the victim's family ([40]).

Taylor J sentenced the offender to 25 years' imprisonment with a non-parole period of 20 years ([46]). After the expiry of his sentence, it was noted that the offender would be deported to India. Knowledge of this deportation was said to make imprisonment more burdensome ([41]). Taylor J also noted that the offender

would be isolated in custody ([42]). The offender's prospects for rehabilitation were found to be good, as a result of some positive references indicating his good character and hardworking nature ([43]).

***DPP v Ristevski (Ruling No 1)* [2019] VSC 165 (15 March 2019) – Victorian Supreme Court**

'Children' – 'Evidence' – 'Physical violence and harm' – 'Post-offence conduct'

Charges: Murder x 1.

Case type: Ruling as to evidence.

Facts: The prosecution alleged that the accused killed the deceased at their home on the morning of 29 June 2016, put her body in the boot of her car and drove it to Macedon Regional Park where he concealed it between 2 logs in a forest. It was discovered approximately 8 months later. The accused and deceased had been married for over 20 years and had a daughter. There was no prior history of physical violence on the part of the accused. However, he admitted to pushing the deceased on occasions if she 'got in his face' during arguments ([34]). The prosecution conceded that the evidence at most supported an inference that their financial difficulty was significant and may have fuelled an argument between them ([24]).

Issue: Whether the prosecution was entitled to rely on evidence of post-offence conduct to prove not only an unlawful killing but also murderous intent.

Held: Beale J noted some similarities with *R v Baden-Clay* [2016] HCA 35. However his Honour found that the differences between the two cases were 'more striking'. At [37], his Honour stated -

> *'First, there was compelling evidence of a motive for Baden-Clay to kill his wife – a desire to be rid of her so he could be with his lover. Second, the post-offence conduct in that case included lies and other conduct directed at concealing his ongoing extra-marital affair. In other words, the post-offence conduct was intertwined with his motive to kill and thus it is easy to see how the High Court, viewing the post-offence conduct on the basis of the evidence as a whole, reached the conclusion that it did.'*

In the present case, the prosecution submitted that the accused's post-offence conduct was inconsistent with his having unintentionally killed the deceased, as one would expect him to report the incident, and not bundle her body into the boot of a car, drive to a remote location, conceal the body and lie about the circumstances of her disappearance to family, friends and investigators ([35]). Counsel for the accused submitted that he could well have feared that the unlawful killing of the deceased would attract a substantial prison term and

cause permanent damage to his relationship with his daughter ([36]). Beale J found that those submissions made it difficult to see how a jury could properly find that the only reasonable explanation for the post-offence conduct was that the accused was conscious of having killed his wife with murderous intent ([36]).

Beale J held that while the evidence of post-offence conduct referred to in the prosecution's amended Notice of Incriminating Conduct could be relied on as evidence that the accused killed his wife, it could not be relied on to prove that the accused did so with murderous intent ([31]–[39]).

***R v Robertson* [2019] VSC 145 (6 March 2019) – Victorian Supreme Court**

'Factors affecting risk' – 'Following, harassing and monitoring' – 'Physical violence and harm' – 'Social abuse' – 'Technology facilitated abuse'

Charges: Murder x 1.

Case type: Sentence.

Facts: The defendant pleaded guilty to murder of his partner (the deceased) with whom he fathered a daughter. After their daughter's birth, their relationship became strained. The defendant resented the deceased's change of employment and her being around other men. He became jealous and constantly concerned about possible infidelity. The deceased's behaviour became more obsessive and paranoid. He even set up a fake Facebook and Instagram account to contact the deceased's work colleagues under the fake name to establish if anything was happening between the deceased and her male colleagues ([3]-[11]). After a heated argument in which the deceased expressed her desire to end the relationship, the defendant picked up a dumbbell bar and hit her multiple times to her face and head. The blows, forceful and vicious, killed her immediately. After committing the offence, the deceased rang his mother and admitted to his actions. His mother rang the police ([12]-[19]).

Issues: The Court determined the appropriate sentence for the offence of murder in the circumstances.

Decision and reasoning: Champion J sentenced the defendant to 24 years' imprisonment, taking into account general and specific deterrence, denunciation, rehabilitation and protection of the community. His Honour considered the defendant's personal circumstances at [39]-43]. The defendant grew up in a close, supportive and loving family. Through his job he was able to buy a home for himself, thus demonstrating his independence and self-sufficiency. Friends and family observed that he became agitated and alienated after

his daughter was born.

Champion J did not accept a complete lack of premeditation even though the defendant committed the offence in a highly emotional state. The 'savagery' of the assault affected the sentencing. The act in question was terrible and grossly violent. It was not fleeting and involved multiple deliberate blows to the face and head. His Honour noted the defendant's intention to kill. An aggravating feature was the fact that she was his intimate partner ([65]-[66]). Champion J therefore concluded that his offending was a grave example of murder and above the middle range of seriousness ([67]). However, it was noted that the extreme violence was out of character as there was no evidence of previous domestic violence incidents ([90]).

Champion J discussed his culpability and degree of responsibility at [68]-[73]. The offending occurred in the context of the defendant being extremely jealous, possessive and controlling. At [73] Champion J stated: 'I note that these features of jealousy, the need to possess, and uncontrollable rage associated with extreme violence emerge too frequently in cases of the murder of an intimate female partner.' The attack was described as grievously inappropriate and a wildly disproportionate response to the situation. Therefore, his culpability and degree of responsibility was within the higher range. A mitigating factor was the fact that the defendant admitted to killing the deceased very soon after the act, and thus his Honour found that it he should receive the full benefit of that early plea as it facilitated the course of justice and relieved the deceased's family and friends from having to give evidence and endure the trauma of a trial ([76]). With these factors in mind, his Honour accepted that the defendant has positive prospects of rehabilitation.

***The Queen v Samaras* [2019] VSC 120 (1 March 2019) – Victorian Supreme Court**

'Firearm' – 'Guilty plea' – 'Misuse of alcohol' – 'Physical harm and violence' – 'Sentencing' – 'Weapon'

Charges: Manslaughter

Proceedings: Sentencing

Facts: Before moving to Australia from America, the victim sent four packages containing firearms to the accused's parents' address in Australia. Three of these packages were intercepted by the Australian Border Force. 'The [female] victim and [male] accused were charged with the importation and possession of firearms and were bailed' [10]. They decided to 'go on the run', packing their belongings and purchasing a caravan to escape in. Arrest warrants were issued after the pair failed to appear in court, but they managed to evade the police [11].

The couple lived in the caravan for a couple of weeks prior to the incident. On the night of the shooting, both the accused and the victim were intoxicated and were arguing. The accused physically assaulted the victim during the argument while the victim was in possession of the loaded firearm. The two struggled for the weapon, with the accused eventually gaining possession and deliberately pulling the trigger. The accused did not aim the weapon or deliberately shoot the victim, although 'there is no suggestion the firearm was defective in anyway' [17].

The accused later pleaded guilty to manslaughter.

Issue: The issue for the Court was to determine the appropriate sentence for the offence.

Decision and reasoning: The accused was sentenced to 11 years' imprisonment with a fixed non-parole period of 8 years. Relevantly, the sentencing judge observed at [48]:

The sentence I pass must make it perfectly clear that the Court deplores the use of firearms, all the more so against women in a setting of domestic violence…… The sentence of this Court should bring it clearly home to any person in our community who might be minded to inflict violence of any sort against a domestic partner, particularly with the use of a weapon, that such conduct will be met with strong punishment.

***DPP v Freeburn* [2018] VSC 616 (14 December 2018) – Victorian Supreme Court**

'Imprisonment' – 'People with disability and impairment' – 'Physical violence and harm' – 'Women'

Charges: Murder x 1

Facts: The offender met the deceased, a 29 year old woman with a mild intellectual disability, on an internet dating site. The deceased was particularly vulnerable as she was guarded about her relationships and sometimes did not inform her family as to her whereabouts. Her parents obtained a guardianship order at VCAT because of their concern that she was unable to protect her own interests. The deceased had told her family and friends of the offender's violent behaviour towards her. The offender often exhibited jealousy, anger and verbal aggression when the deceased interacted with other men. The deceased's body was found in the offender's room three days after she was reported missing, with restraint marks on her wrists, bruising to her face and upper body, and a 'tram track' mark on her back. She also sustained brain injuries, indicating multiple blows to the head. Her wrists were bound and her neck and face were wrapped in tape. An autopsy revealed that she consumed the drug GHB prior to her death. It was entirely plausible that the deceased was

alive, albeit unconscious, when the offender left the premises.

Issues: Sentencing

Decision and Reasoning: The offender was found guilty of murder and sentenced to 25 years' imprisonment with a non-parole period of 20 years. The jury rejected the offender's defence that the deceased's death was caused solely by her consumption of GHB. At the time of the incident, the offender regularly abused drugs, and suffered from personalty disorder and long-term anger management problems which may have affected his judgment and ability to make calm and rational decisions ([24]). The deceased was also in a particularly vulnerable position due to her intellectual disability. His Honour considered the offender's personal circumstances which included his parent's separation, his upbringing which was characterised by substance abuse and family violence, his experience in several foster placements in which he exhibited violent behaviour, and his diagnoses of ADHD, oppositional defiant disorder and conduct disorder. His involvement in the criminal justice system began when he was a minor, and his violent offending included numerous convictions of assault. Given his history of mental health problems and violent prison incidents, his Honour accepted that he should remain in conditions more restrictive than those of other prisoners.

***Re Mongan* [2018] VSC 638 (24 October 2018) – Victorian Supreme Court**

'Bail' – 'Breach' – 'Children' – 'Factors affecting risk' – 'People with children' – 'Physical violence and harm' – 'Protection order' – 'Unacceptable risk and best interests'

Charges: Charges including false imprisonment, recklessly causing injury, unlawful assault, aggravated burglary, theft and threat to kill.

Proceeding type: Bail application.

Facts: The applicant and complainant were married for 13 years and have three children. The complainant claimed that the marriage ended because of the applicant's controlling and intimidating behaviour. From the time of the separation, a series of interim and final Family Violence Intervention Orders (FVIOs) were in place restraining the applicant from contacting the complainant. The applicant breached many of the FVIOs. It was alleged that the applicant, armed with items intended to incapacitate the complainant, unlawfully entered her premises, interfered with a CCTV camera which might have recorded his subsequent conduct, and then waited for her. He grabbed her from behind, forced her to the ground, sought to bind her wrists and gag her,

pushed her into her own home, and again forced her to the ground, binding her ankles. He threatened her in a graphically and frightening manner whilst she was bound and helpless. The children returned home from school and heard the complainant screaming. The complainant eventually escaped ([46]). The applicant submitted that a combination of a number of matters demonstrated a compelling reason that justified a grant of bail (see [34]).

Issues: Whether bail should be granted; Whether there was a compelling reason why the applicant's detention in custody was not justified; Whether the applicant presented an unacceptable risk of committing further offences, endangering the safety or welfare of the complainant and interfering with witnesses.

Decision and reasoning: Section 4AA of the *Bail Act 1977* (Vic) sets out circumstances in which a two-step test applies to the consideration of a grant of bail. Step 1 requires the existence of exceptional circumstances and compelling reasons. Step 2 mandates that the Court must apply the unacceptance risk test. In considering whether or not the applicant established compelling reasons that justified the grant of bail, the Court must take into account the surrounding circumstances (see s 4C and s 3AAA of the Act). The Court was required to assess 'the nature and seriousness of the alleged offending, including whether it is a serious example of the offence' (see s 3AAA(1)(a)).

There was no question that the offending alleged was serious. It was pre-meditated and involved the use of equipment to incapacitate the complainant. Only the escape of the complainant prevented a continuation of the offending. The Court found that the applicant's lawyer's reliance of an 'arguable defence' was 'somewhat optimistic' ([48]). The Court also considered the applicant's criminal history and the extent of compliance with conditions of earlier grants of bail. Although his criminal history was limited and there was nothing to indicate previous breaches of bail, the Court noted two factors, namely, that the applicant failed to accept the breakdown of his marriage, and that he refused to respect the orders of the Magistrate Court in relation to the complainant. A significant matter was the fact that, at the time of the alleged offending, the applicant was approximately six weeks into a six month adjourned bond which he received for his multiple breaches of the FVIOs. Matters pursuant to s 3AAA(1)(g), (j), (k), (l) were also considered.

At [57], his Honour noted that the risk of further violence or intimidation by the applicant towards the complainant was significant and entirely unacceptable (see s 4E of the Act). The application for bail was therefore refused as the applicant failed to establish a compelling reason that would justify the grant of bail. The circumstances suggested that the applicant should be held in custody pending trial.

R v Stone (Ruling No 2) **[2018] VSC 626 (19 October 2018) – Victorian Supreme Court**

'Evidence' – 'Fair hearing and safety' – 'Incriminating conduct' – 'Physical violence and harm' – 'Post-offence conduct'

Charges: Murder x 1.

Proceeding type: Ruling as to the admissibility of evidence.

Facts: The accused allegedly murdered the victim by dousing him with fuel thinner and setting fire to him. Their relationship spanned approximately 25 years. The accused claimed that a Mr Baxter murdered the victim. The question before the Court was whether the accused was the murderer. The Prosecution filed a Notice, pursuant to s 19 of the *Jury Directions Act 2015* (Vic), of its intention to adduce evidence of incriminating conduct, namely, the lies told by the accused in describing the circumstances of the deceased's death, and the accused's authorship of a letter purporting to be under the hand of Amanda Thatcher and which implicated Mr Baxter in the death of the deceased.

Issues: Whether the evidence of the conduct is reasonably capable of being viewed by the jury as evidence of incriminating conduct.

Decision and reasoning: The Court held that there was sufficient evidence on which the jury could be satisfied that the accused's multi-faceted statement as to how the incident took place was deliberately false. The conduct relied on by the prosecution was much more than a bare denial of guilt, and amounted to a detailed account of the deceased's death. Therefore, the jury could conclude that the only reasonable inference that could be drawn from the evidence was that the accused believed that she committed the offence. Accordingly, the prosecution was allowed to rely on the conduct specified in its notice, namely the lies told by the accused describing the circumstances of the deceased's death, as evidence of incriminating conduct ([24]-[27]).

Note: The accused was convicted and sentenced to 34 years' imprisonment with a non-parole period of 28 years: *R v Stone* [2019] VSC 452 (12 July 2019) – Victorian Supreme Court.

R v Stone (Ruling No 1) **[2018] VSC 625 (19 October 2018) – Victorian Supreme Court**

'Evidence' – 'Fair hearing and safety' – 'Physical violence and harm' – 'Relationship, context, tendency and

coincidence evidence'

Charges: Murder x 1.

Proceeding type: Ruling as to the admissibility of evidence.

Facts: The accused allegedly murdered the victim (her defacto partner) by dousing him with fuel thinner and setting fire to him. Their relationship spanned approximately 25 years. The accused claimed that a Mr Baxter murdered the victim. The question before the Court was whether the accused was the murderer. The prosecution sought to lead evidence from the deceased's mother as to the nature of the relationship between the accused and the deceased. That evidence included 1) that the mother observed instances of verbal and physical abuse between the deceased and accused over a number of years; 2) that in 2010, the mother observed a particular argument between the deceased and the accused in which the accused physically assaulted the deceased before the deceased's brother intervened; and 3) that in November 2016, the mother received a phone call from the deceased, claiming that he was fearful for his own life. The prosecution filed a Hearsay Notice with respect to the 'November 2016 incident'. Sections 65(2)(b) and 66A of the *Evidence Act 2008* (Vic) were relied upon as the path to admissibility.

Issues: Whether the deceased's mother's observations of instances of verbal and physical abuse between the accused and the deceased were admissible; Whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the accused; Whether the representations made by the deceased to his mother concerning an earlier incident with the accused are admissible.

Decision and reasoning: The prosecution argued that the deceased's mother's evidence was admissible as relationship and context evidence in that evidence of the poor relationship between the accused and the deceased could rationally affect the assessment of the probability of the existence of the question in issue, namely whether the accused killed the deceased. The accused argued that the relationship evidence was not relevant and that the evidence of the November 2016 incident failed to satisfy the tests specified in s 65(2)(b) and s 66A of the Act ([7]).

On an analysis of the particular evidence, Taylor J made the following observations:

- Evidence of the general poor relationship between the accused and the deceased was relevant to the probability of the existence of the question in issue. However, owing to the vagueness of the general relationship evidence, its probative value was low and was outweighed by the danger of unfair prejudice

to the accused. Therefore, such evidence was excluded under s 137 of the Act.

- The evidence of the 2010 incident was irrelevant and was therefore excluded by the operation of s 56(2) of the Act. The lack of relevance was a result of the fact that the accused was claimed to have threatened the deceased's brother with a knife, rather than the deceased herself.
- The evidence regarding the November 2016 incident, although hearsay, was admissible pursuant to s 65(2)(b). It was sufficiently proximate to the alleged incident and revealed the state of the relationship between the accused and the deceased, as well as the deceased's fear of the accused in the months preceding her death. It was 'extremely unlikely that the representation was a fabrication' ([31]). The evidence was also admissible pursuant to s 66A of the Act.

Note: The accused was convicted and sentenced to 34 years' imprisonment with a non-parole period of 28 years: *R v Stone* [2019] VSC 452 (12 July 2019) – Victorian Supreme Court.

***Re application for bail by Roberts* [2018] VSC 554 (21 September 2018) – Victorian Supreme Court**

'Bail' – 'Children' – 'Factors affecting risk' – 'Physical violence and harm' – 'Protection order' – 'Sexual and reproductive abuse' – 'Unacceptable risk and best interests'

Charges: Charges include rape, unlawful assault, contravention a Family Violence Intervention Order, persistent contravention of a Family Violence Intervention Order, attempt to commit an indictable offence, property damage and use a carriage service for child pornography material

Proceeding type: Application for bail

Facts: The complainant was the former partner of the applicant. They have three children. The applicant was charged with 64 offences including rape, unlawful assault, contravention a Family Violence Intervention Order, persistent contravention of a Family Violence Intervention Order, attempt to commit an indictable offence, property damage and use a carriage service for child pornography material.

Issues: Whether bail should be ordered; Whether the applicant discharged his onus of showing compelling reasons why his continued detention is not justified.

Decision and reasoning: The applicant's application for bail was refused as he failed to show compelling reasons why his continued detention was not justified. Taylor J noted that if he had been satisfied that a compelling reason existed justifying the grant of bail, he must apply the unacceptable risk test. In considering

s 5AAAA(2)(a) of the *Bail Act 1977* (Vic), Taylor J considered that there was a risk that, if released on bail, the applicant would commit family violence. His blatant disregard of the court orders and the effect of his behaviour on the complainant, was exemplified by the 1200 text messages he had sent to the complainant between September 2017 and March 2018. His preparedness on two occasions to continue a sexual offence notwithstanding his knowledge that his actions were being audio-recorded further indicated a complete indifference to the complainant, as well as a sense of entitlement ([57]). His prior convictions for matters of family violence demonstrated continuous disregard for the authority of the court and the complainant's safety and wellbeing. If released on bail, the risk of family violence would not be able to be sufficiently mitigated by the imposition of a bail condition requiring compliance with existing FVIOs ([59]).

***Smith v State of Victoria* [2018] VSC 475 (27 August 2018) – Victorian Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Children' – 'Duty of care owed by police' – 'Family violence' – 'Negligence' – 'Women'

Charges: Negligence claims.

Case type: Application for summary dismissal.

Facts: The plaintiffs, a woman and her three children (who identify as Aboriginal), were the victims of family violence by the children's father. They alleged that police officers and senior officers owed duties of care to them as victims of family violence, and that they suffered psychological harm as a result of breaches of those duties. The plaintiffs also asserted that the officers acted in breach of the plaintiffs' human rights and obligations as public authorities under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ([40]). The defendant submitted that the alleged duties cannot arise at law and that the proceedings should be summarily dismissed ([41]). Alternatively, the defendant sought a strike out of the allegations of a common law duty of care pleaded in certain paragraphs of the plaintiffs' amended statement of claim on the basis that no cause of action had been disclosed ([3]). The plaintiffs contended that the current law in Australia regarding the application of duties of care to police officers is 'in a state of development' and that, as a result, the court ought not summarily dismiss the proceedings ([87]).

Issue: The State of Victoria sought either a summary dismissal of the case or that the Court strike out the claims alleging that a common law duty of care was owed.

Held: Dixon J dismissed the application, stating that the defendant's contention that the proposed duties of

care have no real prospect of succeeding had not been established ([174]). Dixon J held that a summary dismissal is an 'extreme measure' and would 'forever shut out' the plaintiffs from seeking to prove their claim at trial ([169]). Although the case was 'fact rich and fact intensive', the defendant did not persuade his Honour that no duty of care could arise ([171]).

Duty of care

Dixon J stated at [170]:

> *'Australian common law has not affirmatively recognised that a police officer can never owe a duty of care… In no case has a court determined that no duty of care was owed in circumstances that demonstrate the degree of proximity between the plaintiffs and the police that is likely to be demonstrated on the evidence in this case at trial and in the legislative and policy framework that prevail in respect of domestic violence at the relevant time.'*

As outlined in *Kuhl v Zurich Finance Services Australia Ltd* [2010] HCA 11, the existence of a duty of care is determined by considering reasonable foreseeability and the salient features of the relationship between the plaintiffs and the defendant ([168]). The plaintiffs argued that the police officers owed them a duty of care to prevent breaches of several Intervention Orders (IVOs) by the father due to the existence of a relationship of proximity between the police officers and the plaintiffs, arising from various salient features, including that:

- It was reasonably foreseeable that the plaintiffs required protection from breaches of the extant IVOs by the father;
- The police officers had actual or constructive knowledge of the terms of the extant IVOs;
- The police officers exercised control with respect to the compliance by the father with the terms of the extant IVOs;
- The Victorian police represented, through the terms of its family violence policies, that police officers would protect women and children from family violence. As a result of these representations, the plaintiffs relied on the police officers to enforce compliance by the father with the extant IVOs; and
- There were no countervailing policy reasons that negated the imposition of a duty of care on the police officers to prevent breaches of IVOs ([49]).

The defendant argued that some of the pleadings in the plaintiffs' amended statement of claim were too broad. The submission was that these duties were that, 'every' police officer owed a duty to 'every' affected

family member named in any and ‘every’ extant IVO ([53]). In response, the plaintiffs argued that the duties were ‘owed by police officers at stations local to the plaintiffs’ homes, by reason of their status as family violence victims’ or, alternatively, as ‘victims of a recidivist family violence offender known to police’ ([58]). Dixon J accepted the plaintiffs’ submission that the duty was not pleaded in unnecessarily broad terms ([59]).

Salient Features

Dixon J noted that as the existence of a novel duty of care was alleged, the court must apply the salient features approach in *Crimmins v Stevedoring Industry Finance Committee*[1999] HCA 59 ([90]). A determination of the existence of a duty of care requires ‘[a] close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by reference to the salient features or facts affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury’ ([91]).

The plaintiffs submitted that the salient features of foreseeability, knowledge, control and responsibility applied ([129]). They challenged the defendant’s reliance on *Hill’s Case* [1989]AC 53, emphasising that the salient features of proximity, knowledge and control were absent in *Hill’s Case*. Dixon J held that *Hill’s Case* was distinguishable, even if it was good law in Australia ([94]-[95]). The plaintiffs also emphasised the dissenting judgment in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, which viewed proximity as the determinative factor ([102]). The plaintiffs submitted that *NSW v Spearpoint* [2009] NSWCA 233 was analogous, and that it was persuasive authority for their submission that the proceedings could not be summarily dismissed ([114]-[115]).

In relation to the factor of control, Dixon J accepted that the relevant focus was on control of the risk not the offender, and that the issue of control is ‘fact sensitive and a matter for evidence’ ([135]). The plaintiffs suggested that the police officers exercised control by having the father in a police vehicle and dropping him within the zone identified in one of the IVOs ([137]).

***R v Jones* [2018] VSC 415 (31 July 2018) – Victorian Supreme Court**

‘Battered woman syndrome’ – ‘Manslaughter’ – ‘Pregnant people’ – ‘Sentencing’

Charges: Manslaughter based on an unlawful and dangerous act x 1

Proceeding type: Sentence to be imposed

Facts: The female offender was in a relationship with the male victim, with a history of illicit drug use and

domestic violence. In April 2015, the victim grabbed the offender around the throat and threatened to harm and kill her. In October 2015, the victim pushed the offender. She armed herself with a knife and returned to the bedroom to confront him. He grabbed her by the throat, and verbally and physically assaulted her. She was pregnant at the time with his child. In December 2016, there had been a heated verbal argument between the parties. She stabbed him in the chest with a kitchen knife. The offender pleaded guilty.

Issues: Sentence to be imposed.

Decision and Reasoning: Taylor J took into account victim impact statements ([20]-[21]), and the offender's prior criminal history ([22]-[26]) and personal history ([27]-[41]). The offender had been sentenced to a term of imprisonment for a charge of recklessly causing injury by punching and stabbing a former partner. She had experienced trauma at an early age as she was raped by two of her brother's friends. She was diagnosed with post-traumatic stress disorder and excoriation disorder. Her psychological condition did not warrant the application of the principles in *R v Verdins* [2007] VSCA 102. Her Honour accepted that there had been a history of domestic violence at the hands of the victim and that, on the balance of probabilities, physical violence had occurred the morning of the victim's death. The gravity of her offending was to be assessed in the context of her history of family violence and her perception of a physical threat. At [48], her Honour stated –

> *'Family violence is insidious. It need not find expression in physical violence to be described as grave or create a mindset in its victims of fear and helplessness. That mindset arises from all forms of violence experienced by victims and is not triggered only at the time of a physical assault…'*

Her Honour accepted that her plea of guilty was an expression of genuine remorse, and that her time in custody would be more burdensome due to the separation from her children, as well as her diagnosed psychiatric illnesses. Specific deterrence was considered a significant sentencing factor, as well as general deterrence and denunciation. At [58], her Honour acknowledged that 'This Court must pass a sentence that denounces your behaviour and deters others from resorting to the use of knives or other sharp objects during conflicts.' The offender was sentenced to nine years' imprisonment, with a non-parole period of seven years.

***The Queen v Donker* [2018] VSC 210 (11 May 2018) – Victorian Supreme Court**

'Coercive control' – 'Female perpetrator' – 'History of domestic and family violence' – 'Manslaughter' – 'Non-fatal strangulation' – 'People affected by drug misuse' – 'Sentence' – 'Victim as (alleged) perpetrator'

Charges: Manslaughter.

Matter: Sentence.

Facts: Ms Donker and Mr Powell were in a violent, volatile and toxic relationship [5]. Mr Powell's violence was fuelled by ice use, he would become violent in the course of arguments, was controlling and suspicious of Ms Donker, and, even during Ms Donker's first pregnancy, would grab her around the throat and push her around.

Ms Donker lied to protect Mr Powell whenever the police were called. Ms Donker was also violent towards Mr Powell in retaliation, which would make Mr Powell more angry and more violent. Mr Powell's violence had caused their children to be removed from Ms Donker's care and them both to be evicted.

In January 2017 Mr Powell woke Ms Donker when she was asleep in her car in a kindergarten carpark by him dragging her from the car by her hair. She had parked there for the night as it was close to where her children were living with Mr Powell's extended family. In response to Mr Powell's assault she repeatedly manoeuvred her car so as to threaten and taunt Mr Powell. She did not intend to physically hurt him. However, on the fourth instance of reversing away from and driving towards Mr Powell, she struck a pole which bent and fell so as to strike Mr Powell's head, killing him instantly.

Decision and reasoning: Five years' imprisonment with a non-parole period of two years.

Croucher J accepted that:

> [23] ….after years of Mr Powell's violence; after numerous unsuccessful attempts at defending herself; after losing her recently hard-won gains – including her home, her job and, most importantly, the care of her children; after being forced to live in a car; after being choked and having her eyebrow split by him again the night before; after being viciously dragged out of her car by the hair as she tried to sleep…

Ms Donker 'could take no more and finally snapped'.

Having outlined a history of controlling and violent behaviour by the deceased towards the accused at [5]-[9] and the physical violence to which the accused was subjected immediately prior to the instant offending Croucher J noted:

> [72] While the law in this State does not excuse anyone – whether of uncommonly sturdy or brittle

> disposition – from criminal liability for otherwise unlawful actions based on provocation alone, the same law does not demand that victims of abuse of the kind and extent to which Ms Donker was subjected be super-resilient before provocation can operate in mitigation of sentence. Rather, the law attempts to strike a balance that recognizes human frailty in the face of extremely difficult circumstances, and allows that moral culpability may be reduced in such cases. This is such a case. As I say, I think it is very likely that any ordinary person, facing the circumstances which confronted Ms Donker and fixed with her history of exposure to family violence by Mr Powell, would lose self-control and act in a violent manner towards him.

***Re Kele* [2018] VSC 159 (10 April 2018) – Victorian Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Application for bail' – 'Breach of protection order' – 'Exposing children to domestic and family violence' – 'Perpetrator interventions' – 'Physical violence and harm' – 'Show cause'

Charges: Contravention of family violence intervention order x 1; Intending to cause harm or fear x 1; Unlawful assault x 2; Home invasion x 1; Aggravated burglary x 1; Theft x 2.

Case type: Application for bail.

Facts: The applicant was arrested for a family violence incident and an unrelated home invasion ([1]). The family violence incident occurred between the applicant and the victim, who were in a relationship for 4 years and had a 22-month-old son ([7]). The applicant accused the victim of changing his Centrelink account details and cheating on him. He grabbed the victim by her arms, pushed her to the ground, and hit her face, head and hands. The victim left the house and called for help with a payphone ([8]-[9]). The applicant pleaded guilty to one charge of assault and one charge of breaching a family violence intervention order.

Issues: Whether bail should be granted. Because the home invasion charge involved the use of an offensive weapon, the applicant was required to show cause why his detention in custody is not justified, pursuant to s 4(4)(c) of the *Bail Act 1977* ([23]).

Decision and Reasoning: Bail was granted.

Champion J considered the following factors in favour of the applicant:

- the applicant's youth, being 21 years old ([44]);
- the applicant's relative lack of criminal history ([45]);
- limited instances of domestic violence ([46]);
- the defence submitted that the likely penalty for the family violence incident would be higher than the time the applicant has already spent in custody ([48]);
- the likely of up to 12 months delay in having the matter heard in the County Court ([50]);
- the victim had moved to a secret location ([54]); and
- if the applicant was remanded in custody, he would not be able to access a men's behaviour change program ([54]).

Champion J considered the following factors against the applicant:

- the prosecution submitted that the penalty for the breach of domestic violence order would include imprisonment, because it was a serious breach and occurred in front of their child ([56]); and
- the applicant did not have accommodation ([61]).

Champion J considered that the applicant has shown cause why his detention in custody is not justified ([62]). His Honour remarked that while the level of violence towards the victim was unacceptable, it did not involve the use of a weapon, threats to kill or the infliction of significant physical injury ([64]).

***DPP v Lo (Ruling No 3)* [2018] VSC 149 (29 March 2018) – Victorian Supreme Court**

'Evidence' – 'Evidence issues' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Relationship, context, tendency and coincidence evidence'

Charges: Murder.

Case type: Ruling on relevancy of evidence.

Facts: The female accused Lo was charged with murder and perjury. It is alleged that AB shot the deceased and that the accused Lo assisted, encouraged and directed AB in those actions. The accused was a Chinese national living with the deceased prior to the murder.

The central issue of this trial was whether the evidence provided by a marriage celebrant was relevant. The marriage celebrant provided evidence that he visited the deceased's home in relation to proposed plans for

him and the accused to marry. The Defence submitted that this confused the jury, and that it was counter-intuitive to the Crown's case. It was also submitted that if the evidence was put before the jury, there would be a risk that the jury would be misled into thinking that the deceased wanted to marry the accused because he loved and cared for her. This would require the Defence to adduce evidence to show an alternative scenario that the deceased had been actively seeking to marry a young Asian woman and had told others of his willingness to facilitate such a person getting an Australian visa through such an arrangement ([3]-[6]). The Defence submitted that consideration of this issue would be time-consuming and distracting for the jury, and the evidence of the marriage celebrant was not sufficiently relevant to allegations of the accused's complicity in the murder ([7]).

Issues: The Court was required to determine whether the evidence of the marriage celebrant was relevant.

Decision and reasoning: Under the *Evidence Act 2008* (Vic), evidence is prima facie admissible if it is relevant. In order to exclude the evidence, the defendant bears the onus of showing that the danger of unfair prejudice outweighs the probative value. Dixon J held that the marriage celebrant's evidence was relevant and admissible as context and relationship evidence ([22]), and that the Defence should be entitled to adduce evidence supporting a counter-narrative that the deceased had been interested in marriages with other women prior to the murder ([27]). Her Honour was of the view that evidence as to the events in the house the night before the murder, and evidence of the complex nature of the accused's and deceased's relationship was relevant. Any unfair prejudice arising from the jury learning about a planned marriage of convenience between the accused and deceased did not outweigh the probative value of the evidence ([25]). The marriage celebrant's evidence was found to have significant relevance to the issues in the trial ([27]), and to be admissible relationship evidence.

***Director of Public Prosecutions (Vic) v Walker* [2018] VSC 83 (28 March 2018) – Victorian Supreme Court**

'Imprisonment' – 'Manslaughter' – 'People affected by substance misuse' – 'Perpetrator a battered woman' – 'Physical violence and harm' – 'Sentencing'

Charges: Manslaughter x 1.

Case type: Sentence.

Facts: The defendant and deceased were in a relationship for 2 years. There was a history of arguments,

physical violence and cannabis and methylamphetamine use ([2]-[7]). On the day of the offence, the defendant and deceased argued for 3 hours, during which the defendant tried to leave the house, and the deceased dragged her back inside ([9]). The defendant stated in later interviews that the deceased would not let the defendant leave and goaded her into stabbing him ([25]). By the time the police attended, the defendant had stabbed the deceased ([11]-[12]).

Issues: Sentence to be imposed.

Decision and Reasoning: Hollingworth J imposed a head sentence of 7 years' imprisonment with a non-parole period of 4 years ([50]).

Her Honour had regard to the fact that the defendant had a limited criminal history and displayed some evidence of post-traumatic stress disorder and major depressive disorder ([40]). Her Honour also reduced the sentence for the defendant's early guilty plea: the defendant was charged with murder but pleaded guilty to manslaughter a month before her trial was due to begin ([43], [50]). The defendant displayed remorse for her actions ([45]) and had begun counselling in custody ([46]).

***Re Williams* [2018] VSC 76 (23 February 2018) – Victorian Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Application for bail' – 'Challenge to complainant's evidence' – 'Physical violence and harm' – 'Show cause' – 'Word-on-word case'

Charges: Intentionally causing injury x 3; Recklessly causing injury x 5; Unlawful assault x 3; Contravening family violence intervention order x 3.

Case type: Bail application.

Facts: The applicant and the complainant had been in a relationship for 10 years and had 2 children ([2]). The complainant alleged three events forming the basis of the charges. First, the applicant kicked and punched her, drove her to the hospital, dragged her from the car and left her at the entrance. Second, the applicant chased her in his car, dragged her out of her car, and punched her. Third, the applicant forced his way into her house, urinated on her, and punched her ([14]-[22]).

Issues: The applicant was required to 'show cause why his detention was not justified', under s 4(4)(ba)(i) of

the *Bail Act 1977* (Vic).

Decision and Reasoning: Bail was refused.

The applicant argued that he was entitled to bail because he had stable accommodation, was willing to comply with strict bail conditions, and that the prosecution case was not strong because it relied mostly upon the complainant's evidence. The applicant intended to challenge the credibility of the complainant ([24]). The prosecution argued that the applicant had a lengthy criminal history including violence, has shown disregard for previous family violence intervention orders, and has committed offences while on bail ([47]-[48]).

Justice Champion at [57]-[59] discussed the applicant's contention that the prosecution case is weak because it relies on the complainant's evidence:

> … the prosecution points out that cases involving family violence frequently involve 'word on word' evidence and that this is often the very nature of these types of cases. The prosecution submits that this circumstance does not of itself warrant the prosecution case as being regarded as weak, or without merit.
>
> It is clear enough that the case will be strongly defended, and that there are arguable issues to be decided. That said, it was not submitted to me that the case should be regarded as inherently weak.
>
> From what I have been able to glean in this application I cannot conclude that the prosecution case is weak.

***DPP v Paulino* (Sentence) [2017] VSC 794 (21 December 2017) – Victorian Supreme Court**

'Coercive control' – 'Current sentencing practices' – 'Post-separation violence' – 'Protection order' – 'Sentencing' – 'Stalking' – 'Threats to kill' – 'Victorian systemic review into family violence deaths unit' – 'Women'

Charges: Murder x 1.

Appeal type: Sentence.

Facts: The defendant and victim were estranged. The defendant made open threats to kill the deceased, sought to commit a character assassination of her by alleging that she was promiscuous and by making spurious allegations about her involvement in pornography, nuisance-calling her at work, and following her

and her new boyfriend. The deceased took out a protection order against the defendant. Shortly before a Family Court hearing, she was stabbed by the defendant, and was found dead by her sons ([7]). At a pre-trial hearing, relationship evidence was admitted (see *DPP (Victoria) v Paulino* (Ruling No 1) [2017] VSC 343 (17 June 2017)). After a jury trial, the defendant was found guilty.

Justice Bell referred the case to the Victorian Systemic Review into Family Violence Deaths unit at the Coroners Court. The function of the unit includes identifying risks associated with deaths resulting from family violence. His Honour highlighted features of this case, including that:

- the murder was preceded by threats to kill, assassination and blaming directed towards the deceased that were open and persistent;
- there was an intervention order on foot, which was not a sufficient deterrent;
- Family Court proceedings, initiated by the deceased, had reached a critical stage;
- the parties had separated; and
- the deceased had expressed a fear that her husband would kill her.

Issues: Sentence to be imposed.

Decision and Reasoning: The defendant was sentenced to a period of 30 years with a non-parole period of 25 years.

Justice Bell placed importance on the fact that current sentencing practices being more condemnatory of men murdering women ([25]), the circumstances of stalking and breaches of intervention orders leading up to the murder ([27]), and the murder was premeditated ([29]).

The accused's acts in relation to the victim — namely the character assassination and other harassment — were found not to be 'random measures'. Instead, Bell J found that they represented a 'pattern of coercive control'. Her right to 'personal dignity and autonomy' was violated by the accused, whose conduct led to a situation in which she no longer had a life to live. This, Bell J explains, 'was the culmination of a pattern of behaviour aimed at preventing her from living the life she chose'. [27]

***Re Kumar* [2017] VSC 742 (6 December 2017) – Victorian Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Bail' – 'Bail conditions not sufficient' – 'Bail refused' – 'Immigration detention' – 'Past breaches of protection orders' – 'Protection orders' – 'Show cause'

Charges: Contravention of a family violence safety notice intending to cause harm or fear for safety x 1; Destroying or damaging property x 1; Aggravated burglary x 1; Attempted murder x 1; Intentionally causing serious injury x 1; and Recklessly causing serious injury x 1.

Case type: Bail application.

Facts: The applicant attended the house of his former partner and her new partner (the victim), and forced his way in by breaking the window ([7]-[8]). The applicant stabbed the victim's head and hands with a piece of broken glass, leaving him with permanent injuries ([9]).

Issues: The applicant was required to 'show cause why his detention was not justified', under various sub-sections of s 4(4) of the *Bail Act 1977* (Vic). For example, the appellant was charged with contravening a family safety notice in which he was alleged to have used violence and, in the previous 10 years, had been found guilty of the same charge (s 4(4)(ba)(i)) ([12]).

Decision and Reasoning: Bail was refused.

The applicant had argued that because he has been given notice that he is an unlawful non-citizen, he would be put straight into immigration detention and therefore would not pose a risk of committing another offence ([14]).

Priest JA held that there was an unacceptable risk that the applicant would commit further offences against his former partners. Most importantly, the applicant had a history of breaching family violence orders ([20]). Therefore, the risk of the applicant committing further violence could not be mitigated by strict bail conditions ([21]). Furthermore, there was no guarantee that the applicant would be put straight into immigration detention ([17], [20]).

***Re Easson* [2017] VSC 565 (20 September 2017) – Victorian Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Bail' – 'Firearms' – 'Kidnapping' – 'Show cause' – 'Strangulation' – 'Strict conditions' – 'Threats'

Charges: Intentionally causing injury x 1; Recklessly causing injury x 1; Unlawful imprisonment x 1; Unlawful assault x 3; Unlawful assault using an instrument x 2; Unlawful assault by kicking x 1; Threatening to inflict serious injury x 1; Unlawful assault with a weapon (a steak knife) x 1; Making a threat to kill x 2; Kidnapping x 1; Common law assault x 2; Reckless conduct placing a person in danger of death x 1.

Case type: Bail application.

Facts: All charges related to one 12-hour period, where the applicant allegedly assaulted his wife by: banging her head on the floor and striking her with an iron; punching, kicking and strangling her with a lamp cord; and threatening to take her somewhere to be raped, and threatening to kill her while holding a steak knife ([6]).

Issues: Since the applicant was charged with an indictable offence involving the use of a weapon, the issue was whether he could 'show cause' why his detention was not justified (s 4(4)(c) Bail Act 1977 (Vic)) ([3]).

Decision and Reasoning: Bail was granted, with strict conditions. Significant factors against granting the applicant bail included: the charges are serious; and it could not be said granting bail would pose no risk to the complainant ([14]). On the other hand, significant factors in favour of granting bail to the applicant were: he had no criminal history; and the risk to the complainant could be ameliorated by strict conditions such as requiring him to reside with his mother, engage in drug treatment, and removing his access to firearms ([14], set out in full at [17]). Justice Beach stated: 'There is considerable merit (and potential benefit for both the applicant and the wider community) in addressing the applicant's drug, and any mental health, issues now rather than later' ([15]).

***Director of Public Prosecutions (Victoria) v Turner* [2017] VSC 358 (23 June 2017) – Victorian Supreme Court**

'Respect of women' – 'Role of sentencing'

Charges: Manslaughter x 1; Breach of domestic violence order x 1.

Case type: Sentence.

Facts: The defendant and deceased had been in a relationship. After consuming alcohol and methamphetamines, the defendant beat the deceased in their home with punches, kicks, and hit the soles of her feet with a hammer ([5]). The deceased was discharged from hospital, but died of internal bleeding the next day ([8]-[9]). The defendant pleaded guilty to manslaughter.

Issues: Sentence to be imposed.

Decision and Reasoning: Bell J imposed a sentence of 12 years' imprisonment, with a non-parole period of 9 years. His Honour considered that the contravention of a domestic violence order made it a serious example of manslaughter ([32]).

Bell J at [33]:

"Denunciation and specific and general deterrence are sentencing principles through which the law gives effect to the fundamental purpose of protecting individuals and the community from crime. Ms Cay and all other women have an inviolable human right to life, to equality – not just the appearance of equality but to real equality, to physical and emotional integrity, to respect for their dignity and personal autonomy, to loving relationships with children and others, and to freedom from fear of physical or mental harm. They look to the law for protection from men who would perpetrate crimes of assault or homicide upon them in a domestic setting by reason of failing to control their anger, aggression and rage. While the police cannot be present in every home on every occasion of risk, the values and standards of human behaviour that the criminal law demands are omnipresent. The courts must respond appropriately through the sentencing process when those standards are severely or seriously breached, as they have been in this case, for this vindicates the individual interests of victims in seeing that perpetrators are brought to justice, as well as the general interests of the community in seeing that justice is so done, and also performs the important educative function of positively influencing how the community, and especially men, value, respect and treat women."

His Honour thought that the defendant had good prospects of rehabilitation, but the defendant's efforts to stop drinking was not a mitigating factor ([27-[28]).

DPP (Victoria) v Paulino **(Ruling No 1) [2017] VSC 343 (17 June 2017) – Victorian Supreme Court**

'Admissibility' – 'Relationship evidence'

Charges: Murder.

Case type: Pre-trial hearing.

Facts: The defendant and deceased had been in a relationship, and had two children ([3]). They separated acrimoniously in 2010 ([3]). The defendant was accused of murdering the deceased. The prosecution wished

to lead evidence relating to the relationship between the accused and deceased ([4]) in order to establish that the accused's enmity and hatred towards the deceased was the motive for the murder ([5]). The evidence included: threats made by the defendant; relationship evidence; the fact that the accused had an intervention order taken out against him by the deceased; and the accused's actions in relation to a pornographic video allegedly depicting the deceased.

Issues: Whether the 'relationship evidence' should be admitted.

Decision and Reasoning: Justice Bell set out the relevant principles in relation to the Court's mandatory duty to exclude evidence where the probative value is outweighed by the danger of unfair prejudice to the accused (see [33]-[36]). In this context, evidence of a poor relationship between the accused and deceased has been admitted where that evidence may be relevant to whether the accused killed the deceased and whether the accused had a motive to do so ([37]).

Threats

The deceased's statements about her fear of the accused (for example, that if something happened to her, it would be because of the accused) were not admissible. In deciding the admissibility of a victim's fear of the accused perpetrator, the issue is 'whether the evidence of the deceased's fear of the accused was relevant to the probability of the existence of a fact in issue, usually whether the accused had a motive for killing, and actually did kill, the deceased' ([57]). However, the statements were merely evidence of her subjective state of mind, not the accused's ([70]). Further, the content and volume of evidence would be highly prejudicial to the accused ([71]).

By contrast, evidence of threats made by the accused to kill the deceased and her family were admissible, because it was relevant to the accused's state of mind towards the deceased ([76]).

Relationship evidence

Evidence of the defendant's feelings of hatred and enmity towards the deceased was admissible ([42]-[43]). However, most the evidence of the state of their marriage before 2010 was not relevant ([41], [51]). Bell J held that the jury should be told generally that the marriage was unhappy ([85]-[87]), but not the precise details of the aggressive behaviour of the accused ([88]).

Intervention order

Evidence of the intervention order was admissible as a feature of the relationship leading up to the death of the deceased ([91]). There was a danger of unfair prejudice to the accused, but that could be mitigated by proper instruction ([92]).

Pornographic video

The accused had alleged that the deceased had participated in a pornographic video, and had shown his colleagues and the deceased's family ([94]). Evidence of the video and the accused's actions were admissible to demonstrate the extremely negative attitude of the accused towards the deceased ([96]).

***DPP v McDermott* (Rulings Nos 10 & 11) [2016] VSC 822 (27 April 2016) – Victorian Supreme Court**

'Anti-tendency warning' – 'Murder' – 'Prejudicial evidence' – 'Propensity evidence jury discharge'

Charges: Murder.

Case type: Application to discharge jury.

Facts: The defendant was on trial for stabbing his former partner. His son gave evidence that the defendant usually carried a knife. Defence counsel applied to discharge the jury on the ground that the 'propensity evidence' was highly inflammatory and could not be cured by a direction ([2]). The next day, a newspaper article was published about the son's evidence ([35]-[36]).

Issues: Whether the jury should be discharged.

Decision and Reasoning: Jane Dixon J declined to discharge the jury ([31], [45]). Her Honour considered that any prejudice to the accused could be cured by a direction to the jury ([31]). Her Honour gave two anti-tendency warnings ([35], [43]), and intended to give another curative direction in her Honour's final address ([44]).

***The Queen v Cook* [2015] VSC 406 (19 August 2015) – Victorian Supreme Court**

'Denunciation' – 'Deterrence' – 'Murder' – 'Physical violence and harm' – 'Sentencing'

Charges: Murder.

Hearing: Sentence.

Facts: The victim was the male offender's de facto wife. After drinking 15 beers at their house party, the offender started punching and pushing the victim. A friend tried to intervene but was pushed away. He then picked up a steel-framed chair and hit the victim with such force that that one of the legs went through her skin and bone and penetrated her brain.

Decision and Reasoning: Elliot J sentenced the offender to 21 years and six months imprisonment with a non-parole period of 17 years and six months. In passing this sentence, His Honour made some general observations on domestic violence at [28]-[30]:

'The courts clearly recognise that they must forcefully condemn domestic violence (See, e.g., R v Earl [2008] VSCA 162, [23]). When domestic violence manifests in murderous conduct, that conduct must be denounced in the strongest terms (Felicite v The Queen (2011) 37 VR 329, [20]; Portelli v The Queen [2015] VSCA 159, [30]).

Moreover, general and specific deterrence have special significance in cases involving domestic violence. In such circumstances, general deterrence is more important as "[t]he victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities" (Pasinis v The Queen [2014] VSCA 97, [57]).

Also, specific deterrence is often more important, as it is in this case, because "women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously"' (Pasinis v The Queen [2014] VSCA 97, [53]).

***DPP v Williams* [2014] VSC 304 (27 June 2014) – Victorian Supreme Court**

'Aggravating factor' – 'Defensive homicide' – 'Emotional and psychological abuse' – 'Evidence' – 'Expert evidence - academic' – 'History of violence' – 'Lack of disclosure of family violence' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing'

Charges: Defensive Homicide.

Hearing: Sentence.

Facts: The defendant was charged with murdering her de facto partner but was found guilty of defensive homicide. She struck the deceased to the head 16 times with an axe. She buried the deceased's body in the backyard and lied about his whereabouts to family and friends for more than four years, claiming that he had

gone interstate. The defendant gave an account of a violent fight which led to the deceased's death which included the deceased taunting and goading the defendant. She attested to a long history of family violence by the deceased.

Issue/s: The appropriate sentence to be imposed.

Decision and Reasoning: The defendant was sentenced to 8 years' imprisonment, with a non-parole period of 5 years. In finding the defendant guilty of defensive homicide, the jury had to be satisfied that the killing took place in the context of a serious history of family violence. Hollingworth J noted at [20] that, while there was no evidence that the defendant or her children had ever complained about family violence, this is not uncommon.

The deceased was the dominant person in the relationship. He had a long history of violence and drank heavily. His behaviour towards the defendant 'over many years, was abusive, belittling and controlling, and involved both physical and psychological abuse' ([26]). Her Honour noted, 'The final act or acts of the deceased may well be relatively minor, if looked at in isolation; but what happens in such cases is that the victim of family violence finally reaches a point of explosive violence, in response to yet another episode of being attacked. In such a case, it is not uncommon for the accused to inflict violence that is completely disproportionate to the immediate harm or threatened harm from the deceased' ([32]).

The Court heard (largely unchallenged) expert evidence from Professor Patricia Easteal regarding the complex dynamics of family violence, the reasons why women often do not leave violent partners and the use of weapons by female victims of family violence against male partners ([33]-[34]). Given this evidence, Her Honour noted that while ordinarily, striking 16 blows with an axe in response to a minor physical and verbal attack by an unarmed attacker would seem disproportionate, this may not be the correct conclusion in family violence cases involving a female offender ([36]). However, aggravating factors included the defendant's deceit and a lack of remorse. Her offending had a large impact on the deceased's family.

***DPP v Bracken* [2014] VSC 94 (12 February 2014) – Victorian Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Emotional and psychological abuse' – 'Evidence' – 'Expert evidence' – 'Murder' – 'Physical violence and harm' – 'Self-defence' – 'Social framework evidence'

Charges: Murder.

Proceeding: Pre-trial hearing.

Facts: The defendant was on trial for the murder of his de facto partner. He argued that he shot his de facto partner in self-defence. He alleged that his partner perpetrated psychological and physical violence against him over the course of the relationship. He successfully argued that the killing was in self-defence and was thus acquitted.

Issue/s: One of the issues concerned whether evidence of family violence or 'social framework' evidence within the meaning of the then s 9AH of the *Crimes Act 1958* (Vic) was admissible.

Decision and reasoning: The evidence was admitted. Maxwell P held that family violence was alleged as required by the section. As such, evidence such as 'the cumulative effect, including psychological effect, on the person or a family member of (family) violence' was relevant in determining whether self-defence was made out. Significantly, his Honour held that, 'There will be no basis for an objection on grounds of relevance…', though there could be other available grounds of objection (see at [16]).

***DPP v Neve* [2013] VSC 488 (13 September 2013) – Victorian Supreme Court**

'Criminal damage' – 'Denunciation' – 'Deterrence' – 'Intentionally causing injury' – 'Make threat to kill' – 'Physical violence and harm' – 'Reckless conduct endangering life' – 'Sentencing'

Charge/s: Criminal damage, make threat to kill x 2, reckless conduct endangering life, intentionally causing injury.

Hearing: Sentence hearing.

Facts: The offender and the complainant were married. After an argument, the offender fatally shot the complainant's dog. He then reloaded the rifle and began chasing the complainant as she ran towards the road yelling, 'I'm going to fucking kill you…You're fucked'. The complainant stopped running and tried to negotiate with the offender. She managed to grab hold of the gun and forced the applicant to fire both of the shots from the rifle. The offender then pushed her over and started punching her repeatedly in the head and chest, trying to reach other cartridges he had in his pocket. The complainant managed to get up and flag the attention of a passerby.

Decision and Reasoning: The offender was sentenced to a total effective sentence of four years imprisonment, with a non-parole period of two and a half years. In passing sentence, Bell J noted at [67]:

'Denunciation of your crimes and general deterrence are powerful sentencing considerations in your case, leading to an immediate sentence of imprisonment. Ms Fuller was your wife. You are guilty of committing appalling domestic violence towards her. Many of your actions were not only violent but calculated to belittle and demean her and place her in abject fear. The double barrel shotgun was a common feature of all five charges and it was loaded when the first four offences were committed. This criminal conduct deserves the strongest condemnation of the court. Others must be made to appreciate the consequences of committing crimes of this nature'.

***DPP v Huynh* [2010] VSC 37 (19 February 2010) – Victorian Supreme Court**

'Denunciation' – 'Deterrence' – 'Forcible confinement' – 'Physical violence and harm' – 'Sentencing' – 'Violation of trust between husband and wife'

Charge/s: Intentionally causing serious injury.

Hearing: Sentence hearing.

Facts: The offender and the victim, his wife, came to Australia from Vietnam on tourist visas. After the offender became suspicious the victim was seeing another man, he stabbed the victim multiple times in the chest and abdomen.

Decision and Reasoning: In sentencing the offender, Curtain J took into account the offender's plea of guilty, his lack of prior criminal history, the fact that the offender would be separated from his children for a number of years, and that the offender was remorseful and distressed by his conduct. Her Honour also accepted that the offender's prospects for rehabilitation were favourable. However, in opposition to these factors, Curtain J held at [42]-[43]:

'Against these matters stand the nature and gravity of the offence here committed. This is a serious example of a serious offence. It involves the infliction of serious violence upon your wife which is a gross breach of the trust which reposes between husband and wife. I take into account also the need to pass a sentence which will act in denunciation of your conduct and serve to punish you and also give due weight to special and general deterrence.

Although such considerations are to be sensibly moderated, nonetheless, the sentence imposed must signal to the community that acts of violence, including domestic violence, are not tolerated and warrant condign punishment'.

In the circumstances, a sentence of seven years imprisonment with a non-parole period of five years was appropriate.

***R v Gojanovic* [2005] VSC 97 (27 January 2005) – Victorian Supreme Court**

'Murder' – 'Physical violence and harm' – 'Relationship killings' – 'Sentencing'

Charge/s: Murder.

Hearing: Sentence hearing.

Facts: After being in an 'on and off relationship' for some years, the male offender and the female victim separated. One evening, the offender entered the victim's home and battered her repeatedly on the head with a rubber headed mallet. He then took a dressing gown cord and strangled her to death.

Decision and Reasoning: Osborn J noted that while the killing was not premeditated and it occurred in a state of high emotion arising out of the disintegration of the offender's relationship with the victim, there were nevertheless five seriously aggravating circumstances associated with this crime. First, the killing was brutal, protracted and vicious. Second, the killing was selfishly callous. The offender knew he was not only taking the life of another individual but also taking away the mother of four innocent children. Third, the killing took place in what should have been the safety of the deceased's own home. Four, a substantial penalty was warranted in light of the need for general deterrence. As per His Honour at [31]:

'The Court and the community which it represents cannot tolerate resort to violence, let alone homicidal violence, in circumstances of this kind. The Court must send a clear message to estranged parents that they cannot act as you did and expect to receive other than a penalty which affirms the sanctity of individual human life and condemns in the strongest terms the deliberate taking of another life even in circumstances of strong emotion'.

Finally, the offender displayed a total lack of remorse for his conduct. The offender was sentenced to 20 years imprisonment, with a non-parole period of 15 years.

See also *R v Gojanovic (No 2)* [2007] VSCA 153 (14 August 2007).

***R v Kibble* [2002] VSC 52 (1 March 2002) – Victorian Supreme Court**

'Intentionally cause serious injury' – 'Physical violence and harm' – 'Relevance of prior relationship' – 'Right to leave a relationship' – 'Sentencing'

Charge/s: Intentionally cause serious injury.

Hearing: Sentence hearing.

Facts: The female victim ended her relationship with the male offender and gave him money to fly back to London, where he was from. Upon returning to England, the offender felt humiliated and angry and decided to return to Australia to punish the victim. He purchased a rubber mallet to break into the victim's house and a roll of duct tape. When the victim arrived home, the offender started stabbing her with a knife. She managed to fight him off and called the police.

Decision and Reasoning: This offence was serious. As per Gillard J at [57]:

'A person in a relationship with another has every right to terminate the relationship and walk away without fear of reprisal. Too often, upon the termination of a relationship, the physically stronger person pursues a course of conduct of harassment and violence towards the other person. That is what has happened here. Your conduct was serious and has had a long-lasting, emotional effect upon the victim. The Legislature views any offence under s16 as serious. The circumstances surrounding the commission of this offence supports that conclusion and you are guilty of a high level of criminality'.

There were a number of factors that aggravated the offending namely that the conduct was premeditated, the offender waited for the victim in her home, his conduct caused the victim terror and fear, and the conduct had a long-lasting emotional effect on the victim. His Honour was satisfied that specific deterrence was not warranted on the facts but that general deterrence was important i.e. the sentence had to send a message to those who are like-minded to use their superior physical strength to punish a partner in a relationship after it has terminated.

His Honour also took into account a number of mitigating factors namely, the offender frankly admitted his involved, he pleaded guilty at the first opportunity, there was no criminal history, the physical injuries were at the lower end of the scale, the sentence would be onerous because the offender was English, the offence

was out of character, it was unlikely he would reoffend, and his prospects for rehabilitation were good. The offender was sentenced to six years imprisonment with a non-parole period of four years.

***DPP v Williamson* [2000] VSC 115 (31 March 2000) – Victorian Supreme Court**

'Murder' – 'Parents who kill children' – 'Physical violence and harm' – 'Relationship killings' – 'Sentencing'

Charge/s: Murder.

Hearing: Sentence hearing.

Facts: The offender and a young woman, Ms Park, had been in a relationship and had a child together, the victim. This relationship was characterised by the offender's jealousy and possessiveness towards Ms Park and the victim. Eight months after the victim was born, Ms Park left the relationship. The offender resented his obligation to financially support the child and began to deeply resent Ms Park. Four months before the victim's death, the offender began telling people he was going to kill himself and his son, to take him away from Ms Park. One night, the offender took the child to a hotel and smothered him. He then wrote a letter to Ms Park telling her he had killed the victim.

Decision and Reasoning: In sentencing, Cummins J took into account, as mitigating factors, the offender's poor family situation, the burdensome quality of imprisonment to the offender, his age, his lack of prior convictions and the rehabilitative courses he undertook while in custody. However, His Honour stated at [25]:

'Of all the rights of the child, the most fundamental right of all is the right to life. It is necessary that parents and others in charge of children unmistakably understand that child abuse will be met by the full force of the law. The intentional killing of a child by a person without psychiatric illness or other significantly mitigating factor will ordinarily be met with life imprisonment of the offender'.

Cummins J also noted the significant importance of condemnation, punishment, general deterrence and specific deterrence. The offender was sentenced to life imprisonment with a non-parole period of 24 years.

County Court

DPP v Buck [2021] VCC 759 (11 June 2021) – Victorian County Court

'Damaging property' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Strangulation' – 'Weapons and threats to kill'

Charges: Criminal damage; Common assault; Conduct endangering serious injury; Intentionally cause injury; Threat to kill; Trespass; Indictment offence on bail; Persistent Breach of Family Violence Intervention Order.

Proceedings: Sentencing.

Facts: The male offender and female victim had been in a relationship for approximately four months. The offender ripped her clothes off and hit the back of her head with a hair dryer multiple times. He punched her five or six times to the face, and stomped on her head and chest several times. He strangledher, threatening to kill her, and she felt unable to breathe. At one point, the offender chased the victim into the street and threatened to kill her while brandishing a knife. He also caused property damage and assaulted the victim's housemate (who tried to intervene). The victim's children were present at the time of the offending. The victim sustained many injuries, including exposing her bone and skull. A Family Violence Intervention Order was imposed and, despite the order, the offender telephoned the victim from custody on 12 occasions, but desisted once the victim told him to stop.

Issues: Sentence to be imposed.

Decision and reasoning: A sentence of 3 years 5 months imprisonment with a non-parole period 2 years was imposed.

Assessed in the context of an intimate relationship, this was a reasonably serious example of causing intentional injury for the following reasons:

- It was an assault on the offender's partner who was entitled to his care.
- The offending occurred in the victim's home, where she should have felt safe.
- The offender used a household item as a weapon, hitting the victim to her head repeatedly to a point where she was feeling dizzy. The victim said she felt unable to stand up, had blood in her eyes and her head was throbbing. The physical injury to her head was a result of those repeated strikes. The offender continued to assault her, despite her state and her pleading with him to stop.

- The assault was protracted, moving between various rooms in the house, out onto the street and back into the house.
- The acts of violence against the offender's partner "were not only physically violent, resulting in her injuries, but they were degrading, including stripping her naked. One neighbour refers to her running naked in the street, bloodied and bruised."
- As part of the episode, the offender choked her. The victim described feeling unable to breathe and wondering whether she would be able to do so again. There were marks around her neck from that part of this event. During that event, he made the threat to kill her which must have been terrifying given the context of that threat. He later made a threat when brandishing a knife.
- The offender continued to attack the victim, despite the intervention of the victim's housemate.
- The acts occurred in the presence and hearing of the victim's children, which was most disturbing. As his Honour noted: "The fact that a 12 year old had to call police because you were violently assaulting her mother is reprehensible. [The victim's] daughter was extremely courageous and showed wisdom beyond her years in doing what she could to try and get police to the scene."
- The offender's assault on the victim's housemate demonstrated the offender's level of aggression.
- "Despite the fact I have not received a victim impact statement, I can well anticipate that Ms Brewer suffered distress, humiliation and fear during this offending, and that she is likely to have experienced some ongoing trauma as a result. Those matters would only be exacerbated in my view, by the presence of her two daughters and her feelings of concern for them."

The principles from *Bugmy v The Queen* were applicable in this case (disadvantage and events during his formative years) and somewhat reduced the offender's moral culpability. He pleaded guilty. There was an intervention order protecting the victim and the offender had shown no desire to try and contact her now.

***DPP v Vickers (a pseudonym)* [2021] VCC 445 (16 April 2021) – Victorian County Court**

'Coercive control' – 'Detention for a sexual purpose' – 'Low cognitive functioning' – 'Moral culpability' – 'Objective seriousness' – 'Offender in relationship with victim from under the age of 16' – 'People affected by trauma' – 'Rape' – 'Separation' – 'Suicide threat' – 'Young people'

Charges: Rape (rolled up charge, 3 separate incidents) x 1; Detention for a sexual purpose x 1.

Proceedings: Sentencing.

Facts: The male offender was 23 years old at the time of the offending and the female victim, his partner, was 32 years old. The offender had been groomed by the victim since he was a child, with sexual and then de facto marital relationship commencing when he was a child.

Issues: Sentence to be imposed.

Decision and reasoning: A total effective sentence of 6 years and 9 months was imposed, with a non-parole period of 3 years and 10 months.

The court noted the seriousness of rape as an offence. The objective gravity of the offender's offending (as rolled-up charges) was high.

The court noted at [41] that: "This case is an example of controlling and violent conduct borne out of an inability to accept and negotiate the end of the relationship – culminating in the heinous and devastating offence of rape. It is reprehensible conduct of the highest order and must be deterred and denounced." And at [42]: "The impact upon the victim also needs to be given proper weight in the exercise of my sentencing discretion. Your victim states that she has had suicidal thoughts, has been diagnosed with anxiety, depression and PTSD, and is having counselling. The offending has also impacted the children, who are anxious and withdrawn."

Age disparity between the offender and victim alone would have had limited impact in assessing the circumstances of the offending and offender's moral culpability. But, in combination with the following factors, the circumstances of the relationship were more significant:

- The offender was diagnosed with ADHD in Grade 3;
- He had difficulties at school and is dyslexic;
- He suffers hearing impairment, requiring hearing aids;
- He has low intellectual functioning;
- He became a father when he was a child and by 20 was working to support a house of three children;
- To some degree, the offender was subject to some manipulation/control in the form of managing his medication and access to hearing aids, particularly leading up to the offending;
- The relationship was his first sexual relationship. It was his "only experience of a relationship and your attitudes and strategies for dealing with conflict have been shaped within a relationship that commenced when you were a child."

The offender required specific deterrence, treatment and programs to ensure he did not repeat this offending. Denunciation and general deterrence were also important sentencing considerations: “All potential perpetrators who may feel aggrieved within a domestic relationship and who lack the skills, intelligence, maturity and emotional control to relate to a partner or ex-partner in anything other than a violent and controlling way – must be deterred” at [55].

DPP v Senior (a pseudonym) **[2020] VCC 1380 (2 September 2020) – Victorian County Court**

‘Arson’ – ‘Domestic violence’ – ‘Protection order’ – ‘Sentencing’ – ‘Separation’ – ‘Threats to kill’

Charges: Contravention of a DFV protection order x 1; Arson x 1.

Proceedings: Sentencing.

Facts: The male perpetrator plead guilty to breach of a protection order by threatening to kill his female former partner and arson. After an argument the offender called his former partner and threatened to ‘come to her house and blow her and her family up’. He entered her home, and despite his father’s atempts to calm him, threw thinner over the couch and lounge room floor, stating he would burn the house down with his former partner in it. Some of the thinner (accidentally) caught fire on the gas heater causing an explosion. The offender and his father escaped the fire; however, the house was destroyed.

Issues: Sentencing.

Decision and reasoning: Sentenced to time served, followed by a community corrections order for 12 months with conditions designed to continue rehabilitation by way of supervision, mental health and programs to reduce reoffending.

[16] You are fortunate that your vile threats of harm did not cause further injury or damage to your son and his mother. Arson is a very serious offence. In the circumstances of this case, you allowed your rage and anger to get the better of you in a situation in which you recklessly used an accelerant which you well knew and believed would probably result in damage or destruction to property. It is important in your case, as the learned prosecutor made clear very fairly during the course of the plea, that two factors need to be recognised.

[17] The first is that this was not a case in which you burnt down a property either to damage it intentionally or

to prevent or deny another its enjoyment or ownership, and that having properly classified and understood the modus in which the fire started in a seemingly accidental way which nevertheless carries the inference of intention, and secondly, that your intention at the time was to hurt yourself by fire, even endangering your own father; intent which should be also noted you put into effect, not by arming yourself with an accelerant fuel but because your work made it available to you through a thinner which you already had available to you.

[18] The circumstances significantly reduce in my view the gravity of the offending and your moral culpability. You have, by your plea, accepted responsibility legally and I accept you are remorseful for your actions.

***DPP v Jenkins* [2020] VCC 749 (4 June 2020) – Victorian County Court**

'Covid-19 pandemic' – 'Following, harassing and monitoring' – 'Guilty plea at commencement of trial' – 'History of domestic violence' – 'Lengthy procedural history' – 'Obsessive and controlling behaviour' – 'People affected by substance misuse' – 'Persistent offending' – 'Physical violence and harm' – 'Rape' – 'Self-represented litigants' – 'Separation' – 'Sex offender registration' – 'Significant criminal history' – 'Stalking'

Charges: 11 charges, including rape x 2; destroying or damaging property x 1; causing injury intentionally or recklessly x 1; threats to kill x 3; assault x 3; stalking x 1

Case type: Sentence

Facts: The majority of offending was committed against Ms Burgess (the victim), with whom the male accused was in an intimate relationship ([12]). Their relationship was marred by excessive drug and alcohol consumption, physical and sexual violence and stalking. The accused regularly argued with the victim about his paranoid suspicions concerning her infidelity ([13]). The controlling and obsessive behaviour became more severe over time. On one occasion, the victim threatened to stab him before self-harming, demonstrating the level of stress she was suffering at the time ([17]). The accused's controlling behaviour continued. He checked her emails and social media accounts, accessed her phone without permission and tracked her location. He also broke her phone after she refused to give it to him ([18]-[20]).

On 5 October 2017, he raped ([23]-[24]) and physically abused the victim ([25], [27]) and threatened to cut her throat ([26]). A week later, he pushed the victim to the ground after she had told him that their relationship was over and demanded him to leave the premises ([29]). After this incident, the accused was arrested, and released on bail with conditions prohibiting contact with the victim ([30]). Despite this order, he continued to text and ring the victim, track her location and loiter near her home. One evening, the victim allowed the

accused to enter her house, where he accused her of sleeping with other people, physically assaulted her and grabbed her phone ([34]-[40]). The accused continued to contact the victim, causing further distress and fear, and later threatened to cut the victim's and a police officer's throat ([41]-[43]).

There was a significant delay in resolving the matter, and the accused was unrepresented for most of the proceeding, including the plea hearing. His guilty pleas were entered at the commencement of trial ([51]-[52]). The Court held that "the fairest and most appropriate course" was to ensure that he was not punished for adopting a "somewhat uncooperative approach" ([56]), and that his guilty pleas still entitled him to a sizeable reduction in sentence ([57]).

Held: The accused's personal circumstances and criminal history are discussed at paragraphs [58] to [75]. He abused alcohol and drugs from an early age, and had previously seen doctors for drug dependency, depression, drug psychosis and attempted suicides. Although he had suffered numerous head injuries, a neuropsychologist concluded that he did not have an acquired brain injury ([64]-[65]). He also has a significant criminal history, including past convictions for recklessly causing injury, indecent assault, contravening a family violence intervention order, and making threats to kill ([69]-[70]). He has also been convicted of a number of offences against former intimate partners and has breached a family violence safety notice on several occasions ([71]-[73]).

The Court found that the accused's conduct was "absolutely appalling". He had "gained [the victim's] trust and formed an intimate relationship with her only to go on to degrade and demean her at the whim of [his] paranoid obsessions". The rape, assaults and threats to kill demonstrated the kind of behaviour to which she was subject for the duration of their relationship ([85]). The rape was particularly serious, because it was committed in the context of an initially trusting and intimate relationship, and involved the use of force and violence ([86]). The charge of stalking was also serious as the accused went to great lengths to control and abuse the victim in a "pathologically unfeeling" manner. He also knowingly disregarded court orders intended to protect the victim from his conduct ([87]). The Court assessed his moral culpability for the offending as "very high", and accepted the prosecutor's submission that the physical and sexual violence he inflicted on his partner requires just punishment and strong denunciation ([88]). Further, the accused had prior convictions, indicating a tendency to treat intimate partners violently ([89]). The accused appeared to have some "incipient insight" into his conduct and the necessary steps to address his drug problem and attitude towards women ([92]). Whilst he apologised for his behaviour, the Court did not place a great deal of weight on that assertion as there was no evidence that indicated that he was genuinely remorseful for the harm caused to the victim.

The Court was also not confident of his prospects for rehabilitation, but took into account that any sentence imposed must not be crushing ([93]).

Consequently, the Court granted the Crown's application to have the accused report under the Sex Offenders Registration Act 2004 for the "rest of [his] life" as he poses a real risk to the sexual safety of women ([95]-[101]). He was convicted of all charges (except one count of rape), and was sentenced to a total effective sentence of 9 years' imprisonment with a non-parole period of 7 years ([115]).

Director of Public Prosecutions v Linton **[2020] VCC 515 (28 April 2020) – Victorian County Court**

'Female perpetrator' – 'History as victim of family and domestic violence as child' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Substance misuse' – 'Verdins principles' – 'Weapon'

Offences: Recklessly causing serious injury x 1; Possessing drug of dependence x 1

Proceedings: Sentencing

Facts: The female offender and male victim had been in a relationship that ended six months prior to the offending, but had started spending time together one to two months before the offending. One night, the offender picked up the victim from a pub and they visited the victim's cousin's house where they played pool and used drugs. The offender and the victim left around 2am and returned to the offender's bungalow where an argument broke out. The offender stabbed the victim on the left side of his chest with a pair of scissors. The victim left the bungalow and called emergency services. The offender sent text messages to the victim asking him if he was alright, but the focus of the messages was very much on the offender's own needs. The victim suffered a left haemopneumothorax, haemopericardium, a punctured lung and fluid overload, and was admitted to the ICU. The victim initially attempted to protect the offender by not telling police she was the one who caused the injuries, and the offender feigned ignorance when questioned by police, but later the victim told police what had really happened.

Judgment: The sentencing judge ordered that the offender be placed on a community corrections order for three years during which the offender was to complete 300 hours of community work and participate in rehabilitation programs for drug use and mental health issues. The judge also ordered that the offender be subject to judicial monitoring. Her Honour held that "a community corrections order can be punitive, achieve deterrence, and may be suitable even in cases of relatively serious offences such as this, which might have previously attracted a medium term of imprisonment" [72].

Her Honour held that the offender "committed a serious criminal offence with serious consequences" for the victim by inflicting an injury when the victim "had little, if any, chance to know what was happening", using a hidden weapon [19]. However, her Honour accepted that the act was impulsive, without premeditation, and that the actual consequences of the attack were "probably unintended" [20].

Her Honour emphasised the need to give significant weight to general deterrence, as the offence was committed in a domestic violence setting [21]. However, she noted several factors that impacted on the weight to be given to general deterrence in this case. Specifically, the offender's young age, the offender suffered physical and emotional abuse from her former stepfather (and witnessed her mother being subjected to this too) and older brother, the offender abused drugs, the offender had an unstable and volatile upbringing, and the offender had a long history of mental health issues. Her Honour accepted that the offender had committed to positive change and had engaged in a variety of alcohol and drug treatment programs. She also accepted that the offender had personality difficulties which, when combined with her use of ice and other drugs, resulted in difficulty thinking clearly and rationally and impaired her judgment at the time of the offence [43]. Her Honour accepted that there was therefore a basis for limited reduction to moral culpability for the offences [44].

Her Honour somewhat applied limbs 5 and 6 of the decision in R v Verdins & Ors [2007] QSCA 102. Limb 5 refers to the existence of a condition at the date of sentencing which may mean that a given sentence would weigh more heavily on an offender than a person in normal health. Limb 6 refers to a serious risk of the imprisonment having a significant adverse effect on mental health. The judge noted the effects of the COVID-19 pandemic on the offender if she were to be imprisoned, particularly in light of her mental health issues and her strong family support base (which she would be unable to access if imprisoned).

Her Honour held that less weight needed to be given to specific deterrence and protecting the community from the offender because of her lack of criminal history. A discount was given to recognise the utilitarian benefit of the offender's early guilty plea.

Magistrates' Court

DPP v Cope (a pseudonym) **[2021] VMC 014 (17 September 2021) – Magistrates' Court of Victoria**

'Honest and reasonable mistake of fact' – 'Mens rea' – 'Protection order' – 'Statutory interpretation'

Charges: Contravention of family violence intervention order x 1.

Proceedings: Judgement.

Issues: Whether section 123(2) of the Family Violence Protection Act 2008 ('the Act') was a strict liability offence.

Facts: The accused was charged with beaching a family violence intervention order, an offence pursuant to s 123(2) ('the offence') of the Act, by being within 200m of the victim's workplace. Magistrate Foster accepted that the address was unknown to the accused and not specified by the order. However, the prosecution argued that proof of mens rea was not required, because s 123(2) was an offence of strict liability. The prosecution also argued that the accused had not made out the defence of honest and reasonable mistake of fact.

Decision and Reasoning: The charges were dismissed.

Applying *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, Magistrate Foster found that the presumption of mens rea had not been displaced. The aggravated versions of the offence explicitly required proof of a mens rea element ([45]). Therefore, it would be inconsistent with the structure and operation of the act for the offence to be one of strict liability. All three offences carried considerable terms of imprisonment. His Honour highlighted that 'a strong presumption exists that proof of mens rea is necessary where an offence carries serious sanctions' [57]. 'The serious nature of… family violence and… serious consequences for all three… offences strongly suggests that the presumption of mens rea has not been displaced' [48]. Furthermore, the absence of a mens rea element would not assist with the enforcement of the offence (see [59]). It would be counter intuitive and 'contrary… to the spirit of the act' [71] to require the accused to take steps to remain aware of the details of victim's workplace, which was not specified by the order. His Honour found that it was not necessary to address whether the accused had proven the defence of mistaken fact, but explained that the defence would have been established due to evidence that the accused had no reason to believe that the victim worked within 200ms of the café (see [82]-[84] and [97]).

Civil and Administrative Tribunal

ZHC v Victims of Crime Assistance Tribunal (Review and Regulation) (Corrected) [2022] VCAT 333 (30 March 2022) – Victorian Civil and Administrative Tribunal

'Administrative review' – 'Application for assistance' – 'Children' – 'Coercive control' – 'Decision not to pursue charges' – 'Financial abuse' – 'People affected by trauma' – 'Physical violence' – 'Pregnant victim' – 'Reasonable assistance' – 'Reasonable time' – 'Special circumstances' – 'Threats to kill' – 'Victims of crime assistance act 1996'

Proceedings: Review of decision to strike out the victim's application for assistance pursuant to section 52 of the *Victims of Crime Assistance Act 1996* ('the VOCA Act').

Issue: Was the act of violence reported within a reasonable time?

Facts: Under Section 52 of the VOCA Act, an award of assistance must be refused if the Tribunal is satisfied that an act of violence was not reported to police within a reasonable time, or that the applicant failed to provide reasonable assistance to investigators. The section does not apply if the Tribunal considers a delay in reporting, or lack of assistance, to be the result of the applicant's 'special circumstances' [3]. In May 2021, the victim's application was refused on the basis that she had failed to report acts of violence by her former partner within a reasonable time. While the victim had reported a protection order breach in December 2020, materials provided to the Tribunal alleged a history of family violence commencing in 2016 [4].

Decision and reasoning: The Tribunal was not satisfied that the victim's application ought to be refused under section 52 of the VOCA Act. The Tribunal found that the acts of violence were reported to police within a reasonable time. The Tribunal highlighted paragraphs (c), (d) and (e) of section 53 of the VOCA Act, which provide that in considering whether an act of violence was reported within a reasonable time, the Tribunal may consider:

(c) 'whether the person who… is alleged to have committed, the act of violence was in a position of power, influence or trust in relation to the victim'
(d) whether the victim was threatened or intimidated by the person who… is alleged to have committed, the act of violence'
(e) 'the nature of the injury alleged to have been suffered by the victim' [12]-[14].

Considering paragraph (c), the Tribunal noted that the victim's former partner exerted power and influence

her through acts of physical violence, which escalated during her pregnancy, and by controlling her finances. Considering paragraph (d), the victim felt intimidated and threatened by her former partner. This was evidenced by a protection order application, and evidence that the victim's former partner had made threats to harm or kill the victim or their child if she left the relationship. Considering paragraph (e), the victim sustained serious physical injuries due to her former partner's assaults, including cuts, broken teeth, and post-traumatic stress disorder [15]-[19].

The Tribunal was not required to consider whether the victim had provided 'reasonable assistance', or whether 'special circumstances' existed. However, the Tribunal explained that a decision not to pursue charges or provide a statement to assist police to arrest, investigate or prosecute does not amount to a failure to provide reasonable assistance [30]-[31].

Furthermore, the Tribunal noted that the facts exemplified 'special circumstances' [43]. Due to the nature of the violence perpetrated against the victim, the fact that the couple lived together, and the applicant's repeated contravention of protection orders, the victim was unlikely to make immediate reports to police [44]. Rather, the victim prioritised 'more effective mechanisms that would keep her safe', such as a protection order [45]-[48].

Western Australia

Court of Appeal

***State of WA v Williams* [2022] WASCA 105 (11 August 2022) – Western Australia Court of Appeal**

'Appeal' – 'Appeal against refusal to make declaration offender is a serial domestic family violence offender' – 'Criminal law' – 'Family violence legislation reform act 2020 (wa)' – 'Whether declaration can be made following conviction for family violence offence committed prior to commencement of legislation' – 'Whether legislation operates retrospectively'

Proceedings: Appeal against refusal to make a declaration that offender is a serial domestic family violence offender.

Facts: The *Family Violence Legislative Reform Act 2020* (WA) by s 29 inserted s 124E into the *Sentencing Act 1995* (WA). The amendment commenced on 1 January 2021. It provides that where an offender has been convicted of at least three prescribed offences, with at least three of them having been committed on different days, a judge may declare the offender to be a serial family violence offender, consequences of which include a presumption against the grant of bail, and specific sentencing options.

In September 2021 the offender was convicted of three offences, including one prescribed offence, committed on 14 November 2020. He had a prior record of 11 prescribed offences committed against Ms C. The trial judge did not declare him to be a serial family violence offender on the basis that to do so would infringe the presumption against the retrospective operation of statutes. The State appealed the decision not to declare Williams a serial family violence offender.

Grounds: The primary judge erroneously concluded that s 124E(l) of the *Sentencing Act 1995* (WA) did not apply to the 'family violence offences' for which the respondent had been convicted because those offences occurred prior to the commencement of that statutory provision, and that to hold otherwise would infringe the presumption against the retrospective operation of statutes. The discretionary power in s 124E should have been exercised to declare the respondent to be a serial family violence offender.

Decision and Reasoning: Appeal granted; appeal allowed; matter remitted to consider whether to make

declaration.

The Court held that s124E could apply to offences committed before its commencement. First, the section conferred a *discretion* on a court to make such a declaration [45]. The 'trigger' for the discretion is the 'convicting' of an offender by the court, which 'speaks prospectively, that is, it only applies to a 'conviction' occurring after the commencement of the section' [46]. Secondly, while the statutory preconditions required to enliven the discretion might include events that occurred before the section commenced, 'that does not give the section a retrospective operation' [47]. Thirdly, where a court makes a declaration, the consequences only affect an offender's rights in the future [48]. Finally, even the disqualification from being authorized to use firearms or explosives is 'prospective only; it does not make any such licence, permit, approval or authorisation invalid at any time in the past' [52].

***CEG v Wright* [2022] WASCA 42 (1 April 2022) – Western Australia Court of Appeal**

'Appeal' – 'Assault' – 'Audio recording evidence' – 'Child protection' – 'Evidence' – 'People from culturally and linguistically diverse backgrounds' – 'Pregnancy' – 'Strangulation' – 'Use of extended family' – 'Victim credibility'

Charges: Aggravated assault x 1.

Proceedings: Appeal against conviction.

Issues: Whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

Facts: The female complainant and male appellant were married for 10 years and had 4 children.

The couple's fourth child died in May 2019, approximately 6 weeks after being born prematurely. In July 2019, the couple's remaining children were removed from their care. During an argument about child custody proceedings, the appellant slapped and attempted to suffocate the complainant. An audio recording of the incident was captured by a listening device. The appellant was found guilty following jury trial and appealed on the ground that the verdict was unsupported by the evidence. The appellant argued that the complainant lacked credibility by making submissions about inconsistencies in her evidence.

Decision and Reasoning: The appeal was dismissed. The Court rejected the appellant's submissions and affirmed the findings of the primary judge. The Court stated that 'the recordings provided irrefutable, independent evidence that strongly supported the prosecution case' and the complainant's oral evidence. The Court stated that the audio recording contained 'sounds… consistent with the impact of a hand to the face or

head', and a record of the complainant crying, complaining of being hit, and 'pleading with the appellant not to hit her again' [21]. Furthermore, the recording contained 'muffled sounds consistent with the complainant being forced down into pillows or bedding', a record of the appellant threatening to kill the complainant several times, and the complainant saying 'get off me' [23]. The Court found that any inconsistencies or omissions in the complainant's evidence were minor and did not 'justify a conclusion that the complainant was a generally untruthful or unreliable witness'. Moreover, the Court stated that complainant's poor memory of the incident did not detract from her evidence, which 'was strongly supported by the audio recording' of the argument, and an audio recording in which the appellant made references to having hit the complainant [76]. Furthermore, the Court considered the fact that English was the complainant's second language and found that a statutory declaration signed by the complainant, which stated that the appellant had not physically harmed her, had been signed 'at the behest of her father-in-law without' the complainant having understood them.

Turner v State of Western Australia **[2021] WASCA 158 (3 September 2021) – Western Australia Court of Appeal**

'Appeal against conviction' – 'Children' – 'Defense of insanity' – 'Evidence' – 'Intention' – 'Jury directions' – 'Misdirection or non-direction' – 'Murder' – 'Reasonable doubt' – 'Separation' – 'Unsound mind'

Charges: Murder.

Proceedings: Appeal against conviction.

Facts: The male appellant killed the female victim, his former partner with a kitchen knife at the conclusion of a pre-trial conference held at the Joondalup Courthouse in relation to legal proceedings the appellant had brought in the Magistrates Court claiming a debt from the victim. The parties had been in a relationship for 6 years and had two primary school aged children and were engaged in child custody and property settlement disputes. The circumstances and cause of the victim's death were uncontested [1]-[15]. At trial, the appellant unsuccessfully raised the defence of unsound mind on the basis that he had suffered from a dissociative seizure when he stabbed the victim [23]. The appellant was found guilty of murder.

Grounds: The appellant appealed on the ground 'that there was a miscarriage of justice when the learned trial Judge failed to direct or adequately direct the jury that evidence going to insanity, but not establishing it, was relevant and admissible on the issue of specific intent' [20], [53]. This evidence 'should have caused the jury

to doubt that the appellant was capable of forming' an 'intent to cause death' or 'intent to cause bodily injury of such a nature as to endanger, or to be likely to endanger, the life of the person killed' [51]. The evidence related to the nature of the stab wounds, the knife used, the location of the incident, and aspects of appellant's account that were consistent with expert evidence on dissociative seizures [52].

Decision and Reasoning: Appeal dismissed.

Justices Buss, Mitchell and Morrison stated that:

> …the directions were adequate. Taken as a whole, the trial Judge's direction conveyed to the jury that they were to have regard to the whole of the evidence, including the evidence referred to [in the appellant's submissions] in deciding whether the State had proven the requisite intention beyond reasonable doubt. Even if the trial Judge's direction had not done so, it would not have given rise to any miscarriage of justice… because the evidence… considered in light of other evidence led at trial, was not capable of giving rise to any reasonable doubt as to the appellant's capacity to form the requisite intent, or as to whether he did form the requisite intent [52]-[55].

Their Honours continued:

> …[i]n our view, the only reasonable inference open on the whole of the evidence, considered in light of the presumption of sanity, was that the appellant was acting purposefully, with a requisite intention for murder, and he could not have killed Ms Thomas while in a dissociative seizure. No miscarriage of justice could arise from any failure of the trial Judge to give a more specific direction about the jury having regard to evidence when considering the issue of intent, when the relevant evidence was not capable of giving rise to a reasonable doubt as to whether the appellant intended to kill Ms Thomas, or inflict an objectively life-threatening injury upon her [108].

***Noi v The State of Western Australia* [2021] WASCA 84 (18 May 2021) – Western Australia Court of Appeal**

'Aggravated home burglary' – 'Application for leave to appeal against sentence' – 'Control' – 'Damaging property' – 'Intimidation' – 'Protection orders' – 'Unlawful damage'

Charges: Aggravated home burglary x 1; Unlawful damage x 2.

Proceedings: Application for leave to appeal against sentence.

Facts: The male appellant and female victim were former de facto partners, and have 2 children. They had been separated for approximately 8 years. Shortly after a three-day order protecting the victim expired, the appellant attended the victim's residence to show the victim and their son "who was the boss". He kicked in the front door, and wilfully destroyed the television. He said: "you can get a restraining order that lasts for two years, it's not going to make any difference", and smashed the victim's phone as she tried to call 000. The appellant was arrested and pleaded guilty. He was sentenced to 2 years immediate imprisonment, with eligibility for parole.

Grounds of appeal:

1. A miscarriage of justice occurred when the sentencing judge "adopted the matters set out in the pre-sentence report" and found the offences indicated that the appellant "harboured feelings of entitlement consistent with being a domestic violence perpetrator".
2. Sentences of immediate imprisonment were manifestly excessive as to type and the sentencing judge should have imposed conditionally suspended sentences.
3. 2 years' immediate imprisonment for the aggravated home burglary offence was manifestly excessive as to length.

Held: Application for leave to appeal on ground 1 was dismissed. Leave to appeal on grounds 2 and 3 was also refused and the appeal dismissed.

Ground 1: No reasonable prospect of success.

The finding the offending was "a form of domestic violence" was based on the sentencing judge's own assessment of the circumstances, rather than the impugned pre-sentence report/feelings of entitlement.

"[45]… the sentencing judge was plainly correct to characterise the offending as a form of domestic violence. The victim was the appellant's former de facto partner and the mother of his two children (the children being co-parented by the appellant and the victim). The appellant violently forced entry into the victim's home, when he knew she was present, by kicking in the front door. This occurred shortly after the expiry of a police order protecting the victim. The appellant wilfully damaged her property, including a mobile phone which was a means of seeking help, while threatening that the victim obtaining a 2 year restraining order would make no difference. He was clearly using violence to intimidate his former partner with whom he shared the care of

their two children. The pre-sentence report was not required to conclude that the offending was a form of domestic violence. Additionally, the report was not actually relied upon by the sentencing judge for the purposes of reaching that conclusion. Even if the pre-sentence report had been relied upon for that purpose, there would be no miscarriage of justice as, in our view, it could not reasonably be contended that the offending in this case did not constitute a form of domestic violence."

Finding that the appellant intended to intimidate the victim was inevitable, given the admitted conduct constituting the offence.

Grounds 2 and 3: The sentences were not arguably unreasonable or plainly unjust. The offending was serious, as the sentencing judge observed:

> "As I've explained, the offending here is serious and included forced entry and the offending being carried out with an intent to intimidate and to assert control over your ex-partner. The offending also instilled fear in her, which it was intended to do."

***JLD v The State of WA* [2020] WASCA 156 (18 September 2020) – Western Australia Court of Appeal**

'Aggravated assault' – 'Aggravated rape' – 'Application for leave to appeal against refusal to grant bail' – 'Coercive control' – 'Domestic violence' – 'Immolation' – 'Risk assessment' – 'Technology-facilitated abuse'

Charges: Aggravated sexual penetration without consent x 1; Common assault in circumstances of aggravation x 1; Threats to injure, endanger or harm any person x 1.

Proceedings: Appeal against refusal to grant bail.

Facts: The male appellant and female complainant were married in 2015. The complainant first reported domestic violence to relevant services in October 2019. The complainant reported that the appellant was emotionally abusive, jealous and controlling, including requiring the complainant to disclose her Facebook password to him, 'monitor[ing] and question[ing] her on every expenditure on their bank statement' and telling the complainant there was a 'hidden camera in the house' [22]-[23].

In February 2020, during an argument, the appellant made threats against the complainant including: '[y]ou and your daughter deserved to be burned alive like the Queensland family' and accused the complainant of infidelity.

In March 2020, the complainant was recovering from surgery at home. The appellant demanded that the complainant have sex with him. When she refused, he forced her legs open and slapped her in the face saying ‘I’m still your husband and you’re bound to do it’ before raping her. A DFV protection order was made against the appellant to protect the complainant and her daughter.

Grounds: The primary judge erred in finding that the appellant posed a significant risk of interfering with the complainant such that there were no conditions that could be imposed on bail that could sufficiently protect the complainant.

Decision and reasoning: *Leave to appeal refused. Appeal dismissed.*

The primary judge was entitled to receive and take into account the information in the bail risk assessment report (prepared by a family violence worker).

[69] The risk assessment report, and the information on which the report was based, raised issues of serious concern in relation to the appellant’s psychological or psychiatric state and the safety and welfare of the complainant and her daughter if the appellant were to be granted bail. There were reasonable grounds, based on that information, for apprehending that the appellant may have engaged in an escalating process of serious family violence of a sexual character, including threats of greater violence, and may attempt to interfere with the complainant as a witness.

The primary judge was correct to reject the appellant’s submission that the nature of the complainant’s employment indicated that she had support in the community and was not vulnerable:

[26(c)] Her Honour rejected the appellant’s submission that the nature of the complainant’s employment indicated that she had support in the community and was not vulnerable. Her Honour said that offences of domestic violence are not confined to offences against unemployed women at home and that serious domestic violence against women occurs at all levels of society and affects all occupations (ts 4 - 5).

…

[80] Her Honour was obliged to have regard to matters favourable to the appellant’s application, including the presumption of innocence, the absence of a prior criminal record, the fact that the appellant had not actually interfered with the complainant (or any other person) as a witness, his stable and well-paid employment, his need to work to obtain revenue to meet his expenses including the cost of legal representation for his trial, the impact of the COVID-19 pandemic and the time that would elapse before his trial could be listed for hearing.

We are satisfied that her Honour had regard to all matters which militated in favour of a grant of bail.

However, the nature and extent of the relevant risk justified her Honour's decision to refuse bail.

The State of Western Australia v Clark **[2020] WASCA 103 (25 June 2020) – Western Australia Court of Appeal**

'Attempted murder' – 'Children' – 'Controlling, jealous, obsessive behaviour' – 'Home burglary' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Self-harm' – 'State appeal against sentence' – 'Weapon'

Charges: Unlawful assault whilst in the place of another person without that person's consent x 1; attempted murder committed in the course of an aggravated home burglary x 1

Case type: State appeal against sentence

Facts: The respondent was convicted after trial and was sentenced to 15 years' imprisonment on the count of attempted murder in the course of an aggravated home burglary and to 3 years' 6 months' imprisonment for unlawful assault, to be served concurrently such that the total effective sentence was 15 years.

The respondent man and his female ex-partner had been in a relationship for approximately 10 years and had 4 children. They separated in 2017. The respondent had difficulty accepting the end of the relationship, particularly the prospect of his ex-partner dating other men. On the night before the offending the respondent fabricated an incident by texting himself purporting to be from a man who recently had sex with her. The next morning, the respondent broke in to her house and asked her to reconcile. She declined and told him that another man was in her bed (the victim). The respondent took a knife from the kitchen and threw it across the room then left.

Later than morning he returned armed with a knife, assaulted the victim and slashed him across the face causing life-threatening injuries. He also attacked the victim with a screwdriver. The respondent left the house with the knives and began to cut his own wrist with one of them.

The trial judge made the following findings of fact: (1) the respondent did not act in self-defence, but attacked the victim with dangerous weapons; (2) the respondent entered the bedroom with the intention of killing the victim, and this intention was not only momentary; (3) the attack on the victim was premeditated - after

leaving the house on the first occasion, he returned with a weapon and entered the house without consent and with an intention to attack the victim; (4) the attack was persistent and violent; (5) the attack resulted in a very serious injury to the victim's face and was likely to have endangered his life without medical treatment. The victim now has permanent facial disfigurement; (6) the respondent fled the scene and rendered no assistance to the victim; (7) the offending likely traumatised his ex-partner; (8) the respondent did not accept responsibility for his offending and sought to blame the victim; and (9) the respondent displayed limited remorse and victim empathy ([34]).

The respondent had a prior criminal record, including a conviction for domestic violence in relation to his ex-partner so was not a person of previous good character ([36]). He had used drugs since he was 18 years old, experienced marked issues with emotional arousal and regulation, and was diagnosed with ADD as a child. Further, longstanding issues with trust, impulsivity, a sense of betrayal, being made a fool of, perceived injustices and poorly developed decision making and coping skills were relevant factors in his offending. The trial judge did not accept that the respondent's health issues, including ADD and epilepsy, reduced his moral culpability for the offending or reduced the necessity for general deterrence.

Issue: The appellant sought leave to adduce further evidence and appealed his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the entirety of the evidence. He also submitted that the evidence against him was unreliable, inconsistent and not capable of supporting a verdict of guilty on Count 3, and that there was no corroborative evidence in relation to the complainant's allegations as to how the strangulation occurred. The Crown argued that whilst there were weaknesses in the complainant's evidence in terms of her reliability, those factors were fairly outlined by the trial judge in the summing up, and that the complainant's evidence was able to be supported by other evidence.

Ground: The sentence was manifestly inadequate.

Held: The Court allowed the appeal, and imposed a total effective sentence was 17 years' imprisonment ([86]). The Court considered the maximum penalty, the statutory minimum penalty, the facts, circumstances and seriousness of the offending (including the victim's vulnerability and circumstances), the importance of appropriate punishment and personal and general deterrence as sentencing considerations, and all aggravating and mitigating factors. It held that the sentence of 15 years' imprisonment was not commensurate with the seriousness of the respondent's offending, and was substantially less than the sentencing outcome that was properly open to the trial judge ([77]).

S 283(2) Criminal Code was introduced "to ensure that burglars who commit numerous home invasions, which can involve serious violent offences, are incarcerated for longer periods; to deter such offenders; to ensure that such offenders are kept out of circulation longer; and to reflect community abhorrence of such offending" ([56]). Section 6(1) Sentencing Act 1995 (WA) provides that a sentence must be commensurate with the seriousness of the offence ([59]). The respondent's offending was a serious example of offending of this type. The attack was premeditated, persistent, and was carried out with weapons. The respondent's intention to kill the victim was not held only momentarily, but was present while he was inflicting the injuries. After attacking the victim, he fled the scene and rendered no assistance to him ([70]). Although his prior criminal record did not aggravate the seriousness of the offending, it indicated that he was not entitled to leniency on the ground that he was of previous good character ([72]). He did not take responsibility for his actions and denied criminal responsibility ([74]). Mitigating circumstances were limited: he had a difficult and problematic childhood, made appropriate concessions at trial which facilitated the administration of justice, showed some remorse and victim empathy, and completed a number of courses and had positively responded to his incarceration ([76]).

The State of Western Australia v Radovic **2020 WASCA 46 (8 April 2020) – Western Australia Court of Appeal**

'Attempted murder' – 'Physical violence and harm' – 'Protection order' – 'Separation' – 'Threats to kill'

Charges: Possessing an offensive weapon in circumstances likely to cause fear to other persons x1; Attempted murder x1;

Appeal type: State appeal against sentence

Grounds: The sentence for the charge of attempted murder was manifestly inadequate having regard to:

- The maximum penalty for the offence;
  - The person the respondent intended to kill was a police officer;
  - The respondent knew the victim was a police officer before he struck;
  - The respondent came to the premises armed with a sword which he knew was sharp and which he was adept at using;
  - The respondent used the sword to strike to victim in an vulnerable area which was likely to result in fatal injury;

- The offence was committed in front of witnesses; and
- The offence was committed in breach of the respondent's VRO and community based order;

- The serious nature of the offence and the circumstances in which it was committed, including:
- The serious impact of the offence on the victim and his family;
- The personal circumstances of the respondent;
- The importance of personal deterrence considering the respondent's criminal history; and
- The importance of general deterrence and punishment for offences of this nature.

Facts: The respondent man pleaded guilty to the charge of possessing an offensive weapon and was convicted following trial of the charge of attempted murder. He was sentenced to 4 years' imprisonment for possession of an offensive weapon and 9 year's imprisonment for attempted murder. The sentences were backdated to the day of offending and ordered to be served concurrently, resulting in a total effective sentence of 9 years' imprisonment. The ground of appeal relates to the sentence imposed on the charge of attempted murder.

At the time of offending the respondent was the subject of a violence restraining order ('VRO') which prevented the respondent from contact or communicating with his former wife (Radovic) or any of their three children. The day before the offending, the respondent made an application seeking to vary the terms of the VRO. The former wife was opposed to the changes and the matter was adjourned. The next day, the respondent attended the workplace of Radovic's brother armed with a samurai sword. Radovic's brother was not there at the time. Later that day, the respondent went to the unit Radovic's brother and sister shared, banged on the door and shouted threats to kill them. The Respondent did not know that Radovic and her children lived in the unit adjacent to her siblings'. Some of the children witnessed the display and police were called to the scene. The officers arrived in a marked vehicle and attended Radovic's unit to take the children's statements. Radovic arrived shortly after.

The Respondent returned to the unit while police were still there with the samurai sword and began to brandish his sword in a manner that caused fear to those present, constituting the first charge, while threatening to kill them. A witnesses alerted the police and the officers left the unit and approached the respondent. The respondent rushed towards one of the officers with the sword raised, prompting the officer to discharge his taser at the respondent, to no effect. The respondent then swung the sword and forcefully struck the officer's head. This action formed the basis of the attempted murder charge and caused two

lacerations. The respondent was eventually subdued and arrested.

Judgment: The sentence for attempted murder was manifestly inadequate and the respondent was re-sentenced to 13 years' imprisonment.

None of the previous cases concerned truly comparable offending [60]. There is no tariff or usual sentencing range for a charge of attempted murder, sentences are variable and while all offences are very serious each case will turn on its own facts [61]. This was a very serious example of offending [62]. The Court found the fact that the fact that the victim was a police officer executing his duties was a "profoundly aggravating feature" [64]. They noted that "[p]olice officers are often required to place their safety at risk in carrying out their duty to protect the public. It is vital that the courts impose significant custodial sentences upon offenders who intentionally cause serious injury to police officers acting in the course of their duties" [63]. Personal and general deterrence were thought to have particular importance especially in light of the respondent's criminal history [66]. In light of the limited mitigation available to the respondent, it was found that the sentence was "substantially less than the sentence open on a proper exercise of the sentencing discretion" [72] because of the seriousness of the offence and aggravating features.

***Larsen v The State of Western Australia* [2019] WASCA 181 (15 November 2019) – Western Australia Court of Appeal**

'Application for leave to adduce additional evidence' – 'Application for leave to appeal against conviction following guilty pleas' – 'Burglary' – 'Following, harassing and monitoring' – 'Mandatory minimum sentence' – 'Physical violence and harm' – 'Stalking' – 'Weapon'

Charges: Being armed in a way that may cause fear x 1; aggravated home burglary x 1; act intended to cause grievous bodily harm or prevent arrest committed in the course of an aggravated home burglary x 1.

Case type: Applications for leave to adduce additional evidence, application for leave to appeal against conviction following guilty pleas

Grounds:

1. The appellant suffered a miscarriage of justice in relation to Count 3 because he pleaded guilty to the charge without understanding its nature.
2. There was an abuse of process by reason of the amendment of the indictment on the morning of the

appellant's sentencing.

3. The appellant suffered a miscarriage of justice by failing to apply for an adjournment of the proceedings in respect of Counts 2 and 3 following the amendment of the indictment.

Facts: The appellant was convicted on his guilty pleas of being armed with a dangerous instrument, namely a knife, in circumstances likely to cause fear to any person (Count 1), aggravated home burglary (Count 2), and unlawful wounding with intent to maim, disfigure, disable or do some grievous bodily harm in the course of the aggravated home burglary, contrary to s 294(1) and (2) Criminal Code (Count 3). On Count 3, the appellant was sentenced to 15 years' imprisonment, and received concurrent terms of imprisonment with respect to the other offences. Count 3 on the indictment was amended on the day of the appellant's sentencing. The appellant claimed that he had not been advised of the nature of the amended charge or that the amended charge carried a mandatory 15 year sentence of imprisonment.

The circumstances of the offending are as follows. In 2016, the appellant and victim met through an online website, and commenced an intimate relationship. Their relationship eventually broke down, and a violence restraining order protecting the victim was served on the appellant in late-2016. In 2017, the appellant breached the restraining order by attempting to communicate with the victim via mobile. He called the victim 243 times in an attempt to contact her. The appellant continued to breach the order by following the victim to her sister’s unit. Once inside the unit, he slashed and stabbed the victim with a knife in a frenzied and concerted attempt to seriously injure her. The victim feared that she was going to die. Family, neighbours and other members of the public intervened in the appellant’s assault, and he was eventually restrained.

Held: Applications for leave to adduce additional evidence granted; application for leave to appeal on ground 1 granted, appeal dismissed; applications for leave to appeal on grounds 2 and 3 dismissed. It is difficult to set aside a conviction based on a guilty plea, because there is a strong public interest in the finality of proceedings. There are 3 well-recognised circumstances in which courts may set aside guilty pleas: (1) the appellant did not understand the nature of the charge or intend to admit guilt; (2) upon the admitted facts, the appellant could not, in law, have been guilty of the offence; or (3) the guilty plea was obtained by improper inducement, fraud or intimidation ([44]-[46]). The appellant alleged that he suffered a miscarriage of justice because had he been informed that he would be liable to be sentenced to a mandatory minimum sentence of 15 years' imprisonment, he would have pleaded not guilty ([50]).

Mazza and Beech JJA rejected the submissions that the appellant did not understand the element of intent in

Count 3 ([88]) and the fact that if he pleaded guilty to Count 3, he would be liable to a mandatory minimum sentence of 15 years' imprisonment ([89]-[106]). The appellant understood the advice which he was given ([97]). Their Honours also dismissed the alleged abuse of process for two reasons: first, there was no abuse in the making of an application to amend the indictment, and second, the amendment was unnecessary and did not prejudice the appellant because he was liable to the minimum term stipulated in s 294(2) regardless of whether the indictment stated that the offence was committed in the course of a home burglary ([111]). After analysing the authorities, their Honours determined that the State was not required to plead that fact in order to make the offender liable to the mandatory minimum penalty in s 294(2) ([123]). Ground 3 was found to have no reasonable prospects of success, as the appellant did not suffer a miscarriage of justice as a result of his counsel failing to seek an adjournment of the sentencing principles ([128]-[129]).

Allanson J agreed with the orders and reasons of Mazza and Beech JJA, but believed that it was not necessary to decide whether the State was required to plead that the offence in Count 3 was committed in the course of conduct that constituted an aggravated home burglary in order to make the appellant liable to the mandatory minimum penalty in s 294(2) of the Code. That the appellant failed to show that he did not understand the indictment, as amended, or the advice given to him, was sufficient reason to refuse leave to appeal on Ground 2 ([133]).

***The State of Western Australia v TLP* [2019] WASCA 66 (24 April 2019) – Western Australia Court of Appeal**

'Manifestly inadequate' – 'Older people' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Totality principle'

Charges: Aggravated grievous bodily harm x 1; Aggravated assault occasioning bodily harm x 1; Aggravated sexual penetration without consent x 6; Attempted aggravated sexual penetration without consent x 1.

Appeal type: Prosecution appeal against sentence.

Facts: The respondent attended his grandparents' house. He attacked his grandmother and his half-sister. He punched his grandmother and threw her to the ground. He then attempted and committed acts of sexual penetration on his half-sister including inserting his finger and penis into her vagina and anus performing cunnilingus on her ([34]-[56]).

A circumstance of aggravation was that his relationship with both victims was a family and domestic

relationship. In relation to his half-sister, another aggravating circumstance was that he threatened to kill her. In relation to his grandmother, another aggravating circumstance was that she was over the age of 60 ([27]).

The respondent pleaded guilty and was sentenced to a total effective sentence of 6 years 6 months' imprisonment ([1]-[2]).

Issues: Whether the sentence was manifestly inadequate; whether the total effective sentence infringed the first limb of the totality principle by not reflecting the overall criminality.

Decision and reasoning: The appeal was allowed. All three Justices agreed that the respondent should be resentenced to 12 years' imprisonment but differed on the appropriate individual sentences.

Mazza and Beech JJA identified the mitigating factors identified by the trial judge (including his pleas of guilty, remorse, prior good record, relatively young age, negative familial experiences and previous bullying) entitled the respondent to some mitigation of his sentence ([93]). However, the individual sentences for each offence were judged to be manifestly inadequate having regard to the maximum sentences and the seriousness of the conduct. Their Honours would have imposed a total sentence of 15 years, but after having a 'last look' to ensure that the total sentence measures the respondent's overall criminality, determined that a sentence of 12 years was appropriate ([115]-[116]).

Buss P would have imposed a total effective sentence of 12 years' imprisonment without requiring a 'last look'. His Honour imposed slightly different sentences for each individual count compared to Mazza and Beech JJA ([20]-[21]).

***The State of Western Australia v Yamalulu* [2019] WASCA 6 (14 January 2019) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Breaches of protection orders' – 'Factors affecting risk' – 'People affected by substance misuse' – 'People with children' – 'Protection order' – 'Sentencing considerations'

Charges: Grievous bodily harm x 1.

Appeal type: Appeal against sentence.

Facts: In 2017, the respondent, a Walmajarri man, pleaded guilty to, and was convicted of, one count of unlawfully doing grievous bodily harm in circumstances of aggravation. The respondent was in a family and

domestic relationship with the victim and the offending occurred when he was in breach of a violence restraining order which prohibited him from contacting or being within 50 metres of the victim. The respondent and the victim had been in a relationship for approximately three or four years, and had one child aged three at the time of the offence. The relationship had ended due to various incidents of domestic violence. On the night of the offence, the respondent was heavily intoxicated. He found the victim engaging in sex with his brother and subsequently violently assaulted her by throwing her to the ground and jumping on her chest, legs and head. He made attempts to hide from the police and initially gave the police a false name. The victim sustained numerous serious injuries resulting in quadriplegia. The primary judge imposed a sentence of three years and 8 months' immediate imprisonment.

Issues: It was submitted that the sentencing judge fell into error because the sentence was manifestly inadequate on the following grounds:

- The maximum penalty for the offence;
- The exceptionally serious nature of the injuries;
- The serious nature of the offence and the circumstances in which it was committed;
- The need for the sentence to reflect specific and general deterrence;
- The respondent's personal circumstances; and
- The requirement that sentencing be consistent with the standards of sentencing set for offending of this nature.

Decision and reasoning: The Court allowed the appeal, set aside the sentence imposed by the sentencing judge and re-sentenced the respondent. The Court found that the respondent committed 'a frenzied, savage and relentless attack upon a vulnerable, unarmed and defenceless woman' ([68]). He inflicted serious injuries despite the victim's repeated pleas for him to stop attacking her. Their Honours also highlighted that the victim was left permanently disabled with limited prospects of improvement. The respondent had a significant prior criminal history including previous convictions for violent offending against the victim. This history of violence indicated that he should not be afforded any leniency on the ground that he was of good character. Mitigating factors included the respondent's plea of guilty, his remorse and acceptance of responsibility and the adverse effects of his troubled upbringing ([72]). Although the ongoing effects of his childhood deprivation may have diminished his moral culpability, the consequences of his behaviour rendered him a serious threat to women with whom he is or has been in a relationship. Their Honours therefore held that the initial sentence was not merely 'lenient' or 'at the lower end of the available range', but was unreasonable and plainly unjust. A

sentence of seven years six months' imprisonment was imposed.

***NPA v The State of Western Australia* [2018] WASCA 131 (2 August 2018) – Western Australia Court of Appeal**

'Physical violence and harm' – 'Post-separation violence' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Social and psychological abuse' – 'Strangulation' – 'Totality principle'

Charges: Aggravated sexual penetration without consent x 5; Attempted aggravated sexual penetration without consent x 1; Threat to harm x 1.

Appeal type: Defendant appeal against sentence.

Facts: The appellant and complainant were in an 'on again, off again' relationship. The appellant was controlling, manipulative, and required the complainant to change her mobile phone number so that her family and friends could not contact her. There were two main occasions of sexual offending. On the first occasion, at a time where they had broken up, the appellant was invited to the complainant's house. He held the complainant down and inserted his penis into her vagina ([11]). On the second occasion, the appellant entered the house uninvited. Over the next 8 to 9 hours, the appellant repeatedly raped the complainant, choked her, and smashed a TV remote over her head ([17]-[26]).

The appellant was convicted of the charges and was sentenced to a total effective sentence of 12 years' 6 months imprisonment ([1]).

Issues: Whether the total effective sentence infringed the first limb of the totality principle by not reflecting the overall criminality.

Decision and reasoning: The Court held that the sentence did reflect the overall criminality. The Court referred to serious and aggravating factors including the maximum sentences, the repeated nature of the offences, the prolonged nature of the second occasion, the appellant using degrading and insulting threats towards the complainant and the appellant's refusal to accept the complainant's ending of the relationship ([52]).

***Salkilld v State of Western Australia* [2017] WASCA 168 (15 September 2017) – Western Australia Court of Appeal**

‘Breach of protection order’ – ‘Breach of violence restraining order’ – ‘Emotional and psychological abuse’ – ‘Following, harassing and monitoring’ – ‘Remorse’

Charges: Making a threat unlawfully to kill x 1; Stealing x 1; Breach of protective bail conditions x 7; Breach of bail x 1; Breach of violence restraining order (VRO) x 8; Possession of property reasonably suspected to be stolen x 1; Fraud x 1; Breach of police order x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and respondent were in a relationship for about 3 weeks ([4]). The appellant had come home to find the complainant having sex with another man, which sparked a confrontation. The police issued the appellant with a police order preventing the appellant from approaching the property and complainant ([5]). The appellant returned to the property the same day and tried to force his way in ([6]). The complainant obtained a violence restraining order (VRO) against the appellant ([7]). Over a period of two days, the appellant called the complainant many times and sent text messages of a frightening nature, including threats to kill her ([15]-[19]). This conduct constituted a breach of the VRO subject of the appeal. The following day, the complainant repeatedly rode his motorcycle past the house while the complainant was inside ([21]). This conduct constituted a breach of the protective bail conditions subject of the appeal.

The sentencing judge imposed a head sentence of 2 years’ imprisonment ([45]).

Issues: There were 4 grounds of appeal:

1. the sentence of 9 months’ imprisonment for the breach of VRO was manifestly excessive;
2. the sentence of 6 months’ imprisonment for the breach of protective bail conditions was manifestly excessive;
3. the head sentence infringed the principle of totality; and
4. the judge erred in finding that the appellant was not remorseful

Decision and Reasoning: All four grounds were dismissed for the following reasons.

For ground 4, the appellant bore the burden of proof in establishing remorse on the balance of probabilities ([58]). While the appellant had expressed some level of responsibility for his actions, he displayed minimal victim empathy ([59]). It was open to the sentencing judge to find that the appellant demonstrated no remorse for the impact of his offending on the victim ([57]).

For ground 1, the breach was a sustained course of conduct and the messages were intended to terrify the complainant ([63]).

For ground 2, the breach was not an isolated breach and was intended to intimidate the complainant ([72]).

For ground 3, the sentence was well within the acceptable range ([87]).

Liyanage v Western Australia **[2017] WASCA 112 (22 June 2017) – Western Australia Court of Appeal**

'Expert evidence' – 'Risk' – 'Social context evidence' – 'Social worker'

Charges: Manslaughter x 1.

Appeal type: Appeal against conviction and sentence.

Facts: The appellant and the deceased were married. The appellant killed the deceased by striking him with a mallet [1]. The appellant gave evidence that the deceased was violent and controlling, and regularly sexually assaulted her [2]. She had no memory of the night on which she killed the deceased [47]. At trial, she was found not guilty of murder, but guilty of manslaughter [4]. She was sentenced to 4 years' imprisonment [5].

Issues: The appellant appealed on several grounds including that the trial judge should not have excluded evidence from a social worker about domestic violence [7].

Decision and Reasoning:

All grounds of appeal were dismissed.

Social worker's risk assessment evidence

The social worker's risk assessment evidence was in relation to the psychological impact of prolonged exposure to domestic violence (popularly known as 'battered women's syndrome'). The evidence was based on a risk assessment which used actuarial risk assessment tools and clinical guides, including the 'Power and Control Wheel' (see Chapter 4 Context Statement) ([108]). The Court held that: the evidence did not explain the appellant's state of mind ([123]-[129]); that the evidence did not quantify the extent of the risk, and did not specifically address the question of the risk of homicide ([130]-[148]); and the actuarial tools had not 'been accepted by the relevant scientific community' as defining the risk of homicide ([149]-[154]).

Social context evidence

The Court remarked that there is a body of academic literature that is supportive of 'social context evidence' in family violence cases ([160]). This may include evidence about the history of the parties' relationship, the defendant's culture, the non-psychological impediments to leaving a violent relationship ([160]-[165]). However, the Court emphasised that in order for contextual evidence to be admitted, counsel must 'explain precisely and specifically how it is relevant to the issues which the jury are required to decide' ([166]).

The social worker gave evidence in relation to the dangers of leaving a domestic violence relationship ([169]-[177]) and the exercise of power and control which characterises domestic and family violence ([178]-[183]). The Court held that the evidence was too general, and would not assist the jury beyond the knowledge and inferences able to be drawn by a reasonable person ([177],[183]).

***McCoombe v The State of Western Australia* [2016] WASCA 227 (20 December 2016) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault occasioning bodily harm' – 'Blaming the victim' – 'Deterrence' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Public protection' – 'Vulnerable groups'

Charge/s: Aggravated assault occasioning bodily harm x 4.

Appeal Type: Appeal against sentence.

Facts: The male appellant, an Indigenous man, and the female partner ('D') had been in a domestic relationship. Counts 1-3 involved the appellant, who was jealous of the victim, punching her, strangling her, striking her with a chair in the back of the head, and striking her several times with a crate. Count 4 occurred when the appellant again became jealous of the victim. He verbally abused her and poured a kettle full of boiling water down her back, causing second and third degree burns. He then punched and kicked her. The appellant prevented the victim seeking medical treatment for several days. The appellant was sentenced to 5 years imprisonment on count 4, 1 year and 2 months imprisonment on counts 1 and 3, and 1 year imprisonment on count 2. The sentences on counts 1 and 4 were to be served cumulatively.

Issue/s: The sentence imposed on count 4 was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Newnes and Mazza JJA noted the circumstances in

which count 4 was committed at [33]:

'The pouring of a kettle of boiling water on D was a particularly cruel and senseless act which was plainly capable of causing very serious injuries. In the spectrum of physical injuries constituting bodily harm sustained by D, they were severe. The offence entailed an abuse of the relationship of trust which existed between the appellant and D. D was in a vulnerable position by reason of the greater physical strength of the appellant and the degree to which he had intimidated her by his past acts of violence: as to which we respectfully adopt Mitchell J's statement in Bropho v Hall [2015] WASC 50 [16], which was approved by this court in Gillespie v The State of Western Australia [2016] WASCA 216 [48]'.

Their Honours referred to the fact that this was 'part of a pattern of serious and ongoing domestic violence against D'. The appellant had no insight into his offending and sought to justify what he did by blaming the victim. His criminal history was poor and showed that he posed a high risk of further serious violent offending against domestic partners. Retribution, deterrence and public protection were important factors on sentence here (see [34]-[35]).

While acknowledging the severity of the sentence imposed on count 4, Newnes and Mazza JJA concluded that, in light of all the relevant circumstances noted above (including the appellant's plea of guilty and his criminal history), count 4 was an offence of the 'utmost gravity of its kind'. The sentence could not be said to be manifestly excessive (see [36]).

***The State of Western Australia v Smith* [2016] WASCA 153 (31 August 2016) – Western Australia Court of Appeal**

'Aggravated grievous bodily harm' – 'Aggravating factor' – 'Cruelty to animal' – 'Defensive injury' – 'Physical violence and harm'

Charge/s: Aggravated grievous bodily harm, aggravated unlawful wounding, assaulting a public officer, cruelty to animal.

Appeal Type: Crown appeal against sentence.

Facts: The State appealed against a total effective sentence of 2 years and 2 months imprisonment imposed on the respondent in respect of a number of offences. The most significant offences occurred on 5 August 2015 while the respondent was subject to a suspended imprisonment order. The respondent attacked his

former female de facto partner and a police officer using a claw hammer. He pleaded guilty to unlawful wounding and causing grievous bodily harm. He also pleaded guilty to assaulting a public officer and cruelty to the officer's police dog.

Issue/s: One of the grounds of appeal was that the sentence imposed for grievous bodily harm and unlawful wounding was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Buss J (Mazza JA agreeing) held that the sentence of six months imprisonment imposed for the unlawful wounding offence was manifestly inadequate. This was in light of a number of factors including: the maximum penalty (7 years imprisonment); the seriousness of the offending (including the vulnerability of the victim – his former de facto partner); the general pattern of sentencing for offences of this kind; the importance of appropriate punishment and personal and general deterrence; the respondent's unfavourable personal circumstances and antecedents (including a prior history of family violence offences); and all mitigating factors (see [27]-[32]).

Buss J also held that 18 months imprisonment for grievous bodily harm was also manifestly inadequate in light of the seriousness of the offending (especially the injuries the victim sustained in trying to defend herself and the fact that the respondent was significantly larger and more powerful than the victim) and all other relevant factors (see [39]-[40]).

In a minority judgment, Mitchell JA also upheld the appeal. This was in light of a number of factors including that His Honour found that the respondent's offending was a serious example of grievous bodily harm. It was particularly significant that the injury sustained by the victim was a defensive wound, the level of violence was high, the victim did not provoke the attack and she was no threat to the respondent. Mitchell JA also noted that it was a significant aggravating factor that the offence occurred in a family and domestic relationship (see [95]-[96]).

***Conomy v Western Australian Police* [2016] WASCA 31 (18 February 2016) – Western Australia Court of Appeal**

'Breach of violence restraining order' – 'Evidence issues' – 'Following, harassing, monitoring' – 'Unrepresented litigant'

Charge/s: Breach of violence restraining order.

Appeal type: Application for leave to appeal from Supreme Court's decision to refuse leave to appeal.

Facts: The appellant was convicted of breaching a violence restraining order by sending three text messages to the complainant. He was arrested and participated in a video-recorded interview. Leave to appeal to the Supreme Court against conviction and sentence was refused.

Issue/s: Whether the primary judge erred in refusing to grant leave to appeal against conviction. The appellant was self-represented. The grounds were interpreted as raising issues including that:

1. The DVDs of the recorded police interview should not have been admitted in circumstances where the discs served to the appellant were labelled differently and were blank.
2. The magistrate erred by basing his decision on the evidence of the recorded interview which was 'not worthy of any significant weight'.
3. The evidence was not capable of establishing, beyond reasonable doubt, that the interim violence restraining order was still in force, and had not been amended, at the time of breach.
4. The primary judge's reasons were inadequate.

Decision and Reasoning: The appeal was dismissed. In relation to ground 1 above, there was no substance to the appellant's allegations. The labelling of the DVDs was immaterial and even if the discs were blank, the appellant made it clear at trial that he was aware of their contents. There was no issue about the authenticity of the recording, and no challenge as to its fairness (See [8]). Second, the magistrate based his decision on all the evidence before him and indicated that, even without reference to the recorded interview, there was a compelling case the appellant breached the order (See [9]). Third, it was open to the magistrate to be satisfied beyond reasonable doubt that the interim order was still in force at the time of breach. It was implicit in the complainant's evidence that the interim order was still in force. The appellant made no suggestion to any witness in cross-examination that the interim order was not still in force. Statements in the recorded interview reflected the appellant's understanding that the order was still in force. Nothing in the evidence suggested the order had been cancelled or amended (See [12]). Finally, the primary judge's reasons clearly explained why he concluded that none of the grounds had any reasonable prospects of success (See [13]).

***Conomy v Maden* [2016] WASCA 30 (18 February 2016) – Western Australia Court of Appeal**

'Following harassing, monitoring' – 'Interim violence restraining order' – 'Questioning witnesses' – 'Stalking' –

‘Systems abuse’ – ‘Unrepresented litigant’

Charge/s: Stalking.

Appeal type: Application for leave to appeal from Supreme Court’s decision to refuse leave to appeal.

Facts: The appellant and the complainant went on six dates. The complainant made it clear she did not want to see the appellant again. The appellant repeatedly sent her emails, letters and text messages. She took steps to discourage further communication including obtaining an interim violence restraining order which prohibited contact. But the appellant persisted. The appellant was charged with a stalking offence and fined $3000. Leave to appeal against sentence and conviction was refused in the Supreme Court.

Issue/s: Whether the primary judge erred in finding that none of the grounds of appeal against conviction had any reasonable prospect of success.

Decision and Reasoning: The appeal was dismissed. None of the many and detailed grounds of appeal that the appellant advanced had any reasonable prospect of success. Some of the reasons for this finding included that the magistrate was correct in treating the existence and breach of the interim violence restraining order as relevant to the complainant’s subjective fear and apprehension and assessing whether the communication could reasonably be expected to cause fear or apprehension in the complainant (See ‘Primary Ground 5B/Appeal Ground 6’ [96]).

Additionally, the appellant argued that the objective element of the stalking offence was not satisfied because he could not reasonably have expected his actions to have intimidated a normal person. However, the question was not what the appellant could reasonably have expected but rather whether the manner of his communication with complainant could reasonably be expected to cause her fear or apprehension. Further, the magistrate did not give inordinate weight to the evidence of the complainant because the complainant’s evidence was central to questions of whether the communications occurred, and whether the manner of these communications subjectively caused her fear and apprehension (See ‘Primary Grounds 9A and 9B/Appeal Grounds 9 and 10’ [109] - [110]).

Finally, the magistrate did not err in assessing the complainant to be a reliable witness and did not err in refusing to permit the appellant to ask certain questions. The appellant, an unrepresented litigant, had a ‘tendency to become distracted by, and fixated on, issues not significant to the question of his guilt of the charged offence’. The appellant was entitled to ask questions of the complainant relevant to matters in issue

at trial. However, the magistrate had a responsibility to ensure the appellant did not abuse this right by the manner and length of his cross-examination of the complainant (See 'Primary Ground 16/Appeal Ground 12' [115]-[118]).

'The paramount responsibility which a judicial officer presiding over a criminal trial owes to the community is ensuring that the accused person receives a fair trial. However, the judicial officer also owes other concurrent responsibilities to the community. In a case such as the present they include a responsibility to see that the accused does not utilise the proceedings as a vehicle for harassment of the alleged victim. The exercise of that responsibility will require vigilance in confining an accused person to asking questions which are relevant to the issues raised for the court's determination' (See 'Primary Ground 16/Appeal Ground 12' [117]).

***The State of Western Australia v Stoeski* [2016] WASCA 16 (19 January 2016) – Western Australia Court of Appeal**

'Deterrence' – 'Murder' – 'People affected by substance abuse' – 'People with mental illness' – 'Physical violence and harm' – 'Rehabilitation' – 'Sentencing'

Charge/s: Murder (two counts).

Appeal Type: Appeal against sentence.

Facts: The first victim was the respondent's long term partner. He had an unfounded and delusional belief in her infidelity. He killed her by asphyxiation in their bedroom. After killing her he bound her head and neck with multiple layers of duct tape and wrote derogatory remarks across her forehead. The second victim was the respondent's long-term male friend and associate. He had an unfounded and delusional belief that his friend was spreading rumours about him. He stabbed him three times and struck him repeatedly to the head with a chrome vehicle component. The respondent had a history of mental illness and had ingested a substantial amount of illicit drugs in the period leading up to the offences. He was sentenced to life imprisonment with a non-parole period of 21 years for each count. The sentences were to be served concurrently.

Issue/s: Whether the non-parole periods were manifestly inadequate.

Decision and Reasoning: The appeal was upheld.

The Court held that these murders were at the upper end of the scale of seriousness. The killings were unprovoked and the first victim was extremely vulnerable as she was smaller in stature than the respondent

and isolated in her bedroom. The respondent treated the first victim in a degrading manner and he made no attempt to seek medical assistance. The killing has deprived their children of their parents (see further at [153]). Mitigating factors included his plea of guilty, genuine remorse and good prospects of rehabilitation. However, these mitigating factors were outweighed by the brutal and sustained nature of the attack and the respondent's entrenched drug abuse. The appellant's rehabilitation prospects had to be understood in the context of the drug abuse and the difficulty of predicting rehabilitation progress for offenders of that kind. As such, the main sentencing considerations were just punishment and personal and general deterrence. The non-parole period on each count was increased to 27 years.

***The State of Western Australia v Churchill* [2015] WASCA 257 (23 December 2015) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Alcohol' – 'Community protection' – 'Deterrence' – 'Male victims' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal type: State appeal against sentence.

Facts: The deceased was in a domestic relationship with the respondent. The day prior to the murder, the respondent approached the deceased with a broken bottle and threatened to kill him. The deceased told the respondent he wanted to leave her. The next day the respondent threw bottles at the deceased, threatened to kill him, and chased him wielding a bottle. Later, the respondent and the deceased drank alcohol together. An argument broke out in which the both the respondent and the deceased threatened to kill each other. At some time between that night and the next morning, both the respondent (who was intoxicated) and the deceased returned home. The respondent stabbed the deceased with two knives and assaulted him with an electric frypan, causing his death. In total, there were 14 stab injuries and 26 incised injuries. The respondent cleaned up the premises, changed out of her clothes, and went to a neighbour's place saying she had found the deceased injured. *'[The deceased] had been the victim of sustained physical abuse at the hands of the respondent, who the sentencing judge described as bigger and stronger than the 'weak and vulnerable' [deceased]. This case confirms the experience of those who work in the criminal justice system in this State that, particularly in alcohol and/or other drug fuelled dysfunctional relationships and communities, it is not uncommon for a male to be a victim of domestic violence'* (See [15]). The respondent was sentenced to life imprisonment with a non-parole period of 17 years.

Issue/s: The non-parole period was manifestly inadequate.

Decision and Reasoning: The appeal was allowed and the respondent resentenced to a non-parole period of 21 years. The nature and extent of the respondent's very significant prior record of violent offending underscored the need to give significant weight to the sentencing objectives of punishment, protection of the public and personal deterrence (See [35]). The circumstances of the respondent's offence placed it at the high end of the scale of seriousness of the offence of murder – she intended to kill the deceased, engaged in a 'sustained, prolonged, frenzied attack', used multiple weapons, and went to considerable lengths to cover up the murder. Her long standing alcoholism contributed to the crime. However, of greater significance, was 'her inability to control her volcanic eruptions of anger, and the regularity and normalisation of her use of violence' (See [37]). The only mitigating factor was the respondent's disadvantaged and dysfunctional upbringing.

Rimington v The State of Western Australia **[2015] WASCA 102 (29 May 2015) – Western Australia Court of Appeal**

'Arson' – 'Criminal damage by fire' – 'Damaging property' – 'Deterrence' – 'Mitigating factors' – 'mental illness' – 'Sentencing' – 'Totality'

Charge/s: Criminal damage by fire (4 counts).

Appeal Type: Appeal against sentence.

Facts: The appellant had recently separated from his wife and had commenced discussion relating to the distribution of assets. The appellant lit three fires. Count 1 related to the destruction by fire of the contents of business premises effectively owned and controlled by the appellant and his former wife. Count 2 related to damage caused by the same fire to a neighbouring unit and common property. Count 3 concerned a separate fire causing extensive damage to an investment property owned by the appellant's former wife. Count 4 related to a third fire causing extensive damage to the former family home and a car.' The total damage was worth approximately $1.5 million. The appellant pleaded guilty and was sentenced to a total effective sentence of 6 years' imprisonment, taking into account various orders of concurrency and cumulation.

Issue/s: Some of the issues concerned –

1. Whether the sentencing judge sufficiently took into account the appellant's depression as a mitigating factor.
2. Whether the sentencing judge placed excessive weight on general deterrence.
3. Whether the sentence was manifestly excessive, as it infringed the first limb of the totality principle.

Decision and Reasoning: The appeal was dismissed.

1. A psychiatrist's report expressed the view that the appellant's acute depression and adjustment problems relating to his separation mitigated against the seriousness of his actions and affected his capacity for sound judgment and self-control. The appellant's intoxication was also relevant (see at [30]). While the sentencing judge made a factual error by concluding that the appellant was taking anti-depressants, this error was not material. The sentencing judge expressly referred to the psychiatric report, and more specifically, the error did not affect the judge's assessment of the appellant's good prospects of rehabilitation.
2. The sentencing judge observed that general deterrence was the dominant sentencing factor in arson cases. The appellant submitted that this statement was in error because 'no one purpose of sentencing can be said to have the dominant role' as sentencing requires a 'sensitive approach' which involves weighing the purposes of punishment and all the relevant circumstances of each case (see at [41]). Beech J (with whom Buss JA and Mazza JA agreed) rejected this argument and confirmed that there is a consistent line of authority that general deterrence is the dominant sentencing consideration in cases of arson.
3. The Court found that this was a serious example of arson because the appellant lit three fires over 1 hour, the offending involved a degree of preparation and the offending was founded on the appellant's anger towards his former wife. The offences were founded on the appellant's anger towards his ex-wife and his intention was to destroy the properties so as to defeat her claim to them. That context aggravated the offending. The sentencing judge did take into account various mitigating factors including the appellant's remorse, good character, good rehabilitation prospects, low risk of re-offending and the fact he was suffering from depression when he committed the offences. Furthermore, the sentencing judge did consider issues of totality by ordering the sentences on counts 1 and 2 to be concurrent because they related to the same fire and ordered that the sentences on counts 3 and 4 be partially concurrent. As such, the Court found that the sentence imposed did bear a proper relationship to the overall criminality of the offending.

***X v Y* [2015] WASCA 70 (13 April 2015) – Western Australia Court of Appeal**

'Expert witness' – 'Self-represented litigants' – 'Social worker'

Appeal type: Appeal against parenting orders.

Facts: The appellant father and respondent mother were in a de facto relationship. They separated when the appellant attacked the respondent's father. The Family Court of Western Australia made parenting orders granting the appellant no time with the children. The appeal centred upon the report of a 'single expert witness', a social worker. The expert's report stated that the children did not wish to spend time with the father due to his violence towards their grandfather and his verbal abuse towards the children themselves ([25]).

Issues: Whether the magistrate erred in law by failing to take into account relevant matters and finding that the single expert witness was qualified as a witness.

Decision and Reasoning: The appeal was dismissed. The Court summarised the principles applicable to Family Court appeals at [61]-[64]. In relation to the evidence of the social worker, the Court held that it was open to the magistrate to admit the evidence: "[although] he was not a clinical psychologist, the nature of his expertise was known to the parties when the court ordered, by consent, that he be the single expert witness in the proceedings" [126].

***Oxenham v The State of Western Australia* [2015] WASCA 30 (18 February 2015) – Western Australia Court of Appeal**

'Aggravated assault occasioning bodily harm' – 'Aggravating factor' – 'Exposing a child' – 'Grievous bodily harm with intent' – 'Physical violence and harm' – 'Sentencing' – 'Separation'

Charge/s: Grievous bodily harm (GBH) with intent, aggravated assault occasioning bodily harm (aggravating factor – the appellant was in a family and domestic relationship with the victim).

Appeal Type: Appeal against sentence.

Facts: The appellant was in a de facto relationship for 8 years. After they separated, his former partner commenced a new relationship with a work colleague and the appellant reacted poorly. The appellant

attended his former partner's home and pleaded to recommence the relationship. The appellant went with his former partner to their children's bedroom. In the presence of their children, he demanded to see her phone. He read through her text massages, threatened to kill her and repeatedly kicked her in the shins. He then used his former partner's phone to lure her new partner to the house. When her new partner arrived, the appellant attacked him by punching him in the face and continued to kick and punch him while he lay on the ground, again in the presence of their child. He dragged her new partner outside. He taunted his former partner and children to look at the injuries that he was inflicting. The appellant forced his former partner to kiss her new partner while he was unresponsive on the ground and used substantial force to do this. He photographed her new partner's injuries and sent it to her friend. The injuries sustained by his former partner were relatively superficial, but her new partner sustained extremely serious injuries. The appellant had favourable antecedents with no relevant criminal history and was regarded generally as a person of good character. He pleaded guilty and was sentenced to a total effective sentence of 7 years and 6 months' imprisonment for both offences (six years' imprisonment for the GBH offence committed against the new partner and 18 months' imprisonment for the assault offence committed against his former partner).

Issue/s:

1. Whether the offence imposed for GBH was manifestly excessive.
2. Whether the total effective sentence infringed the first limb of the totality principle.

Decision and Reasoning: The appeal was dismissed.

1. The attack against his former partner's new partner was extremely serious and left permanent injuries. There were elements of premeditation and deception. The attack was not provoked and committed in the presence of children. The offending was at the upper end of the scale of criminality for offences of a similar character. See in particular at [34] where Martin CJ (Buss JA and Mazza JA agreeing) noted at [34], *'The breakdown of personal relationships is an inevitable aspect of contemporary society, and often causes anger, frustration and jealousy. (The appellant) responded to those emotions with particular brutality…The community rightly expects the courts to denounce conduct of this kind in the clearest of terms, and to impose a sentence which reflects the community's abhorrence of serious offences of domestic violence of this character.'*
2. The appellant submitted that the total effective sentence of 7 years and 6 months' imprisonment did not bear a proper relationship to the criminality involved in the two offences. Martin CJ (Buss JA and Mazza

JA agreeing) held that while both offences were related and stemmed from the same motive, they were separate and required distinct punishments. In those circumstances, and also considering the various mitigating and aggravating circumstances, the Court held that the sentence was not disproportionate to the overall criminality involved.

***Hill v The State of Western Australia* [2015] WASCA 17 (22 January 2015) – Western Australia Court of Appeal**

'Accident' – 'Directions and warnings for/to jury' – 'Evidence' – 'Manslaughter' – 'Physical violence and harm' – 'Relationship evidence'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction.

Facts: The appellant and the deceased knew each other for 25 years prior to her death. At one stage, the relationship broke down (at which point the deceased obtained a restraining order against the appellant) but it later improved to the extent that the appellant began to live in a bus on land nearby the deceased's property. Following a series of escalating arguments (involving the appellant doing things such as throwing objects at the deceased and threatening to kill her), a neighbour found the deceased's body.

Issue/s: Whether the trial judge's directions to the jury with respect to the defence of accident (under section 23B of the *Criminal Code (WA)*) were adequate.

Decision and Reasoning: The appeal was dismissed. Hall J (with whom McLure P and Mazza JA agreed) held that the trial judge made sufficient reference to the evidence of a medical expert. He adequately explained that the jury must have regard to that evidence in considering the severity of the injuries to determine whether the death was foreseeable for the purposes of the defence of accident. In considering that defence, the jury was also obliged to consider the whole of the evidence including that the appellant knew the deceased was vulnerable and the previous history of violence and threats of violence (see at [62]).

***Hansen v The State of Western Australia* [2014] WASCA 229 (11 December 2014) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Assault causing bodily harm' – 'Exposing children' – 'Grievous bodily

harm' – 'Physical violence and harm' – 'Sentencing' – 'Totality'

Charge/s: Assault causing bodily harm, grievous bodily harm.

Appeal type: Application for an extension of time to appeal and appeal against sentence.

Facts: One of the victims, Ms Lee, was in a family and domestic relationship with the appellant, an Indigenous man. She had previously been in a relationship with the other victim, Mr Hill, and they had 2 children together. Count 1 related to an occasion where Ms Lee, Mr Hill and their children were out walking. The appellant, who had followed them, struck Mr Hill with a stick out of anger and jealousy. Mr Hill suffered bruising to his elbow, a fracture to the ulna bone, bruising to the back and loin, and a laceration and bleeding in and around the kidney. Count 3 occurred when the appellant and Ms Lee were in Ms Lee's bedroom and he asked her for sex. She refused and the appellant punched her seven to ten times to her face with a closed fist. Ms Lee underwent surgery to repair a fractured eye socket and sustained ongoing psychological trauma. In sentencing, to accommodate the totality principle, His Honour reduced the individual sentence he would have imposed on each offence by six months. The total effective sentence was 6 years' imprisonment.

Issue/s: The total effective sentence infringed the first limb of the totality principle namely, 'the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences, viewed in their entirety and having regard to the circumstances of the case, including those referable to the offender personally' (See [22]).

Decision and Reasoning: The application for an extension of time within which to appeal was granted but the appeal was dismissed. The total effective sentence of 6 years' imprisonment properly reflected the appellant's overall criminality having regard to all the circumstances of the case (See [27]). These offences were serious examples of their type. The offences were 'brutal, sustained and completely without justification'. The victims were defenceless and the injuries they sustained were significant. In count 1, the appellant used a weapon capable of causing serious harm. In count 3, the appellant beat his domestic partner who was in bed and therefore vulnerable. The sentencing judge was correct to emphasise the need for general deterrence. There was very little that could be said by way of mitigation (See [24]).

McCardle v McCardle [2014] WASCA 129 (15 July 2014) – Western Australia Court of Appeal

'Appellant a legal practitioner' – 'Application for violence restraining order' – 'Delay' – 'Family law matters' – 'Following harassing, monitoring'

Appeal type: Extension of time within which to commence the appeal, appeal against decision dismissing application for violence restraining order.

Facts: The appellant originally obtained a restraining order against the respondent in Adelaide in March 2010 which expired in March 2012. The appellant then obtained an ex parte interim violence restraining order (VRO) in Western Australia on 11 July 2012. This was obtained on the basis that the appellant had received telephone calls from the respondent on at least 33 occasions in mid-2012. Prior to final orders being given in relation to the ex parte VRO, the respondent made an application to strike out proceedings on the basis that they were an abuse of process in light of the determination of family law matters in the Federal Magistrates Court. The Magistrate made orders cancelling the July 2012 order in March 2013.

In June 2013, the appellant appealed to the District Court. The respondent brought an interlocutory application seeking orders to have the appeal struck out. The respondent's application was allowed. His Honour noted, amongst other things, that the appellant (herself a legal practitioner) had chosen not to seek a fresh restraining order on the basis of any actions since July 2012. There was no suggestion that the respondent had telephoned the appellant since July 2012. It was accepted that the original grounds of the 2012 interim VRO were 'stale' and 'sufficiently minor' so as to not justify the costs of the appeal.

Issue/s: Whether the appellant should be given an extension of time within which to commence the appeal against the decision of the District Court?

Decision and Reasoning: The application for an extension of time within which to appeal was dismissed. In terms of prospects of success, it was arguable that the judge erred by 'understating the degree of domestic and family violence' evidenced by the 'blocked number' telephone calls, the alleged verbal abuse of the appellant from the respondent in the call she answered, and the failure to take into account incidents which allegedly occurred after July 2012' (See [34]). However, it was nevertheless not in the interests of justice to grant the extension of time. The Court of Appeal was unable to make orders for the application for a VRO to be heard by a magistrate. Instead the matter would have to be returned to the District Court for a rehearing of that appeal (See [39]-[40]). The length of delay that would result was not minimal. The appellant's stated reasons for not filing an appeal notice on time were unsatisfactory for a legal practitioner (See [37]). Further, there was no impediment to the appellant seeking a fresh violence restraining order, particularly in relation to any events since July 2012 (See [41]).

***Baron v Walsh* [2014] WASCA 124 (18 June 2014) – Western Australia Court of Appeal**

'Act of abuse' – 'Evidence' – 'Evidence not previously adduced' – 'Following, harassing, monitoring' – 'Fresh evidence' – 'Legally available procedures' – 'Systems abuse' – 'Violence restraining order'

Appeal Type: Appeal from the District Court which upheld the respondent's appeal against the imposition of a violence restraining order.

Facts: The appellant and respondent were in a relationship for six months. The respondent sent offensive text messages which led the appellant to apply for an interim violence restraining order (VRO). This was made a final order. The respondent successfully appealed to the District Court against the imposition of the order. The District Court judge held that the text messages from the respondent to the appellant did not contain any threats, and, more specifically, 'threats to take, and/or the pursuit of, "legally available procedures" were incapable of constituting acts of abuse' (under s 11A of the *Restraining Orders Act 1997*) (see at [46]). The only messages capable of constituting acts of abuse were four offensive text messages, which were not repeated and the appellant apologised for them.

Issue/s:

1. Whether the respondent's use of 'legally available procedures' is capable of amounting to an act of abuse within the meaning of s 11A of the *Restraining Orders Act 1997*.
2. Whether the District Court judge erred by admitting affidavit evidence that was not adduced or admitted at the final restraining order hearing in the Magistrates' Court.

Decision and Reasoning: The appeal was upheld.

1. The respondent's use of 'legally available procedures' included making complaints to the appellant's employer's regulator (she was employed as a nurse) regarding her professionalism, commencing minor claim proceedings, making multiple interlocutory applications in the VRO application and making a perjury complaint to police. McLure P, (with whom Mazza JA and Chaney J agreed), noted that the use of legally available procedures, of itself, will not normally amount to an 'act of abuse'. However, if legally available procedures are used or threatened with an improper intent or purpose, this could amount to a tort (such as malicious prosecution or abuse of process) or a criminal offence. Her Honour gave the following examples at [63] –

   'a threat made with intent to cause or compel a person to settle an action is a criminal offence under s

338A of the Code: Tracey v The Queen [1999] WASCA 77 [11] - [16]. See also The Queen v Jessen [1996] QCA 449; (1996) 89 A Crim R 335. Further, the commencement or maintenance of legal proceedings for an improper collateral purpose is a tort: Williams v Spautz [1992] HCA 34;(1992) 174 CLR 509; Flower & Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 163 ALR 744. A knowingly frivolous and vexatious claim is also an abuse of process.' Her Honour went on at [65] – *'To threaten and/or take detrimental action against a person to achieve a collateral outcome is improper (at least) and is to behave in a manner that is intimidating, even if the action involves a person availing himself of legally available procedures. I do not intend to suggest that this is an exhaustive statement of behaviour that is intimidating.'*

The Court held that the Magistrate was correct in finding that the respondent's behaviour of using legally available procedures was intimidating and noted that the excuses given by the District Court judge for the respondent's behaviour 'underscore the failure to recognise the impropriety of the respondent's conduct' (See at [68]). The respondent's conduct therefore amounted to an 'act of abuse'.

2. This ground was also upheld. The relevant evidence concerned the relationship of the parties and what the appellant could have reasonably expected from the break up. Its use led the District Court judge to conclude that the purpose of the Act is not to 'protect a person from the fallout of a failed relationship'. This was incorrect, the purpose of the Act is, 'to protect people from acts of abuse in appropriate circumstances whether or not they occur in the fallout of a failed relationship' (see at [78]). This evidence was used notwithstanding that it was not adduced at the final hearing in the Magistrates' Court and it was not substantially litigated by the parties at the hearing. The judge was in error in using this evidence.

***Cramphorn v Bailey* [2014] WASCA 60 (21 March 2014) – Western Australia Court of Appeal**

'Assault' – 'Breach of police order' – 'Cross-examination' – 'Physical violence and harm' – 'Unrepresented litigant' – 'Violence restraining order'

Charge/s: Assault, breach of police order.

Appeal type: Appeal against conviction.

Facts: The prosecution case was that the appellant and her de facto partner, the complainant, were travelling

in a vehicle when the appellant punched the complainant in the mouth. The appellant stopped the vehicle in the middle of the road and a further altercation occurred between them in which the appellant clawed at the complainant's face. Police issued the appellant with a 24-hour police order which the appellant breached by sending the complainant two abusive text messages. The appellant was convicted after trial in the Magistrates Court of unlawful assault, and breaching a police order. At trial, the appellant was entitled to the protection of a previously imposed violence restraining order issued against the complainant. The appellant appealed to the Supreme Court but the appeal was dismissed. At every stage of proceedings, the appellant represented herself.

Issue/s: One of the issues was that the trial in the Magistrates Court was unfair to the appellant.

Decision and Reasoning: The appeal against conviction was dismissed. Although the proceedings before the magistrate were not in respect of the violence restraining order issued against the complainant, the existence of the order was relevant to the proceedings because there was likely to be considerable antipathy between the appellant and the complainant, and there was a risk that the presence might intimidate the unrepresented appellant (See [88]). The trial posed difficulties for the unrepresented appellant, particularly with respect to her having to directly cross-examine the complainant (See [90]). However, having regard to the whole of the trial record, the trial was conducted fairly. The magistrate explained the trial process to the appellant. He controlled the complainant and the appellant, intervening when required during cross-examination and when the complainant interrupted the appellant's evidence (See [91]). Despite arguing to the contrary, the appellant was permitted by the magistrate to cross-examine the complainant about the history of the domestic violence relationship. She declined to do so (See [92]). Further, the appellant was not entitled to use an intermediary for cross-examination. These provisions are only for the benefit of the person being cross-examined (See [104]-[106]).

***Beins v The State of Western Australia [No 2]* [2014] WASCA 54 (12 March 2014) – Western Australia Court of Appeal**

'Aggravated burglary' – 'Drug and alcohol programs' – 'Parity' – 'Physical violence and harm' – 'Women'

Charge/s: Aggravated burglary.

Appeal type: Appeal against sentence.

Facts: The female appellant had been in an off and on relationship with the male complainant. Prior to this,

the appellant had been in a relationship with her co-offender. The appellant and the complainant had been arguing and the argument became violent. The appellant contacted her co-offender and they formed a plan to assault the complainant. They went to the complainant's premises and the appellant's co-offender struck the complainant with a pole approximately 15 times. Amongst other findings, the sentencing judge found that the appellant was not the victim of entrenched domestic violence and could not claim any degree of diminished responsibility. Her co-offender had a history of severe domestic violence against him, his brother and their mother. The appellant was sentenced to 2 years and 8 months' immediate imprisonment. Her co-offender was sentenced to 2 years and 8 months' imprisonment, suspended for 2 years.

Issue/s: One of the issues was whether the sentence breached the parity principle.

Decision and Reasoning: The appeal was allowed. McLure P held that the totality of sentencing considerations could not justify the imposition of different types of sentence. The offenders were broadly comparable in terms of their personal circumstances, involvement with the police, and remorse and rehabilitation. McLure P noted that the sentencing judge cast the appellant as a 'siren' who manipulated and knowingly misused her 'childlike' co-offender and found that this was not justified by the evidence. The sentencing judge incorrectly concluded that the co-offender's rehabilitation required the incarceration of the appellant (See [48]). Pullin JA also upheld the appeal but for different reasons. His Honour found that the existence of extraordinary disparity in sentences breached the parity principle (See [82]). Mazza JA also provided his own reasons. Mazza JA noted that the disparity in sentences could not be rationally explained by differences in the circumstances of offending or of the offenders. The offences were not markedly different, their personal circumstances were similar, and both were amenable to programmatic intervention for their therapeutic needs (See [113]-[116]).

Rosewood v The State of Western Australia **[2014] WASCA 21 (29 January 2014) – Western Australia Court of Appeal**

'Deterrence' – 'Exposing a child' – 'Intoxication' – 'Mitigating factors' – 'Murder' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The appellant was in a domestic relationship with the deceased for 12 months prior to the offence and

had a 3-month old child. On the day of the offence, the appellant and deceased were drinking alcohol and an argument occurred. The appellant then stabbed the deceased in the chest. The deceased turned away and the appellant stabbed her twice in the back. The appellant witnessed 'chronic and acute' (see at [7]) domestic violence in his childhood. He had several prior domestic violence convictions against the deceased and other partners. The appellant was convicted on a plea of guilty. The sentencing judge accepted that the appellant was a high risk of violence in respect of intimate partners and a moderate risk in respect of other people. He was sentenced to life imprisonment with a non-parole period of 18 years.

Issue/s: Whether the non-parole period was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. McLure P (with whom Newnes JA and Mazza JA agreed) held that this was a serious example of offending of this kind. The deceased was unarmed. While the attack was impulsive and not premediated, this meant that the deceased and other people in the house had limited ability to defend her. The offence was committed in front of the deceased's family including young children. In relation to intoxication, her Honour noted at [15] – '*The fact that the appellant was heavily intoxicated at the time is not mitigatory. The sentencing objectives of personal and general deterrence weigh heavily in relation to acts of domestic violence that are committed when drunk or sober.'*

***Tunney v The State of Western Australia* [2013] WASCA 286 (17 December 2013) – Western Australia Court of Appeal**

'Aggravated assault occasioning bodily harm' – 'Aggravated burglary' – 'Breach of bail' – 'Breach of police order' – 'Damaging property' – 'Deterrence' – 'Emotional and psychological abuse' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Trespass' – 'Wilfully and unlawful destroying or damaging property'

Charge/s: Aggravated assault occasioning bodily harm, wilfully and unlawfully destroying or damaging property, aggravated burglary, breach of a police order, trespass, breach of bail.

Appeal Type: Appeal against sentence.

Facts: The appellant was in an 'on and off' domestic relationship with the victim for about three years. The aggravated assault charge involved the appellant standing over the victim who was on the floor of their living room. The appellant kicked her in the groin, which caused her to cry out and curl up into the foetal position in agony. The damaging property offence occurred the next day. While driving, the victim noticed the appellant

was following her in his truck. He called her and sent her text messages as she drove to a shopping centre. She entered the shopping centre. When she returned to her car she found that two tyres had been deflated.

Some months later, the victim arrived home to find the appellant inside. He began shouting at her. She fled and the appellant took a bag containing her passport and other belongings. He was issued with a 72-hour police order. He then breached that order the next day by making numerous phone calls to the victim at her work. The trespass charge involved the appellant entering the victim's home using a set of keys that he had cut without the victim's knowledge. The aggravated burglary charge occurred when the victim arrived home, again finding the appellant in the house. He attempted to kiss her and refused to leave. At one point, the appellant threw her onto a bed, ripped a necklace from her neck, struck her to the face and hit her on the head with his knees. Later the appellant entered into a bail undertaking in relation to these matters, which he breached by contacting the victim and asked her to look after him because he was sick. He insisted that she take him back to her home, where he remained until he was taken into custody. The total effective sentence imposed was 3 years 8 months' imprisonment.

Issue/s: One of the issues concerned whether the sentence infringed the totality principle.

Decision and Reasoning: The appeal was dismissed. The Court found that notwithstanding the appellant's 'favourable' antecedents, he was not truly remorseful, and considerations of personal and general deterrence remain important. The offending was sustained and designed to intimidate the victim physically and psychologically. He was not deterred from further offending notwithstanding the imposition of police orders and bail conditions. As such, the Court held that the total effective sentence did bear a proper relationship to the overall criminality involved, having regard to all the relevant circumstances. A substantial period of imprisonment was required.

***Silva v The State of Western Australia* [2013] WASCA 278 (4 December 2013) – Western Australia Court of Appeal**

'Deterrence' – 'Following, harassing, monitoring' – 'Murder' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The appellant's marriage to the deceased was marred by ongoing arguments. There had been prior

minor assaults. The appellant then discovered the deceased was having an affair. The appellant became obsessed about the deceased's fidelity, was jealous of her friendships with work colleagues and he demanded that she resign from her employment, which she refused. The appellant became aware that the deceased remained friends with the man with whom she had an affair. Before her death, the deceased took leave from work and the appellant monitored her phone calls and prohibited her from returning to work. His unhappiness with the deceased was increased because of her failure to participate in the family's morning prayer ritual. The appellant then killed the deceased in the living room by hitting her on the right side of a head on at least three occasions with a hammer that he had bought that morning. Mitigating factors included the appellant's early plea of guilty and good character. He was sentenced to life imprisonment with a 17-year non-parole period.

Issue/s: Whether the non-parole period was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Buss JA (with whom Mazza JA agreed) found that the seriousness of the offence was demonstrated by (among other things), the brutality and repetitive nature of the attack, the appellant's intent to kill the deceased, the fact the appellant confronted the deceased when she was alone and vulnerable and the history of domestic violence inflicted by the appellant on the deceased (see further at [40]). The Court upheld the following statement by the sentencing judge in relation to general deterrence –

'The law is clear that disputes between partners, no matter how emotionally hurtful, must be resolved peacefully. People must understand that marriage is not a licence to treat a spouse as a chattel and violence in the course of a marriage breakdown will be met with deterrent sentences. It is obvious that the minimum term must recognise the high value that the Western Australian community places on a person's life and a person's right to live without violence from their partner. Domestic violence continues to be a significant cause of violent death and serious injury in our community. The courts must impose sentences which continue to reflect the community's abhorrence and intolerance of such offending, particularly where it results in the death of the victim' (see at [42]).

***The State of Western Australia v Naumoski* [2013] WASCA 215 (18 September 2013) – Western Australia Court of Appeal**

'Aggravating factor' – 'Deterrence' – 'Grievous bodily harm with intent' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing'

Charge/s: Grievous bodily harm with intent.

Appeal Type: Appeal against sentence.

Facts: The respondent and the victim were married and had a young daughter. Their relationship ended. When the respondent returned to the victim's unit to retrieve his property, the victim called police due to his behaviour. He left before police arrived. He then returned to the unit. The victim again called police who issued the respondent with a 24-hour move-on notice. The following evening, the respondent entered the unit using his own key, confronted the victim, struck her on the top of her head, placed his hands around her neck then stabbed her multiple times. The victim managed to exit the unit while the respondent chased after her and continued to stab her in the back. The victim almost died and suffered extremely serious injuries and is disfigured for life. She lost the use of one hand and use of her thumb on the other hand and could no longer look after her daughter on her own. The mental effects were also severe – she became depressed, highly dependent on others, unemployed and 'cannot stand the sight of herself' (see at [11]). The appellant had a previous conviction for violence and the sentencing judge noted that he was intoxicated at the time of the offence and had a propensity for violence whilst intoxicated. He was sentenced to 5 years' imprisonment and was made eligible for parole.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was upheld. McLure P (with whom Buss JA and Mazza JA agreed) noted that the offending was premediated, with the respondent having waited more than an hour for the victim to return home. He acted 'out of hate related to his wife's attempt to take control of her own life' (see at [21]). See in particular at [25]-[41] where McLure P provided summaries of all comparable cases. Her Honour described this offending as 'high on the scale of seriousness just short of the worst category', noting its premeditated nature, ferocity, the nature and extent of the harm and the tragic effect on the victim. A further aggravating factor was that the respondent intended not only to do her grievous bodily harm but to disfigure her body. This made the sentence manifestly inadequate notwithstanding the mitigating factors and the respondent was resentenced to 7 years' imprisonment with no change of parole eligibility.

Her Honour discussed the prevalence of domestic violence and the fact that is often connected with conduct in a relationship that, 'understandably generates high emotion, volatility and associated loss of control.' Notwithstanding, the fact that violence occurs in a domestic relationship is not a mitigating factor (see at [43]). As to whether it would be an aggravating factor, her Honour stated at [41]– '*I am not persuaded that the*

sentencing subtleties are appropriately conveyed by characterising the domestic relationship (whether past, existing or anticipated) setting as itself aggravating the offending' and at [43], '*Deterrence is called for in relation to all offences involving serious violence, domestic and otherwise.'*

***Abfahr v The State of Western Australia* [2013] WASCA 87 (5 April 2013) – Western Australia Court of Appeal**

'Deterrence' – 'Failing to report car accident' – 'Failing to stop after car accident' – 'Grievous bodily harm with intent' – 'Orders affecting children' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Suspended sentence'

Charge/s: Grievous bodily harm with intent, failing to stop after a car accident, failing to report a car accident to police.

Appeal Type: Application for leave to appeal against sentence.

Facts: The appellant had been in a relationship with the victim for 16 years. They had two children. Both parties claimed to have been the subject of threats and violence by the other. The appellant was served with an interim violence restraining order. He received a call from his children who said that their mother was not home and requested food. While claiming to be driving to a supermarket to purchase food for his children, he saw the victim at a bus stop. Once the victim had alighted from the bus, the appellant drove onto the footpath and struck her with the middle of the bonnet. She was thrown into the air and landed on the pavement, causing serious injuries. He continued without stopping – he claimed he saw her attempt to get up and assumed she was okay. A psychologist's report indicated that the appellant showed no empathy or remorse, and that rehabilitation would be difficult. Another psychologist's report indicated that the victim had significant mental health issues and serious difficulties in providing adequate care for her children. A total effective sentence of 5 years' imprisonment was imposed.

Issue/s:

1. Whether the trial judge erred in failing to suspend the term of imprisonment.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that in not suspending the term of imprisonment, the trial judge erroneously concluded that the inability of the victim to care for her children was due to the appellant's conduct. This argument was rejected. The trial judge's conclusions were that the victim was unable to care for her children due to her mental illness and that the appellant also contributed to her incapacity because of his having caused her grievous bodily harm.
2. In noting the 'egregious' nature of the offending, Buss JA (with whom McLure P and Mazza JA agreed) held that the sentence was appropriate. Punishment and deterrence (both personal and general) were the relevant considerations, in the absence of any significant mitigating factors and the appellant's lack of remorse and prospects of rehabilitation. While the sentence will cause the children to suffer 'hardship and distress' (see at [80]), his Honour was not persuaded that this amounted to an 'extreme or exceptional case' or that the hardship would be severe enough to warrant a lesser sentence.

McLaughlin v The State of Western Australia **[2012] WASCA 204 (12 October 2012) – Western Australia Court of Appeal**

'Arson' – 'Assault occasioning bodily harm' – 'Damaging property' – 'Physical violence and harm' – 'Possess weapon' – 'Sentencing' – 'Threat to kill' – 'Totality'

Charge/s: Assault occasioning bodily harm, making a threat to kill (two counts), arson, possessing a weapon.

Appeal Type: Application for leave to appeal against sentence.

Facts: After consuming alcohol, an argument between the appellant and his current partner ensued. He threw an ashtray which hit her in the back. He used a knife to cut the cord to a vacuum cleaner that she was using. Later, he spat on, grabbed and shook her. He then used the knife to smash a coffee table and stab walls while threatening to kill her, her son and others. He prevented her from leaving the lounge room. She was fearful of him and remained awake all night. After being arrested and released on bail for these offences (assault and threat to kill), the appellant broke into the home of his estranged wife, ignited a lounge chair and again made threats to kill by leaving voice messages on her mobile phone. The appellant had a history of violent offending against his partner and his estranged wife. A psychologist described him as having 'deep seated rejection fears' attributable to his traumatic childhood. The total effective sentence imposed was four years eight months' imprisonment.

Issue/s: Whether the total effective sentence infringed the first limb of the totality principle.

Decision and Reasoning: Leave to appeal was refused. The Court noted the extremely serious nature of arson and the fact that the maximum penalty is life imprisonment. Buss JA (Mazza JA agreeing) provided a summary of sentencing patterns for arson at [48]-[58]. The fire had a potential to destroy the house. His Honour also noted the threats to kill against his partner, 'occurred in the context of a persistent course of conduct designed to denigrate and humiliate (her) and cause her intense fear and anxiety' (See at [68]). As such, the sentence was not disproportionate.

Wongawol v The State of Western Australia **[2011] WASCA 222 (17 October 2011) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Community protection' – 'Deterrence' – 'Intention' – 'Murder' – 'People affected by substance abuse' – 'Physical violence and harm' – 'Sentencing' – 'Traditional Aboriginal and Torres Strait Islander punishment'

Charge/s: Murder

Appeal Type: Appeal against sentence.

Facts: On the day of the offence, the appellant (an Aboriginal man) was intoxicated and had been smoking cannabis. He returned home and an argument ensued relating to his partner's confession that she had been 'sexually misbehaving' (see at [4]). The appellant became angry and attacked her with a knife. The blows were struck mainly in the region of her legs. The sentencing judge held that the fact he mainly stabbed her in the legs, as opposed to, (for example) in the chest was not particularly relevant to establishing the requisite intention – the appellant struck a considerable number of blows randomly with the intention of causing serious harm. The appellant was sentenced to life imprisonment with a non-parole period of 14 years.

Issue/s:

1. Whether the sentencing judge failed to recognise the significance of the stabbing being in the legs when making conclusions with respect to the intention with which the blows were inflicted.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that he was a traditional full-blood tribal Aboriginal man and was familiar with

the concept of spearing or stabbing in the legs as punishment. The sentencing judge found that the appellant intended to hurt the deceased severely by punishing her for sexual misbehaviour. In the past, the appellant had self-harmed by stabbing himself and the deceased in the thigh. The appellant submitted that this was relevant to the sentencing judge's conclusion with respect to intention. This argument was rejected – McLure P (with whom Buss JA and Mazza J agreed) held that the number and distribution of the wounds 'reflect the frenzied nature of the appellant's attack on the deceased and more than adequately support the sentencing judge's finding' (see at [30]).

2. The appellant had a long history of violent offending. He was described as being 'aimless' and as having a problem of habitual intoxication and use of cannabis. The appellant submitted that the sentencing judge placed too much weight on these 'lifestyle issues' and grossly dysfunctional background. This argument was rejected – a psychologist's report confirms that the appellant uses violence in order to solve conflict. Further, his substance abuse contributed to his offending and he had limited insight into his problems. His prospects of rehabilitation were poor. As McLure P noted at [39] –

'This is a case where the protection of the community in which the appellant lives and both personal and general deterrence are very weighty sentencing considerations. The incidence of alcohol and drug fuelled violence within Aboriginal communities is distressingly high. A new generation of children are scarred. The cycle continues. Having regard to all relevant sentencing factors, there is no merit in the claim that the minimum period of 14 years is manifestly excessive.'

***Evans v The State of Western Australia* [2011] WASCA 182 (5 September 2011) – Western Australia Court of Appeal**

'Alcohol' – 'Insanity' – 'Murder' – 'mental illness' – 'Physical violence and harm' – 'Provocation'

Charge/s: Murder.

Appeal type: Appeal against conviction.

Facts: During an altercation, the male appellant slashed his fiancee's arm with a knife (the first injury). Realising the seriousness of the injury, the appellant dropped the knife and applied a tourniquet to her arm. The deceased further goaded the appellant to kill her. The appellant slashed her twice in the neck, causing her death (the second and third injuries). The deceased was a person who frequently consumed excessive amounts of alcohol. During the months prior to the death, the relationship between the appellant and the

deceased was characterised by frequent incidents of domestic violence, with the appellant usually being the victim. A few hours after the killing, the appellant was taken into custody and admitted to killing the deceased in a recorded interview. In the 8 years prior to the killing and thereafter, the appellant was admitted to psychiatric hospitals. It was accepted that he suffered psychotic episodes from time to time.

Issue/s:

1. The trial judge made material errors of law in his direction to the jury on the provocation defence resulting in a substantial miscarriage of justice.
2. The verdict of the jury was unsafe or unsatisfactory on the ground that the jury should have found the appellant insane at the time of the killing.

Decision and Reasoning: The appeal was upheld on ground 1 and a retrial was ordered. The State conceded that the trial judge made an error of law in his direction to the jury on provocation but argued that the error did not result in a substantial miscarriage of justice because the evidence was incapable of supporting the defence of provocation. McLure P (with whom Mazza J agreed) found that the evidence was capable of giving rise to a reasonable doubt as to whether the appellant was provoked to cause all three injuries. There was a resulting miscarriage of justice (See [142]-[143]). Pullin JA in dissent found that while the trial judge erred in directing the jury as to provocation (See [231]), there was no miscarriage of justice as provocation should not have been left as an issue to be decided by the jury. The appellant was no longer deprived of self-control when he caused the third injury (See [238]-[239]).

Ground 2 was dismissed. McLure P (with whom Mazza J agreed) held that it was reasonably open to the jury to fail to be persuaded on the balance of probabilities that the appellant was deprived of the capacity to know he ought not to kill the deceased. There was evidence in the police interview that the appellant was thinking rationally before and after the deceased's death (See [125]-[126]). Pullin JA, in a separate judgment, also held that while there was unanimous evidence from psychiatrists that the appellant suffered from a mental illness and that suffered from psychotic episodes, whether he was psychotic on the night of the killing and whether he lacked the capacity to know the act of slashing in the neck was wrong was a matter of controversy. Pullin JA was unable to conclude, on the balance of probabilities, that the appellant lacked the relevant capacity (See [219]-[220]). See also *Evans v The State of Western Australia* [2010] WASCA 34 (26 February 2010) and *The State of Western Australia v Evans [No 2]* [2012] WASC 366 (9 October 2012).

***O'Driscoll v The State of Western Australia* [2011] WASCA 175 (10 August 2011) – Western Australia Court of Appeal**

'Evidence' – 'Hearsay' – 'Murder' – 'Physical violence and harm' – 'Relationship evidence' – 'Remoteness of evidence'

Charge/s: Murder

Appeal Type: Application for extension of time for leave to appeal against conviction.

Facts: The appellant was convicted of the murder of his de facto partner.

Issue/s: One of the issues concerned whether the trial judge erred by admitting evidence of the relationship between the appellant and the deceased, particularly statements made by the deceased as to the nature of the relationship and previous violence she suffered at the hands of the appellant.

Decision and Reasoning: The appeal was dismissed. The prosecution relied on common law principles in relation to admissibility of the evidence. Martin CJ (with whom Pullin JA and Hall J agreed) at [25] – [41] considered various High Court decisions on the correct test to apply including *Wilson v The Queen* (1970) 123 CLR 334 and *Walton v The Queen* (1989) 166 CLR 283. The Court held firstly that the evidence was not hearsay, because it was only used to establish the deceased's state of mind. The jury could then draw an inference as to the nature of the relationship. The crucial issue was the way the evidence was used. If the jury had regarded the evidence as facts asserted by the deceased and then went onto conclude that the appellant was prone to violence, it would have been prejudicial to the accused. However, the prosecution did not use the evidence in this way and the trial judge directed accordingly. An argument that statements made by the deceased earlier than one or two weeks prior to her death was 'too remote in point of time' to be admissible was also rejected. The Court held that while it may be possible for evidence to be so distant as to be inadmissible, this was not the case here. The relationship was relatively short and the statements that were made completely spanned this period. This increased rather than reduced its probative value.

***MJS v The State of Western Australia* [2011] WASCA 112 (9 May 2011) – Western Australia Court of Appeal**

'Directions and warnings for/to jury' – 'Evidence' – 'Evidence of character' – 'Indecent assault in family or domestic relationship' – 'Indecent dealing with lineal relative under 16 years' – 'Physical violence and harm' – 'Sexual and

reproductive abuse' – 'Sexual penetration of a lineal relative under 16 years' – 'Violence restraining order'

Charge/s: 18 charges of a sexual nature relating to the appellant's two biological daughters.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant was charged with various sexual acts relating to his two daughters (see at [22]). He was convicted by a jury of 11 offences of indecent dealing, 4 offences of indecent assault and acquitted of three charges. There was previously an interim violence restraining order (VRO) in place against the appellant. The appellant later breached this order. Evidence of this breach and his subsequent imprisonment for a weekend was inadvertently admitted at trial after one of the complainants mentioned it during cross-examination.

Issue/s: Some of the issues in the appeal against conviction concerned –

1. Whether the trial judge should have discharged the jury after one of the complainants gave evidence during cross-examination of a prior breach of a VRO in place against the appellant.
2. Whether the directions of the trial judge in respect of this evidence were sufficient.

Decision and Reasoning: The appeal against sentence was upheld but the appeal against conviction was dismissed.

1. The appellant submitted that the admission of the interim VRO evidence was inadmissible and so prejudicial it required the trial judge to discharge the jury. The appellant also submitted that this failure to discharge the jury led to further inadmissible evidence concerning other VROs and alleged breaches which compounded the initial prejudice. Mazza J (with whom Buss JA and McLure P agreed) held that the only basis upon which this evidence could be admissible was with respect to the appellant's character. Generally, evidence of bad character is inadmissible but can be admissible where an accused puts their character in issue, in which case the prosecution is able to call evidence of bad character in rebuttal (see at [144]). In this case, the accused asserted that he was of good character. As such, the prosecution was entitled to adduce rebuttal evidence. The evidence of the VROs could only be admissible for that purpose.

   The Court held that in isolation, the making of an interim VRO was not of relevance to an accused's character. However, the evidence also included the alleged breach of the VRO. Mazza J held that a breach of a VRO 'amounts to deliberate disobedience of a court order' and 'is conduct which is prima facie inconsistent with the usual behaviour of a person of good character. It is evidence capable of

rebutting an assertion of good character' (see at [153]). As such, it was admissible. However, the evidence that he had spent a weekend in jail was not relevant to character and thus inadmissible, but capable of being dealt with by judicial direction. Furthermore, even if the VRO evidence was inadmissible, it was general in nature – 'There was no detail as to when the VRO was made, who was the protected person, what was the basis for the order and what the appellant did to breach it' (see at [157]). As such, any potential prejudice could be dealt with by judicial direction.

2. The Court held that while the trial judge's directions in relation to this evidence could have been 'fuller', they were sufficient. It would have been desirable for him to 'use the authority of his office to confirm that a court had not determined on its merits whether a final VRO should be made'. However, the judge explained to the jury the ex parte nature of an interim order. While the judge did not explicitly tell the jury that it could only take the breaches into account for the purposes of character, he did tell the jury that the State's case was that these breaches were relevant to character and that the ex parte VROs and the time spent in jail were irrelevant. This was sufficient for a reasonable jury to understand that the evidence was only relevant in relation to the appellant's character.

The State of Western Australia v Cheeseman **[2011] WASCA 15 (19 January 2011) – Western Australia Court of Appeal**

'Aggravating factor' – 'Assault occasioning bodily harm' – 'Deprivation of liberty' – 'Deterrence' – 'Fines' – 'Mitigating factors' – 'People living in regional, rural and remote communities' – 'People with mental illness' – 'Physical violence and harm' – 'Reconciliation' – 'Sentencing' – 'Threat to kill'

Charge/s: Deprivation of liberty (two counts), assault occasioning bodily harm, threatening unlawfully to kill.

Appeal Type: Appeal against sentence.

Facts: The first victim (K) was the respondent's former partner, with whom he had a 2-year old child. The second female victim (C) commenced an intimate relationship with K. The respondent believed that the relationship between K and C had begun before he had separated with K. After the separation, the respondent asked K and C to meet at his home to discuss their relationship with each other. The respondent then left with K, at which point an argument developed. The respondent refused to permit K to leave his car and detained her while he drove her back home. He prevented her from escaping the house. He then armed himself with a spear gun and loaded it with a barbed spear. C then returned to the respondent's home,

whereupon the respondent pointed the spear gun at her, forced her to enter the house and prevented her from leaving. C refused to give the respondent her car keys. In response, the respondent punched C hard in the left cheek which knocked her down. He then picked her up by the throat and lifted her from the ground. He made a number of threats to kill C. C was left with severe injuries and the mental effect has been 'profound'. She was in fear of her life (see at [47]-[53]). He later reconciled with K. There was no evidence of domestic violence by the respondent towards K before he became suspicious about her relationship with C. He was sentenced to 12 months' imprisonment (conditionally suspended for 18 months) for both counts of deprivation of liberty, fined $1000 for assault occasioning bodily harm and sentenced to 24 months' imprisonment (conditionally suspended for 18 months) for threatening to kill. These terms (as well as a fine for unrelated offending) were imposed concurrently which resulted in a total effective sentence of 2 years' imprisonment, conditionally suspended for 18 months and a $2000 fine.

Issue/s: Some of the issues concerned –

1. Whether the fine imposed for assault occasioning bodily harm was manifestly inadequate.
2. Whether the sentencing judge erred in suspending the terms of imprisonment by not having sufficient regard to the seriousness of the conduct and the impact on the victims
3. Whether ordering the sentences be suspended resulted in a sentence that was manifestly inadequate.

Decision and Reasoning: The appeal was upheld in respect of issues 1 and 3.

1. Buss JA (Mazza J agreeing) noted that the assault against C was serious, unprovoked, committed against an unarmed victim who offered no resistance and part of a prolonged episode of intimidation. The fact that the respondent was armed with a spear gun was likely to have increased the victim's fear. The context of the assault (the breakdown of the domestic relationship between the respondent and K and the new relationship between K and C) made personal and general deterrence relevant. This made a $1000 fine manifestly inadequate notwithstanding the respondent's personal circumstances, including that he was suffering from a mental illness. McLure P agreed and noted that a fine cannot be justified on totality grounds and 'falls well short of appropriately recognising the degree, effect and context of the physical violence inflicted by the respondent on C' (see at [1]).
2. Buss JA (Mazza JA agreeing) held that the remarks of the sentencing judge did sufficiently refer to the seriousness of the conduct and the impact on the victims, as he noted that the issue of suspension required him to consider all aggravating and mitigating factors as well as the objective features of the

offence (see at [89]).

3. Buss JA (Mazza JA agreeing) noted that the deprivation of liberty and threat to kill offences were objectively very serious. His Honour disagreed with the sentencing judge and noted that a matrimonial breakdown, reconciliation and the presence of a child in the relationship cannot be regarded as mitigating factors. However, the fact that the respondent's mental state has improved following therapy could indicate progress towards rehabilitation. Nevertheless, the seriousness of the offending and the associated need for deterrence outweighed other factors such as rehabilitation and mercy. McLure P noted that C suffered greater actual and threatened violence than K, such that it was difficult to understand the sentencing judge's explanation for suspending the deprivation of liberty and threat to kill sentences.

   See also her Honour's remarks at [3] – '*The circumstances to which the sentencing judge referred are neither unique nor mitigatory. The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C.'*

   As such, these offences warranted immediate imprisonment. A total effective sentence of 18 months' immediate imprisonment was imposed.

***Papas v The State of Western Australia* [2011] WASCA 3 (10 January 2011) – Western Australia Court of Appeal**

'Aggravated burglary' – 'Assault occasioning bodily harm' – 'Breach of protective bail conditions' – 'Criminal damage' – 'Damaging property' – 'Deterrence' – 'Exposing a child' – 'Mitigating factors' – 'Obstructing a public officer' – 'People affected by substance abuse' – 'People with mental illness' – 'Physical violence and harm' – 'Separation'

Charge/s: Aggravated burglary (two counts), assault occasioning bodily harm, criminal damage, obstructing a public officer, breaching protective bail.

Appeal Type: Appeal against sentence.

Facts: The complainant was the father of the appellant's former partner. The appellant attended the complainant's house and obtained entry. He was confronted by the complainant who demanded he leave. A verbal altercation occurred, at which point the appellant's former partner came to the aid of the complainant. The appellant then grabbed her by the hand and bent her middle finger which caused it to fracture. One another day, the appellant again obtained entry to the house, this time by throwing a pot plant through a door. His former partner was inside and she barricaded herself and her 2-year-old son in a bedroom with a chest of drawers. The appellant rammed the door with a table which enabled him to unlock the door. She managed to flee the bedroom and the appellant was detained by a neighbour until police arrived. The appellant suffered from depression and anxiety and was intoxicated on both occasions. He had no relevant criminal history. A total effective sentence of 12 months' imprisonment was imposed.

Issue/s:

1. Whether the trial judge erred in failing to find that the appellant's depression and anxiety reduced his moral culpability and the need for general deterrence.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. McLure P (with whom Mazza J agreed) held that the appellant's mental impairment did not impair his functioning to the extent that his culpability or the need for general deterrence should be reduced. Instead, the offending can be attributed to his level of intoxication.
2. The Court held that the seriousness of this offending was heightened by the extent of the actual and threatened violence committed by the appellant, and as McLure P (Mazza J agreeing) noted – 'The seriousness of the offending is not reduced because it occurred in the context of a failed or failing domestic relationship. It is necessary to protect actual and potential victims of domestic violence' (see at [16]). The mitigating factors, such as the appellant's remorse and good character were given sufficient weight by the sentencing judge.

***Austic v The State of Western Australia* [2010] WASCA 110 (11 June 2010) – Western Australia Court of Appeal**

‘Circumstantial evidence’ – ‘Directions and warnings for/to jury’ – ‘Evidence’ – ‘Murder’ – ‘Offender character references’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Sentencing’

Charge/s: Murder.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant was convicted for the murder of the deceased; with whom he had been in a casual sexual relationship for 12 months. The deceased was 22 weeks pregnant with the appellant’s child at the time of her death. The appellant was intoxicated, attended the deceased’s home and stabbed her 21 times in her bedroom. He then walked back to his home, threw away the knife and left the deceased. He destroyed evidence that could implicate him in the murder. The prosecution’s case relied purely on circumstantial evidence. He was sentenced to life imprisonment with a non-parole period of 25 years.

Issue/s: Some of the issues concerned –

1. Whether the trial judge erred by not directing the jury that they had to be satisfied beyond reasonable doubt of certain facts because these facts were indispensable links in the chain of reasoning towards a finding of guilt.
2. Whether the non-parole period was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The Court held that there was a very strong circumstantial case against the appellant and the trial judge’s directions were sufficient for the jury to understand that they had to be satisfied beyond reasonable doubt that the appellant had the opportunity to and in fact did kill the deceased.
2. The appellant submitted that the 25-year non-parole period was excessive given various comparable cases, the objective seriousness of the crime and the appellant’s personal circumstances. He also submitted that the fact that the crime did not involve multiple victims or multiple offences and the lack of any lengthy premeditation was significant. The appellant had no relevant criminal history. He was previously in a de facto relationship which did not involve violence, had two daughters and had numerous references attesting to his good character. The appellant’s increasing alcohol consumption had been a factor in the breakdown of the relationship. He had been suffering from depression for which he was receiving psychological treatment. However, the Court found the non-parole period was not manifestly excessive. A significant aggravating factor was the deliberate killing of the unborn child.

While a psychologist's report indicated that the appellant was a low risk of re-offending, he refused to admit guilt or show remorse. Further, the crime was committed 'in a calculated and savage manner and for a shallow and appalling motive' (see at [186]) such that little weight could be afforded to the appellant's antecedents.

***Heijne v The State of Western Australia* [2010] WASCA 86 (11 May 2010) – Western Australia Court of Appeal**

'Intention' – 'Motive' – 'Murder' – 'People who are gay, lesbian, bisexual, transgender, intersex and queer' – 'Physical violence and harm' – 'Self-defence'

Charge/s: Murder.

Appeal type: Appeal against conviction.

Facts: The male appellant and the male deceased had been in an intimate personal relationship for nearly 25 years. The prosecution case was that this relationship deteriorated particularly because of the development of a relationship between the appellant and a younger man (Mr X). The prosecution argued that the appellant strangled the deceased. The defence case was that the evidence did not exclude that the deceased died of a heart attack not strangulation. The defence further asserted that the State failed to prove the appellant had a motive to kill or intention to kill the deceased. The defence also relied on self-defence against an unprovoked assault. The appellant asserted that the deceased struck his face with the back of his right hand before the strangulation occurred.

Issue/s:

1. Whether there was material on which the jury acting reasonably could fail to be satisfied that the prosecution had excluded the application of self-defence against unprovoked assault.
2. There was insufficient evidence to enable the jury to be satisfied beyond reasonable doubt that the appellant intended to cause some form of injury, of whatever kind, falling within the definition of grievous bodily harm.
3. The trial judge erred in directing the jury as to causation.
4. The trial judge gave inadequate directions with respect to the intent necessary to sustain a charge of

murder.

Decision and Reasoning: The appeal was dismissed. First, there was no basis in the evidence for the jury to have entertained the possibility that the appellant reasonably apprehended that he faced death or grievous bodily harm. Assaults committed by the deceased on the appellant in the past were not of a kind to cause apprehension of death or grievous bodily harm, and the deceased striking the appellant with the back of his hand would similarly not be of a kind to cause such fear (See [44]-[49]). Further, the jury could not have entertained the possibility that the only practical means of averting the threat was through application of force to the deceased's throat. Other options open to the appellant included brushing the deceased off or punching him in the head (See [50]).

Second, there was ample evidence sustaining the inference that the appellant intended to cause some form of injury within the definition of grievous bodily harm. This included the pathological evidence given in relation to the extent of the deceased's injuries, the evidence of animosity in the relationship, the appellant's description of the struggle preceding the killing, the appellant's evidence that when he realised the deceased was dead he thought he must have strangled him, the appellant's conduct before and after the killing, the appellant's admissions to Mr X and another man, and a witness's evidence of lies told by the appellant (See [71]).

Third, the trial judge did not err in his approach to the issue of causation in his direction to the jury. He reminded the jury of the most pertinent evidence on the subject and clearly identified the issue they had to resolve and the manner in which they should resolve it (See [81]-[85]).

Finally, the trial judge specifically referred the jury to all the evidence that was relevant to the intent of the appellant at the time of the death. The evidence was relevant to both the question of intent required to sustain the charge of wilful murder, and the intent required to sustain the charge of murder. The difference between those two intentions was made abundantly clear to the jury (See [106]-[107]).

Note: the High Court refused special leave to appeal (see *Hellings v The Queen* [2005] HCATrans 255 (27 April 2005)).

***Evans v The State of Western Australia* [2010] WASCA 34 (26 February 2010) – Western Australia Court of Appeal**

'Accident' – 'Alcohol' – 'Hearsay evidence' – 'Insanity' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal type: Appeal against conviction.

Facts: The male appellant and the deceased woman had been in a seven-month relationship. The police had been involved on at least five occasions including an incident in which the appellant broke the deceased's hand. The deceased, an alcoholic, was not inclined to cooperate with police and declined to provide a statement on these occasions. The appellant convinced police that he was the victim of the deceased's aggression. On 13 November 2007, the appellant caused the deceased knife wounds to her right arm, her neck, and her chest near her armpit. After cutting her neck, the appellant pressed on the deceased's chest, accelerating her blood loss and her death. During an interview with police, the appellant admitted that he killed the deceased. The appellant had a history of mental health problems from August 1999. At trial, evidence was adduced from Ms Maton about conversations she had with the deceased regarding acts of violence perpetrated upon her by the appellant. The two broad issues at trial were whether the State negated the defence of accident and whether the appellant had established the defence of insanity.

Issue/s: Some of the issues included that –

1. The trial judge erred in her directions on accident.
2. The trial judge erred in her directions on insanity.
3. The trial judge erred in directing the jury as to the use that could be made of out-of-court statements made by the deceased.

Decision and Reasoning: The appeal was allowed. Wheeler JA (with whom Owen JA agreed) found it unnecessary to deal with ground 1. The respondent accepted that the trial judge erred in her classification of the infliction of the fatal wound as an 'event' for the purposes of applying the defence of accident. The appeal would have to be allowed unless there was no substantial miscarriage of justice. Wheeler JA found it unnecessary to undertake such analysis because the appeal was allowed on other grounds (See [46]). On ground 1, McLure P found there had been a substantial miscarriage of justice (See [15]-[17]).

Wheeler JA (with whom Owen JA agreed) allowed the appeal on ground 2. The trial judge failed to adequately direct the jury that the appellant could be found not guilty by reason of insanity, even if the appellant knew what he was doing was contrary to law (See [57]-[58]). Further, the trial judge failed to direct

the jury that, when considering whether the appellant was deprived of the capacity to know he ought not to do the act, the issue was whether the appellant was incapable of reasoning with some moderate degree of calmness as to the wrongness of the act or of comprehending the nature or significance of the act of killing (See [61]-[62]). McLure P held that the trial judge failed to direct the jury that a person can lack the relevant capacity even if they know the act is unlawful (See [24]-[27]).

The appeal was also allowed on ground 4. Wheeler JA (with whom McLure P and Owen JA agreed) noted that the evidence of Ms Maton was provided in graphic and striking detail, and had the potential to be significantly prejudicial to the appellant. Not only was the evidence admitted but the trial judge invited the jury to treat the account given by Ms Maton as evidence of the truth of the matters recounted to her. This direction was plainly erroneous (See [72]-[74]). A retrial was ordered. See *Evans v The State of Western Australia* [2011] WASCA 182 and *The State of Western Australia v Evans [No 2]* [2012] WASC 366 (9 October 2012).

***Atherden v The State of Western Australia* [2010] WASCA 33 (26 February 2010) – Western Australia Court of Appeal**

'Aggravating factor' – 'Effect of guilty plea' – 'Intention' – 'Murder' – 'Non-parole period' – 'Physical violence and harm' – 'Violence restraining order' – 'Vulnerable - women'

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The appellant had been in a relationship with the deceased for some three and a half years before the relationship ended. The deceased obtained a violence restraining order against the appellant which prohibited him from coming within 100m of her home or work and within 20m of her person. The appellant went to the deceased's house for the purpose of discussing the restraining order – he wanted to ask the deceased to remove the restraining order because it would be difficult to renew his licence as a car dealer with the restraining order in place. When she yelled at him to get off the property, he hit her with a rubber mallet multiple times until she lost consciousness. He then hit her with a brick. She sustained severe head injuries and she later died. The appellant did not seek medical attention for the deceased. He was sentenced to life imprisonment with a minimum non-parole period of 16 years. The appellant had some history of domestic violence – an ex-partner had obtained a violence restraining order against him after he stalked her and punched her several times.

Issue/s:

1. Whether the original sentence was within range of comparable sentences and whether the trial judge gave sufficient weight to the prosecution's concession that the appellant only intended to cause grievous bodily harm, not death.
2. Whether the trial judge failed to give sufficient weight to the early plea of guilty in combination with the long non-parole period.

Decision and Reasoning: The appeal was upheld in respect of ground 2.

1. This argument was dismissed. Wheeler JA (with whom Owen JA and McLure P agreed) firstly accepted that given the value which the community places on human life, it is likely that (generally) killing with intention to cause death will be more seriously regarded than killing with the intention to cause grievous bodily harm. However, this will not always be the case, and intention is only one of a range of relevant factors in determining an appropriate sentence (see at [30]-[31]). Indeed, there were other aggravating factors which were relevant in this case. These included – '*the brutality of the attack on a defenceless woman, the fact that two weapons were used, the stalking behaviour which occurred in the months leading up to the attack, the presence of the violence restraining order, and the appellant's callous disregard for the victim's obvious need for medical attention'* (see at [48]).
2. The trial judge did not state that the guilty plea was a mitigating factor for which some reduction in sentence should be made. Furthermore, both parties accepted that that a non-parole period of 16 years was severe for an offence involving no premeditation and a relatively brief (albeit violent) attack. Wheeler JA stated that where an early plea can be regarded as a mitigating factor, sentencing judges should expressly state in open court that a reduction in sentence has been made for that reason (see at [45]). The non-parole period was reduced to 14 years.

***The State of Western Australia v Bennett* [2009] WASCA 93 (26 May 2009) – Western Australia Court of Appeal**

'Damaging property' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Stealing motor vehicle' – 'Threat to kill' – 'Totality' – 'Wilful damage by fire'

Charge/s: Stealing a motor vehicle, wilful damage by fire, threat to kill.

Appeal type: Appeal against sentence.

Facts: On a number of occasions, the male respondent threatened the female complainant who he was in a relationship with. The respondent put his face against her, and said aggressively, 'I'll do 25 over you. If I can't have you, no one will have you'. A few days later, the complainant told the respondent she was leaving him, and he said to her, 'If you think you're going to walk away I will kill you'. A few days after that, the intoxicated respondent grabbed the complainant's throat and said, 'I am going to kill you. If I can't have you, no one can'. Afraid, the complainant left for a few days. The drunk respondent then stole a motor vehicle and crashed it into a wall at the front of the house. He spread petrol through the house and lit it on fire. The sentencing judge sentenced the respondent to 15 months' imprisonment on the arson offence, 6 months' imprisonment for stealing a motor vehicle, and 9 months' imprisonment for the threat to kill. Her Honour recognised that the offence of threatening to kill took place on a different occasion but thought all sentences should be served concurrently.

Issue/s: Some of the grounds included –

1. The sentences imposed on the offences of arson and threat to kill was manifestly inadequate.
2. The sentencing judge erred in her application of the totality principle.

Decision and Reasoning: The appeal was allowed. The respondent was resentenced to an aggregate sentence of 4 years and 9 months' imprisonment. The sentence of imprisonment was manifestly inadequate. The arson offence required the imposition of a deterrent sentence. The respondent's personal circumstances carried less weight because this was a case of arson but regardless these did not provide much by way of mitigation. The appellant was a mature age, had an extensive criminal record, and his substance abuse problem could only be offered as an explanation rather than an excuse for his behaviour. This was a very serious case of arson *'because the respondent's offending was apparently motivated by revenge, it caused the destruction of a residential building, and it was against the background of a violent domestic relationship'* (See [48]-[51]). Further, the threat to kill was a very serious one. It was made against a history of domestic violence, and the complainant was afraid of the respondent (See [54]-[56]).

Miller JA additionally held that the sentencing judge erred in her application of the totality principle. There was nothing crushing about imposing a cumulative sentence on the threat to kill offence. The sentence on the offence of threat to kill should instead have been lowered to reflect the totality principle (See [58]-[62]).

***Gilmour v The State of Western Australia* [2008] WASCA 42 (28 February 2008) – Western Australia Court of Appeal**

'Aggravated stalking' – 'Attempt to pervert the course of justice' – 'Following, harassing, monitoring' – 'Systems abuse' – 'Temporary protection order'

Charge/s: Aggravated stalking, attempting to pervert the course of justice.

Appeal type: Appeal against sentence.

Facts: After the marriage between the male appellant and female complainant ended, the complainant noticed the appellant following her around. Several items went missing from her home. The appellant then damaged the property of a complainant's male friend resulting in the imposition of a violence restraining order (VRO). The appellant subsequently breached this VRO. An altercation between the appellant and complainant led to the appellant being charged with assault and damage to property. He was acquitted on the assault charge. The appellant continued to follow the complainant around, telephoned her and would not speak, and made noises around her property at night. The complainant obtained a VRO. Notwithstanding this, the appellant changed a white light bulb at the complainant's home to a red bulb. Cameras she installed at her property also detected the appellant wearing a gorilla mask and holding a knife in his hand. The appellant also attempted to pervert the course of justice in relation to this incident by requesting his neighbours provide him with an alibi. He received a term of 4 years' imprisonment in respect of the aggravated stalking and 10 months in respect of the attempt to pervert the course of justice, to be served cumulatively. That produced a total effective sentence of 4 years 10 months' imprisonment.

Issue/s:

1. The sentence in respect of the aggravated stalking offence was manifestly excessive, particularly in view of the appellant's antecedents.
2. The sentencing judge erred in imposing cumulative sentences.

Decision and Reasoning: The appeal was dismissed. The sentence was not manifestly excessive. The personal circumstances favourable to the appellant (being only the absence of a prior record) could have limited weight in the circumstances, having the regard to the absence of remorse and a clear need for personal and general deterrence. This was determined and persistent pursuit of the complainant, in circumstances where she had obtained a restraining order and where he had been charged with offences

arising out of his conduct towards her (See [12]-[13], [16]). Wheeler JA further held that the sentencing judge did not err in making the sentence of attempting to pervert the course of justice cumulative. This was more serious offending than the giving of a false name to police or entering a false recognisance. It was an attempt to pervert the course of justice in relation to an offence of a relatively serious nature and involved the use of innocent and unconnected third parties to engage in criminal conduct (See [17]-[19]). See *Gilmour v State of Western Australia* [2005] WASC 243 (8 November 2005).

***Lydon v Lydon* [2008] WASCA 8 (8 February 2008) – Western Australia Court of Appeal**

'Elder abuse' – 'Emotional abuse' – 'Expert evidence' – 'Meaning of emotional abuse' – 'Protection order' – 'Provocation' – 'Sibling abuse' – 'Threat to kill'

Proceedings: Protection order appeal.

Facts: The appellant man was the respondent to a protection order protecting his mother and sister. The appellant resided in a shed adjacent to the mother's home, which his sister frequently visits. All parties are in dispute in relation to the deceased father/husband's estate, discussions in relation to which resulted in the allegations of emotional abuse upon which the protection order was granted. The brother stood in his sister's way, blocking her from leaving, got in her face, poked her in the chest and shouted at her and her mother. There was an allegation that on at least one occasion he made a threat to kill his sister. The order included terms that the appellant not contact the other parties or enter the house.

Issue: Whether provocation defence applies to application for restraining order; Whether finding of emotional abuse requires supportive expert testimony.

Decision and Reasoning: Appeal dismissed.

The argument that provocation was required to be considered was misconceived as the Magistrate's decision was founded on emotional abuse.

Le Miere AJA held that:

> [49] Emotional abuse is not defined in the Act. Emotional abuse involves improper or inappropriate behaviour, verbal or non-verbal, that adversely impacts upon another person's emotional wellbeing. Emotional abuse improperly excites strong unwelcome feelings in another. Emotional abuse may involve

> coercion by intimidation, inducing fear, stalking, or harassment, that is words, conduct or action, usually repeated or persistent that, being directed at a specific person, annoys, alarms or causes substantial emotional distress to that person.
>
> [50] There are two aspects to emotional abuse. The first is the adverse impact upon another person's emotional wellbeing. The second is the behaviour that causes the negative impact upon the emotional wellbeing of another.

And:

> [57] It is open to the court to be satisfied that a person has behaved in an ongoing manner that is emotionally abusive towards another person without the benefit of any psychiatric or psychological evidence. Behaviour that is emotionally abusive is behaviour that is reasonably capable of adversely impacting upon another person's emotional wellbeing. This does not require psychological or other expert evidence.

Iveson v The State of Western Australia **[2005] WASCA 25 (23 February 2005) – Western Australia Court of Appeal**

'Assault occasioning bodily harm' – 'Breach of restraining order' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Throttle' – 'Unlawful detention'

Charge/s: Unlawful detention, assaults occasioning bodily harm (x 2), breach of restraining order.

Appeal type: Appeal against sentence.

Facts: The male applicant struck the female complainant, his de facto partner, across her back with a pole (the first assault). The applicant retrieved a knife from the kitchen but did not use it. The complainant tried to escape out the front door but the applicant prevented this. He began to throttle her (the second assault). The complainant tried to attract attention through the open front door but the applicant shut the door (unlawful detention). The complainant passed out. When she came to, she was again choked by the applicant and lost consciousness. The complainant obtained an interim violence restraining order which the applicant subsequently breached by telephoning her. The sentencing judge imposed an aggregate sentence of 4 years and 10 months' imprisonment.

Issue/s: Some of the grounds of appeal included –

1. The total criminality of the applicant's conduct did not justify the imposition of a cumulative sentence for the second, more serious assault. The conduct of the unlawful detention merged with the throttling of the complainant.
2. The proper application of the totality principle would lead to the conclusion that the aggregate term of 4 years and 10 months was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. First, the individual sentences were well within the discretion of the sentencing judge. The two assaults were of a different character to each other and were further distinguishable from the unlawful detention offence because this did not cause her bodily harm. The decision to order the sentence on the second assault (throttling) to be cumulative was also appropriate in recognition of its particular seriousness and additional criminality (See [25]-[26]). Second, the aggregate term was not manifestly excessive. Although the applicant was a young man, his criminal history was not as bad as it might have been, he was remorseful, and appreciated that his conduct was largely driven by the effects of his drug abuse, the offences were very serious. The second assault was 'about as serious an example of this offence as it would be possible to find'. The applicant endeavoured to throttle the victim, she lost consciousness twice, he renewed his attack, he persisted in the attack even after she tried to escape, and he obtained a knife (which he did not use, to his credit). Further, he ignored the terms of the violence restraining order (See [31]).

***Brown v Roe* [2004] WASCA 210 (16 September 2004) – Western Australia Court of Appeal**

'Breach of violence restraining order' – 'Conditions of orders' – 'Consent' – 'Temporary protection order'

Charge/s: Breach of violence restraining order.

Appeal type: State appeal against dismissal of charges of violence restraining order.

Facts: The protected person (the former de facto wife of the respondent) obtained a violence restraining order (VRO). The respondent was charged with three offences of breaching the VRO by communicating or attempting to communicate with the protected person. There was no dispute that the protected person had contact with the respondent during the period the VRO was in place. However, there was a dispute between the parties as to how many times there was contact and whether it was made with the consent of the protected person. The magistrate dismissed the charges because he considered all the evidence showed the

protected person, by her actions prior to the contact alleged, had consented to the contact.

Issue/s:

1. The magistrate erred in law in finding that the protected person's earlier course of conduct could create a continuing general consent entitling the respondent to thereafter breach the restraining order.
2. The magistrate erred in fact in finding that the protected person consented to the respondent's breaches of the restraining order.

Decision and Reasoning: The appeal was allowed on ground 2. Counsel for the appellant argued that there could not be 'continuing general consent' given by a protected person to a person bound by a VRO. Barker J noted that this proposition was probably right *'but whether or not consent has been given to any particular contact must be decided on the facts of each case'* (See [14]). In relation to ground 2, Barker J held that the magistrate erred in finding that the protected person consented to the respondent's breaches. The evidence did not support such a conclusion (See [57]-[59]). Barker J further stated that, *'it is not appropriate for a Court, while a VRO is in place, effectively to suspend the operation of a VRO by taking the view that a person protected is inclined to use the VRO as a "walking stick", as the Magistrate in this case suggested'*(See [46]). As the protected person explained, it was sometimes easier to tolerate the applicant's presence and other times it was necessary to call police and enforce the terms of the order (See [42]).

'It may be recognised that, in many circumstances, the continuing relationship between persons who were once in a close personal relationship will be strained, especially after a VRO has been granted by a Court. Nonetheless, a person who is bound by a VRO must take all appropriate steps to ensure that the terms of the order are complied with. It may well be that, on some occasions, by virtue of a course of conduct, a person bound by the order may feel entitled to approach physically or telephone a protected person. It may be that a prior course of conduct in some cases implies a consent to approach the protected person in that way, at least initially. But if the protected person makes it plain that she or he does not consent to that contact or that initial contact continuing, then it behoves the person bound by the order to back off and strictly comply with the order' (See [44]).

***The State of Western Australia v Anderson* [2004] WASCA 157 (29 July 2004) – Western Australia Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Assault occasioning bodily harm' – 'Parole

eligibility order' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Remorse' – 'Threat to kill'

Charge/s: Assault occasioning bodily harm, threat to kill.

Appeal Type: State appeal against sentence.

Facts: While intoxicated, the respondent, an Aboriginal man, found the complainant (his de facto partner) in bed asleep with another man. The respondent slapped and punched the complainant which woke her. The respondent then pulled her from her bed and dragged her 200m down a street, at which point he hit her repeatedly with a steel stake and ripped her bra off. He then grabbed her throat, threatened to kill her repeatedly and pinned her to the ground. She was in genuine fear for her life. The respondent's criminal history included serious incidents of domestic violence committed against his former partner and other offences of violence. He was sentenced to 18 months' imprisonment for each offence, to be served concurrently. A parole eligibility order was not made.

Issue/s: Whether the sentencing judge erred in reducing the length of the sentence to allow for the fact that he did not make a parole eligibility order.

Decision and Reasoning: The appeal was upheld. The Court held that the sentencing judge erred by reducing the sentence on account of not making a parole eligibility order. Jenkins J (with whom Murray and McLure JJ agreed) noted that the sentence imposed at trial was significant, given the respondent's plea of guilty and the maximum penalties. However, the Court noted the seriousness of the offence and described it at [26] as 'close to the worst category of cases of this kind'. The offending was aggravated by the repeated use of a weapon and the complainant being humiliated by the removal of her bra which rendered her half naked during the beating. The context in which the respondent found the complainant amounted to 'some mitigation' but this was 'not significant', given the respondent's history of domestic violence and having previously undergone counselling in anger management and substance abuse (see at [28]). Indeed, an exchange with the sentencing judge showed that it was unlikely his plea was indicative of true remorse (see at [14]). The sentence was increased to two years' imprisonment.

***Hellings v The Queen* [2003] WASCA 208 (3 September 2003) – Western Australia Court of Appeal**

'Aggravated stalking' – 'Following, harassing, monitoring' – 'Parole' – 'Physical violence and harm' – 'Propensity evidence' – 'Temporary protection order' – 'Threat with intent' – 'Totality' – 'Violence restraining order'

Charge/s: Aggravated stalking (x 2), threat with intent to prevent the complainant doing an act she was lawfully entitled to do.

Appeal type: Appeals against conviction and sentence.

Facts: While in a relationship with the male applicant, the female complainant were in a relationship obtained two restraining orders. The relationship ended and she obtained another violence restraining order. The applicant was charged with two counts of aggravated stalking. Further, he was charged with making a threat with intent to prevent the complainant doing an act she was lawfully entitled to do because of a 10-page letter he sent to the complainant. This was ‘abusive in the extreme’ and threatened violence against the complainant if she participated in the court action. The applicant was acquitted of the indictable offence for the first aggravated stalking charge and convicted of the alternative simple offence. He was found guilty in two other trials for the second indictable aggravated stalking offence and for the threatening letter. The complainant gave evidence of the relationship between her and the applicant. On occasions, her answers were unresponsive to questions and rambling but neither counsel made any effort to prevent the complainant answering questions in that way. The applicant was sentenced respectively to 6 and a half years’ imprisonment and 5 years’ imprisonment, cumulative. The applicant sought leave to appeal against these latter two convictions and sentences.

Issue/s: Some of the issues included –

1. A miscarriage of justice arose because evidence of the relationship should have been deemed inadmissible or should have been excluded on discretionary grounds in both the stalking and threatening letter trials.
2. In the stalking trial, the trial judge erred by failing to give adequate directions to the jury as the relevance of the ‘context’ or ‘relationship’ evidence and to the extent they could use it in their deliberations.
3. The trial judge erred in not making a parole eligibility order.
4. The sentences were manifestly excessive in all circumstances concerning their commission and, when accumulated, the total term of 11 and a half years’ imprisonment is disproportionate to the total offending behaviour.

Decision and Reasoning: The appeals against conviction and sentence were dismissed. First, while some of the complainant’s evidence in both the stalking and threatening letter trials was inadmissible or might have

been objected to on discretionary grounds, there was no resulting miscarriage of justice (See [34]-[36] and [60]-[63]). The evidence that was inadmissible or might have been excluded was insignificant having regard to the evidence that was admissible relating to relevant aspects of violence and harassment in the relationship (See [34]-[36]).

Second, a direction to the jury regarding the use of the complainant's relationship evidence as 'propensity evidence' was not necessary here. *'Such a direction will be very necessary in cases where there is a danger that the jury might reason that because an accused person has conducted himself in a particular way in the past towards his victim he might be found to have done so again at the time alleged by the indictment'* (See [39]). This was not the case here as there was no real dispute that the applicant breached the violence restraining order or that his actions fell within the meaning of pursuit (See [37]-[39]).

Third, the discretion not to order parole eligibility did not miscarry in this case. The applicant remained beset by a deep-seated psychological disorder. His aggression was unchecked and his past behaviour showed that if parole eligibility was ordered he would be likely to reoffend (See [85]-[87]).

Finally, the sentences were not manifestly excessive. The stalking offence was of a very serious kind. The offending occurred when the applicant was already charged with an offence of aggravated stalking, he failed to appear on the date for trial, and was eluding authorities. The nature of the stalking itself was serious and persistent with 160 calls over a 22-day period and overt threats being made (See [92]-[97]). Further, in relation to the threatening letter offending, the threats were credible, and 'serious and graphic'. The purpose of the threat, to prevent a person engaging in lawful activities, significantly aggravated the offending (See [98]-[99]). In terms of totality, the total sentence was not disproportionate to the offending given the persistent nature of the applicant's conduct, the period of time over which it took place and the serious nature of the offending (See [101]).

Note: the High Court refused special leave to appeal (see *Hellings v The Queen* [2005] HCATrans 255 (27 April 2005)).

***Owen v Jilba* [2002] WASCA 283 (17 October 2002) – Western Australia Court of Appeal**

'Breach of misconduct restraining order' – 'Following, harassing, monitoring' – 'Intimidation' – 'Lawful conduct'

Charge/s: Breach of misconduct restraining order.

Appeal Type: State appeal against dismissal of charge.

Facts: A misconduct restraining order was in place against the respondent which prevented him from behaving in an 'intimidatory or offensive manner' towards the complainant. He was charged with breaching that order by intimidating the complainant. The alleged intimidatory conduct included the respondent driving past the complainant's house and staring at her such that she felt intimidated. At trial, the Magistrate accepted a no case submission made by the respondent's counsel. The Magistrate concluded that an order which restrained the respondent from behaving in an 'intimidatory or offensive' way was not authorised by the *Restraining Orders Act 1997* (the Act). The Magistrate concluded that the respondent's alleged conduct would constitute an offence under the *Police Act 1892*. As such, because the Act only provides for the restraint of 'lawful' activities, an order which purported to restrain 'unlawful' conduct would fall outside the scope of the section. The Magistrate was also concerned with the subjective nature of the alleged intimidation. The order appears to prevent conduct which is objectively intimidatory, but the evidence referred to the subjective experience of the protected person.

Issue/s:

1. Whether the Magistrate was correct in concluding that the purported intimidatory behaviour was not 'objectively intimidating' within the meaning of the order.
2. Whether it is open for restraining orders to restrain unlawful conduct.

Decision and Reasoning: The appeal was dismissed.

1. Wheeler J agreed with the Magistrate's concerns and held that while conduct that is subjectively intimidating will often coincide with conduct that is objectively intimidating, 'it is self-evident that not all conduct which is experienced by a person as intimidating will be regarded as intimidatory from the point of view of an objective observer. The person who feels intimidated may be hypersensitive or may simply misunderstand the nature of the conduct' (see at [6]). In this case, the Court found that given there was little context or background before the Magistrate (such as acts of prior violence, property damage or threats), merely driving near someone's house and staring at them for a 'relatively short period' is difficult to perceive as intimidatory. While the respondent's conduct may have upset and intimidated the protected person subjectively, it could not objectively be regarded as intimidatory.
2. Wheeler J concluded that it was unlikely that the purpose of the Act was to substitute the sanctions of the criminal law or provide another means for deterring and punishing the commission of offences.

However, her Honour then held that the Magistrate erred in finding, 'that the mere fact that conduct which was alleged to be in breach of a restraining order was at the same time conduct which might be punishable under some other legislation took it outside the scope of the order, or alternatively meant that the order was not a "proper" order as applicable to such conduct' (see at [17]). Rather, the power to impose restraints of 'lawful activities and behaviour' under the Act should be read as granting a power to impose restraints on broadly lawful behaviour. Her Honour gave the example of an order purporting to restrain 'threatening' behaviour which could be lawful or unlawful behaviour, depending on the context. On the other hand, an order which restrains a person from murdering another would fall outside the scope of the Act. As such, depending on the circumstances and context, conduct in breach of a restraining order could be conduct which contravenes other legislation, and should not for that reason be determined to be outside the scope of the Act.

***Ugle v The Queen* [2001] WASCA 268 (31 August 2001) – Western Australia Court of Appeal**

'Assault occasioning bodily harm' – 'Exposing a child' – 'High risk' – 'People affected by substance abuse' – 'Perpetrator intervention program' – 'Sentencing' – 'Unlawful wounding with intent to cause grievous bodily harm'

Charge/s: Assault occasioning bodily harm, unlawful wounding with intent to cause grievous bodily harm.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was in a de facto relationship with the complainant and had 1 child. The assault offence occurred after the couple split up. The applicant repeatedly called the complainant. He approached the complainant as she walked to a shopping centre. He then grabbed her by the hair and punched her to the back and head. The applicant made numerous threats to kill the complainant during the assault and she attempted to run away but he dragged her back. The unlawful wounding offence involved the applicant forcing his way into the complainant's house. He stabbed her numerous times in the chest, back and neck and also attempted to stab her in the face. She pretended to be dead so as to stop the attack. While he was in remand, police officers made a number of telephone calls on the applicant's behalf indicating that he wished her to visit him. She did not do so and moved into a refuge after her release from hospital. However, her whereabouts was discovered by members of the applicant's family so she was forced to move. The complainant suffered lasting psychological injuries and her daughter was severely traumatised as the events occurred in her presence. The applicant was sentenced to three years' imprisonment for the assault offence

and 9 years' imprisonment for the wounding offence, to be served cumulatively such that the total effective sentence was 12 years, with parole eligibility.

Issue/s: One of the issues concerned whether the sentences were manifestly excessive.

Decision and Reasoning: Leave was granted and the appeal was upheld.

The appellant submitted that the 9-year sentence imposed for the unlawful wounding offence was excessive. Malcom CJ (with whom Steytler J and Burchett AUJ agreed) held that this was a vicious, pre-meditated attack which put the complainant's life in danger. Nevertheless, the sentencing judge's starting point for the wounding offence (before the applicant's guilty plea) was 12 years, which the Court held was excessive and that a starting point of 9 years would have been appropriate. It was noted at trial that the appellant remained a high risk of reoffending and prison based alternatives to violence programs to develop more appropriate strategies for resolving conflicts in relationships were recommended. This recommendation was not disapproved by the Court of Appeal. The appellant was re-sentenced to 6 years' imprisonment for the wounding charge, which resulted in a total effective sentence of 7 years and 4 months.

***Sandle v Crofts* [2001] WASCA 106 (30 March 2001) – Western Australia Court of Appeal**

'Assault occasioning bodily harm' – 'Exposing a child' – 'Mitigating factors' – 'Physical violence and harm' – 'Provocation' – 'Sentencing'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant arrived home late at night and asked his wife if she had had anyone in the house while he was overseas. She said no, at which point he punched her in the face. She then told him she did have a man in the house. He then started hitting her in the face and head with closed fists. He pulled her by the hair to a chair. He then hit her again and kicked her in the side while on the floor which caused her to black out. She was awoken by her son calling for her. Fearing for her life, she jumped off the balcony which was about three metres off the ground. The appellant tried to drag her up the stairs by the ankles which she resisted. She sustained severe injuries. The defence case was that the complainant's injuries were as a result of self-harm and she jumped off the balcony by choice. The appellant had no criminal history. He was sentenced to 12 months' imprisonment with parole.

Issue/s:

1. Whether the conviction was unreasonable and cannot be supported having regard to the evidence.
2. Whether the sentence was manifestly excessive and whether the Magistrate gave insufficient weight to the 'mitigating circumstances of great provocation' leading up to the incident.

Decision and Reasoning: The appeal was dismissed.

1. This argument was dismissed – see at [28]-[50].
2. McKechnie J found that this offence was 'a vicious assault by a husband upon his wife without reason or provocation' (see at [52]) and that in cases of domestic violence a sentence encompassing general and personal deterrence is called for. The Court then held that a 12-month term of imprisonment was called for given the circumstances of the offence. However, the Court did acknowledge that given this was the appellant's first offence (he had no history of violence), it may have been appropriate for the sentence to be suspended for two years so as to provide for rehabilitation. However, ultimately the 12-month sentence was within the discretion of the Magistrate.

***Mead v Couper* [2000] WASCA 345 (10 November 2000) – Western Australia Court of Appeal**

'Assault occasioning bodily harm' – 'Deterrence' – 'People living in regional, rural and remote communities' – 'Perpetrator intervention program' – 'Physical violence and harm' – 'Sentencing' – 'Victim'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against sentence.

Facts: The appellant had been told (untruthfully) that his de facto wife of six years had been sleeping with another man. The appellant accused her of doing so and then punched her in the face with a clenched fist multiple times. The complainant fell to the ground and the appellant kicked her in the back. He then grabbed her and carried her to a nearby yard. After the complainant yelled at the appellant to let her go, he released her and raised a wooden fence post above his head in a threatening way. The complainant suffered a broken jaw, facial swelling, various cuts and a sore back. The appellant was sentenced to 18 months' imprisonment with parole edibility.

Issue/s: Some of the issues concerned –

1. Whether the sentence was manifestly excessive or should have been suspended.
2. Whether the Magistrate erred in rejecting a supervision order coupled with an anger management course as a suitable penalty.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that: he had no prior convictions involving violence; he had favourable prospects of rehabilitation; he demonstrated remorse and entered an early plea of guilty; his wife did not want him to be sent to prison and a prison sentence would have a harsh effect upon his wife and children. The Court rejected these arguments. Steytler J held that the assault was 'vicious' and caused serious injuries. His Honour also upheld previous authorities which indicate there is a general public concern with domestic violence (see at [13]).
2. The sentencing Magistrate commented that some in the community would view a supervision order coupled with an anger management course as a 'soft option'. Steytler J held that the Magistrate was simply concluding that the offence was so serious as to justify only a period of imprisonment and that general deterrence was of paramount concern. His Honour held that general deterrence is an important consideration in cases of domestic violence and that it was open for the Magistrate to conclude that general deterrence would not sufficiently be met by anything other than a sentence of imprisonment.

***Bartlett v Scantlebury* [2000] WASCA 234 (29 August 2000) – Western Australia Court of Appeal**

'Assault' – 'Deterrence' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Sentencing' – 'Verbal abuse'

Charge/s: Assault.

Appeal Type: Appeal against sentence.

Facts: The appellant was in a de facto relationship with the complainant. On Christmas Day 1999, the appellant was heavily intoxicated. An argument occurred. The appellant then assaulted the complainant by squeezing her arms and pulling her hair while she attempted to leave the house. The Magistrate also accepted that the appellant had engaged in intimidatory and threatening conduct over the previous two days. The appellant's evidence differed substantially. The Magistrate found that the appellant's evidence was

contrived and manipulative and sought to paint his actions without fault. The Magistrate noted the protracted and serious nature of the offending. The complainant was left with no substantial physical injuries but there was a significant mental impact. The Magistrate also noted the fact that domestic violence cases are insidious, difficult to detect and have significant implications for the parties and the general community (see at [8]). The appellant was sentenced to 12 months' imprisonment with parole eligibility.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld.

Miller J disagreed with the Magistrate's conclusions that deterrence outweighed all other sentencing considerations and that the seriousness of the offence meant that the only justifiable sentence was imprisonment. His Honour noted that this case concerned only one assault, which was the combination of seizing the complainant by the arm and pulling her hair. The Court also held that the Magistrate had placed undue weight on the events leading up to the assault and noted that the appellant had only been charged with one offence. While it was appropriate to take into account the traumatic effect of the assault on the complainant and correct that assaults involving domestic violence call for deterrent sentences, 'this assault could not be categorised as being of the most serious kind' and the description of it as such was an 'over-reaction to the facts of the case' (see at [17]). Miller J therefore set aside the sentence of imprisonment and fined the appellant $6000.

***McCormack v The Queen* [2000] WASCA 139 (25 May 2000) – Western Australia Court of Appeal**

'Deterrence' – 'Evidence' – 'Following, harassing, monitoring' – 'Grievous bodily harm with intent' – 'Intent' – 'Mitigating factors' – 'mental illness' – 'Physical violence and harm' – 'Relationship evidence' – 'Sentencing'

Charge/s: Grievous bodily harm with intent, attempted murder.

Appeal Type: Appeal against conviction and application for leave to appeal against sentence.

Facts: The appellant and his wife began conversing together with a man online. After some time, the appellant's wife's conversations with this man became 'more flirty and intimate' and eventually his wife agreed to stop using the internet. She said goodbye to this man and she refused to tell her husband what they discussed in this conversation. The next day, after attempting to discuss the issue with his wife, he stabbed her in the upper back while she was in bed either asleep or attempting to sleep. He then stabbed her again as

she attempted to flee. He then unsuccessfully attempted to commit suicide. The appellant was found not guilty of attempted murder but guilty of grievous bodily harm with intent and was sentenced to 8 years' imprisonment with parole eligibility.

Issue/s: Some of the issues concerned –

1. Whether the trial judge erred in instructing the jury that they could use evidence of the relationship between the appellant and his wife in the months leading up to the attack for the purposes of determining intention.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that the judge had misdirected the jury in allowing them to use evidence of disagreements between the appellant and his wife about her use of the internet and the breakdown of their relationship to infer the presence of intent. Kennedy J (with whom Pidgeon and Ipp JJ agreed) rejected this argument and held that the relationship was clearly admissible evidence which the jury could take into account in considering the appellant's intention when he attacked his wife (see at [19]).
2. The sentencing judge took into account various mitigating factors including the appellant's high degree of emotional distress arising from his childhood which left him with a 'dependent personality disorder, chronic depression and anxiety'. The sentencing judge also took into account the victim impact statement, which described the devastating effect of the attack on the appellant's wife and children. The sentencing judge also correctly noted the need for personal and general deterrence in domestic violence cases and that no form of domestic violence is acceptable, especially when it includes the use of a weapon. Kennedy J (Pidgeon J and Ipp J agreeing) held that although the sentence imposed was high, it was within the range of the sentencing discretion and correctly weighed the mitigating factors (see at [27]) and the need for general deterrence.

***Vickers v Bailey* [2000] WASCA 136 (19 May 2000) – Western Australia Court of Appeal**

'Assault' – 'Deterrence' – 'Exposing a child' – 'People with mental illness' – 'Perpetrator intervention program' – 'Physical violence and harm' – 'Sentencing' – 'Suspended sentence' – 'Verbal abuse'

Charge/s: Assault (eight counts).

Appeal Type: Appeal against sentence.

Facts: The complainant was the appellant's de facto partner. After returning home intoxicated, the appellant 'lost the plot' after discovering that the cat had defecated on the bed. He assaulted the complainant. The following day, there was a further altercation and the appellant assaulted the complainant several times, including by squeezing her throat, throwing coffee and the contents of an ashtray over her and '(pushing) up her chin and started spitting into her face' in the presence of their children. The complainant then obtained a restraining order against the appellant but was unable to particularise many of the assaults due to the length and nature of the incident. The appellant conceded that the assaults were a build-up of frustrations over the last 12 months of the relationship and submitted that he suffered from depression, was remorseful and had never previously been violent towards the complainant. The appellant was sentenced to 9 months' imprisonment for each count, to be served concurrently.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The appellant submitted that notwithstanding the seriousness of the offending, a sentence of imprisonment was not the only option. Counsel for the respondent submitted that while each assault in isolation may have warranted a lesser penalty, the combination of all the counts and the time period over which they were committed aggravated the circumstances of the offence. The respondent also submitted that cases of domestic violence call for a sentence of personal and general deterrence.

Miller J agreed but emphasised that regard must be had to the individual circumstances of the case – *'I entirely agree with the submissions of counsel for the respondent that in general terms, a deterrent sentence for domestic violence offences will be called for. Much, however, depends upon the extent of the violence. Whilst here there were multiple offences and offences committed over a period of time, the complainant fortunately appears to have escaped injury. Further, seven of the offences appear to have occurred as one group of offences. Additionally, the appellant does not appear to have ever assaulted his de facto in the past, there being no allegation to that effect in the pre-sentence report, statement of facts or elsewhere and there being no victim impact statement from the complainant'* (see at [12]). Miller J noted the pre-sentence and psychological report which suggested the appellant needed counselling in relation to anger. The appellant himself initiated contact with a domestic violence program and was proposing to participate in that program. As such, the Court found that the appellant should have been given the opportunity of a suspended sentence

as an inducement for him to reform.

***Pillage v Coyne* [2000] WASCA 135 (19 May 2000) – Western Australia Court of Appeal**

'Breach of violence restraining order' – 'Importance of appropriate penalties' – 'Physical violence and harm' – 'Technical or trivial breach' – 'Temporary protection order'

Charge/s: Breach of violence restraining order.

Appeal type: Appeal against sentence.

Facts: The female appellant and the male respondent had been in a relationship for six years. The appellant obtained an interim violence restraining order against the respondent. The respondent was charged with one offence of unlawful assault and four offences of breaching a violence restraining order. The magistrate dismissed the charge of assault and two charges of alleged breach of a violence restraining order. He convicted the respondent of two charges of breach for going into the bedroom of the complainant in the early hours of the morning and communicating with her by telephone on the same morning. The magistrate gave no real reasons for either the acquittals or the convictions he recorded (See [6]). The magistrate also decided to impose no penalty, without giving any reasons for doing so (See [7]).

Issue/s: The magistrate erred in law and in fact in imposing no penalty or sentence.

Decision and Reasoning: The appeal was upheld. The magistrate made no reference to the provisions of the section of the Act allowing for the imposition of no penalty if certain preconditions are met. This constituted sufficient grounds for allowing the appeal. Further, this section also had no relevance in this case. The circumstances of the offence were neither trivial or technical (See [9]-[12]), and it was not unjust to impose a sentence in light of the fact that respondent was 42 years of age, employed with a regular income, and had a prior record of convictions (See [13]). Miller J also noted the clear social importance of the *Restraining Orders Act 1997.* His Honour provided, '*protected persons in the community generally must have confidence that restraining orders will be obeyed and complied with … [When] they are not, there must be significant consequences to support the fact that restraining orders mean something … [The] courts [must] ensure that their orders are not ignored'* (See [13]-[15]). Fines of $750 and $250 were substituted. See also *Dawes v Coyne* [2000] WASCA 134.

***Dawes v Coyne* [2000] WASCA 134 (19 May 2000) – Western Australia Court of Appeal**

'Physical violence and harm' – 'Temporary protection order' – 'Violence restraining order'

Proceeding: Violence restraining order.

Appeal type: Appeal from decision of magistrate to place appellant on violence restraining order.

Facts: The female appellant and the male respondent had been in a relationship for six years. The appellant obtained an interim violence restraining order against the respondent. The respondent was subsequently charged with one offence of unlawful assault and four offences of breaching a violence restraining order. The magistrate dismissed the charge of assault and two charges of breach of the violence restraining order but convicted the respondent of two charges of breach. No penalty was imposed in respect of these breaches. Without warning, the magistrate also placed the appellant on a violence restraining order.

Issue/s: The magistrate erred in placing the appellant on a violence restraining order.

Decision and Reasoning: The appeal was allowed and the violence restraining order set aside. The magistrate's actions were in every way a complete breach of the Act. The magistrate *'gave no indication of what it was that he intended to do, failed to alert the appellant to the possibility that an order might be made against her, and made no invitation to her to respond in any way'* (See [10]).

Miller J also noted that the magistrate *'started by stating that it was a tragedy that 'domestic matters of this sort get into the criminal court' and made the observation that 'both parties had been causing trouble for the police who do not want to be involved in these sort of things''.* These observations were *'entirely inappropriate'* (See [6]). See also *Pillage v Coyne* [2000] WASCA 135.

***Gallegos v R* [1999] WASCA 191 (6 October 1999) – Western Australia Court of Appeal**

'Complainant and applicant ex-lovers' – 'Complainant pregnant at time of assault' – 'Domestic violence' – 'Sentence not excessive'

Charge/s: Aggravated burglary and assault occasioning bodily harm

Appeal type: Application for leave to appeal against sentence.

Facts: the applicant and complainant shared a brief sexual relationship, but did not live together. The applicant saw the complainant in a night club in Fremantle. He spat on her and wiped faecal material on her

face. She went home. He followed her, without permission. At the house, he punched her repeatedly and kicked her. He also threatened her with a knife. The assault caused significant injuries to the complainant. The applicant pleaded guilty and, at first instance, was sentenced to three and a half years' imprisonment.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: Application refused. The applicant was self-represented. Chief Justice Malcolm considered that the way in which the earlier assault at the night club had preceded the aggravated burglary showed some persistence in the offending. It also exhibited an element of premeditation. The seriousness of the offending was elevated by the fact that the applicant knew that the complainant was pregnant at the time and the nature of the attack was such that no regard was paid to the safety of the foetus. His Honour said at [28]:

"It is now clear that in cases of domestic violence a sentence which gives effect to both personal and general deterrence will normally be called for. The circumstances may be such as to justify a substantial sentence of imprisonment".

Supreme Court

Kritskikh v Director of Public Prosecutions [2022] WASC 130 (21 April 2022) – Western Australia Supreme Court

'Admissibility of evidence' – 'Appeal against conviction' – 'Body-worn camera footage' – 'Credibility' – 'Evidence act 1906 (wa) ss 37 and 39g' – 'Failure to consider family violence provisions' – 'Failure to have regard to the dynamics of family violence' – 'Female perpetrator' – 'Intoxication' – 'Previous incident of family violence' – 'Self defence' – 'Self-defence' – 'Significance of being first reporter of incident' – 'Victim as (alleged) perpetrator'

Charges: Aggravated assault causing bodily harm x 1.

Proceedings: Appeal against conviction.

Issues:

1. Whether the court's reasoning was consistent with how a jury would be directed in respect of the family violence provisions
2. Whether evidence relevant to the appellant's degree of intoxication was wrongly excluded

Facts: The female appellant and Mr Williams were in a de facto relationship [19]. On the night of 1 December 2020, after the appellant and Mr Williams had attended a work function, Mr Williams formed the view that he ought to drive the appellant home because she was intoxicated, and carried her to his car. While Mr Williams was driving, the appellant allegedly attempted to take hold of the steering wheel, before punching and kicking Mr Williams. In response, Mr Williams repeatedly pushed the appellant away forcefully, making contact with her face. Mr Williams then called the police, who took photos of his injuries [4]-[8]. The appellant was found guilty by a Magistrate, and appealed on the following grounds:

1. Firstly, that the learned magistrate erred by excluding relevant evidence.
2. Secondly, that the magistrate erred by reasoning in a manner that was inconsistent with the family violence provisions of the Evidence Act 1906.

Decision and Reasoning: The appeal was allowed, with orders setting aside the convictions and ordering a retrial.

Justice Hall found that grounds 3, 4 and 5 were made out because the Magistrate 'failed to address the issue

of self-defence and reasoned in a way that was inconsistent with the family violence provisions' [126]. 'The circumstances of this case required that express consideration be given to self-defence and that, in dealing with that issue, the reasons be consistent with s 39E and s 39F.'

His Honour stated that self-defence was an issue due to 'evidence of the appellant being forced against her will into the car, the evidence of the significant injuries sustained by the appellant during the incident and the evidence of the prior incident of family violence' [112].

In considering the credibility and reliability of the evidence given by the appellant and Mr Williams, the Magistrate made the following findings:

1. Because Mr Williams had called the police in relation to both the current and previous altercations between the couple, his credibility was enhanced, and it was less likely that he had been the aggressor on those occasions.
2. '[T]he claim by the appellant that she had previously been the victim of domestic violence lacked credibility because she had not made a complaint about that earlier incident until after she was charged with the present charges' [122].

The Court found that in making these findings the magistrate failed to have regard to the dynamics of family violence (s 39F). In particular, the fact that victims of family violence often do not make reports to police. Instead, 'the magistrate relied on the delay in the appellant reporting the earlier incident of family violence to impugn' her credit [115]. Therefore, the magistrates' findings were inconsistent with s 39F [124].

In respect of the second ground of appeal, Justice Hall stated:

'The body worn camera footage was potentially cogent evidence of the appearance and condition of the appellant close in time to the alleged incident. The relevance of that evidence was that it went to the question of how intoxicated the appellant was. This was, as the magistrate noted, a matter of significance both to the likelihood that the appellant had behaved in the way alleged and in regard to the reliability of her memory of the events' [134]. Therefore, 'the magistrate was in error in excluding it' [136].

Sellenger v Turner **[2021] WASC 308 (7 September 2021) – Western Australia Supreme Court**

'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Economic and financial abuse' – 'Exposing children to domestic and family violence' – 'Following, harassing and monitoring' – 'History of domestic and

family violence' – 'Separation' – 'Stalking' – 'Totality principle'

Charges: Breach of protection order x 2, stalking x 1.

Proceedings: Applications for extension of time and leave to appeal against sentence.

Facts: The 29-year-old male appellant and female victim had been in a relationship for 6 months. When the relationship ended, police protection orders were served on the appellant with a condition that the appellant not go within 100m of where the protected person lives or works. In contravention of the orders, the appellant followed the victim while driving and made repeated attempts to contact her via phone. The appellant also attended the victim's workplace. The appellant also deposited small amounts of money in the victim's bank account. He was charged with breaches of the orders and with stalking. The appellant pleaded guilty to the charges and was sentenced to 14 months' imprisonment. The appellant appealed on the ground that the sentence imposed infringed the first limb of the totality principle [4].

Decision and Reasoning: Applications for extension of time and leave to appeal against sentence allowed, appeal dismissed.

Justice Strk found that the breach of the protection order was serious, occurring within 24 hours of the order having been served, by deliberate and repeated conduct. Her Honour noted that the victim felt intimidated by the appellant's behaviour including his deposits of money in the victim's bank account after their separation [100]. Her Honour explained that because the offences had not overlapped, it was not inconsistent with the totality principle that the sentences be served cumulatively [97], [105], [107]. Her Honour noted the appellant's 'troubling history of similar offending… which made personal deterrence a significant factor in sentencing' [108], and the fact that the appellant's guilty plea was the only mitigating factor [109]. Her Honour repeated the sentencing Magistrate's remarks on the victim impact statement, which detailed the significant and lasting psychological impact of the offending on the victim and her 10-year-old daughter [40].

***Pedrochi v Brown* [2021] WASC 81 (25 March 2021) – Western Australia Supreme Court**

'Aggravated assault occasioning bodily harm' – 'Application for leave to appeal against sentence' – 'Manifest excess' – 'Strangulation'

Charges: Aggravated assault occasioning bodily harm x 1.

Proceedings: Application for leave to appeal against sentence.

Facts: The male appellant strangled his female partner until it was hard for her to breathe, and punched her in the face, causing significant bleeding from her left eye. He told her: “You did this. I didn’t do this.” The appellant was convicted, following trial, and sentenced to 2 years and 6 months imprisonment with eligibility for parole.

Grounds of appeal:

1. The sentence was manifestly excessive.
2. The magistrate erred in her calculation of the date on which the appellant's sentence was to be backdated (out by 4 days).

Held: Application for leave to appeal granted on both grounds but appeal only allowed in part to correct a mathematical error in sentencing (vary date of commencement from 21 to 17 August 2019).

Ground 1 alleging manifest excess was rejected. While the sentence was at the top of the range of appropriate sentences, it was not unreasonable or plainly unjust. The offence was extremely serious: “unprovoked, sustained and vicious.” Little could be said by way of mitigation, with the applicant’s complete lack of remorse or acceptance of responsibility. General deterrence is an important sentencing consideration in family violence offences. In particular at [62]-[63]:

> “It is characteristic of offences of this kind that they involve significant power imbalances (as the offence in this case did), that they are committed behind closed doors (as the offence in this case was) and that they are accompanied by lies and gas lighting (as the offence in this case undoubtedly was).
>
> These features underscore the need for the courts, in imposing sentences commensurate with the seriousness of the offence in each case and applying all relevant sentencing principles, to send a strong signal that violence of this kind is intolerable and will be dealt with accordingly. The “firming up” of sentences for such violence, referred to in *Duncan v The Queen* [2018] WASCA 154, reflects that need.”

In addition, the court emphasised at [64] that:

> “offences involving strangulation are particularly serious. As [the magistrate] said “a case of non-fatal strangulation … is extremely serious” and that “the courts now recognise how serious that action is.” In my view, her Honour can here be taken to be referring to the growing appreciation of the particular dangers associated with offences involving strangulation and with the role they play in cases of intimate

> and family violence. That recognition has, of course, led to legislative action, introducing a specific offence of suffocation or strangulation. That offence was, of course, not in existence at the time of the appellant's offending against Ms Hallam. Nevertheless, as the learned Magistrate recognised, the recognition of the seriousness and danger of non fatal strangulation predated those legislative reforms and was a relevant sentencing consideration."

Ground 2 upheld but only to correct the date from which the sentence commenced from 21 August 2019 to 17 August 2019.

***Hill v Tomkin* [2021] WASC 54 (3 March 2021) – Western Australia Supreme Court**

'Act causing bodily harm' – 'Appeal against sentence' – 'Glassing' – 'Imprisonment'

Charges: Act causing bodily harm x 1.

Proceedings: Appeal against sentence.

Facts: The male appellant and the female victim had been in a domestic relationship but had lived separately for 7 months. The appellant and the victim had a verbal argument through the glass window pane of a side door. The appellant punched the glass window pane, causing the glass to break and strike the victim on her face, resulting in injuries requiring medical attention including stitches. The appellant pleaded guilty on the first morning of trial and was sentenced to 10 months immediate imprisonment, with eligibility for parole.

Grounds of appeal:

1. The magistrate erred in the calculation of the discount afforded for the guilty plea.
2. The magistrate erred in failing to take into account any factor in mitigation other than the guilty plea.
3. The magistrate erred in imposing a sentence of imprisonment when a sentence of last resort was not warranted.
4. The magistrate erred in imposing a sentence of immediate imprisonment when it was not inappropriate to suspend the sentence.

Held: Appeal was upheld on grounds 3 and 4, and the appellant re-sentenced by way of a community based order.

The injuries sustained by the complainant were severe but was not comparable to “glassing” distinguishing: “[a] glassing involves an intentional breaking of a glass into a person’s face with the obvious potential for very severe injury. The appellant’s act involved the appellant breaking a window in a momentary loss of control with no intention of causing harm to the complainant.”

Ground 4: The term of immediate imprisonment was manifestly excessive having regard to sentences imposed in other cases and factors mitigating the seriousness of the offence (absence of weapons and intention to cause injuries suffered, impulsivity and lack of foresight of the consequences, no threats of violence, and isolated nature of the act). The appellant was also remorseful, had no history of violence or violent offending and had positive antecedents. Further, on Ground 3: It was not open to impose a sentence of imprisonment. A term of imprisonment greater than 6 months would not have been appropriate.

***Dickerson v The State of Western Australia* [2020] WASC 425 (18 November 2020) – Western Australia Supreme Court**

‘Aboriginal and Torres Strait Islander people’ – ‘Bail application’ – ‘Exceptional circumstances’ – ‘Female perpetrator’ – ‘Protection order’ – ‘Rehabilitation’ – ‘Victim as (alleged) perpetrator’

Charges: Aggravated unlawful wounding x 1; Breach of protective bail conditions x 1.

Proceedings: Application for bail.

Facts: The female applicant was awaiting trial for an aggravated unlawful wounding charge against her male ex-partner, the complainant, intending to argue she acted in self-defence. She had pleaded guilty to and was awaiting sentence for a breach of protective bail conditions charge. These conditions had prevented the applicant having any contact with the complainant but she submitted he had forced her to see him. While remanded in custody, the applicant’s ex-partner had tried to contact her, but she had refused. She had obtained a Family Violence Restraining Order protecting her from the complainant. She had taken steps towards rehabilitation, including drug and alcohol rehabilitation following an earlier breach of bail conditions for consuming alcohol.

Issues:

1. Whether there were exceptional reasons why the accused should not be kept in custody.
2. Whether the grant of bail would otherwise be proper, having regard to other factors the court must

consider under cl 1 and cl 3 of Sch 1 Pt C of the *Bail Act 1982* (WA).

Decision and reasoning: Bail granted.

Issue 1: There were exceptional reasons why the applicant should not be kept in custody. The breach of protective bail conditions charge was towards the lower end of seriousness for offending of its kind, particularly so "if it is accepted, in due course, that the applicant felt under pressure to go with the complainant. It was, in any event, the complainant who initiated the contact on that occasion". There was no suggestion that the applicant was violent or intending to interfere with the complainant as a witness ([90]-[93]).

Further, the applicant had demonstrated a concerted effort to engage in rehabilitation. It was particularly significant that she had engaged in alcohol and drug rehabilitation after she was sentenced for an earlier breach of bail due to consuming alcohol ([94]-[95]).

In addition, it was significant that the applicant had refused to have contact with the complainant while remanded in custody, even though she was permitted to do so. The court noted at [96]:

> "It is an irony in matters of this kind that a person who is remanded in custody for having breached a condition that prevented contact with a complainant is not prohibited from having contact with the complainant once they are in custody".

And continued at [97]:

> "Of course, in circumstances in which the applicant is well aware that she may put her prospects of being released on bail at risk if she were to have contact with the complainant, one might understand that she would exercise caution in that regard. However, the applicant has gone further. She has made an application and been granted the FVRO to prevent the complainant, Mr N, from having contact with her or approaching her. In other words, she has taken positive steps to give effect to the purpose to which cl 2(c) and (d) of sch 1 pt D of the Act are directed. That, it seems to me, is an unusual situation which, in combination with the applicant's steps towards rehabilitation and the hardship that she will be required to endure if she remains in custody in the metropolitan area while her mother and her young child remain in Carnarvon, does amount to exceptional reasons why the applicant should not be kept in custody".

Issue 2: The conditions outlined at [100]-[108] were sufficient to guard against the risk that the applicant would commit a further offence or would either endanger or interfere with the complainant as a witness in

these proceeding ([109]).

S v Barnes [2020] WASC 327 (11 September 2020) – Western Australia Supreme Court

'Application for leave to appeal against conviction' – 'Defence of provocation' – 'Domestic violence' – 'Social media confession' – 'Strangulation' – 'Victim as (alleged) perpetrator'

Charges: Aggravated common assault x 1.

Proceedings: Application for leave to appeal against conviction.

Facts: The male appellant admitted to assaulting his female partner; the sole issue at trial was whether the assault was unlawful. The complainant and appellant had a 'prolonged and heated argument' regarding the complainant buying plants and because the appellant refused to leave the TV room so that the children could watch TV. The context proceeding the assault included: the complainant slapping the appellant and trying to pull him off the couch where he was sitting; the complainant threatening to smash a hard disk drive unless the appellant left the TV room and when he did not leave throwing the hard disk drive against the wall; the complainant threatening to smash a PlayStation device and, when the appellant refused to leave the room, smashing it on the floor; the complainant kicking the appellant to try and force the appellant off the couch and allegedly saying 'If you don't do as I say, you'll never see your son again'.

The appellant then grabbed the complainant around the neck with his right hand and squeezed her throat. The complainant collapsed and lost consciousness. The appellant's evidence was that after she regained consciousness, she immediately started hitting him again. The complainant's evidence was that she left the room but returned some minutes later and punched the appellant in the face. The appellant recounted these events two months after the incident in an extended Facebook post.

Grounds: (1) In making an assessment of the severity of the provocation, the magistrate failed to assess the totality of the complainant's conduct.

Decision and reasoning: *Leave to appeal refused.*

It is clear from the magistrate's reasons as a whole, and particularly the following passages, that the magistrate considered the totality of the complainant's conduct:

> [60] "To say to a person in the course of an argument, 'You will never see your child again' if it was said,

and I'm assuming that it was, is an unpleasant thing to say, and I would expect that it would have an effect on any father. It would make anybody angry, in my view, or perhaps more angry than they already were. But applying what was said in paragraph 35 of the *Hart* case which is been brought to my attention, I do not accept that saying that would be sufficient to cause a reasonable person to lose control to such an extent as to choke the person who said it into unconsciousness.

Many things get said in the course of heated domestic arguments; I don't consider that it can be said to justify such an extreme response. Although there is no medical evidence on the subject, I am sure that to choke a person into unconsciousness requires a considerable force and sustained over a period of time. It's a requirement of provocation defences the force used must not be disproportionate to the provocation which is offered, and my view, this force which I have been talking about clearly is disproportionate.

[61] … So at the end of the day, I am satisfied that the conduct of the complainant may well have provoked the accused to some extent, that it may well have provoked him to lose control and act on the sudden. But I do not consider that her conduct was sufficiently provocative in all of the circumstances to justify an assault of this magnitude and of this seriousness. And I am of the view that choking her into unconsciousness was clearly disproportionate *to any provocation that she may have offered.*

Had I concluded that the magistrate had erred in any of the respects alleged by ground 1, I would have granted leave to appeal but dismissed the appeal on the basis that there had no substantial miscarriage of justice. In my judgment looking at the totality of the evidence and, for the purpose of the objective element of the defence of provocation, attributing to the ordinary reasonable person each of the characteristics identified by the appellant in ground 1, the prosecution discharged the burden on it to negative the defence of provocation. Faced with the provocation offered by the complainant as described by the appellant in the Facebook post, an ordinary reasonable person would not have 'choked out' the complainant."

***Stockley v Bailey* [2020] WASC 193 (8 June 2020) – Western Australia Supreme Court**

'Aggravated home burglary' – 'Application for leave to appeal against sentence' – 'Breaches of protection order' – 'Controlling, jealous, obsessive behaviour' – 'Following, harassing and monitoring' – 'Guilty pleas' – 'History of domestic violence' – 'Separation' – 'Stalking' – 'Weapon'

Charges: Breaching a family violence restraining order x 6; possessing a controlled weapon x 1; aggravated

home burglary x 1; deprivation of liberty x 1

Case type: Appeal against sentence

Facts: In February 2020, the applicant man was sentenced to 7 months' imprisonment following his conviction after guilty pleas to 6 offences of breaching a family violence restraining order (FVRO) and one offence of possessing a controlled weapon. Three days earlier the applicant was sentenced, following a guilty plea, to 3 years' imprisonment in relation to a charge of aggravated home burglary and deprivation of liberty. These offences occurred at the same time as one of the FVRO offences and the possession of the controlled weapon, and the day before another two of the FVRO offences.

The applicant man and female victim were in a relationship which ended around April 2019. On 26 May 2019, the applicant was served with the FVRO which prohibited him from, among other things, communicating or attempting to communicate with the victim. Approximately 2 hours after being served, the applicant sent a series of 88 text messages to the victim. He was arrested, charged with breaches of the FVRO and released on bail. Several days later the applicant entered the victim's house, pointed a replica pistol at her, forced her into his car and handcuffed her. That night, the pair discussed their relationship and had consensual sex. The applicant continued calling the victim and told her that he had entered her house again and accessed her Facebook account. He also repeatedly approached the victim on her commute home, including getting into her vehicle with her. The applicant was eventually arrested near the victim's home, and police searched his premises and located the replica firearm. The applicant had a modest criminal record, including convictions for breaching restraining orders and assault.

Grounds:

1. 7 months' imprisonment was manifestly excessive; and
2. the total sentence of 3 years, 7 months was disproportionate to the overall criminality involved and the total sentence was crushing.

It was also argued that the learned magistrate failed to give sufficient weight to his early guilty pleas, his lack of a relevant record and reasonably good antecedents, his efforts at rehabilitation, and his mental health at the time of his offending, which had been treated at the time of sentencing.

Held: Leave to appeal granted, appeal dismissed.

Ground 1 was not established. The applicant's breaches of the FVRO were not minor or technical. Rather, he repeatedly refused to obey the order which was imposed for the victim's protection, and flagrantly disregarded both the authority of the court and the rights of the victim ([56]). The offences were serious as they involved the applicant entering the victim's home on two separate occasions (one of which involved a replica pistol and handcuffs), and following her on the train home. These breaches were terrifying for the victim who believed that she was going to be murdered. The offences were further aggravated by the fact they were committed when the applicant was on bail for earlier breaches of the FVRO ([57]). However, Hill J noted that the Magistrate did not comply with s 9AA(5) Sentencing Act by failing to state the extent of the reduction given for his guilty plea ([70], [85]), but this did not result in the applicant's sentences being overturned ([71]). Hill J also found that the Magistrate took the applicant's antecedents and mental health issues into account. It was clear that the Magistrate considered that the applicant's mental health issues were not such that he was an unsuitable vehicle for personal and general deterrence ([74]-[75]).

In relation to Ground 2, Hill J found that the total effective sentence was neither unreasonable nor plainly unjust, and was not crushing ([82]-[84]). Any error made by the Magistrate did not result in a substantial miscarriage of justice ([91]).

Hosking v The State of Western Australia **[2020] WASC 167 (20 May 2020) – Western Australia Supreme Court**

'Bail application' – 'Controlling behaviours' – 'Physical violence and harm' – 'Risk of reoffending' – 'Separation' – 'Step-child in the family' – 'Weapon'

Offences: Breach of Police Order x 1; Common assault x 1; Assault causing bodily harm x 1; Being armed in a way that may cause fear x 1.

Proceedings: Bail application

Issue: Whether the applicant might reoffend if released from custody; whether there were conditions that could be reasonably imposed if bail were granted to ameliorate the risk of reoffending.

Facts: The male applicant and female victim were married for 11 years and had three children. The victim also had another child (Ryan) from a previous relationship. One night at the family residence, the applicant pushed Ryan in the chest, causing him to stumble backwards, then punched him in the face. A 72-hour police order was served on the applicant following this incident which prohibited him from entering or remaining

within 10 metres of the residence, from going within 10 metres of the victim, and from acting in a violent or intimidating manner towards her. The night following the incident, the applicant entered the residence. An altercation ensued in which the applicant pushed the victim to the ground, punched her in the head and kneed her in the head and body, for which she required medical attention. A Mr Ledgerton was at the residence and intervened to protect the victim. The victim left the house. The applicant then armed himself with a knife and went out to the front drive where he threatened Mr Ledgerton and a neighbour with the knife.

The applicant plead guilty to breaching the police order but not guilty to the remaining charges and was remanded in custody. The applicant applied for bail for the charged offences, but this was refused by the Magistrate on grounds of the seriousness and nature of the alleged offending, the fact that the applicant had breached a police order shortly after it was made, and fears by the victim (and concerns by the police) that the applicant posed a risk to the victim and her children. The applicant subsequently applied for bail again after the victim visited him in custody, but the Magistrate again refused on the basis that the prosecution case was strong and no conditions could be imposed that would ameliorate the risk of offending in a violent manner or interfering with witnesses. The applicant then applied for bail a third time.

Judgment: The judge granted bail subject to several conditions which His Honour stated would "sufficiently remove the possibility of the applicant reoffending" [8]. These conditions included: curfew and reporting conditions; conditions to protect the victim, Ryan, Mr Ledgerton and the neighbour from contact by the applicant; and conditions regulating the applicant's conduct with his children [20].

The respondent opposed the bail application because there was a risk the applicant would reoffend if released [8]. However, the victim submitted an affidavit to the court stating that she wanted the applicant to be released on bail [7]. The affidavit provided that: the victim did not resile from any of the allegations made; during the relationship, the applicant engaged in controlling behaviours that caused the victim distress; and the applicant continued to telephone her while in custody causing her more stress [16]. However, the affidavit also provided that the applicant's alleged conduct was out of character and the victim wanted bail to be granted because she was concerned that the applicant's continued detention would adversely affect his relationship with his children and make it more difficult for her to establish a new life [16].

His Honour had reservations about the victim's change in attitude [7] but granted bail due to a number of factors including: accommodation and employment arrangements that had been made for the applicant; the likely length of any sentence that would be imposed if he were convicted; the likely time until trial (next year); the incentive he had to abide by his bail undertakings (ie: access to his children); the time since the alleged

offending occurred; the victim's attitude (she expressed a wish that the applicant be granted bail and had visited him in custody with two of her children); and evidence concerning the applicant's behaviour at the time of the offending (the behaviour occurred in a particular context that no longer prevailed – the applicant now accepted that the relationship was over) [7], [12].

***Riddoch v Chiera* [2020] WASC 114 (7 April 2020) – Western Australia Supreme Court**

'Aggravating factor' – 'Children' – 'Coercive control' – 'Manifestly excessive' – 'Miscarriage of justice' – 'Non-fatal strangulation' – 'Physical violence and harm'

Charges: Aggravated assault causing bodily harm x1;

Appeal type: Application for leave to appeal against sentence

Grounds:

1. The magistrate's conduct during the sentencing hearing did not allow defence counsel to make full submissions as to the appellant's personal circumstances and the nature of the relationship between the appellant and complainant, which hindrance resulted in a miscarriage of the sentencing exercise; and
2. The type of sentence imposed was manifestly excessive as it was reasonably open to His Honour, in all the circumstances, to suspend the term of imprisonment imposed. Particulars:
    1. The plea of guilty and the relevance of the discount for that plea;
    2. The appellant's antecedents;
    3. Sentences imposed in, broadly, comparable cases;
    4. The prosecution's concession as to the type of sentence open to the Court.
3. The learned Magistrate erred when he failed to adequately consider the imposition of a type of sentence less than one of immediate imprisonment.

Facts: The male appellant and female victim had been in a domestic relationship for six years and had a child together. At the time of offending, the victim and appellant were arguing in a car while the child was in the backseat. During the argument, the victim pulled over to the side of the road out of fear of the appellant and

ask him to get out of the car. The appellant then punched the victim to the upper-left arm and grabbed her and squeezed her arm. He then "punched the victim to her left breast and the left side of her stomach". The appellant continued to assault the victim until he hit her head against a window and strangled her until she could not breathe.

The appellant entered a plea of guilty and was sentenced to 14 months' imprisonment. The magistrate declined to suspend the term.

Judgment: The first ground was dismissed; as the Magistrate was not discourteous and did not prevent the plea from being made, the contention was without foundation. McGrath J observed that "His Honour directly challenged counsel as to whether a submission was effectively being made that the victim was to blame. Counsel then positively engaged with the judicial officer, clarifying the submission." [26]

The second ground of appeal was also dismissed; it was noted that the sentencing judge "carefully reviewed all relevant sentencing factors" and only after doing so correctly concluded that imprisonment was the only appropriate punishment [37-8].

The third ground was also dismissed. McGrath J found the domestic relationship and presence of young children to be aggravating factors and thought the 15% discount afforded for the guilty plea by the sentencing judge was appropriate. After placing minimal weight on the offender's personal circumstances, such as his age, as mitigating factors, the Court concluded that the sentence was not manifestly excessive.

***Clarke v Cantatore* [2019] WASC 385 (28 October 2019) – Western Australia Supreme Court**

'Aggravating factor' – 'Assault' – 'Manifestly excessive' – 'Mitigating factors' – 'Strangulation' – 'Totality'

Charges: Aggravated administration of a noxious thing to another person x 1; Aggravated common assault.

Proceedings: Appeal against sentences

Facts: The appellant and the complainant had, at the time of the allegations, been in a relationship for approximately five years and were engaged to be married. The appellant verbally abused the complainant and threw her onto the bed. The complainant managed to kick the appellant off her and the appellant threw items around the room. The complainant's attempt to use pepper spray to keep the appellant away only angered him further. He picked the complainant up by her neck and jaw before throwing her back a couple of metres into the fridge. The accused hit the complainant against the fridge again, causing her to drop to the

ground in pain. When she stood up again the accused sprayed the back of her neck with pepper spray.

The appellant was sentenced to 12 months imprisonment and was made eligible for parole.

Issues: The appellant appealed on grounds the sentences were manifestly excessive and that the magistrate erred in ordering the sentences be served cumulatively and that the total sentences should not be suspended.

Decision and reasoning: Jenkins J held that the magistrate had correctly balanced the appellant's personal circumstances including the domestic relationship with the complainant and repeated significant force against any aggravating factors and that the sentences were therefore not manifestly excessive. The total effective sentence was held to be plainly unjust given the offending was close in time and in one incident, the appellant had good prospects of rehabilitation, and had never been sentenced to imprisonment or convicted of violent offending previously. There was no error in choosing not to suspend the sentences.

***RE Magistrate G Benn; EX Parte Gethin* [2019] WASC 380 (15 October 2019) – Western Australia Supreme Court**

'Application for review order' – 'Cyber stalking' – 'Interim fvro'

Case type: application for review of an interim FVRO

Facts: The respondent was granted an interim FVRO based on allegations in an application, affidavit and oral evidence that his sister(the applicant) was communicating in an intimidating and abusive manner by phone calls, text messages and emails in a manner consistent with the meaning of 'cyber-stalking'. The communications related to the way in which he was caring for their father, who was in a nursing home. The applicant submitted that the magistrate applied the wrong meaning of the term 'family violence' and there was no evidence of any act that could arguably constitute 'family violence' within the correct definition under the Restraining Orders Act 1997 (WA), arguing that the magistrate therefore lacked jurisdiction to grant the FVRO, or alternately that her application be treated as an appeal.

Issue: Did the magistrate apply the wrong meaning of 'family violence'

Held: The magistrate did not make an error in jurisdiction by applying the wrong definition and the application for review was dismissed. The application, supporting affidavit and oral evidence heard all disclosed matters that were within the definition of "cyber stalking". In any event if the matter were to be reviewed the final

hearing on the FVRO would need to be vacated and the matter would be more quickly dealt with by way of final hearing.

[Summary prepared by Lily Philp for Western Australian Magistrates Court]

Howell v Davies **[2019] WASC 220 (27 June 2019) – Western Australia Supreme Court**

'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Children' – 'Court safety' – 'Family violence' – 'Intimidation' – 'Repeated breaches'

Charges: 1 x breach of restraining order

Case type: Application for leave to appeal out of time and leave to appeal against sentence

Facts: The appellant man pleaded guilty to a charge of breaching a family violence restraining order. He breached the order by approaching his female former partner outside court immediately following the restraining order final hearing for which he had failed to appear and asking "when am I going to see my kids?" He was sentenced to 7 months' imprisonment. He sought leave to appeal against that sentence. The application for leave to appeal was lodged 12 days after the last date for filing an appeal. An application for expedited hearing had already been granted.

Ground: The learned magistrate erred in finding that it would be necessary to find 'unjust circumstances' in order to suspend the term of imprisonment ([24]).

Held: The breach in question did not involve any actual or expressly threatened violence, however Hall J noted that 'protected persons can feel intimidated or threatened by being contacted or approached by the person they fear'. The orders intended to provide protection from such fear, as well as the risk of physical harm ([31]).

In assessing the gravity of the offence, Hall J listed relevant factors:

- The breach occurred in the surroundings of a court, where the protected person was entitled to feel secure;
- The appellant attended court for a hearing in relation to the order, so its requirements must have been known to him;
- The approach was physical, and it is more likely that fear would be caused to a protected person in such

a case;

- This was the third breach of the same order within a 4-month period, demonstrating a persistent disregard for court orders and the appellant's failure to be deterred by previous prison sentences;
- The breach occurred just over 10 days after the appellant was released after serving, concurrently, 2 months for previous breaches (aggravating feature);
- This was the eleventh offence of this nature over a 5-year period. The appellant had clearly shown contempt for authority on previous occasions, which thereby increased the need for specific deterrence.

These factors, as well as the appellant's explanation for and nature of the breach, his early guilty plea and the risk of institutionalisation, led his Honour to find that it would have been inappropriate to suspend the term of imprisonment. Accordingly, there was no substantial miscarriage of justice and the appeal was dismissed ([39]).

Goodacre v Lumbers **[2019] WASC 184 (27 May 2019) – Western Australia Supreme Court**

'Appeal against conviction - guilty plea' – 'Breach of fvro' – 'Meaning of fvro term'

Charge/s: 1 x breach of FVRO

Case Type: Application for extension of time to appeal, appeal against conviction following plea of guilty

Facts: On 29 December 2018 the appellant was convicted in the Magistrates Court on his plea of guilty to one offence of breaching a FVRO contrary to s 61(1) of the Restraining Orders Act 1997 (WA). The appellant applied for an extension of time to appeal and for leave to appeal against conviction. The appellant appeals the conviction on the ground that he could not in law, on the basis of the admitted facts, have been guilty of the offence. The appellant was said to have breached the FVRO by 'harass[ing] the Person Protected by any electronic means, including by using the internet and any social network application (such as 'Facebook') to depict or refer in any manner to the person protected', and appeals on the basis that he was dealt with in the Magistrates Court on the basis that he referred to the person protected and not on the basis he harassed her.

Issue: Is a reference to a protected person in a SMS message not sent to the protected person a breach of the FVRO? Is it a mere reference via electronic means that constitutes a breach, or is it actual harassment?

Held: Application allowed and leave granted. A breach occurs if the person subject to the order 'harasses' the

person protected. The reference to ‘including by using the internet and any social network application (such as ‘Facebook’) to depict or refer in any manner to the person protected’ serves only as an example of what could constitute harassment, and was not intended by parliament to mean that any electronic reference to the person protected constitutes a breach.

[Summary prepared by Lily Philp for Western Australian Magistrates Court]

***Masoud v Dhaliwal* [2019] WASC 56 (1 March 2019) – Western Australia Supreme Court**

‘Fines’ – ‘Physical violence and harm’ – ‘Security officer’ – ‘Sentencing’ – ‘Strangulation’

Charges: Assault in circumstances of aggravation x 1.

Case type: Appeal against sentence.

Facts: The appellant was convicted on his plea of one offence of assault in circumstances of aggravation. The relevant circumstance of aggravation was that the appellant and the victim, the appellant's wife, were in a family relationship. The assault comprised of the appellant hitting the victim, grabbing her by the throat, and holding her around five seconds until other family members intervened ([6]). At the time of the offence, the appellant held a security officer’s licence and worked as a security officer. The licence was suspended and he resigned from his job before the sentencing hearing ([7]). Having regard to the seriousness of the offence and mitigating factors, the magistrate imposed a fine of $1200 and made a spent conviction order ([1]).

Issues: The appellant appealed the sentence. Submissions included that:

- The appellant's counsel did not make submissions about the amount of the fine or the possible impact of a fine on the appellant's ability to continue to hold a security licence, and therefore the magistrate did not consider such implications.
- The sentence would lead to a loss of employment, hardship and a loss of financial security.
- The imposition of a fine under $500 would be within the range of an appropriate exercise of the sentencing discretion given the circumstances of the offence and relevant mitigating factors (appellant's age and evident remorse, absence of any prior offending, the fact that the appellant is the main financial provider for his family).

Decision and reasoning: The Court was not satisfied that there was any substantial miscarriage of justice and dismissed the appeal. At [29]-[32], Tottle J noted numerous issues with the appellant’s case. First, as the

respondent submitted, reducing the fine imposed on the appellant under $500 would undermine the operation of the *Security and Related Activities (Control) Act 1996* (WA). His Honour accepted that this was a case involving a nexus between the offending and the appellant's occupation as a security officer. Security officers must often exhibit self-restraint in the performance of their duties. The offending was contrary to this. Second, there was force to the respondent's submission that the appellant's argument does not rest on the proposition that the fine should be reduced because of the extra-curial punishment constituted by the financial hardship resulting from the loss of the appellant's security officer's licence, but that the fine should be reduced to avoid that extra-curial punishment with the result that the appellant is doubly advantaged in relation to mitigation. Third, the maximum penalty for the offence of common assault in circumstances of aggravation is a $36,000 fine or 3 years' imprisonment, or both. A fine of less than $500 would not constitute an appropriate sentence. Although the offence was considered to be 'towards the lower end of the scale', there is no single correct sentence for any offence, and his Honour held that a fine of less than $500 would not be adequate given the seriousness of the offending.

***Smartt v Sloane* [2019] WASC 35 (5 February 2019) – Western Australia Supreme Court**

'Coercive and controlling' – 'Cumulation' – 'Factors affecting risk' – 'Following, harassing and monitoring' – 'Protection orders' – 'Sentencing'

Charges: Breaches of a restraining order and a protective bail condition, stalking.

Appeal type: Appeal against sentence.

Facts: The appellant breached a Family Violence Restraining Order (FVRO) which restrained him from communicating or attempting to communicate with the victim (his former partner) by any electronic means. He was also charged with an offence of stalking, based on repeated calls he made to the victim which had the effect of intimidating her. He also failed to comply with a protective bail condition ([3])-[12]). He pleaded guilty to all the offences and was sentenced to 12 months' imprisonment. The Magistrate noted that the appellant's conduct was coercive and controlling, causing fear to his former partner. His behaviour was 'persistent and intimidatory', and the breaches showed a repeated disregard of the court orders ([16]).

Issues: The appellant sought to appeal his sentence on the ground that the Magistrate's sentencing discretion miscarried, and that the sentence was manifestly excessive and contrary to the weight of the evidence.

Decision and reasoning: The Court found that the appellant's breaches of the restraining order could not be

described as ‘minor or technical’ ([33]). Although the breaches did not involve actual or threatened violence, his repeated acts showed a refusal to accept the authority of the order imposed for the protection of the victim. The Court was satisfied that the term imposed for the offences was manifestly long so as to show an error in principle ([35]). The Court considered the personal circumstances of the appellant – he was 36 years old, a self-employed businessman, and had previous convictions for serious breaches of a VRO against the same victim for which he was sentenced to imprisonment ([37]). Consequently, the Court allowed the appeal and resentenced the appellant. A cumulative sentence was found to be appropriate to reflect the additional element of intimidation. The head sentence was reduced to 8 months, and the appellant was eligible for parole ([40]-[41]).

***Bryant v Witts* [2018] WASC 194 (27 June 2018) – Western Australia Supreme Court**

‘Animal abuse’ – ‘Disclosure’ – ‘Manifestly excessive’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Totality’

Charges: Aggravated unlawful assault x 2; Aggravated unlawful assault causing bodily harm x 4; Cruelty to an animal causing it unnecessary harm x 1.

Appeal type: Appeal against sentence.

Facts: The appellant and complainant were in a de facto relationship. On multiple occasions over 2 years, the appellant punched or struck the complainant, causing a broken arm ([25]) and a split lip ([26]). On the occasions where he struck her with a hairbrush and mobile phone, her head split open and she required stitches ([18]-[21], [24]). The appellant also kicked her small dog, causing it to become paralysed and die ([29]). Her children were present on most of the occasions. The assaults were unprovoked. While the police were sometimes called by witnesses, the complainant did not feel safe enough to tell the police about all the assaults until she had left the relationship ([31]).

The appellant pleaded guilty and was sentenced to 22 months’ imprisonment ([48]).

Issues: Whether the sentence was manifestly excessive; whether the sentence infringed the first limb of the totality principle; whether a suspended sentence should have been imposed.

Decision and reasoning: The appeal was dismissed.

Derrick J found that the sentence was not manifestly excessive. His Honour stated that “over an extended

period of time the appellant engaged in a serious course of criminal conduct comprised of subjecting the vulnerable complainant to a number of significant acts of domestic violence. The fact that the offences were committed in a domestic setting increases the seriousness of what the appellant did" ([73]). Factors such as the appellant's relative youth and relatively limited prior record provided some mitigatory value.

For largely the same reasons, Derrick J considered that imposing an immediate term of imprisonment, compared to a suspended sentence, was not outside the range of the magistrate's sentencing discretion ([94]).

Re Magistrate G Mignacca-Randazzo; Ex parte Chown **[2018] WASC 157 (11 May 2018) – Western Australia Supreme Court**

'Adjournments and timely decision making' – 'Fair hearing and safety' – 'Family violence restraining order' – 'Judicial review' – 'Victim experience of court processes'

Case type: Application for review of Magistrate's decision not to make a final family violence restraining order and application for stay of proceedings.

Facts: The applicant made an application for a family violence restraining order pursuant to s 24A of the *Restraining Orders Act 1997* (WA) ('*Restraining Orders Act*') against her former partner ([9]). The Court made an interim family violence restraining order ([10]). The respondent objected to the interim order ([11]). The next hearing was listed as a 'Restraining Order Final Order Directions Hearing'. The respondent did not attend at that hearing. The Magistrate did not make a final order, and adjourned the hearing ([14]-[17]).

The applicant applied for a review order under s 36 of the *Magistrates Court Act 2004* (WA) ([2]), to review the Magistrate's decision not to make a final restraining order. The applicant also applied for a stay of the substantive hearing.

Issues: Whether the applications should be granted.

Decision and Reasoning: Tottle J granted the review order and the stay of proceedings.

Tottle J set out the principles governing judicial review under s 36of the *Magistrates Court Act 2004* (WA) at [4]-[8]. His Honour set out the principles governing when a final order must be made under s 42 of the *Restraining Orders Act* at [20]-[24]. Tottle J held that it was irrelevant that the hearing was described as a 'Restraining Order Final Order Directions Hearing' even though no hearing of that nature is contemplated or

provided for by the Restraining Orders Act (discussing *Kickett v Starr* [2013] WADC 52) ([27]-[32]). Tottle J was satisfied that the Magistrate made a jurisdictional error by not exercising the jurisdiction conferred on him by the *Restraining Orders Act* ([33]).

Tottle J set out the principles governing when a stay ought to be granted at [40]. Tottle J granted a stay of the proceedings on the grounds that the applicant's medical conditions and stress would be exacerbated by having to face the respondent in a contested hearing ([41]-[42]). Tottle J noted that s 10B of the *Restraining Orders Act* requires courts to have regard to the possibility of re-traumatisation during the proceedings ([43]).

***Labriola v Morgan* [2017] WASC 256 (30 August 2017) – Western Australia Supreme Court**

'Animal abuse' – 'Breach of restraining order' – 'Control' – 'Domestic violence incident report' – 'Factors affecting risk' – 'Financial abuse' – 'Frequency of abuse' – 'Jealousy' – 'Risk assessment' – 'Stalking' – 'Strangulation' – 'Threats to kill'

Charges: Obstructing a police officer x 1.

Appeal type: Appeal against conviction.

Facts: The appellant was convicted of obstructing two police officers by resisting arrest ([2]). The appellant was arrested on suspicion of committing an offence by breaching a violence restraining order ([2]). The breach occurred when the appellant attended a dog training class when he allegedly knew the victim would be there ([56]). The victim later reported the incident and the incident was recorded with a Domestic Violence Incident Report ('DVIR'):

- 'Prior family domestic violence incidents between the involved parties? Yes
- Is the victim frightened? Yes
- Is the abuse happening more often? Yes
- Is the abuse getting worse? Yes
- Financial issues? Yes (Issues surrounding the ownership of the two dogs)
- Does the perpetrator try to control everything the victim does? Yes
- Is the perpetrator excessively jealous? Yes
- Does the perpetrator constantly text, call contact, follow, stalk or harass the victim? Yes
- Has the perpetrator ever threatened to hurt or kill the victim? Yes

- Has the perpetrator eve attempted to strangle/choke/suffocate/drown the victim? Yes
- Other information: [the appellant] has grabbed [the complainant] by the throat in Dec 2014 and has tried to strangle one of the two dogs in the past' ([57]).

Issues: One issue was whether the police could form a reasonable suspicion that the appellant had breached a violence restraining order by relying on a DVIR ([61](iv))

Decision and Reasoning: Justice Tottle concluded that the officer's 'suspicion of a breach of the order by the appellant was reasonable. The narrative section of the incident report read in the context of the DVIR section of the report (that is the allegation of breach assessed against what had allegedly taken place in the past) provide a basis for a suspicion that the appellant had breached the order' ([70]).

***Dennis v Lanternier (No 2)* [2017] WASC 5 (12 January 2017) – Western Australia Supreme Court**

'Breach of restraining order' – 'Following, harassing and monitoring' – 'Sentencing-protection of victims' – 'Threats'

Charges: Breach of violence restraining order (VRO) x 20.

Appeal type: Appeal against sentence.

Facts: The appellant and the victim were married for 14 years but were separated at the time of the offences ([13]). A VRO was granted with the victim as the protected person ([13]). The appellant was prohibited from contacting the respondent except to arrange for contact with his son ([15]). The appellant breached the VRO over a period of 7 months by making a significant number of phone calls to the victim and sending text messages and letters beyond the bounds of the VRO ([18]-[53]). In some instances, the messages included threats to kill the victim and himself. The Magistrate imposed an aggregate sentence of 18 months' imprisonment.

Issues: There were 6 grounds of appeal:

1. the total sentence was manifestly excessive;
2. the Magistrate did not properly take into account the appellant's pleas of guilty which were entered at an early opportunity;
3. the Magistrate failed to consider totality when determining the aggregate sentence;
4. the Magistrate overlooked the appellant's personal circumstances including his wife's breaches of the

Family Court consent orders and the appellant's mental state at the time of the offences;

5. the Magistrate made an error of fact by taking into account an untrue submission made by the prosecutor that the appellant had threatened his child; and
6. there was an error in recording the appellant's aggregate sentence as 18 months' imprisonment rather than 15 months' imprisonment ([3]).

Decision and Reasoning: Jenkins J dealt with the grounds of appeal in the following manner:

1. Dismissed ([142]-[175]).
2. Error made out. Jenkins J held that the Magistrate failed to correctly apply s 9AA(5) of the *Sentencing Act 1995* (WA) by failing to state the extent of reduction given to the pleas of guilty for each head sentence ([122]-[124]).
3. Dismissed ([125]-[127]).
4. Dismissed ([128]-[137]).
5. Not possible to decide because part of the proceedings in the Magistrates Court had not been recorded. Jenkins J did not take this fact into account in deciding the appeal ([138]-[141]).
6. Dismissed. It was clear that the Magistrate meant to impose an aggregate sentence of 18 months' imprisonment ([109]-[110]).

While Jenkins J accepted that ground 2 was made out, the appeal was dismissed because the error did not result in a substantial miscarriage of justice ([184]).

Jenkins J referred to the role of the *Restraining Orders Act* in deterring domestic violence at [152]:

> The long title of the Restraining Orders Act reflects Parliament's intention for the Act to provide for orders to 'restrain people from committing acts of family or domestic or personal violence by imposing restraints on their behaviour and activity'. In order for the Act to be effective, offenders must appreciate that if they breach a VRO they will receive a significant penalty. The community and the courts have [an] intolerance and abhorrence of violence and threatened violence in domestic and former domestic relationships. The penalties imposed for breaches of VROs must reflect that intolerance and abhorrence, in the hope that the penalties deter offenders and protect victims.

***Bindai v Armstrong* [2016] WASC 341 (20 October 2016) – Western Australia Supreme Court**

'Miscarriage of justice' – 'Notice of application' – 'Violence restraining order'

Charges: Breach of violence restraining order ('VRO') x 1.

Appeal type: Appeal against conviction.

Facts: There was a final VRO in place protecting the applicant's partner. The applicant's partner applied for a variation of that order. The applicant was not served with notice of the application to vary the VRO ([10]). The Magistrate granted the application to vary the VRO even though the appellant was not present ([11]). The appellant pleaded guilty to breaching the VRO ([1]).

Issues: Whether the appellant's conviction upon his own plea was a miscarriage of justice.

Decision and Reasoning: The appeal was allowed ([30]). The variation to the restraining order was a nullity ([16], [22]). It was an essential condition of the jurisdiction to hear the application to vary the VRO under s 48(2) of the *Restraining Orders Act 1997* (WA) that the Court be satisfied that the appellant was served with the summons ([23]). Since the Court was not so satisfied, the VRO had no legal force. It was a miscarriage of justice for the appellant to be convicted of breaching the order ([24]).

***BV (on behalf of M, N and O) v TP* [2016] WASC 228 (28 July 2016) – Western Australia Supreme Court**

'Evidence issues' – 'Exposing children to domestic and family violence' – 'Victim experience of court processes' – 'Violence restraining order'

Case type: Application for leave to appeal against Magistrate's decision not to grant final violence restraining order (FVO).

Facts: The appellant, BV, and the respondent, TP, were married but separated. BV obtained an interim FVO against TP in the Children's Court. The FVO was to protect BV and TP's three daughters, M, N and O ([1]-[2]). At the final order hearing, after BV had given her evidence in chief, the Magistrate interrogated TP's counsel about the likely content of further evidence proposed to be given by the children. The Magistrate expressed a strong disinclination against exposing the children to cross-examination by the respondent's counsel. The Magistrate summarily dismissed BV's application for a final order VRO on the basis that even if their evidence was accepted, it would not be enough to justify an FVO being granted ([7]-[8], [45]).

Issues: Whether the Magistrate erred in law by summarily dismissing the proceedings.

Decision and Reasoning: The appeal was dismissed. Kenneth Martin J held that the Magistrate was correct in expressing concern for the children's welfare if they were cross-examined ([118]). His Honour held that the Magistrate had the power to summarily dismiss the final order VRO application ([133]-[143]) and that the Magistrate's discretionary exercise of power to dismiss the proceedings was justifiable ([144]-[147]).

His Honour discussed the Supreme Court's appellate jurisdiction in the circumstances that the interim order was made in the Children's Court at [21], [46]-[90] and [149]-[161]. His Honour discussed the principles applicable to children giving evidence in VRO proceedings at [99]-[119].

***Bacchelli v Merchant* [2015] WASC 205 (9 June 2015) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Insanity' – 'Miscarriage of justice' – 'People with mental illness' – 'Physical violence and harm' – 'Plea of guilty'

Charge/s: Breach of violence restraining order.

Appeal Type: Appeal against conviction.

Facts: The appellant pleaded guilty to breaching a violence restraining order in favour of his wife and was fined $500 with costs. The breach arose out of the appellant's attendance at his wife's home to retrieve some of his property. He claimed he had misunderstood the terms of the violence restraining order and that if he had known that the order did not permit him to attend the house, he would have attended the police station and asked officers to accompany him while he retrieved the property. The appellant had previously been diagnosed with bipolar disorder and had tendered medical records to the Magistrate.

Issue/s: Whether there was a miscarriage of justice because when the appellant pleaded guilty he was unaware he had an arguable defence of unsoundness of mind.

Decision and Reasoning: The appeal was upheld and a retrial was ordered. The appellant's affidavit on appeal stated that he was suffering a relapse of his bipolar disorder when he pleaded guilty to the charge. A psychiatrist's affidavit indicated that it was more likely than not that the appellant was, 'in such a state of mental impairment so as to deprive him of the capacity to know that he ought not to assault someone or return to his house' (see at [36]). However, at the time he pleaded guilty, he was not aware that his mental

state was not normal. As such, the evidence indicates that he may have had an arguable insanity defence at the time of the guilty plea. Furthermore, when the appellant consulted with a solicitor, there was no discussion in relation to a possible insanity defence, even though the solicitor knew of the appellant's history of mental illness. There was no available evidence at the time that the lawyer should have considered the availability of a mental impairment defence. Nevertheless, Beech J held that, 'through no fault of his own, Mr Bacchelli had no practical opportunity to raise the possible defence of insanity, or the facts relevant to it, with his lawyer' (see at [54]). The appellant had an arguable defence but had no way of knowing of that defence, such that his plea was fundamentally not an informed one. Beech J noted that this does not mean a plea will always be set aside in these circumstances but in this case, the nature of the appellant's ignorance of the defence resulted in a miscarriage of justice.

***Bernard v Williams* [2015] WASC 182 (30 April 2015) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Consent' – 'Immediate imprisonment' – 'Repeated breaches of a restraining order' – 'Temporary protection order'

Charge/s: Breach of violence restraining order.

Appeal type: Appeal against sentence.

Facts: The appellant pleaded guilty to two breaches of a violence restraining order. He breached the order by living with the protected person and by being within a hundred metres of the protected person (in the same house as her). At the same time, the appellant was also dealt with for an earlier breach alleging that he was within a hundred metres of the protected person (attending and remaining at the protected person's address). This was a 'third strike' case in which the magistrate was required to impose a penalty that is or includes imprisonment. The magistrate imposed a term of imprisonment for six months for each offence. A sentence of six months or less may not be imposed (*Sentencing Act 1995* (WA) s86). The day before the hearing of this appeal, the Magistrates Court recalled the sentence and imposed a sentence of 6 months and 1 day.

Issue/s: One of the issues was that the sentence contravened the *Sentencing Act.*

Decision and Reasoning: The appeal was allowed. If it was not for the error in imposing a sentence of six months, the decision of the magistrate to impose a sentence that included imprisonment would have been within the sound exercise of sentencing discretion. The appellant had breached a VRO repeatedly (See *Pillage v Coyne* [2000] WASCA 135 at [13]-[15]). The correction of the sentence to 6 months and 1 day was

not made in compliance with s 37(2) of the *Sentencing Act* as the magistrate did not give the appellant the opportunity to be heard. The appellant fell to be resentenced.

A sentence of suspended imprisonment would have been appropriate but for the fact that the appellant had already served 6 weeks in prison. The term of imprisonment was set aside and the appellant fined $1,500. The court took into account a number of factors including that the protected person expressed no fear of the appellant at the time of appeal; it was important to demonstrate to the appellant that he could not disregard the order of the court with impunity; the consent of the protected person was not a mitigating factor but it was relevant in considering the circumstances of the offence; and although there had been repeated breaches of the order, there was nothing to suggest actual violence or threat of violence (See [25]-[28]). His Honour also cited *Pillage v Coyne* [2000] WASCA 135 where his Honour Miller J described the *Restraining Orders Act* as social legislation of the utmost importance:

'…protected persons in the community generally must have confidence that restraining orders will be obeyed and complied with … [When] they are not, there must be significant consequences to support the fact that restraining orders mean something … [The] courts [must] ensure that their orders are not ignored [14].'

***Wallam v Grosveld* [2015] WASC 145 (24 April 2015) – Western Australia Supreme Court**

'Breach of restraining order' – 'Imprisonment' – 'People affected by substance abuse' – 'Sentencing'

Charge/s: Breach of restraining order.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was subject to a violence restraining order (VRO) in favour of his former partner which prevented him from approaching her and from being within a nominated distance of her premises. He attended her premises in breach of the order. He claimed that he and the protected person were 'back in a relationship'. His had a history of breaching restraining orders in place against the same protected person. He was sentenced to 8 months' imprisonment.

Issue/s: Some of the issues concerned –

1. Whether it was reasonably open for the Magistrate to conclude that a sentence of immediate imprisonment was the only appropriate sentencing option.

2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. It seemed that the protected person invited the applicant back to her premises to collect his clothes. Notwithstanding, any breach of a VRO is serious. Justice Kenneth Martin commented on the penalties for the offence and then noted at [78]:

'Those significant statutory penalties speak loudly as to the seriousness of a breach of a restraining order and dictate how closely and carefully the underlying circumstances of such an offence must be assessed in every case. In the past there have, of course, been well referenced instances where terrible crimes of violence have been committed in the community against protected persons by individuals otherwise bound by a restraining order, but who chose to ignore it. Plainly, the statutory right to apply for a VRO is meant to assist the more vulnerable to protect themselves from violence, especially (but not solely) women who are the victims of domestic violence. Thus, issues of general and specific deterrence concerning offenders are more than usually important in this arena.'

In this case, there had been no threatening or intimidatory behaviour. While an adverse inference could be drawn from the apparent fact that the applicant was hiding when police arrived, the applicant's actions cannot be seen as a 'calculated and flagrant' contempt of the VRO – *'Ignorance about the strict workings of a VRO, in the face of periods of separation and reconciliation and then heavy alcohol consumption at the end of a long-term relationship, are a more viable explanation for his misconduct, in my view'* (see at [80]).

His Honour expressly stated that he was not meaning to convey that for some VRO breaches which include a 'flagrant disregard' for court orders, 'a term of immediate imprisonment will not present as the only appropriate sentencing option' (see at [81]). However, in this case the circumstances (including that the penalties imposed upon him for his prior breaches were only fines and the benign nature of the breach) meant that an escalation in punishment from these pecuniary penalties up to a term of 8 months' imprisonment, was not within the discretion open to the Magistrate. (Note: this position would be altered if s 61A of the *Restraining Orders Act 1997* (WA) applied, which provides for a requirement of imprisonment after 2 discrete offences within a 2-year period).

2. This argument was also upheld.

***Rogers v Hitchcock* [2015] WASC 120 (7 April 2015) – Western Australia Supreme Court**

'Breach of police order' – 'Criminal history' – 'Exposing a child' – 'Following, harassing, monitoring' – 'Programs for

perpetrators' – 'Sentencing'

Charge/s: Breach of police order.

Appeal Type: Appeal against sentence.

Facts: The appellant was at a caravan park with his wife and two-year-old child. The appellant and his wife were drinking heavily when a disagreement occurred and police attended. Police issued a 72-hour order under the *Restraining Orders Act 1997* (WA) which prevented the appellant from communicating with his wife or approaching within 100 metres of her. The next day, police attended to check on the appellant's wife and discovered the appellant hiding in the house. The appellant had a minor but relevant criminal history involving two breaches of prior police orders made in favour of his wife. He pleaded guilty, was granted bail and was placed on a 'domestic violence behaviour change programme' under the supervision of a Family Violence Court. He completed the majority of the program but was unable to complete it because he was remanded in custody after attending his wife's home in breach of bail. A progress report about his participation in the program was provided to the Magistrate, which stated that he generally 'reported as directed and engaged well' but that he 'had made no identifiable treatment gains during the programme and was not considered suitable for a further community based disposition' (see at [16]). He was sentenced to seven months' imprisonment.

Issue/s: Some of the issues concerned –

1. Whether the Magistrate erred in sentencing the appellant to a term of imprisonment.
2. Whether the Magistrate erred in failing to suspend the term.
3. Whether the Magistrate erred in failing to backdate the sentence of imprisonment.

Decision and Reasoning: The appeal was upheld in respect of ground 3 – the Magistrate erred by not backdating the sentence to give credit for time already spent in custody.

1. The issue of imprisonment was decided in the context of s 61A of the *Restraining Orders Act 1997* (WA), which provides for a presumption of imprisonment for repeat offenders under the Act. Hall J held that while there was no actual or threatened violence involved in the current or prior breaches, the appellant had deliberately refused the authority of the orders. See in particular at [46] – '*Deliberate breaches of court orders or police orders made under the Act undermine the efficacy of such orders.*

Deterrence both personal and general must play a significant role when orders are breached. If those who are the subject of such orders believe that they can breach them without suffering any real consequence then there will be little incentive to be compliant.'

2. The Court held that it was within the Magistrate's discretion to refuse to suspend the sentence.

   Given error was demonstrated by the failure to backdate the sentence, it was appropriate to resentence the appellant. In that regard, Justice Hall took into account some further steps that the appellant had taken towards rehabilitation, including drug and alcohol programs. Given these circumstances and the time already spent in custody, the prison sentence was set aside and the appellant was fined $1500.

***Weston v Cartmell* [2015] WASC 87 (16 March 2015) – Western Australia Supreme Court**

'Bail' – 'Breach of bail' – 'Following, harassing, monitoring' – 'Sentencing' – 'Totality' – 'Trespass'

Charge/s: Trespass, Breach of bail (numerous counts).

Appeal Type: Appeal against sentence.

Facts: The appellant's marriage with his wife (the complainant) ended. The complainant had purchased a new house and the appellant climbed the fence and walked around the property for some time. He had some property including vehicles at the house. The appellant then forced entry and was restrained by the complainant's male friend who was at the home before police arrived. After being released on bail with conditions that he not contact or attempt to contact the complainant, he breached this bail by attempting to contact her via email 153 times. He also made 126 phone calls or text messages. These communications occurred while the appellant was living in New Zealand. The appellant and the complainant had shared business interests. The appellant also had an interest in the complainant's home because part of the deposit for the home had been paid from a bank account in which the appellant had an interest. The prosecution accepted that many of the communications related to these business matters. A total effective sentence of 16 months' imprisonment was imposed.

Issue/s: Whether the total effective sentence did not bear a proper relationship to the overall criminality.

Decision and Reasoning: The appeal was upheld. The appellant submitted that the sentence should have been suspended.

Hall J noted that while the large number of breaches of bail made this offending serious, the personal circumstances of the appellant were exceptional. Given that many of the communications related to business issues, it is difficult to conclude that the communications were intimidatory. As his Honour noted at [39] – *'The number of the communications could not be viewed in isolation from their purpose and subject matter. There was no evidence that any of the communications were harassing or threatening in tone, content or nature. There was no information regarding communications being at inconvenient times or being deliberately repetitive.'*

Furthermore, the evidence indicated that the conduct was out of character. The appellant had previous good character, a solid employment history, surrendered himself to police and fully cooperated. This indicated an acceptance of responsibility and remorse. He was at minimal risk of re-offending so specific deterrence was not significant. While general deterrence is important in sentencing breaches of bail and 'Compliance is likely to be undermined if breaches are dealt with by derisory penalties' (see at [43]), this did not mean that the term of imprisonment could not be suspended in this case. As such, the total effective sentence was suspended for 12 months.

***Bropho v Hall* [2015] WASC 50 (9 February 2015) – Western Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated common assault' – 'Breach of protective bail condition' – 'Coercive control' – 'Exposing children' – 'Physical violence and harm' – 'Women'

Charge/s: Aggravated common assault, breach of a protective bail condition.

Appeal type: Appeal against sentence.

Facts: The appellant, a male Aboriginal man, was in a domestic and family relationship with the female victim. The appellant and the victim had been drinking alcohol with three friends. Their two children were also present. The appellant took exception to a comment made by the victim about his behaviour towards one of her female friends. He grabbed the victim by the T-shirt, causing scratches to the side of her neck. They continued shouting at each other. The appellant punched the victim in the face, causing bruising and swelling to her left eye. The victim moved away but was followed by the appellant and he delivered a further blow to the side of her head. The appellant stopped hitting the victim after their two children told him to stop. The appellant was arrested and entered into a bail undertaking with protective conditions. He breached those bail conditions by attending and remaining at the home of him and the victim. The appellant was sentenced to 15

months' imprisonment for the aggravated assault and 2 months' imprisonment for the breach of protective bail condition, served cumulatively.

Issue/s: One of the grounds of appeal was that the sentences imposed for the aggravated assault and breach of protective bail conditions were manifestly excessive.

Decision and Reasoning: The appeal was allowed. The case represented a relatively serious example of the offence of common aggravated assault involving domestic violence, falling within the midrange of these types of cases (See [24]). It involved two circumstances of aggravation. First, the appellant was in a family or domestic relationship with the victim. Mitchell J provided:

'The fact that the aggravated assault occurred in a domestic setting is a significant aggravating factor of the offence. An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted, the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence. Recognising that common feature, it remains important for a court sentencing an offender for that kind of offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner' (See [16]).

The second circumstance of aggravation was that children were present when the offence was committed. Mitchell J noted:

'The facts of this case illustrate a tragic cycle of violence with which the courts are depressingly familiar. A person exposed to domestic violence in his early life goes on as an adult to perpetrate the violence to which he was exposed as a child, damaging members of his community in the same way he was damaged as a child. For that reason, the fact that the appellant's offence was committed in the presence of children was a significant aggravating factor' (See [18]).

However, following an examination of cases, Mitchell J held that cases where a sentence of 15 months' imprisonment had been imposed involved a significantly greater level of violence than committed by the appellant here. The sentence was manifestly excessive (See [23], [35]-36]). The appellant was resentenced

to an intensive supervision order.

The State of Western Australia v Carlino **[No 2] [2014] WASC 404 (31 October 2014) – Western Australia Supreme Court**

'Battered woman syndrome' – 'Economic abuse' – 'Emotional abuse' – 'Evidence' – 'Expert testimony' – 'Following, harassing, monitoring' – 'Murder' – 'Opinion evidence' – 'Physical violence and harm' – 'Self-defence'

Charge/s: Murder.

Proceeding: Application to adduce certain expert evidence.

Facts: The accused and the deceased were both male. They lived together, but it was not a sexual relationship. The accused was the deceased's assistant and helped with the deceased's drug dealing activities. The accused admitted killing the deceased by shooting the deceased to the head while the deceased was sleeping. The main issue at trial was to be whether he acted in self-defence. The accused sought to call evidence of a psychologist regarding his state of mind. The psychologist was to give evidence, 'that the accused was in a compromised mental state at the time as a result of being in an abusive relationship with the deceased. The accused is said to have felt powerless in relation to (the deceased), and to have thought that the only way out of the relationship was to kill (the deceased)' (see at [2]). The State objected to the admission of this evidence on the basis that it was not a recognised psychological condition and that it was not analogous to cases falling within the 'battered woman syndrome' (BWS). The state further submitted that the matters to be the subject of the evidence from the psychologist were not outside the ordinary experience of jurors.

The accused described himself as a 'lackey', the deceased as 'possessive' and that the deceased would threaten violence and control his 'movements, communications and finances'. The psychologist's evidence was that the relationship was consistent with the learned helplessness associated with BWS. The psychologist also stated that the syndrome was not confined to females or sexual relationships, and that this relationship was of a sufficient duration to be consistent with the syndrome.

Issue/s: Whether the evidence of the psychologist should be admitted.

Decision and Reasoning: The application was refused. This did not preclude a claim to self-defence, but was relevant to the issue of whether the accused believed his actions were necessary. Hall J held that the

psychologist's evidence was opinion evidence and admissible only if it met the requirements of expert evidence (see at [15]). His Honour noted that BWS is widely accepted as an area of specialised knowledge, but that it is important to pay close attention to what is actually recognised as BWS. He referred to *Osland v The Queen* (1998) 197 CLR 316 where Kirby J stated that the syndrome should extend beyond females as victims. Hall J held that this relationship differed from a typical 'battering' relationship – it was not a long term marriage relationship and was not characterised by 'recognisable cycles of tension, violence and reconciliation' (see at [25]). While there were similarities in the 'assertion of increasing control, emotional volatility and increasing feelings of helplessness' (see at [25]), his Honour held that the differences between these circumstances and other BWS cases required that, '*the application of the syndrome to a situation like this is accepted by the majority of experts in the field of psychology*' (see at [26]). There was no evidence of majority acceptance of experts. As such, the evidence was inadmissible. Evidence of the violent and controlling behaviour of the deceased could still be considered by the jury in order to assess whether the accused's actions were necessary to prevent the deceased from harming him (see at [31]).

***Taylor v The State of Western Australia* [2014] WASC 292 (19 August 2014) – Western Australia Supreme Court**

'Assault causing bodily harm' – 'Bail' – 'Physical violence and harm'

Appeal type: Bail application.

Facts: On 4 October 2013, the applicant was charged with assaulting his former de facto partner. He was released on bail. The bail undertaking included a condition that he was not to contact or attempt to contact the victim by any means. While on bail, the applicant committed a further assault on the victim causing her bodily harm. He was arrested and charged with that assault and with failing to comply with a protective bail condition. Bail could not be granted again unless the applicant showed there were exceptional reasons he should not be kept in custody. The applicant's criminal history showed that he had two prior convictions for breach of protective bail conditions in 2012 and 2013. The applicant was also alleged to have breached protective bail conditions on another occasion but this had not been the subject of prosecution.

Issue/s: Whether there were exceptional reasons why the applicant should not be kept in custody.

Decision and Reasoning: The application for bail was refused. There were not exceptional reasons why the applicant should not have been kept in custody. The applicant had breached protective bail conditions on

multiple occasions in the past. While the victim had a conviction for assaulting the applicant, this did not justify the applicant's failure to comply with protective bail conditions (See [29]-[30]). Although the prosecution case against the applicant could not be said to be overwhelming, it could not be said to be particularly weak. *'A less than overwhelming case does not provide exceptional reasons to grant bail. If the prosecution case was particularly weak one or there was a high probability of acquittal the position might be different: Bertolami v The State of Western Australia* [2009] WASC 269' (See [32]). Based on the offending conduct, the judge could not accept the applicant's argument that if he was convicted and imprisoned, the minimum term of any such sentence would be likely to be equal to or less than the time already spent in custody (See [33]). There was a risk that the applicant would commit further offences if released on bail, in particular by breaching any protective bail condition in regard to contacting the victim (See [34]).

***Sturt v Ball* [2013] WASC 343 (9 September 2013) – Western Australia Supreme Court**

'Breach of protection order' – 'Definition of 'approach'' – 'Protection order'

Charges: Breach of violence restraining order x 1.

Appeal type: Appeal against conviction.

Facts: The appellant was subject to a violence restraining order which provided that the appellant must not approach within 20 metres of the protected person ([4]). The evidence was that the protected person walked up to the appellant ([6]-[8]).

The magistrate convicted the appellant on the basis that even though the appellant did not 'approach' the protected person, it was incumbent upon the appellant to immediately walk away ([12]).

Issues: Whether the verdict was unreasonable and could not be supported.

Decision and Reasoning: The appeal was upheld, and the conviction quashed. Beech J held that the charge should have been dismissed once the Magistrate was satisfied that the appellant did not approach the protected person ([16]). The word "approach" should be construed in its ordinary meaning: "to come nearer or near to (someone or something) in distance or time" ([14]). An obligation to walk away from a protected person cannot be implied into a violence restraining order ([17]).

***Mills v Hawley* [2013] WASC 261 (3 July 2013) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Following, harassing, monitoring' – 'Sentencing'

Charge/s: Breach of violence restraining order.

Appeal Type: Appeal against sentence.

Facts: The appellant had previously been in a relationship with the protected person and they had a 2-year-old child. He sent about 49 text messages and made 31 phone calls on a daily basis in breach of a violence restraining order (VRO). He claimed he was attempting to make arrangements to see his child. He had one prior conviction for breaching the same VRO. The prosecution accepted that the text messages were not threatening and the phone calls were not answered. However, the seriousness of the offence was increased because it occurred immediately after he had been dealt with by the Court for the previous breach. The appellant pleaded guilty to a charge of breaching a VRO. He was sentenced to 7 months' imprisonment, suspended for 12 months.

Issue/s: Whether the Magistrate erred in imposing a sentence of imprisonment and failing to reduce the sentence to take account of the appellant's early plea of guilty.

Decision and Reasoning: The appeal was upheld.

Under s 61A of the *Restraining Orders Act 1997* (WA)*, '*if a person has committed and been convicted of at least two offences within the period of two years before the conviction of the offence for which he or she is to be sentenced, the person is to be sentenced for a 'repeated breach'' (see at [12]). This did not apply to the appellant. As such, under s 6(4) of the *Sentencing Act 1995* (WA) the Court cannot impose a sentence of imprisonment unless it concludes that it is justified by the seriousness of the offence or the protection of the community. This offence was serious (see at [4]). However, Allanson J concluded that a sentence of imprisonment was not the only appropriate penalty. His Honour noted (at [19]) various mitigating factors including the appellant's youth ([19]) and the fact that no violence nor threats of violence were involved in the offending. Therefore, it could not be said that the protection of the community or the protected person required a sentence of imprisonment. The Magistrate also did not refer to the plea of guilty as a mitigating factor. The sentence was set aside and sent back to the Magistrates' Court for re-sentencing and his Honour stated at [23] that a community based order may be appropriate.

***Brown v Bluett* [2013] WASC 189 (14 May 2013) – Western Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault' – 'Breach of restraining order' – 'Physical violence and harm' – 'Repeated breaches of a restraining order' – 'Temporary protection order'

Charge/s: Aggravated assault causing bodily harm, breach of violence restraining order (x 3).

Appeal type: Appeal against sentence.

Facts: A violence restraining order was obtained by the female victim against the male, Aboriginal appellant. This included conditions prohibiting the appellant from communicating or attempting communication with the victim, from remaining on premises where the victim lived or worked and from remaining within 10 metres of the victim. The first breach of the restraining order occurred at a Native Title meeting where the appellant spoke to the victim. He also assaulted her by hitting her on the back of the head with a jaffle iron. The second breach occurred when the appellant went to the victim's home and persuaded her to take him to Meekatharra. Finally, the appellant breached the order by ringing the victim on 52 occasions and also by persuading the victim to drive him to Bondini Reserve. In sentencing, the magistrate noted that the appellant had pleaded guilty immediately and was entitled to a reduction of a maximum of 25% as provided for by s 9AA of the *Sentencing Act.* Her Honour took the maximum penalties as a starting point and reduced these by 25% in imposing sentences. This resulted in a head sentence of 27 months' imprisonment.

Issue/s: The magistrate erred in the application of the *Sentencing Act* in particular by construing it as requiring a (potentially) significant increase in the sentence that would otherwise have been imposed and a starting point being the maximum penalty open to the court.

Decision and Reasoning: The appeal was allowed. The respondent conceded that the magistrate's interpretation of s 9AA was erroneous and that the appeal ought to be allowed. That concession was properly made. The magistrate's application of the *Sentencing Act* was erroneous and the error resulted in a sentence beyond the range of sentences customarily imposed for offences of this type. The appellant was resentenced.

In resentencing the appellant, Allanson J noted that a sentence of immediate imprisonment was the only penalty appropriate in light of repeated violations of a restraining order and one act of significant violence. His Honour provided:

'The law is limited in the manner in which it can respond to domestic violence. One important part of that

response is by the issue of violence restraining orders. It is essential that those orders are not ignored. When they are repeatedly breached, the need for general and individual deterrence will ordinarily outweigh subjective and other mitigating considerations' (See [16]).

The offence of assault was a serious example of its kind as it involved a blow to the victim's head and was committed with an object capable of causing serious injury (See [17]-[18]). The breaches of the restraining order did not in themselves involve acts of violence but it was particularly serious that in each of the last two offences the appellant was breaching the order soon after appearing in court in relation to the first breach (See [19]). The appellant had made some attempt to turn his life around but the mitigating weight of this factor was limited by the nature of the offending and the need to emphasise the importance of complying with the restraining order (See [21]-[22]). Taking these factors into account and with the full benefit of the 25% reduction, Allanson J imposed a head sentence of 12 months' imprisonment.

***Hamlett v Whitney* [2013] WASC 100 (22 March 2013) – Western Australia Supreme Court**

'Aggravated assault' – 'Bail' – 'Emotional and psychological abuse' – 'Physical violence and harm' – 'Temporary protection order' – 'Totality'

Charge/s: Breach of bail (x 2), breach of protective conditions.

Appeal type: Appeal against sentence.

Facts: The appellant was on bail for a charge of common assault in circumstances of aggravation namely, that the appellant was in a domestic relationship with the female complainant. The appellant's bail was subject to a number of conditions including that he was not to contact or attempt to contact the complainant, he was not to approach within 20 metres of an address at which the complainant was living, and he was not to behave in a provocative or offensive manner to residents at that house. The applicant was subsequently charged with breach of protective bail conditions when he verbally abused and threatened the complainant at Centrelink offices. He was further charged with a number of offences of stealing and aggravated burglary and failed to appear in Court after being released on bail. He was charged with two breach of bail offences.

The appellant pleaded guilty to the breach of protective bail conditions and the two other charges of breach of bail. In sentencing, the magistrate noted: *'Protective bail is placed on people for a purpose and that is to protect the victim, the person who is protected by the protective bail; and people who breach protective bail, like people who breach restraining orders, in a manner that you did, that is, actually threatening the protected*

persons, in my view ought be sentenced to a term of imprisonment […] These three offences, in my view, show a total disregard for court orders. There really is nothing that can be said by way of mitigation in relation to this offending. Ms Svanberg has pressed upon me that when you breached your protective bail you were intoxicated, but being intoxicated may explain why you breached your protective bail and why you breached your normal bail undertakings but it doesn't excuse your behaviour. The fact of the matter is you were on protective bail for a reason and you breached it' (See [17]). The appellant was sentenced to a total effective sentence of 6 months and 1 day.

Issue/s: The appellant did not suggest that the 4-month sentence for the breach of protective bail conditions was excessive. The sentences of imprisonment for the other two offences were manifestly excessive. Further, the total effective sentence was disproportionate to the total criminality and therefore offends the totality principle.

Decision and Reasoning: The appeal was refused. In light of the maximum penalties available, the seriousness of the offences, and the personal circumstances of the appellant the sentence imposed was not manifestly excessive. The total effective sentence was also not disproportionate to the total offending (See [35]).

***Rowe v Gaunt* [2013] WASC 90 (20 March 2013) – Western Australia Supreme Court**

'Breach of restraining order' – 'Expiration of restraining order' – 'Miscarriage of justice'

Charge/s: Breach of restraining order.

Appeal Type: Appeal against conviction.

Facts: An interim violence restraining order was granted which prohibited the appellant from approaching within 5m of any premises where the protected person lived or worked. This order was later made final. The appellant was charged with breaching the order by going to the house of the protected person and placing a letter in the letterbox. She pleaded guilty and was convicted. However, the police later became aware that the order had expired when the offence occurred.

Issue/s: Whether the conviction should be set aside.

Decision and Reasoning: The appeal was upheld. The Court set aside the conviction because the conviction amounted to a miscarriage of justice. Hall J noted the following at [13] –

'I am compelled to note that this is the second occasion in recent times on which I have been called upon to set aside a conviction for breach of a violence restraining order where the alleged breach has occurred after the order has expired. See Topic v Lynch [2012] WASC 446. *It is of course a necessary element of an offence under s 61 of the Act that there be a restraining order in force at the time the breach is alleged to have occurred. It is always possible that a protected person may complain to the police on the basis of a mistaken belief that a restraining order is still in force. Care must be taken to ensure that that is the case.'*

***Cramphorn v Bailey* [2012] WASC 462 (30 November 2012) – Western Australia Supreme Court**

'Breach of protection order' – 'Protection orders' – 'Self-represented litigant' – 'Whether police restraining order must be served on the protected person'

Charges: Aggravated assault x 1; Breaching a police order x 1.

Appeal type: Appeal against convictions.

Facts: The appellant was in a relationship with a Mr Michalaros. While driving her car, the appellant punched Mr Michalaros in the face. There was evidence that Mr Michalaros was the subject of a restraining order in favour of the appellant.

The police attended and issued the appellant with a police order, with one of the conditions to not contact Mr Michalaros for a 24-hour period. Mr Michalaros alleged that she sent him threatening text messages in breach of the order.

The appellant was convicted following a trial and was fined a total of $1,300 and granted a spent conviction order.

Issues: Multiple grounds, including that the restraining order was invalid because the police did not serve Mr Michalaros with a copy.

Decision and reasoning: The appellant was a self-represented litigant. The judge rejected all grounds of appeal. In relation to the argument that the police order was invalid the judge stated:

> It would be contrary to the purposes of the ROA (*Restraining Orders Act 1997* (WA)) if the validity of an order depended upon service on the protected person. There could be circumstances where the police

have grounds to issue a police order but where the protected person cannot be located or it is impractical to serve a copy upon him or her. Given the shortness of time for which such orders remain current and the urgent circumstances in which they must often be made, it would produce consequences that are contrary to the purposes of the ROA if an order only became effective when a copy was served on the protected person. This is a procedural requirement only and not one upon which the validity of an order depends.

***Harrison v Hunter* [2012] WASC 166 (30 April 2012) – Western Australia Supreme Court**

'Aggravated assault' – 'Interests of child' – 'Perpetrator intervention program' – 'Sentencing' – 'Subsequent engagement in family violence programme'

Charge/s: Aggravated assault

Appeal Type: Appeal against sentence.

Facts: The appellant and complainant were in a relationship for almost three years. They had a daughter. The complainant and daughter were financially and emotionally dependent on the appellant. The appellant returned from work intoxicated. An argument developed. The appellant struck the complainant to the face with a closed fist. No injuries were caused by the blow. The matter was resolved by a plea of guilty, at the earliest reasonable opportunity. When his Honour, Chief Justice Martin, considered the seriousness of the offence he noted at [27]:

"The offence committed by the appellant in this case was serious. Domestic violence is an offence that rightly provokes community condemnation and rightly requires courts to respond to the community abhorrence of such offending by imposing sentences that are commensurate with the seriousness with which the community rightly regards this type of offence."

Despite those observations, his Honour considered that the 8 month term of imprisonment could be suspended for 12 months for a number of reasons. Firstly, it was in the best interests of the complainant and her child, cohabiting with the appellant, that he not be imprisoned: [33]. Secondly, the appellant had attended eight sessions of a family violence programme: [38]. His Honour stated that the offence was not in the upper range of seriousness: [15].

***Kjellgren v Cameron* [2012] WASC 80 (1 March 2012) – Western Australia Supreme Court**

'Aggravated assault occasioning bodily harm' – 'Deterrence' – 'Physical violence and harm' – 'Sentencing' – 'Verbal abuse'

Charge/s: Aggravated assault occasioning bodily harm.

Appeal Type: Appeal against sentence.

Facts: The appellant was in a relationship with the complainant for about four months. The appellant was intoxicated and following a dispute, he was arrested and ordered not to approach the caravan park where the complainant was residing. After being released, he knocked on the door of the complainant's caravan and verbally abused her, threatened her and punched her to the face multiple times. He then knocked her to the ground. He stopped her from escaping. She was left with serious injuries. He was sentenced to two years' imprisonment and was made eligible for parole.

Issue/s: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld.

McKechnie J acknowledged the seriousness of the offence especially considering it amounted to a deliberate breach of a police order. This type of violence to women cannot be condoned and as such a sentence of immediate imprisonment was appropriate. However at [11]-[16], his Honour considered various comparable cases and came to the conclusion that the sentence was manifestly excessive. His Honour especially had regard to *Messiha v Plaucs* [2012] WASC 63 where it was held that an 18-month sentence for aggravated assault occasioning bodily harm (including other charges) was disproportionate to the overall criminality of the offending. Nevertheless, general and specific deterrence and the significant injuries that the complainant suffered remained important considerations. The appellant was re-sentenced to 15 months' imprisonment with parole eligibility.

***Messiha v Plaucs* [2012] WASC 63 (24 February 2012) – Western Australia Supreme Court**

'Aggravated assault' – 'Aggravated assault occasioning bodily harm' – 'Character' – 'Criminal history' – 'Exposing a child' – 'People affected by substance abuse' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Sentencing' – 'Threat to injure' – 'Totality' – 'Victim'

Charge/s: Aggravated assault, threat to injure, three counts of aggravated assault occasioning bodily harm (circumstances of aggravation: that the appellant was in a family or domestic relationship with the victim).

Appeal Type: Appeal against sentence.

Facts: The appellant engaged in a verbal argument with his wife. The appellant punched and grabbed the side of her face. She attempted to escape, at which point he threatened to kill her, grabbed her around the neck and stabbed her with a screwdriver. She feared for her life. The appellant then bit her twice and told his son who was attempting to stop the assault to get away several times. The appellant had a serious drug problem and the offending occurred while he was under the influence of drugs. He had prior convictions for violent offences but they did not involve domestic violence. He was sentenced to an aggregate term of 18 months' imprisonment for all offences.

Issue/s: One of the issues concerned whether the total aggregate sentence infringed the totality principle.

Decision and Reasoning: The appeal was upheld.

The Court firstly noted that the offending was sustained, premediated and ferocious. It occurred in the family home in the presence of two young children.

The appellant submitted *inter alia* that the sentences should have been made concurrent because they constituted a single course of conduct. The Court rejected this argument and held that the so called 'one transaction rule' is a general rule and the operative question is whether the total effective sentence properly reflects the overall criminality involved. In this case, the course of conduct had distinct features which increased in seriousness over time so it was open to the Magistrate to impose some cumulative penalties.

The appellant also submitted that the Magistrate erred by giving the appellant's criminal record undue weight, given it did not involve domestic violence. This argument was rejected – the Magistrate correctly stated that the record showed a lack of mitigation in that the appellant did not have past good character. Hall J was of the view that there is little merit in distinguishing past violent offending as irrelevant if it is not committed in domestic circumstances. These offences do have relevance, not necessarily as showing a tendency but in showing 'an absence of mitigation as to past good character' (see at [31]).

Another issue concerned whether the Magistrate erred by not having sufficient regard to the appellant's longstanding relationship with his wife, the fact they have dependent children as well as his wife's wishes. His

wife filed an affidavit on appeal indicating that the appellant's imprisonment was causing her extreme hardship. Her mortgage was in arrears. If the appellant was released, she claimed that there would be the prospect that the appellant would obtain employment so the arrears could be paid. The appellant and his wife were migrants and she had no wider family in Australia. The Court referred to McLure P's remarks in *The State of Western Australia v Cheeseman* [2011] WASCA 15 (19 January 2011) and held that the wishes of victims of domestic violence for reconciliation has to be seen in context. Offenders cannot expect leniency because their punishment impacts others. While this issue could be relevant in some cases, it should not have been given much weight in this case.

The appellant also submitted that the fact he had successfully completed three community based orders should have been afforded more weight by the Magistrate. This argument was rejected – the Court held that the mitigatory effect of past completion of community orders can be diminished by reoffending. Reoffending can put into doubt whether the order was successful in bringing about attitudinal and behavioural change (see at [37]).

In relation to the presence of the children at the time of the offending, while it was not included as a formal circumstance of aggravation, it was open to take these facts into account (see at [41]).

The Court then noted that there was no history of domestic violence but the offending was serious and justified immediate imprisonment. In applying comparable cases, the Court concluded that the aggregate sentence was particularly high and did not bear a proper relationship to the overall criminality of the offending. In noting that the appellant had apologised, expressed remorse, expressed a wish to assist his wife with the mortgage and children and that he had his wife's support, the total aggregate sentence was reduced to 15 months' imprisonment with eligibility for parole.

***Musgrove v Millard* [2012] WASC 60 (22 February 2012) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Double jeopardy in sentencing' – 'Double punishment' – 'Following, harassing, monitoring' – 'Sentencing' – 'Stalking' – 'Unlawful installation of a tracking device'

Charge/s: 113 offences including: Stalking, unlawful installation of a tracking device, breach of violence restraining order (104 counts), breaching a protective bail condition (7 counts).

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant was served with an interim restraining order prohibiting him from communicating with his former partner in any way. In breach of this order, he attended her address and/or workplace, sent her a number of text messages and unlawfully installed a tracking device on her vehicle. This conduct also comprised the stalking offence. Later, the applicant called his for partner 80 times. The Magistrate noted that there were a significant number of offences committed over an extended period which had a considerable impact on the victim. A total effective sentence of 16 months' imprisonment was imposed which comprised of 8 months' imprisonment for stalking, 4 months' imprisonment for unlawfully installing the tracking device (to be served cumulatively on the sentence for stalking) and 4 months' imprisonment for 15 convictions including breaching bail conditions and the restraining order. All the other convictions for breaching the restraining order were to be served concurrently for the stalking offence.

Issue/s: Whether the Magistrate erred in making the sentence for unlawfully installing a tracking device cumulative upon the sentence imposed for stalking - the conduct which formed the basis of the stalking charge including the installation of the tracking device, such that a cumulative sentence resulted in the applicant being punished twice for the same conduct.

Decision and Reasoning: Leave was granted and the appeal was upheld.

The Court noted the 'complexities' involved in this issue and found it was not necessary to be resolved directly because of the application of the 'common elements principle' which states 'when two offences of which an offender stands convicted contain common elements… it would be wrong to punish that offender twice for the commission of the elements that are common' (see, for example *Pearce v The Queen* (1998) 194 CLR 610). This principle applied directly to this case. The facts indicated that the conduct which formed the basis of the tracking device charge was the same conduct, 'which was part of the conduct relied upon to support the stalking charge' (see at [40]). This falls directly within the common elements principle.

The Court found that there was a substantial miscarriage of justice caused by this error. The application of the common elements principle means that there could have been no additional punishment for the unlawful installation of the tracking device. As such, the 4-month sentence for the surveillance device offence was made concurrent, which resulted in the overall sentence being reduced to 12 months.

***Stokes v Auckland* [2012] WASC 2 (10 January 2012) – Western Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Assault occasioning bodily harm' – 'Deterrence' – 'substance abuse'

– ‘People living in regional, rural and remote communities’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Victim’

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant, (an Aboriginal man) engaged in an argument with his de facto partner. He punched her in the head multiple times until she fell over. He dragged her by the hair to a nearby tap to wash the blood off her. The appellant was very intoxicated at the time. He had a significant history of alcohol and drug abuse and violence including prior convictions for violent offences against the complainant. In fact, the offending was committed while he was subject to three suspended sentences relating to offences committed against the complainant. The complainant wished to continue her relationship with the appellant and at one stage indicated that she did not want to proceed with the charges. However, the appellant pleaded guilty at an early stage and was sentenced to 16 months’ imprisonment. He was also re-sentenced for the suspended sentences which resulted in a total effective sentence of 22 months’ imprisonment.

Issue/s: Some of the issues concerned –

1. Whether the plea of guilty was made under duress and did not reflect his acceptance of the facts alleged by the prosecution.
2. Whether the sentence of 16 months for the latest assault was manifestly excessive and whether the total effective sentence was disproportionate to the overall criminality of the offending.

Decision and Reasoning: The appeal against conviction and sentence was dismissed.

1. This argument was dismissed – see at [23]-[32].
2. Hall J accepted the Magistrate’s conclusion with respect to the seriousness of the appellant’s conduct. His Honour then noted that the attack was ‘prolonged’, instigated by the appellant and aggravated by the fact that it was committed notwithstanding previous court orders imposed for similar offending. This showed a disregard for the law and a need for a personal deterrent. Hall J noted that other than the early plea of guilty, there was little by way of mitigation. Furthermore, the fact that the appellant was intoxicated when the offence was committed was not mitigatory, as the appellant was ‘acutely aware that alcohol was a risk factor in respect of his past offending behaviour’ (see at [41]). In relation to the complainant’s wishes for reconciliation, his Honour noted McLure P’s remarks in *The State of Western Australia v Cheeseman* [2011] WASCA 15 (19 January 2011) and held that, ‘An otherwise appropriate

penalty should not be reduced on account of an expression of willingness on the part of the complainant, for whatever reason, to forgive the offender and continue a relationship with him' (see at [43]).

As such, the Court held that while the one-month sentence was at the higher end of the range for offences of this kind, it was within the Magistrate's discretion, having regard to the seriousness of the offence and the need for personal and general deterrence. In relation to totality, the Court held that the earlier offences were separate and unrelated to the latest assault. It was appropriate to activate these suspended sentences and orders of cumulation did not make the total effective sentence disproportionate to the overall criminality of the offending.

***Corrigan v Kirkman* [2011] WASC 254 (11 July 2011) – Western Australia Supreme Court**

'Aggravated common assault' – 'Breach of protective bail conditions' – 'Breach of violence restraining order' – 'Physical violence and harm' – 'Temporary protection order' – 'Totality'

Charge/s: Aggravated commons assault, breaches of violence restraining orders, breaches of protective bail conditions.

Appeal type: Appeal against sentence.

Facts: The offences related to a female complainant, with whom the appellant had been in a domestic relationship with. The appellant committed 29 breaches of a violence restraining order which prohibited the appellant, amongst other things, from communicating with the complainant. He did so by communicating with her by mobile phone (the 'VRO offences'). He also committed four offences of breach of protective bail conditions by being 50-100 metres of the complainant on three occasions and by sending her a text message on one occasion (the 'bail offences'). Finally, the applicant committed one offence of common assault in circumstances of aggravation at the same time as one of the bail offences. The magistrate sentenced the appellant to a total effective term of 12 months' imprisonment, made up as follows: on aggravated assault 8 months' imprisonment, one of the bail offences 4 months' imprisonment (concurrent), 2 of the bail offences 4 months' imprisonment (cumulative), one of the bail offences 2 months' imprisonment (concurrent), and VRO offences 6 months' imprisonment concurrent.

Issue/s: One of the issues was whether the total sentence was contrary to the first limb of the totality principle.

Decision and Reasoning: The appeal was allowed. The total effective sentence in this case was disproportionate to the overall criminality of the offending behaviour. The aggravating circumstances in respect of the assault offence, i.e. the breaches of the VRO and protective bail conditions, called for concurrency between the sentence on that offence and all other sentences. There should have been partial concurrency or a reduction in the length of sentence to avoid multiple punishment for these acts (See [97]-[99]).

***Isenhood v Green* [2011] WASC 70 (10 February 2011) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Deterrence' – 'Exposing a child' – 'Following, harassing, monitoring' – 'Hearsay' – 'People affected by substance abuse' – 'Prejudicial material in victim impact statement' – 'Programs for perpetrators' – 'Sentencing' – 'Threats to injure' – 'Victim impact statement'

Charge/s: Breach of violence restraining order, making threats to injure.

Appeal Type: Appeal against sentence.

Facts: The complainant was the ex-partner of the appellant's current partner. There was one daughter of that relationship. The appellant's partner remained principally responsible for the welfare of the daughter. This meant that the appellant and the complainant often had contact with each other. Events at the complainant's home prompted the complainant to seek a violence restraining order (VRO) on behalf of his daughter against the appellant, to prevent the appellant from committing an act of abuse against his daughter and from 'behaving in a way that could reasonably be expected to cause fear that the child will be exposed to an act of family and domestic violence' (see at [4]). The complainant then later obtained another VRO which prevented the appellant from communicating in any way with him. The appellant then made repeated telephone calls to the complainant and threatened to kill him and his daughter, which constituted both the breach and threat to injure charges. He was sentenced to 12 months' imprisonment on each of the charges, to be served concurrently.

Issue/s:

1. Whether the sentence was manifestly excessive.
2. Whether the Magistrate erred by taking into account hearsay and irrelevant material in the victim impact statement.

3. Whether the Magistrate erred by taking into account prior property damage offences in concluding that the appellant has the potential to act violently in the future.

Decision and Reasoning: The appeal was upheld in respect of issues one and two.

1. Firstly, Jenkins J noted that the breach offence was not at the upper range because it did not involve any physical contact or actual violence. However, it was not trivial and included a threat of actual violence. Furthermore, there were no significant mitigating factors – the appellant had six prior convictions for breaching a VRO, was not remorseful and the previous penalties imposed had clearly not been effective as a personal deterrent. Notwithstanding, there were no attempts to carry through with the threats and no indication that the appellant intended to do so. Also, the appellant was no longer in a relationship with his partner and had ceased contact with the complainant's daughter.
2. The victim impact statement detailed the history of the dispute between the appellant and complainant from the complainant's point of view. The appellant described it as 'inflammatory' and Jenkins J agreed with that description. The appellant was not given an opportunity to respond to the matters in the statement. The respondent conceded that the Magistrate should not have taken these matters into account. The Magistrate needed to make clear that these matters were not taken into account.
3. Jenkins J held that it was 'drawing too long a bow' to suggest that the appellant's violent attack on an ATM machine was reason to believe that he may attack people in the future. However, this of itself was not cause to allow the appeal as no substantial miscarriage of justice occurred.

   The appellant was re-sentenced to a 12-month intensive supervision order which included programs to address anger management and alcohol abuse.

***Morgan v Kazandzis* [2010] WASC 377 (10 December 2010) – Western Australia Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Aggravated assault causing bodily harm' – 'Deterrence' – 'People living in regional, rural and remote communities' – 'Physical violence and harm' – 'Pregnancy' – 'Sentencing' – 'Suspended sentence' – 'Vulnerable groups' – 'Women'

Charge/s: Aggravated assault causing bodily harm (x 2).

Appeal type: Appeals against conviction and sentence.

Facts: One of the appeals concerned two occasions where the appellant, an aboriginal man, unlawfully assaulted the victim who he was in a family and domestic relationship with. They were living at the Oombulgurri Aboriginal Community, and the victim was pregnant to the appellant. On both occasions, the victim, bleeding, with multiple injuries to her face and head, sought assistance from the police at the police facility. The victim told the police she was afraid of the appellant and wanted to get away from Oombulgurri. The police arranged for an aeroplane to take the victim to another centre for a time. The appellant was sentenced to 8 months' imprisonment and 15 months' imprisonment on each charge respectively. In light of the nature and seriousness of the offences, the Magistrate determined an immediate sentence of imprisonment was required.

Issue/s: Some of the grounds of appeal included –

> The learned magistrate erred by failing to suspend the terms of imprisonment imposed, when:
>
> 1. the learned magistrate failed to give consideration to whether the terms ought to be suspended; and
> 2. a suspension of the sentence was open in all of the circumstances.

Decision and Reasoning: The appeal was dismissed. These were serious offences committed by the appellant, who had two recent convictions of aggravated assault causing bodily harm. The violent conduct towards the victim was repeated less than five weeks later and the victim had a well-founded fear of the appellant. The victim was vulnerable as she was much younger than the appellant, had been in a relationship with him and was pregnant (see at [69], [72]).

'Violent treatment of women in this fashion cannot be tolerated anywhere in the State, but it is of particular importance that in isolated communities such as Oombulgurri that the punishment of an offender who commits such offences in a short space of time should be such as to demonstrate to all members of the community that that conduct is unlawful and that effective punishment will be imposed in order to deter the general community from the use of violence. Specific deterrence of the individual offender was, in this case, also a necessary and essential ingredient of the sentence' [72].

A longer term of imprisonment was warranted on the second offence because it was more serious in that it was a repetition of the same unlawful conduct, and it was an unrelated offence.

***Baudoeuf v Venning* [2010] WASC 322 (17 November 2010) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Extenuating circumstances' – 'People with mental illness' – 'Sentencing' – 'Suspended sentence'

Charge/s: Breach of violence restraining order, breach of suspended imprisonment order.

Appeal Type: Appeal against sentence.

Facts: The appellant (aged 24) was the subject of a violence restraining order (VRO) in favour of the protected person (aged 52). They had been living together in an 'off and on' de facto relationship for about 18 months. The protected person had unsuccessfully applied to the Magistrates' Court to have the order withdrawn. The breach occurred when the appellant had been living with the protected person for three days. An argument occurred, the police were called and the appellant was arrested. There was a history of violence in the relationship and the order had been breached four times in the past. According to a psychiatric report, the appellant presented with a 'schizo-affective disorder, an ADHD history, personality disorders and mental retardation' (see at [11]). Despite the orders being in place, it was the protected person who repeatedly invited the appellant back to live with her which constituted the repeated breaches. The breach of the VRO also constituted a breach of a suspended imprisonment order which had been imposed in relation to a prior breach in respect of the same protected person. He was sentenced to 7 months' imprisonment for both offences, to be served concurrently.

Issue/s: Whether the Magistrate erred in imposing immediate sentences of imprisonment.

Decision and Reasoning: The appeal was upheld.

At trial, the Magistrate concluded that the psychiatric evidence did not support a conclusion that the appellant's mental illness or disturbance led to the commission of the offences. She concluded that the 'non-aggressive resumptions of cohabitation' (by the appellant) were 'part of a course of conduct over which the appellant could and should have exercised restraint and control in obedience to the VRO' (see at [42]). Em Heenan J held that this amounted to an error of fact and that his breaches could 'to a material degree' be explained by his history of mental illness (see at [44]). The appellant's mental health problems, in combination with significant personal stress related to his relationship with the victim 'impaired his ability to exercise appropriate judgment and his ability to appreciate the wrongfulness of his conduct, so contributing causally to the commission of the offence' (see at [48]). This reduction in culpability could lead to a reduction in the

severity of the sentence and this was not sufficiently taken into account by the Magistrate. The appellant was re-sentenced as follows – no punishment was imposed in relation to the earlier breach. A conditional period of suspended imprisonment for 7 months (wholly suspended for 9 months) was imposed for the later breach.

***Lutey v Jacques* [2010] WASC 78 (28 April 2010) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Deterrence' – 'Emotional abuse' – 'Following, harassing, monitoring' – 'People living in regional, rural and remote communities' – 'People with mental illness' – 'Sentencing' – 'Threat of self-harm'

Charge/s: Breach of a violence restraining order (VRO).

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty to three counts of breaching a VRO. Only the second count was the subject of the appeal. The appellant's relationship with the complainant had recently ended. He was served with a VRO which prohibited him from contacting her by any means and from entering or being within 200m of any place where she lived or worked. The second breach of the order (the subject of the appeal) occurred when the appellant attended the Karratha Women's Refuge (where the complainant was staying) and wrote in the dust on the rear window of her car – 'I am a dead man walking'. He later returned to rub the message off. The appellant had no relevant criminal history. He was sentenced to 8 months' imprisonment, suspended for 2 years.

Issue/s:

1. Whether the Magistrate erred by failing to adequately consider sentences other than imprisonment.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld in respect of issue 2.

1. The Court held that the Magistrate did sufficiently have regard to the possibility of other sentencing options, such as an intensive supervision order or a fine.
2. Simmonds J firstly noted that the maximum penalty for breaching a restraining order had been increased which indicates Parliament's intention is that the courts regard these offences more seriously. At [53]-[61], his Honour provided a summary of relevant authorities. He stated at [61] that these

authorities (decided before the increase in penalty) take the following approach in sentencing breaches of VROs –

'The approach is one recognising that the Act is social legislation of the utmost importance as part of the legal response to domestic violence: Pillage v Coyne [2000] WASCA 135 [13] (Miller J); it is essential the courts ensure their orders are not ignored: Kenny v Lewis (Unreported, WASC, Library No 990113, 12 March 1999) (Kennedy J) 10; and violence restraining orders are notoriously difficult to enforce, and the need for general and individual deterrence will ordinarily outweigh subjective or other mitigating considerations: Dominik v Volpi [2004] WASCA 18 [80] (Roberts-Smith J).'

However, this does not mean that a custodial sentence will be appropriate in all cases. Simmonds J found that there are various circumstances which made this offence of a less serious kind. The appellant was surprised that the relationship had ended. There was no indication of any 'offence or serious misconduct' that led to the making of the VRO. Furthermore, the appellant made no attempt to enter the refuge and there was no threatening or intimidatory conduct. However, the complainant had recently been hospitalised for heart treatment. The respondent submitted that this as well as the fact that she was living in a refuge was relevant to assessing the seriousness of the offence. Simmonds J found that while these factors would make the offence more serious, evidence of the subjective impact on the complainant would be needed (see at [70]).

The respondent also submitted that the message left on the car might indicate a potential for the appellant to self-harm. His Honour then referred to the equivalent Victorian legislation which defines 'emotional abuse' (see at [71]) and accepted that a threat of self-harm intending to or producing the effect of causing distress or hurt to someone is a factor capable of aggravating the offence of breaching a VRO. However, in this case there was no evidence pointing to a threat of self-harm made with that intention or effect. Furthermore, the fact that the appellant's counsel referred to the protected person as the 'complainant' at trial did not of itself show that she suffered distress or hurt (see at [72]). In fact, the Court accepted that this potential for self-harm indicated the presence of a mental condition which contributed to the offending, notwithstanding the absence of a report from any mental health professional. This lessened the weight to be assigned to general and specific deterrence (see at [93] – [94]).

The respondent submitted that the offences occurred in the remote Pilbara region which had the second highest rates of violence against women in the state. There was data before the Court indicating that remote areas have about five times the rate of domestic violence compared to capitals. His Honour responded to this submission at [81] –

'*I accept without deciding that I can take judicial notice of these matters, and that I should regard them as going to the prevalence of offences of domestic violence to which the Restraining Orders Act is part of the legal response. On the relevance of the prevalence of offending of a particular type, see Yates v The State of Western Australia [2008] WASCA 144 [55] (Steytler P), [94] (McLure JA). I also accept without deciding that sentences for the same offending committed in different parts of the state may be affected by differences in the prevalence of that offence in those parts of those magnitudes.'*

This could result in the offence being viewed more seriously than otherwise. However, given that there was no element of physical threat or intimidation, the offence remained less serious (see at [82]). The Court held that the main mitigating factor was the appellant's plea of guilty. Given this and the mental condition as discussed above, the Court concluded that the sentence was manifestly excessive and stated that a community based order was likely to be appropriate.

***Sakkers v Thornton* [2009] WASC 175 (22 June 2009) – Western Australia Supreme Court**

'Aggravated stalking' – 'Breach of restraining order' – 'Concurrency' – 'Deterrence' – 'Double jeopardy and other charges' – 'Double punishment' – 'Following, harassing, monitoring' – 'Possession of firearm' – 'Suspended sentence' – 'Totality'

Charge/s: Aggravated stalking (circumstance of aggravation – that the offence was committed in breach of a violence restraining order), breach of violence restraining order (12 counts), possession of firearm with circumstances of aggravation.

Appeal Type: Appeal against sentence.

Facts: The appellant was in a relationship with the complainant for three years which ended. The appellant then continually sent emails and text messages to the complainant (including at her workplace) and made threats to kill her. The complainant obtained a violence restraining order (VRO) which prevented the appellant from communicating with her by any means. His conduct then continued in breach of the order. He was arrested and Police found a firearm and ammunition at his home. The appellant was sentenced to 12 months' imprisonment for the stalking charge, a global sentence of 12 months' imprisonment for the breach offences (cumulative on the sentence for stalking) and 7 months and 2 weeks' imprisonment for the possession of firearm offence.

Issue/s: Some of the issues concerned -

1. Concurrency: Whether the sentence imposed for the breach offences should have been made concurrent with the sentence for the stalking offence because both offences involved the same acts.
2. Totality: Whether the Magistrate failed to have proper regard to the totality principle.
3. Whether the sentences were manifestly excessive.
4. Whether the sentence should have been suspended.

Decision and Reasoning: The appeal was upheld in respect of issue 1.

1. The prosecution conceded that the appeal on the issue of concurrency must succeed. Section 11(1) of the *Sentencing Act 1995* provides that a person is not to be sentenced twice on the same evidence. Simmonds J stated at [22] – *'Here the offence of aggravated stalking was constituted by the course of conduct whose constituents were the 12 breaches of the violence restraining order. The sentences for the 12 breaches of violence restraining order, globally, are the same as the sentence for the aggravated stalking.'* As such, the global sentence for the breach offences was set aside.
2. The appellant submitted that a total effective sentence (without the sentence for the breach offences) of 19 months and 2 weeks was a crushing sentence and was not a just measure of the criminality involved. Simmonds J acknowledged that the Magistrate failed to recognise an overlap in the criminality between the stalking and breach offences, in that he did not have regard to the issue of double punishment, as noted above. However, this did not result in the sentence infringing the totality principle.
3. An argument that the sentences for the aggravated stalking and firearms offences were manifestly excessive was dismissed. The appellant had some modest criminal history which did not involve violence. While he pleaded guilty, he showed minimal insight into his actions or empathy towards the victim. Simmonds J also noted the seriousness of the offending. In comparing analogous cases (see [70]-[72] for summaries) his Honour concluded that the sentence was within range.
4. The Magistrate did not suspend the sentence because he was concerned that a suspended sentence would act as a sufficient deterrent to the appellant and would not provide adequate protection for the victim, as well as other matters. This approach was appropriate and this ground was dismissed.

***Paskov v Hull* [2008] WASC 163 (28 July 2008) – Western Australia Supreme Court**

'Aggravated assault occasioning bodily harm' – 'Deterrence' – 'Double jeopardy in sentencing' – 'People affected by substance abuse' – 'Physical violence and harm' – 'Proximity of offences' – 'Sentencing' – 'Totality'

Charge/s: Two counts of aggravated assault occasioning bodily harm (aggravating factor: that the applicant was in a domestic relationship with the victim), escaping from lawful custody, failure to comply with bail conditions.

Appeal Type: Application for leave to appeal against sentence.

Facts: The applicant had an argument with the complainant (his de facto partner). The applicant then pushed the back of her head into a window which caused the window to smash and the complainant to fall on the ground. He then dragged her out of a door and kicked and punched her multiple times which caused her head to hit a railing, at which point she passed out. The applicant then evaded arrested for some days. After being granted bail, he phoned the complainant in breach of protective bail conditions. The second assault occurred 6 months later. The applicant became aggressive and dropped the complainant onto the ground and kicked her repeatedly in the rib area. He also used a ring on his left hand to gouge her left eye, resulting in a bruised and swollen eye and a cut to the eyeball. He had long standing problems with drug and alcohol abuse. His criminal history included a violent offence in a previous de facto relationship. He was sentenced to an effective term of 2 years and 2 months' imprisonment. The sentences for the escaping custody and second aggravated assault offences were made cumulative.

Issue/s:

1. Whether the sentence was manifestly excessive.
2. Whether the Magistrate erred in making the sentences for the second count of aggravated assault occasioning bodily harm and escaping custody cumulative because the offences occurred on the same day.

Decision and Reasoning: Leave to appeal was refused.

1. Hasluck J noted that the offences were particularly serious. The Magistrate gave appropriate consideration to this as well as to personal and general deterrence. This was, 'apt in respect of a severe attack on a defenceless woman who was in a relationship with the applicant, especially when the attacks were sustained and persistent' (see at [52]). As such, the sentences could not be described as

manifestly excessive.

2. The Court held that there was a separation in time between the offences and they were of a different kind. Hasluck J referred to the 'common elements principle' and acknowledged that it would be wrong two punish an offender twice where 'there is essentially one transaction or commonality is evident' but that this did not arise on the facts (see at [51]).

***Elliot v Blanchard* [2007] WASC 289 (14 November 2007) – Western Australia Supreme Court**

'Assault occasioning bodily harm' – 'Deterrence' – 'Physical violence and harm' – 'Sentencing' – 'Verbal abuse'

Charge/s: Aggravated assault occasioning bodily harm (circumstance of aggravation: that the appellant was in a family and domestic relationship with the victim).

Appeal Type: Appeal against sentence.

Facts: The appellant was in an intimate personal relationship with the complainant after meeting on the internet. The appellant was intoxicated. An argument occurred and the appellant verbally abused the complainant. He then pushed her into a chair, threatened to kill her and grabbed her around the throat almost to the point of making her lose consciousness. He repeatedly slapped her face and choked her for several minutes. He threw her into a bed before dragging her by the arms into another room. The appellant then calmed down and stated that the complainant was free to leave but informed her that he was in possession of two firearms. The complainant made him dinner to pacify him and eventually managed to escape. The appellant later left a message on her phone in which he apologised for hitting her. She sustained various injuries including bruising and swelling. The appellant pleaded guilty and was sentenced to 12 months' imprisonment with parole eligibility.

Issue/s: One of the issues concerned whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld in respect of other issues such as the weight given to the plea of guilty and the time already spent in custody and the sentence was reduced by 1.5 months. In relation to the issue of manifest excess, the appellant emphasised the effect of alcohol and prescribed medication which he was taking as well as his prior good character, remorse and progress in rehabilitation. However, McKechnie J held that the Magistrate was not in error. While this was the appellant's first violent offence, he had a number of previous offences of driving while intoxicated and on the day of the offending he had been

fined $8000 for other offences which he had committed while intoxicated. The Magistrate did sufficiently take the appellant's remorse into account. His Honour also noted that there is no offence of domestic violence. It is a term which 'euphemistically describes serious criminal conduct' (see at [10]). In this case, the offending was particularly serious. The sentence was appropriate, taking into account the public interest in general deterrence and just punishment.

Gilmour v State of Western Australia **[2005] WASC 243 (8 November 2005) – Western Australia Supreme Court**

'Aggravated stalking' – 'Attempt to pervert the course of justice' – 'Bail' – 'Breach of violence restraining order' – 'Damaging property' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Systems abuse' – 'Temporary protection order'

Charge/s: Aggravated stalking, breach of violence restraining order, attempt to pervert the course of justice.

Appeal type: Appeal against refusal of bail.

Facts: The decision concerned a bail application arising from three charged offences following the estrangement of the applicant from his second wife. The first alleged offence was the theft of mail from the complainant by the applicant. The second alleged offence was the commencement of a series of events said to amount to stalking. Some of these events included the applicant damaging the property of the complainant's male friend, and the male friend obtaining a violence restraining order which the applicant subsequently breached. The applicant also became involved in an altercation with the complainant and she obtained a violence restraining order against him. The applicant stole items of women's clothing from the complainant's home, stole a security camera the complainant had installed, and was seen in the complainant's backyard disguised with a mask and carrying a knife. The third offence occurred when the applicant asked his neighbours to provide him with a false alibi for the evening he was seen in the complainant's yard wearing a mask and carrying a knife.

Issue/s: Whether there were exceptional reasons why the applicant should not be kept in custody.

Decision and Reasoning: The appeal was dismissed. The applicant had not made out exceptional reasons for the grant of bail in this case. The character of factors pointing towards the grant of bail, namely, hardship to the applicant, the applicant's antecedents, and the likely time before trial, were not sufficient to establish exceptional reasons. This was particularly so when weighed against the strength of the State's case, the

adverse effects on protected persons of a release on bail, the concern for the failure of achievement of the purposes of protection orders in this case, and any difficulties in proving any future breach of a protective order (See [69]). See also *Gilmour v The State of Western Australia* [2008] WASCA 42 (28 February 2008).

Family Court

Ahmed and Gupta [2020] FCWA 140 (31 August 2020) – Family Court of Western Australia

'Coercive control' – 'Financial abuse' – 'History of domestic and family violence' – 'Imprisonment' – 'Interim orders' – 'Isolation' – 'Monitoring' – 'People from culturally and linguistically diverse backgrounds' – 'Technology facilitated abuse' – 'Threats to extended family' – 'Use of threats by extended family'

Proceedings: Parenting orders.

Issue: What is the appropriate parenting arrangement for the children of Mr Ahmed and Ms Gupta?

Facts: Ahmed and Gupta are the mother and father of Child A and Child B, two girls aged four and three years respectively. Both parents are from Country A where they had an arranged marriage in 2013. After the birth of Child A, the mother and Child A moved to Perth to join the father in 2016. Less than a year later the parties separated. Child B was born after separation. The mother alleges a history of sexual and physical violence and controlling and coercive behaviour by the father. The mother alleged the father locked her in the house and only allowed her to leave once a week in company with him. Both parties alleged that the other's extended families had engaged in threatening behaviours and legal proceedings towards each other's extended families in country A and there was dispute as to whether these proceedings were ongoing. The father strongly denies the mother's allegations. Against the background of these contested allegations and other family and cultural issues, the Court is asked to determine the parenting arrangements for the children. Currently the children live with the mother and spend a few hours each fortnight with the father.

Decision and Reasoning: The Court considered the mother's allegations that she was subjected to controlling and isolating behaviour by the father. The mother alleged there was a hidden camera in the home and that the father or Mr B always listened to her conversations. The mother alleged Mr B was violent towards her and at times she was alone in the house with him.

The Court, while unable to make findings on each finding of family violence, was satisfied that the mother has been the victim of family violence as defined in s 4AB(1) of the *Family Law Act* 1975 (Cth). It was accepted that the father controlled and coerced the mother, that he controlled her financially and isolated her from others, and that the father's behaviour towards the mother caused her to be fearful of him.

It was ordered on the basis of this coercive relationship that the mother have sole parental responsibility for the long-term care, welfare and development of the children, the children reside with the mother and the

father have contact, and there were also orders for a review of the orders in twelve months.

***Shelley and Dickens* [2020] FCWA 52 (3 April 2020) – Family Court of Western Australia**

'Child abuse' – 'Coercive control' – 'Family law' – 'History of domestic and family violence' – 'Victim as (alleged) perpetrator'

Proceedings: Parenting orders.

Facts: Ms Shelley (mother) and Mr Dickens (father) had a short relationship which ended when G (their child) was 18 days old. Since that point, G has lived with the mother and spent limited time with the father. The mother and father each seek an order that G live with them.

The mother's case is that the father has physically, sexually and emotionally harmed G and he poses an unacceptable risk of harm. She says the father has perpetrated significant and sustained family violence towards her during their relationship. The father's case is that the mother has emotionally and psychologically harmed G, by fabricating and repeatedly raising false allegations against him, by failing to comply with orders to facilitate G's relationship with him and through her failure to adequately provide for G's needs in terms of her education and health. He alleges he was the victim of family violence perpetrated by the mother.

The parties agree that their relationship involved family violence, but largely deny the allegations of the other.

Decision and reasoning: It was accepted that the child, G, is at risk of psychological harm — as well as exposure to physical violence — both with the mother *and* the father.

Orders were made to the effect that:

- All previous parenting orders in relation to [G] born [in] 2011 be discharged.
- The mother and father are to communicate by way of email in relation to [G], with all emails to be copied onto the ICL.
- [G] live with the mother.
- G spend time with her father as specified in the orders (at [306]).

The Court was satisfied that the father was the perpetrator of physical violence, which included the mother suffering significant injuries including two broken teeth and two broken wrists. During the parties' arguments, particularly on the yacht, there were occasions when the fights escalated and the father physically restrained

the mother, to protect himself and prevent her from assaulting him. In doing so, the mother suffered injuries and property belonging to her was damaged. The father's reactions to the mother were physically abusive and aggressive.

The father was also found to have behaved in a controlling and coercive manner, which falls within the definition of family violence. For example, he prevented the mother talking to her family by removing the telephone from her on the yacht; he demanded the mother answer his calls when in hospital after G's birth and suggested the maternal grandmother required his permission to provide assistance with meals after G was born.

The Court was also satisfied that the mother has perpetrated acts of family violence against the father. For instance, she has yelled, sworn and called him names. She has hit him and kicked him. She has instigated arguments and attempted to prevent him from leaving. It was accepted that the father suffered injuries including bruises and a bloodied lip, and had property damaged by the mother.

Orders were made to the effect that:

- All previous parenting orders in relation to [G] born [in] 2011 be discharged.
- The mother and father are to communicate by way of email in relation to [G], with all emails to be copied onto the ICL.
- [G] live with the mother.
- G spend time with her father as specified in the orders (at [306]).

***Breckenridge & Kudrna* [2019] FCWA 9 (10 January 2019) – Family Court of Western Australia**

'Parenting orders' – 'People with disability and impairment' – 'People with mental illness' – 'Presumption of equal shared parental responsibility' – 'Psychological harm' – 'Rebutting the presumption'

Proceeding: Parenting orders.

Facts: The mother and father had two children and sought parenting orders. The mother maintained that she and the children now suffered significant mental health issues because of the father's alleged physical and psychological abuse. The father denied these allegations and instead claimed that the mother's own serious mental health issues have harmed, and continue to harm, the children. Each parent sought orders according sole responsibility of the children and allowing the other parent to have limited supervised visits.

The mother's mental health issues created evidential gaps and several contradictions in the evidence she provided. Sutherland J was satisfied that the mother and the children's psychologist had effectively coached the children to corroborate her story given their impressionable age.

Issues: What parenting orders are appropriate in the circumstances?

Decision and reasoning: Sutherland J's reasoning was guided by Part 5 of the *Family Court Act 1997* ('the Act')and the Full Court's decision in *Goode & Goode* [2006] FamCA 1346 and consequently concerned the underlying presumption that 'it is in the best interest of the child that the child's parents have equal shared parental responsibility, subject to the qualifications set out in the relevant section'. Sutherland J provided in relation to this presumption:

> 'should I make an order for equal shared parental responsibility then I must also consider the obligations placed upon me by s 89AA of the Act which requires me to then consider whether the child should spend equal time or substantial and significant time with each parent.
>
> In determining the outcome of these parenting matters, I must, pursuant to s 66A of the Act, consider the best interests of the children as the paramount consideration. In determining what is in a child's best interests, I must consider the matters set out in s 66C of the Act.' [197]-[198]

Sutherland J ordered that the father was to have sole parental responsibility for the children, for Child A to receive continued therapeutic support from Child A's psychologist, and for the mother to eventually be allowed supervised visits. The presumption of equal shared parental responsibility did not apply for the following reasons: (1) Sutherland J was not satisfied that the mother experienced any family violence and/or abuse from the father; and (2) the children suffered significant, ongoing psychological harm while in the mother's sole care and were at risk of further harm if they remain in her sole care.

***Janz & Bagley* [2018] FCWA 210 (8 November 2018) – Family Court of Western Australia**

'Children' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility' – 'Rebutting the presumption' – 'Unacceptable risk'

Proceeding: Parenting orders.

Facts: The parties had one child and sought parenting orders. The mother sought sole parental responsibility

and that the child live with her. She also proposed that the child should not spend any time with the father. The father sought orders that the parties have equal shared parental responsibility; that the child live with the mother while gradually increasing the time she spent with the father; injunctions as to the parties' alcohol consumption; and non-denigration orders. The father was a self-represented litigant while the mother and ICL were represented by counsel.

The parties had a history of family violence and the father had used explicit photos of the mother to blackmail her throughout their relationship. The child was exposed to some of this violence during the relationship and to the father's denigration of and threats towards the mother after the parties' separation.

Issues: What are the appropriate parenting orders given the circumstances?

Reasons: The child had a meaningful relationship with the mother and a close and loving relationship with the father. However, the child was at risk of physical and/or psychological harm while in the father's care. Duncanson J also found that this, along with the child possibly 'absorbing' the father's negative and unhealthy beliefs and confrontational behaviour, formed an unacceptable risk that could not be managed by mere supervision. With the presumption of equal shared parental responsibility being displaced by the family violence between the parties, Duncanson J ordered the mother have sole parental responsibility and that the child live with the mother. It was also ordered that the child spend no time with the father as he posed an unacceptable risk of harm.

***Byrne & Krilly* [2018] FCWA 158 (23 August 2018) – Family Court of Western Australia**

'Children' – 'Parental orders' – 'People from culturally and linguistically diverse backgrounds' – 'People with mental illness' – 'Physical violence' – 'Relocation orders'

Proceeding: Parenting and relocation orders.

Facts: The mother and father had one child and sought parenting orders and the mother sought relocation orders. Each party sought sole parental responsibility for the child while the ICL proposed the parties have equal shared parental responsibility for him. The mother and ICL proposed that the mother be able to relocate the child to Europe.

The father had mental health issues and was violent towards the mother. This violence caused the mother to develop severe trauma and a desire to return to her home country to receive the support of her family. The

mother described her future in Australia as ‘bleak’ and was of the view her employment prospects would be better back in Europe.

Issues: What are the appropriate parenting and relocation orders given the circumstances?

Decision and reasoning: While the child was exposed to family violence during the parties’ relationship and when they were separated, the father addressed the issues causing his abusive behaviour. As such, Duncanson J found that the child did not need to be protected from harm in the care of either parent at the time of proceedings. This, coupled with the findings that the child had a meaningful and loving relationship with both of his parents which was in the child’s best interests to maintain, led Duncanson J to order that the child must spend time with the father despite relocating overseas. As the mother had been the child’s primary caregiver up until proceedings, Duncanson J ordered that the mother have sole parental responsibility; the child live with her; and that the mother can relocate the child to Europe. The presumption of equal shared parental responsibility did not apply because of the history of family violence.

***Hobbs & Roth* [2018] FCWA 163 (21 August 2018) – Family Court of Western Australia**

‘Aboriginal and Torres Strait Islander people’ – ‘Children’ – ‘Damaging property’ – ‘Family violence’ – ‘Parenting orders’ – ‘People affected by substance misuse’ – ‘People living in regional, rural and remote communities’ – ‘Relocation orders’ – ‘Technology-facilitated abuse’ – ‘Undefended proceedings’

Proceeding: Parenting and relocation orders.

Facts: The mother and father have one child. The mother was granted leave to proceed on an undefended basis. The mother sought sole parental responsibility for the child and that he live with her. The mother also sought permission to relocate the child to another town; injunctions relating to non-denigration of herself and her sister; and injunctions restraining the father from consuming alcohol while with the child.

At the time of the proceedings, the child lived with the mother and spent time with the father. The child was exposed to family violence – primarily directed towards the mother – and to problems of excessive alcohol consumption while living in the same town as his father. The father was controlling and abusive. He had slashed the tyres of the mother’s car and threatened to place intimate pictures of her on social media. The mother wished to remove the child from this environment and wanted to relocate due to fear for her own safety.

Issues: What are the appropriate parenting and relocation orders given the circumstances?

Decision and reasoning: Although 'it is to [the child's] benefit to have a meaningful relationship with the father, this must be balanced against the need to protect [the child] from harm' [28]. Given the history of family violence and the family violence of the father towards his new partner, there was a need to protect the child from harm while in the father's care. There is no need to protect the child from harm while in the mother's care.

The history of family violence rebutted the presumption of equal shared parental responsibility being in the best interests of the child. Duncanson J ordered that the mother have sole parental responsibility for the child; that the child live with the mother and that she is permitted to relocate him to another town as the mother had been the primary caregiver up until proceedings; and that the child spend time with the father at such times and on such terms and conditions that the mother thought fit.

***Trigg & Rowland* [2018] FCWA 136 (26 July 2018) – Family Court of Western Australia**

'Children' – 'Family violence' – 'People from culturally and linguistically diverse backgrounds' – 'Relocation orders'

Proceeding: Parenting and relocation orders.

Facts: The parties had one child and sought parenting orders and orders regarding the child's living arrangements. The mother wished to leave the town where they had lived as a family lived and return to her home town. The father, having come from another country, wished to remain in the town as that was were his only connections in Australia were. The father sought orders for sole parental responsibility and proposed that the child live with him four nights a week and with the mother the remaining three provided that the mother can meet all the child's needs. The mother sought orders for equal shared parental responsibility and orders permitting her to relocate to her hometown. She also proposed that the child predominately live with her.

There was evidence of domestic violence. The parties were also unable to agree on a form of communication at the time of the proceedings.

Issues: What are the appropriate parenting and relocation orders for the circumstances?

Reasons: The presumption in favour of equal shared parental responsibility did not apply due to the issues of family violence. Thackray CJ, however, still ordered equal shared parental responsibility - with the exception that the mother have sole parental responsibility for issues concerning the child's physical health – as the

child had a meaningful relationship with both parties and was found not to be at risk of harm in either parties' care. Thackray CJ also ordered that for the next few years the child live with both parents on a '5-2-2-5' roster before eventually transitioning to a week-about arrangement.

In regard to the sought relocation orders, Thackray CJ found that it was in the child's best interests to remain in the parties' current town. Thackray CJ considered the dysfunction within the mother's family in her hometown, the child's current stability, and the possibility of separating the child from the father to be the main factors supporting this decision.

***Kazi & Kazi* [2018] FCWA 61 (13 April 2018) – Family Court of Western Australia**

'Emotional and psychological abuse' – 'Exposing children to family violence' – 'Parenting orders' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility' – 'Rebutting the presumption' – 'Sexual and reproductive abuse'

Proceeding: Parenting orders.

Facts: The mother and father have four children and sought parenting orders. The mother proposed that the children continue to live with her and have no communication or contact with the father. The father sought orders that the children spend time with him. The mother's proposal was based on the parties' history of family violence and fear of the children's well-being. The ICL proposed 'that the children live with the mother who should have sole parental responsibility for them, although the mother should keep the father informed of all significant health issues' [36]. The ICL also proposed that the two older children spend time with and communicate with the father as they wished while the younger child spend time with him in accordance with their wishes in consultation with a therapist.

The parties' relationship was characterised by family violence inflicted upon the mother and the children from the time of their marriage. The mother deposed that the violence directed towards her was both physical and emotional, with the father also often forcing her to have sex against her will. The father was physically abusive towards the children, who were eventually terrified of him. This fear caused psychological harm to the children.

Issues: What are the appropriate parenting orders given the circumstances?

Decision and reasoning: The children had a meaningful relationship with the mother and it was to their benefit

that it continued. The children did not have a relationship with the father at the time of proceedings and did not wish to. While there was no need to protect the children from harm in the mother's care, there was a need to protect them from physical and psychological harm in the father's care.

The family violence rebutted the presumption that it is in the children's best interests that their parents have equal shared parental responsibility. Duncanson J ordered that the mother have sole parental responsibility and that the children live with her, but that she inform the father of all significant health issues affecting the children. He found that the mother has the capacity to provide for the children's needs including their emotional and intellectual needs. Duncanson J also ordered that the father eventually be able to contact the children provided he undertook psychological assessment and subject to the children's wishes.

***May and Blackthorn & Anor* [2018] FCWA 23 (16 February 2018) – Family Court of Western Australia**

'Issues of welfare of children and stability' – 'Living arrangements' – 'Parenting orders' – 'Physical violence'

Proceeding: Parenting orders.

Facts: Prior to proceedings, the child lived with her paternal grandmother. The child had very limited, if any, contact with the parents. The paternal grandmother sought sole responsibility of the child and for the child to live with her. The orders sought also permit overseas travel, orders for the provision of information and a non-denigration order, and for the child to occasionally spend time with the parents. Prior to the proceedings and the parents' separation, the father physically assaulted the mother on several occasions, exposing the child to family violence when she lived with them.

Issues: What parenting orders are appropriate given the circumstances?

Decision and reasoning: The proceedings were determined under Part VII of the *Family Law Act 1975* (Cth) ("the Act"). The objects in Part VII 'ensure that the best interest of the children are met' [37]. Given the circumstances, Duncanson J paid specific attention to s 60CC(2) which sets out the primary considerations of the 'benefit to the child of having a meaningful relationship with both the child's parents and the need to protect the child from physical or psychological harm' [42]. Attention was also given to s 60CC(2A) which 'provides that in applying the above considerations, the Court is to give greater weight to the need to protect the child from harm' [40].

In reaching his decision, Duncanson J considered that: (1) the child had neither communicated nor seen

either parent for a considerable period of time; and (2) while 'there was not a need to protect the child from harm in the care of the paternal grandmother', there was 'a need to protect [the child] in the care of the father, by reason of drug and alcohol use, and his violent and aggressive behaviour towards others' [42]. There was also a need to protect the child from the mother's unstable circumstances. Duncanson J consequently affirmed the orders sought by the paternal grandparent as it was in the best interests of the child.

***Headley & Steners* [2017] FCWA 169 (30 November 2017) – Family Court of Western Australia**

'Children' – 'Economic abuse' – 'Parenting orders' – 'People with disabilities and impairments' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility' – 'Rebutting the presumption'

Proceeding: Parenting orders.

Facts: The mother sought sole parental responsibility for the children; an injunction restraining the father from approaching either her or the children within 50 metres; and an injunction restraining the father from communication with the mother and children by any means. The father sought equal shared parental responsibility; an order that the children live with the mother; and that the children spend time with the father.

The parties' relationship was 'characterised by significant family violence perpetrated by the father against the mother' [2], with the father also negatively influencing the mother's financial position post-separation. The father's behaviour was partially attributed to the effects of a traumatic head injury which caused loss of inhibitory control, irritability, frustration and verbal aggression.

Issues: What parenting orders are appropriate given the circumstances?

Decision and reasoning: The presumption of equal shared parental responsibility did not apply given the parties' history of family violence. It was open to the judge to make an order for equal shared parental responsibility if, and only if satisfied that despite the presumption not applying it remained in the best interests of the children that such an order should be made [187]. This led Moncrieff J to turn to the primary and additional considerations set out in s 60CC(3) (Family Law Act 1975 (Cth)). 'The very real difference between the two classes of considerations is that the additional considerations do not all necessarily apply to each and every case whilst the primary considerations do' [189]. From these considerations, Moncrieff J concluded that 'the father is incapable of controlling his behaviour and as such the children remain at risk of psychological harm, if not physical harm, and of being exposed to physical abuse of the mother by the father' [201] and ordered that there should be no contact between the children and their father. It was ordered that the children

consequently live with the mother; the mother have sole parental responsibility; and the father be restrained and an injunction be granted restraining the father from approaching the mother or children within 50 metres.

***Peak & Cleary* [2017] FCWA 166 (24 November 2017) – Family Court of Western Australia**

'Family violence' – 'Parenting orders' – 'People affected by substance misuse' – 'Relocation orders'

Proceeding: Parenting and relocation orders.

Facts: The mother and father had one child and sought parenting and, in the mother's case, relocation orders. The mother sought sole parenting responsibility and for the child to live with her, proposing for the father to be allowed limited visits. The mother also sought an order permitting her to relocate the child to another country. The father proposed equal shared parenting responsibility and for visitation while the child lived with the mother. Both parties sought orders regarding the cost and conditions of travel.

> 'During the [parents'] relationship the father was overbearing and aggressive and violent. The mother coped by drinking alcohol and was often intoxicated. The parties' relationship was marred by incidents of violence mostly perpetrated by the father upon the mother. Both parties abused drugs and alcohol. [The child] was exposed to family violence between his parents.' [130]

Issues: What would be the appropriate parenting, spend-time and relocation orders given the circumstances?

Decision and reasoning: When dealing with the issue of parental responsibility, Duncanson J found that the child had a meaningful relationship with both of his parents. It was to his benefit that it continues. However, the history of family violence between the parties rebutted the presumption of equal shared parental responsibility, with Duncanson J finding that it would be in the child's best interests for the mother to have sole parental responsibility. Duncanson J subsequently ordered that the child live with the mother.

Turning to the issue of relocation, Duncanson J considered that while the child did have a meaningful relationship with his father, he had a much deeper relationship with and dependency on his mother. Although it may be initially distressing for the child to be separated from the father if permitted to relocate to another country, the separation would minimise the risk of exposing the child to harm and be in his best interests. The father will still be able to spend time with the child several times a year and will be able to communicate with him electronically.

***Richey & Morty* [2017] FCWA 113 (19 September 2017) – Family Court of Western Australia**

'Children' – 'Parenting orders' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility' – 'Property settlement' – 'Rebutting the presumption' – 'Self-represented litigant'

Proceeding: Parenting and financial orders.

Facts: The parties had two children and sought parenting and financial orders. The father sought orders for equal shared parental responsibility; the children live with both parents on a week about basis; regular telephone communication with the children; and injunctions restraining the parties from denigrating each other. The father also proposed that each party retain their own property and superannuation and for payments from the mother. The mother sought orders 'apportioning' parental liability 80%:20% in her favour. She also proposed that the children predominately live with her and sought orders to alter her property interests such that she received half of the father's superannuation, child support payments and cash payment for the parties' shared car.

The mother was a self-represented litigant. O'Brien J was satisfied she understood his explanation of the trial's processes and his obligations.

There were two separate violent incidents between the parties' post-separation, however there was no evidence to suggest a history of family violence while the parties were married.

Issues: What parenting and financial orders are appropriate for the circumstances?

Reasons: O'Brien J first dealt with the parenting orders sought by the parties and provided that the presumption that equal shared parental responsibility is in the best interests of the child is rebutted if there are reasonable grounds to believe that the child was exposed to family violence.

> 'The phrase "reasonable grounds to believe" is not unimportant. The legislation does not require that abuse or family violence be proven for the statutory presumption to be displaced; it is sufficient for there to be reasonable grounds to believe that a party has engaged in abuse or family violence. [59]

O'Brien J found that the presumption did not apply because the two children were exposed to family violence during the second of the two separate violent incidents that occurred post-separation. Despite this, O'Brien J also found that the children were not at any risk of physical or psychological harm in the care of either party. Upon also finding that both parties have the capacity to provide for all of the children's needs, O'Brien J

ordered equal shared parental responsibility and that the children spend equal time with each parent.

In turning to the competing financial orders sought by the parties, O'Brien J stated that

> 'the court has a wide discretion conferred by s 79(1) of the Act. That discretion is to be exercised in accordance with legal principle, and without assuming that the parties' interests in assets, or responsibilities for liabilities, are or should be different from those determined by common law and equity. The court must be satisfied that it is just and equitable to make an order adjusting existing property interests, including equitable interests. That requirement is readily satisfied in most cases, including this one…In determining what orders will be just and equitable, the court's power is not confined by any 'steps' or 'stages', let alone a prescribed sequence of such.' [135]

The parties were found to have a total net pool of -$3,932.00, with most of the liabilities being the joint responsibility of the parties. It was also found that 'neither party retain[ed] reliable assets of any real value'. O'Brien J consequently ordered that 'the only just and equitable outcome achievable' was that each party retained their assets and, considering the mother being currently unemployed, that the father retain responsibility for the liabilities.

O'Brien J then considered the child support orders sought be the mother. O'Brien J declined to provide the orders sought as the mother did not provide sufficient evidence to justify them.

***Finton & Kimble* [2017] FCWA 106 (24 August 2017) – Family Court of Western Australia**

'Family violence' – 'Parenting orders' – 'Presumption of equal parental responsibility' – 'Unacceptable risk'

Proceeding: Parenting orders.

Facts: The father and mother had two children and sought parenting orders. The father sought orders for equal shared parental responsibility and for the children to live with their mother while also spending time with him. The mother sought orders for sole parental responsibility, the children to live with her, for the children to not spend time with the father and for the issuing of passports to the children without the father's consent. The Independent Children's lawyer (ICL) submitted that the orders which best meet the children's interests were as set out by the mother.

The children's parents separated when the children were very young. 'The relationship between the parties has been described as one of significant conflict and domestic upheaval. Their separation was surrounded by

allegations of violence, abuse and aggressive and erratic behaviour, levelled against the husband in particular' [6]. 'In the period following separation, the husband's life descended into turmoil and conflict. There is evidence of significant hostility, anger and threatening behaviour directed by the husband towards a wide range of people and institutions' [9].

The children were in the mother's care after the parties separated and had limited opportunity to form a relationship with their father.

Issues: Should the parties have equal shared parental responsibility for the children?

Decision and reasoning:

Walters J provided that

> '[t]he Court's paramount consideration is the welfare or best interests of two very young girls. The history of this case and the legitimate concerns and aspirations of the parents are matters which must be taken into account – but it is the children's future, welfare and best interests upon which the Court must concentrate. The Court is responsible for determining what orders best meet their needs and advance their interests – including the need to be protected from the risk of harm… The Court has no interest in or enthusiasm for rewarding one party or punishing the other. Its preoccupation is with, and concentration is on, the best interests of the children…Generally speaking, what parties *do*, how they behave and the attitudes that they display towards their roles as parents or carers are far more relevant to the decision process in a parenting case, and of much greater significance, than the vague and often highly complex emotion known as love.' [59]-[105]

Here, the father demonstrated 'an "entrenched pattern of abusive behaviour over a significant period of time"…The husband seems to have been oblivious to or unconcerned about the real or potential harm he caused or could have caused others' [109]. Any spend time orders or orders allowing the children to communicate with the father were determined likely to cause the mother 'significant psychological detriment – and in turn, psychological harm to the children' [120]. This, coupled with the fact that the mother was deemed to have the capacity to sufficiently provide for the physical, emotional and intellectual needs of the children led Walters J to decide that '[i]t [was] not in the children's best interests to spend any time with the husband' despite his belief that 'it is a grave and far-reaching step for a Court to deprive children of a relationship with a parent – or, put another way, to deprive a father of a relationship with his children' [191]-[192]. Stemming from this belief, Walters J noted that

> '[p]arenting orders are not ordinarily regarded as "final" and immutable. If circumstances change significantly, and in a manner that relates to the best interests of the children, then there is a possibility that the orders I propose to make can be revisited – and, if required in the children's best interests, varied' [195].

***Vieri & Vieri* [2017] FCWA 101 (9 August 2017) – Family Court of Western Australia**

'Children' – 'Parenting orders' – 'People with disability or impairment' – 'People with mental illness' – 'Physical violence and harm' – 'Presumption of equal shared responsibility' – 'Rebutting the presumption'

Proceeding: Parenting orders and property settlement orders.

Facts: The mother and the father had two children and sought parenting and property orders. For the parenting orders, the mother sought sole parental responsibility, for the children to live with her, and proposed that the father be allowed to spend time with the children. The father sought equal shared parental responsibility and for the children to live with both parties on a fortnightly cycle.

For the property orders, the mother sought an order that the father transfer his interest in the former matrimonial home to her and she would refinance the mortgage to Bankwest into her sole name. She also sought to have a car transferred to her, proposing a 7:3 division in her favour. The father proposed to transfer the above home to the mother and refinance the mortgage into her sole name contemporaneously with the transfer. The father also sought for the mother to pay him $250,000 from the transfer. Both parties sought to retain all other assets and superannuation. The property pool was estimated to be around $900,000.

Both children have been diagnosed with medical conditions. The parties did not communicate well and the mother did not keep the father informed of important issues regarding the children's health. The mother frequently denied the father's requests to see the children and had a Violence Restraining Order against the father.

Issues: What are the appropriate parenting orders given the circumstances?

Decision and reasoning:

Parenting Orders

The presumption that it is in the child's best interests for the parents to have equal shared parental responsibility for the child 'does not apply in circumstances where there is abuse or family violence. The presumption may be rebutted by evidence which satisfies the Court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility.' Notwithstanding this presumption, [Duncanson J was] of the view that it is in the children's best interests that their parents have shared parental responsibility for most, but not all long-term issues. In all but medical issues, I think both parties should jointly make the decisions.' This decision was based on Duncanson J's findings that the children had a meaningful relationship with both of their parents and it was to their benefit that it continued. The children were not at risk of harm in the care of either parent - although they had previously been exposed to conflict between the parties - and both parties have the capacity to provide for the children's needs.

Duncanson J ordered an increase in the time the children spent with the father, but predominantly live with the mother during school terms. Keeping in mind the children's disabilities and anxiety, this increase was to be implemented incrementally.

Property Orders

The proceedings were governed by s 79 of the Act and the decision in *Stanford v Stanford* (2012) 247 CLR 108. Having regard to the mother's care of the children, the father's superior earning capacity and the father's property entitlement comprising significant superannuation benefits, Duncanson J divided the property in favour of the mother, ordering a 6:4 division.

***Rhodes & Lewington* [2017] FCWA 75 (6 June 2017) – Family Court of Western Australia**

'Children' – 'Parenting orders' – 'People with mental illness * psychological harm' – 'Presumption of equal shared parental responsibility' – 'Property settlement' – 'Rebutting the presumption' – 'Unacceptable risk'

Proceeding: Parenting and financial orders.

Facts: The mother and father had two children and sought parenting and financial orders. The proceedings primarily concerned whether the children should have any contact with their father. The mother sought sole parental responsibility and orders that the children live with her. The father sought equal shared parental responsibility and shared care of the children.

The father often deceived and manipulated the mother, children and people around him during the parties'

relationship, feigning several severe and terminal illnesses. Through this deception, he spent large sums of the parties' money for personal use (such as travel and accommodation) under the guise of paying for medical treatment. The father also frequently threatened the mother and occasionally their children, leading the mother to apply for a Violence Order.

Issues: What parenting and financial orders are appropriate given the circumstances?

Decision and reasoning: the presumption of equal shared parental responsibility did not apply because of the father's psychological abuse of the children. Walters J found that that the father's psychological abuse of the children displaced the presumption of equal shared parental responsibility. He also found that the father's behaviour amounted to an unacceptable risk to the children's psychological and emotional wellbeing. As such, Walters J ordered that the mother have sole parental responsibility and that the children not have any contact with the father.

The parties had a net property pool of $970,381. Upon considering the father's spending while deceiving the mother along with his limited contributions towards household expenses and the children while the parties were together, Walters J ordered that the mother receive 84% of the net property and superannuation.

***Dempsey & Brahms* [2017] FCWA 59 (12 May 2017) – Family Court of Western Australia**

'Children' – 'Coercive control' – 'Family violence' – 'Presumption of equal shared parental responsibility' – 'Property damage' – 'Rebutting the presumption'

Proceeding: Parenting orders.

Facts: The mother and father have two children and sought parenting orders. The father proposes that the older child decides where he lives with a week-about arrangement for the younger children (save for the holidays when they would spend up to two weeks with each parent). The mother sought sole parental responsibility; for the children to live with her; and for the children to only spend time with the father subject to her consent. The ICL proposed that the mother have sole parental responsibility.

The father sought to undermine the children's relationship with the mother and after the parties' separation threatened the mother on several occasions. The father's negative attitude towards the mother influenced the oldest child's opinion of and behaviour around her, with the child eventually mimicking some of the father's negative behaviours. While the oldest child did leave the mother's home to live with the father for two years,

he eventually returned and had a hostile relationship with the father until the time of proceedings.

Issues: What are the appropriate parenting orders in these circumstances?

Decision and reasoning: Thackray CJ ordered the mother have sole parental responsibility for the three children; the children live with the mother; and that the children only spend such time with the father as the mother deemed appropriate.

Thackray CJ 'did not doubt' that there were great benefits to the children having a meaningful relationship with their mother. 'She [was] focused on their well-being and has been their primary caregiver. She [was] a stable and steadying influence' [109]. On the other hand, the father's conduct towards the mother and children was damaging. '[T]he benefit to the children of having a meaningful relationship with their father [was] outweighed by the importance of protecting them from the harm that often arises when they spend time with him' [110]. Thackray CJ provided that the presence of family violence rebutted the presumption of equal shared parental responsibility and that it was inappropriate for the parents to share responsibility given their inability to communicate.

Thackray CJ found (at [15]) that the father was: an 'aggressive, controlling and manipulative man' with a propensity to bend the truth, skilled at turning accusations against him back onto the accuser, that he demonstrated no insight into the way that he made the lives of the mother and her adult sons (and to a slightly lesser extent his own children) a complete misery and that he was quite oblivious to the harm his violent, abusive and controlling behaviour has caused.

Thakray CJ held (at [111]) that the father has engaged in coercive, controlling and abusive behaviour towards the mother and children and that he has damaged every vehicle the mother has ever owned (sometimes when children have been in the vehicle and sometimes when they have been observing). His Honour accepted that "the mother remained in the relationship for as long as she did because of the father's manipulative behaviour and because she considered this was the best way to keep her and the children safe. The father's manipulation has included his efforts to drive a wedge between the mother and her friends and between the mother and the children." [113]

***Arthur and Joyner* [2015] FCWAM 197 (4 September 2015) – Family Court of Western Australia (Magistrates Decisions)**

'Interim parenting orders' – 'Parenting orders and impact on children' – 'Physical violence and harm'

Proceedings: Interim parenting orders.

Facts: The mother and father had two children. Both parties had criminal histories, mental health issues and problems with drugs and alcohol. The mother previously obtained an interim violence restraining order and a family violence offence had been reported to the police against the father but both matters were dropped. Before the hearing, the parenting arrangements were that the children live with the mother and spend supervised time with the father once a week. The father sought orders for unsupervised time with the children. At the end of the hearing, the Court made immediate orders for unsupervised time between the father and the children.

Issue/s: What ought to be the extent of ongoing time between the children and the father?

Reasoning/Decision: The strict and comprehensive guidelines for determining an interim parenting application were set out in *Goode & Goode* (2006) FLC 93-286 (see [27]). Magistrate Kaeser cited the Full Court of the Family Court's decision in *Banks & Banks* [2015] FamCAFC 36, which provided guidance on the application of these principles. The Court in *Banks* stated at [48]-[50]:

'It should also be said that in parenting proceedings, as in all civil litigation, it will be the issues that are joined that will dictate which s60CC factors are relevant. By their nature, interim parenting proceedings should be confined to those issues which, in the best interests of the child, require determination prior to a proper determination at a trial [emphasis in original]. The fact such disputes are commonly dealt with in overcrowded Court lists makes it even more desirable to identify with precision those issues which can, or should, be resolved on an interim basis.

[…]

When it is obvious that the findings made as to some of the s60CC factors will be determinative of the child's best interests on an interim basis, it is a sterile and unnecessary exercise to address other factors. Moreover, it would be a sterile exercise to determine whether or not particular facts are disputed if they are relevant only to one of the nondeterminative s60CC considerations. Properly understood, we do not interpret what was said in Goode as meaning that in an interim case, each and every fact must be characterised as disputed or not; and that each s60CC factor must be traversed where it is obvious on the facts and issues joined that there are only one or two decisive factors'.

Magistrate Kaeser affirmed the orders that the father ought to have unsupervised contact with the children.

The presumption of equal shared parental responsibility did not apply given that there was reasonable grounds to believe there had been family violence in the relationship. In these circumstances, the issue of equal time or substantial and significant time did not need to be determined. It was reasonable for the children to spend one overnight occasion with their father every fortnight (see [33]-[44]).

***Sampson and North* [2014] FCWA 75 (25 November 2014) – Family Court of Western Australia**

'Court management' – 'Emotional and psychological abuse' – 'Exposing children' – 'Fair hearing and safety' – 'No contact orders' – 'Parenting orders' – 'Physical violence and harm' – 'Questioning witnesses' – 'Self-represented litigants' – 'Sexual and reproductive abuse' – 'Unacceptable risk'

Proceedings: Parenting orders.

Facts: The father was verbally, physically and emotionally abusive towards the mother throughout their relationship. He assaulted her, forced her to have sex against her will, posted comments on Facebook referring to kill her and threatened to kill her. After their first child was born, a safety plan was put in place by the Department of Child Protection (DCP) specifying that the father have no unsupervised contact with the child. Their second child was born. The mother left the home with the children. She obtained a violence restraining order and a filed a Notice of Abuse with the DCP.

Issue/s: What parenting orders were appropriate in the circumstances?

Reasoning/Decision: This case raised significant issues relating to case management in circumstances where the father was a self-represented litigant. The father's behaviour at trial soon was unmanageable, despite several requests from the court that he refrain from using foul language and despite warnings regarding his conduct. The mother was cross-examined by the father and kept her composure in extremely difficult circumstances (see [43]-[44]). Likewise, counsel for the mother questioned the father in a calm and measured way, despite his behaviour.

Following threats made in the courtroom by the father, the Court took the unusual step of asking counsel for the mother and the Independent Children's Lawyer to his chambers. He informed them that the trial could not safely proceed with the father present in court. Upon the resumption of the trial the Court made an order that the father attend trial from an alternative venue by way of video link (see [47]-[48]). The father's behaviour did not improve throughout the rest of the hearing. The Court warned the father on several occasions that if he

continued to use foul language the Court would switch on the mute button. After several disruptions, the Court activated the mute button (see [51]-[67]).

Duncanson J stated here at [68] that: *'The trial was conducted in the most difficult circumstances by reason of the father's conduct, threats and appalling language. Both the ICL and counsel for the mother conducted themselves properly throughout and are to be commended for their perseverance and tolerance. An order sought by the mother was that the children spend no time with the father. In these circumstances it was important that the relevant evidence be provided to the court and properly tested by cross-examination to ensure that the Court is able to determine all issues and make orders which are in the best interests of the children. It was also important that the Court not allow the father to distract it from those issues'.*

In making parenting orders, Duncanson J held that the presumption of shared equal parental responsibility did not apply here because of family violence committed by the father. The mother was given sole parental responsibility for the children. It was also in the best interests of the children that they live solely in the care of their mother as the children would be placed at an unacceptable risk of harm in the care of their father.

Finally, the Court held that the father have no contact with the children. This was appropriate in circumstances where *'the children's relationship with the father is not a meaningful one and as such will not be of benefit to them in the future. The children are at risk of both physical and psychological harm in the care of the father. His unrelenting denigration, criticism and vitriol towards the mother could undermine the children's relationship with her and impact upon her parenting of the children in the future'* (see [184]-[197]).

***Eddon and Eddon* [2012] FCWA 104 (6 November 2012) – Family Court of Western Australia**

'Emotional and psychological abuse' – 'Parenting orders and impact on children' – 'Relocation orders'

Proceedings: Relocation and parenting orders.

Facts: The mother was born in England and the father was born in Australia. They had one child together. The mother sought orders to have sole parental responsibility for the child and permission to relocate the child to the UK. Her case revolved around the claim that the father's sustained emotional abuse towards her transformed her from a strong, independent woman into a nervous wreck who needed the support of her family in the UK (see evidence [31]-[80]). The father sought equal shared parental responsibility and that the child live with the mother in Australia.

Issue/s: What parenting and relocation orders were appropriate in the circumstances?

Reasoning/Decision: First, in relation to the issue of allocating parental responsibility, Thackray CJ noted that the presumption in favour of shared parental responsibility did not apply because of the father's violence. In the circumstances, it was appropriate for the mother to have sole parental responsibility for the child. His Honour was satisfied that the mother would seek to involve the father in any important decisions about the child and that she would make the right choices for the child (see [157]-[160]).

Second, Thackray CJ turned to the issue of the planned relocation. His Honour noted that this case involved choosing the least bad alternative, as neither of the proposed outcomes was in any way satisfactory. If the mother relocated, the child would effectively be denied a meaningful relationship with his father, at least for some years until the father could afford to see him more regularly. If the mother was not permitted to relocate, there was a serious risk that she would fall into a state of depression, leading to the likelihood of a damaged attachment with her child. This would be extremely damaging to the child in the long term. In His Honour's view, this factor was of far greater importance than the 'significant, but not sever grief', the child would face if not permitted to see his father regularly. The mother was therefore permitted to relocate to the UK to obtain support from her family to recover from the abuse she suffered.

His Honour concluded at [166]-[167]:

Although not a factor I need to take into account, there is potential for the outcome of cases such as the present to have a salutary impact on the behaviour of other parents. Unless the best interests of the child demand otherwise, it cannot reasonably be expected that one party to a relationship can behave in an abominable fashion, cause severe emotional harm to the other party, and then insist that they continue to live nearby so that they can continue to have a close relationship with their child. The strong emphasis given by our law to the importance of protection from violence would be undermined if any different message were conveyed.

Notwithstanding his past conduct, it is impossible not to feel some sympathy for the father who I consider not only has gained some appreciation of the consequences of his behaviour, but wants to do the best he can for his son. His behaviour has been much improved, and he should be commended for that. But, unfortunately, as was put to him in cross-examination, it is a case of "too little, too late". The damage has been done. All the father can do now, which I am satisfied he wants to do, is to make amends. It is not too late for him to be a good father, but he will have to achieve that by allowing the mother time to recover, which I am persuaded

she can only do if she is permitted to go home'.

***P and J* [2010] FCWA 53 (9 March 2010) – Family Court of Western Australia**

'Parenting orders' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility'

Proceedings: Parenting orders.

Facts: The mother and the father had two children together, Jack and Helen. The father breached a violence restraining order on four occasions and had been convicted of assaulting the mother. The father sought orders for shared parental responsibility for major long term issues concerning the children. The mother proposed that she have sole parental responsibility for issues concerning the children's health, education and Jack's speech and language therapy requirements, but otherwise agreed that there ought to be shared parental responsibility.

Issue/s: One of the issues was should the parties have equal shared parental responsibility for the children?

Reasoning/Decision: In relation to the issue of shared parental responsibility, Thackray CJ was satisfied that the father had engaged in family violence and therefore the presumption of equal shared responsibility did not apply. His Honour noted that just because the presumption did not apply, did not mean that it could not be in the best interests of the children for the parents to have equal shared parental responsibility. However, in the circumstances, equal shared parental responsibility was not an option. The parents had shown no capacity to come to any agreements in relation to significant matters concerning the children and any order requiring them to consult would fail.

His Honour concluded that the mother have sole parental responsibility for all major long term issues concerning the children. This was appropriate in circumstances where she was also to have primary care responsibility for the children and further, she was more in tune with the children's needs and was better equipped than the father to make decisions for the children's long term welfare (see [75]-[81]).

***W and W* [2006] FCWA 103 (6 October 2006) – Family Court of Western Australia**

'Parenting orders' – 'Physical violence and harm' – 'Presumption of equal shared parental responsibility' – 'Rebutting the presumption'

Proceedings: Parenting proceedings.

Facts: The mother and the father had two children together and sought parenting orders. The mother proposed that she be given sole responsibility for decisions concerning the children's welfare while the father sought orders for shared parental responsibility.

Issue/s: One of the issues was whether the parties should have equal shared parental responsibility for the children?

Reasoning/Decision: The presumption of equal shared parental responsibility did not apply here because the father assaulted the mother. However, Thackray J went on to state at [23]-[24]:

'The fact the presumption does not apply is by no means the end of the matter. Judges in this Court have long taken the view that it is generally appropriate for both parents to have an equal say in major decisions about their children. This is particularly true of cases where the parents have a shared-care arrangement. The fact there has been family violence is clearly an important factor in determining whether it is appropriate for the parents to share parental responsibility; however, the nature of the violence needs to be assessed to determine whether it should have any impact.

It is my assessment that the nature of the violence here was not such, in itself, as to have any real impact on the allocation of parental responsibility. However, I consider there are other reasons why it would not be in the best interests of the children for their parents to be left with shared parental responsibility'.

His Honour held that the mother ought to be given sole parental responsibility in circumstances where the parties had an extremely poor relationship, they did not communicate with each other than by email (which the father used to abuse, annoy and denigrate the wife) and the father was extremely controlling, argumentative and pedantic (see [25]).

District Court

Re AB [2023] WADC 28 (17 March 2023) – Western Australia District Court

'Child abuse' – 'Compensation' – 'Corroboration' – 'Criminal injuries compensation' – 'Criminal injuries compensation act 2003 (wa)' – 'Finding of child abuse' – 'Sexual abuse'

Proceeding: Appeal pursuant to s55 and s56(1) of the *Criminal Injuries Compensation Act 2003* (WA) from a decision of the chief assessor refusing an application for compensation for harm suffered as a result of incidents of sexual abuse allegedly committed against the appellant by her former partner W.

Issue: Whether compensation should be ordered for injuries arising from sexual assaults (x2) and other abuse.

Facts: The appellant made an application for compensation for injuries arising from alleged emotional/verbal and physical/sexual abuse between 1999 and 2015 and two separate alleged sexual assaults in 2015 allegedly committed by her former de facto partner, W. At first instance, the chief assessor refused compensation.

The appellant had been in a de facto spousal relationship with the alleged offender between 1999 and 2015. After leaving him she made a formal complaint to police of two occasions of non-consensual anal penetration, which she later advised police she did not wish to proceed with. The appellant later asked police to reopen their investigation into her earlier complaint alleged that her ex-partner had also been physically and verbally abusive during their relationship and had threatened self-harm and suicide when she tried to leave him. Police decided not to charge the alleged offender with any offence as there was not evidence to corroborate her account, despite corroboration not being required to prove an offence of sexual assault.

The chief assessor found the sexual abuse of the appellant was not non-consensual. There was evidence of contact with medical and mental health practitioners including reports of non-consensual anal sex and a 17 year history of sexual assault by her de facto partner. J, a child who the appellant cared for pursuant to Family Court orders, was successful in a criminal injuries compensation claim as both a secondary victim of W's abuse of the appellant and primary victim of other abuse by W, and reasons subsequently published by the assessor of J's claim reversed the finding that W's abuse of the appellant constituted an offence and found that although the incidents of anal penetration of the appellant by W while she was crying and W had his hands around her neck were not non-consensual the appellant and AB and W committed an offence by

exposing J to the incidents.

Reasoning and decision: Appeal allowed, awarding the appellant $120,000 for non-pecuniary loss and $1,846 for reimbursement of expenses.

Staude DCJ was satisfied that the two offences of aggravated sexual penetration without consent had been committed and were not isolated offences. The appellant's statements were consistent with her reports to police and other agencies, and the judge accepted that she had been stuck in an abusive relationship and too embarrassed to report the incidents in more detail. He was not able to be satisfied that the other offences had occurred.

Staude DCJ found that the appellant had suffered injury as a consequence of the offences and assessed the injury in context of the harmful relationship. It was determined that the sexual assaults had materially contributed to the appellant's diagnosed depression, anxiety and functional impairments and had led to her loss of self-esteem and confidence. However, some of the injury was not considered compensable as it was attributed to other abuse in the relationship and would therefore have been suffered regardless of the offences.

The judge was highly critical of the assessor of J's claim's findings that the appellant had committed an offence under s 101 of the *Children and Community Services Act 2004* by exposing her son to abuse.

***DB v RB* [2020] WADC 93 (29 June 2020) – Western Australia District Court**

'Damaging property' – 'Evidence' – 'Exposing children to domestic and family violence' – 'Physical violence and harm' – 'Protection orders' – 'Sexual and reproductive abuse'

Proceedings: Appeal from magistrate's decision to make final Family Violence Restraining Order (Final Order) pursuant to *Restraining Orders Act 1997* (WA) ('the RO Act').

Facts: The magistrate was satisfied on the balance of probabilities that DB had committed acts of family violence against his wife (RB): a sexual assault, letting down RB's car tyres (controlling behaviour), and two physical assaults. The magistrate was also satisfied that RB had reasonable grounds to apprehend he would commit acts of family violence against her. In relation to their daughter, TB, the magistrate found that DB had committed acts of family violence against her, exposed her to family violence, and she had reasonable grounds to apprehend further family violence/exposure to family violence. The magistrate made the Final

Order protecting RB and her eldest daughter (TB) for a term of two years.

Grounds of appeal:

1. The magistrate did not accord DB procedural fairness in refusing to grant leave to call overseas witnesses.
2. The magistrate erred in relying on his finding that TB was a credible witness to be satisfied on the balance of probabilities that incidents of family violence had occurred.
3. Text messages sent by RB to her sister that she had been raped, shortly after the incident occurred, were inadmissible as they were sent to an unknown number.
4. The magistrate disregarded one instance where DB was not the aggressor.
5. The decision the magistrate made was excessive.

Decision and reasoning: Appeal dismissed.

Ground 1: Evidence of the two proposed overseas witnesses was irrelevant as they had only observed the relationship in the past. Evidence was also inadmissible as it was only intended to bolster the credibility of DB.

Ground 2: The magistrate's finding as to TB's credibility (a child witness) was open to make based on his assessment of the way she gave evidence, and in light of all of the evidence.

Ground 3: While the probative value of/weight given to the text messages may have been an issue for the magistrate to consider, the magistrate did not err admitting them into evidence. They were relevant to the matters to which he was required to have regard. The court also noted that s 44A(i) of the RO Act provides that the court is not bound by the evidence in a final order hearing and the court may inform itself on any matter in such a manner as it considers appropriate.

Ground 4: The magistrate did not rely on this incident as one of the acts of family violence he was satisfied DB committed. In any event, the fact that DB may not have been the instigator of the events described did not detract from the fact that DB acknowledged he acted violently towards his wife in the course of that incident.

Ground 5: The magistrate correctly applied the test set out in s 10D(1) of the RO Act that a final order must be made where the magistrate is satisfied of the matters set out in s 10D(1)(a) or s 10D(1)(b), unless special circumstances exist.

Potschick v Bruce **[2018] WADC 107 (31 August 2018) – Western Australia District Court**

'Protection orders' – 'Summary of considerations'

Charges: The Magistrate was satisfied that the respondent committed two acts of abuse against the appellant.

Appeal type: Appeal from a decision of the Magistrate refusing to make a final violence restraining order.

Facts: The appellant appealed a decision of the Magistrate to refuse to make a final violence restraining order against the respondent. The appeal was conducted by way of a rehearing of the application.

Issues: Whether the Magistrate erred in fact in finding that the respondent was not likely, in the future, to commit an act of abuse against the appellant.

Decision and reasoning: The appeal was dismissed. Before the Court's power to grant a Final Violence Restraining Order (VRO) is enlivened, it must be satisfied that the respondent committed an act of abuse against the appellant and that he is likely to commit such an act again. The Court noted that the Magistrate was not satisfied to the requisite standard that the respondent was likely to commit an act of abuse against the appellant again, or that the granting of either a Family Violence Restraining Order FVRO of an Misconduct Restraining Order (MRO) was justified. As the Court was not prepared to disturb the Magistrate's finding as to the respondent's likely future conduct, there was no statutory basis on which the Court could order an MRO (there being no family relationship between the appellant and respondent). Having regard to the issue of the respondent's likely future conduct in relation to the appropriateness of granting a Final VRO or a MRO, there was no utility in undertaking a consideration of a hypothetical question of whether the Magistrate erred in exercising his discretion to refuse an order in the event that the finding was overturned and the jurisdiction to make an order enlivened ([36]).

Purpose and limitations

In its review of the legal response to domestic and family violence in Australia, *Family Violence – A National Legal Response*, published in 2010, the Australian Law Reform Commission and New South Wales Law Reform Commission recommended that a National Domestic and Family Violence Bench Book ("this bench book") should be developed. Recommendation 31.2 states:

> The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations in this Report in relation to the content that should be included in such a book.

Consequently this bench book has complemented efforts under *The National Plan to Reduce Violence against Women and their Children 2010 – 2022* by assisting the education and training of judicial officers so as to promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia and complements efforts under *The National Plan to End Violence against Women and Children 2022-2032* [National Plan 2022] to improve justice responses to all forms of gender-based violence.

There is no single 'family violence law' in Australia, and a range of legal responses may be applicable in cases where domestic and family violence is involved. Some of these legal responses are federal (such as Family Law) and some are state or territory-based (such as domestic violence protection orders and criminal law). However, this bench book does not reproduce or interpret the substance of these laws and legal responses, or explain how they vary.

The purpose of this bench book is to provide a central resource for judicial officers considering legal issues relevant to domestic and family violence related cases that will contribute to harmonising the treatment of these cases across jurisdictions along broad principles and may assist them with decision-making and judgment writing. This bench book does not seek to represent the opinions or preferences of judicial officers, or to direct judicial officers as to the manner in which they should respond to domestic and family violence related cases. Rather, it provides background information and knowledge supported by research, links to a range of legal and related resources, and practical guidelines for courtroom management that judicial officers

may consult when considering the breadth of issues and appropriate course of action in any individual case. In deciding whether, or how, a particular issue may be dealt with, the judicial officer must necessarily balance the interests of all participants in a case.

As well as serving as a resource in the judicial decision-making process, this bench book is a publicly available resource that is intended to benefit other legal professionals and service providers who are working with victims and perpetrators of domestic and family violence.

The social science and related literature referenced in the ‘key literature’ and ‘other resources’ sections of this bench book are provided to promote a greater understanding of the dynamics and behaviours associated with domestic and family violence identified in a significant body of academic research conducted in Australia and internationally over recent decades. Each case is different and this research is not intended to be definitive or prescriptive [Hayes 2014] in any given case. Furthermore, its admissibility in judicial proceedings is regulated by the rules of evidence applicable in the jurisdiction in which the particular proceedings are being heard.

Cautionary note: some people may find reading the content in this bench book distressing or traumatising.

This bench book is up to date at June 2023.

Purpose and limitations - Key Literature

Hayes, Alan, 'Social Science and Family Law – From fallacies and fads to the facts of the matter' [2014] (94) *Family Matters* 70.

This paper canvasses broad issues arising from the use of 'social science evidence' in family law proceedings. Hayes firstly discusses the changing nature of knowledge, such that 'some ideas that would have been regarded as "facts" in their day now appear ridiculous to us' (p 70). He cites several examples – see pp 70-72. Moreover, 'Scientific argument becomes the stuff of popular social knowledge that is all too readily detached from the detail and the critical debates within the scientific community. In this process, scientific evidence can be distorted in its meaning and significance' (p 72). Hayes then applies these arguments in relation to academic discourse on child development (see pp 72-74).

In discussing the nature of scientific research in this context, Hayes notes, 'Limits of social science evidence "presented as briefs in family law matters" must be acknowledged' (p 77). 'These limits ought to be framed in terms of the selection criteria for the studies reviewed and synthesised, the theoretical frame and methods, the manner in which effect sizes are assessed, as well as the extent of acceptance by the scientific community. As such, the norms of science should be applied not only to the research, itself, but to the way it is used!' (p 77). At p 77, Hayes provides a list of common errors in the use of social science evidence -

- 'applying evidence from group data to individual instances;
- holding on to outdated, static models of development that ignore the complex dynamics at play over the life course;
- grasping, selectively, a single study or a small number of studies while overlooking the caveats and concerns that apply to them;
- misunderstanding the differences between the concepts of statistical significance, effect sizes and the variance explained by the measures in a study;
- inflating the weight to be put on a single attribute, variable or outcome when multiple and changing influences impinge on individuals, at the biological, behavioural and social levels of explanation;
- overstating the capacity to predict likely developmental outcomes and pathways, given the many influences that impinge on lives, by design and accident; and
- ignoring the complex factors that lead to individual differences, including differential genetic

susceptibility.’

Purpose and limitations - Other Resources

National

- **Australian Human Rights Commission 2022, Wiyi Yani U Thangani First Nations Women's Safety Policy Forum Outcomes Report November 2022.**
- **Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (Australian Law Reform Commission and New South Wales Law Reform Commission, 2010).**
- **Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System* (ALRC Report 135, 2019).**
- **Australian Law Reform Commission, Family Violence and Commonwealth Laws – Improving Legal Frameworks *Report No 117* (*Australian Law Reform Commission, 2012*).**
- **Commonwealth of Australia (Department of Social Services) 2022, *National Plan to End Violence against Women and Children 2022-2032: Ending gender-based violence in one generation: A joint Australian, state and territory government initiative*, Commonwealth of Australia.**
- **Council of Australian Governments. (2019). Fourth action plan: National plan to reduce violence against women and their children 2010-2022 Canberra, Commonwealth of Australia.**

Australian Capital Territory

- **ACT Government (2019) *Australian Capital Territory response Australian Government national plan to reduce violence against women and their children 2010-2022 : preventing domestic and family violence and improving safety for all women and children in the ACT community ; fourth action plan 2019-2022*, Canberra.**
- **Standing Committee on Justice and Community Safety, Report on Inquiry into Domestic and Family Violence – Policy Approaches and Responses August 2019, Australian Capital Territory.**

New South Wales

- **New South Wales Government (2022) NSW Domestic and Family Violence Plan 2022-2027**

Northern Territory

- **Northern Territory Government, Department of Territory Families, Housing and Communities (2018)** ***Domestic, Family and sexual violence reduction Framework 2018-2028***

- **Northern Territory Government, Department of Territory Families, housing and Communities (2018)** ***The Northern Territory's Domestic, Family and Sexual Violence Reduction Framework 2018-2028 Safe, Respected and Free from Violence: Action Plan 1: Changing Attitudes, Intervening Earlier and Responding Better (2018-2021)*****.**

Queensland

- **Queensland Government, Queensland's reform program to end domestic and family violence (2022)** ***Fourth Action Plan of the Domestic and Family Violence Prevention Strategy 2022-23 to 2025-26*****.**

Queensland Government Women's Safety and Justice Taskforce (2021-2022) A wide-ranging review of the experience of women across the criminal justice system (2021-2022).

Hear her voice – Report one - Addressing coercive control and domestic and family violence in Queensland.

- Volume 1
- Volume 2
- Volume 3

Hear her voice - Report two – Women and girls' experiences across the criminal justice system.

- Volume 1
- Volume 2

- **Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland,** ***Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*** **(2015).**

South Australia

- **Government of South Australia, Office for Women (2022)** ***Women's Policy: Safety and Wellbeing***

(website).

Tasmania

- **Department of Communities Tasmania (2022) Survivors at the Centre: Tasmania's Third Family and Sexual Violence Action Plan 2022-2027.**

Victoria

- **Family Violence Reform Implementation Monitor (2021) *Report of the Family Violence Reform Implementation Monitor as at 1 November 2020*, State Government of Victoria.**

State Government of Victoria (2022) Free from Violence: Victoria's strategy to prevent family violence webpage.

Includes links to:

- Free from Violence - Victoria's Prevention Strategy
- Free from Violence – Second Action Plan 2022-25
- Free from Violence – References and Resources

- **Victorian Royal Commission into Family Violence – Report and Recommendations (March 2016).**

Western Australia

Western Australian Government (2021) *Western Australia's Strategy to Reduce Family and Domestic Violence.*

- *Path to Safety: Western Australia's Strategy to Reduce Family and Domestic Violence 2020-2030*
- *Path to Safety: First Action Plan 2020-2022*

Terminology

Cautionary note: some people may find reading the content in chapter 3 distressing or traumatising.

Long-standing debates exist over the most appropriate terminology to use when identifying violence and abuse between spouses, partners, and family members [National Plan 2022]. Terminology is fragmented across the policing, legal and service sectors in Australian and overseas jurisdictions, and is complicated by the range and diversity of cultural, socio-economic, sexual, geographical and familial structures that are intended to be captured by any one label. Moreover, key terms (and definitions) in Australian State, Territory and Commonwealth domestic-violence related legislation lack consistency.

Descriptors such as ‘domestic violence’, ‘domestic abuse’, ‘domestic and family violence’, ‘family violence’, ‘domestic harm’, ‘domestic abuse’, ‘domestic control’, ‘violence against women’, ‘gender-based violence’ and ‘intimate partner violence’ have frequently been and are often interchangeably adopted in reports and by academics and commentators writing in this area [Groves & Thomas 2013]. To varying degrees, each of these terms has limitations.

For example, proponents of the term ‘violence against women’ argue that the descriptors ‘domestic violence’ and ‘family violence’ mask the reality that violence in this context is gendered and, in an overwhelming majority of cases, is perpetrated by men against women [Behrens 1996]. This descriptor has, however, been criticised on the basis that it excludes the reality that some violence, albeit at significantly lower rates, is perpetrated by women against men [MacDonald 1998].It is recognised that the terminology is evolving [National Plan 2022].

While acknowledging there is no widespread consensus regarding its use, the descriptor adopted in this bench book is ‘domestic and family violence’. There are, however, a number of important points to note.

The word ‘domestic’ may suggest that the violence is limited to conduct occurring only in the home [MacDonald 1998] between people living together in a relationship. The risk is that conduct occurring outside the physical confines of the home or between estranged individuals or other parties – including, parent to child or adolescent, sibling to sibling, or adolescent to parent – may be overlooked.

The inclusion of the word ‘family’ in the descriptor endeavours to address this potential limitation and aligns more closely with statutory definitions. Proponents also note that the reference to ‘family’ more accurately reflects the context and dynamic of violent behaviours occurring in certain groups within the community. For example, in Aboriginal and Torres Strait Islander communities [JCCD, The Path to Justice (ATSI) 2016], it recognises the absence of demarcation between private and public spheres; and encompasses the range of behaviours that may occur within intimate, immediate and extended family and other communal or extended kinship relationships of mutual obligation and support [AHRC 2022]. Further, in culturally and linguistically diverse communities [JCCD, The Path to Justice (CALD) 2016], where migrant and refugee women are more likely to move in with their husband’s family after marriage, victims may experience violence and abuse perpetrated by not only their partners, but their ‘in-laws’ and other extended family members.

Use of the term ‘violence’ may risk a focus on physical acts causing bodily injury. There may be reluctance by some victims to name their experience as one of ‘violence’ unless it involves severe and physically damaging behaviour. The majority of State, Territory and Commonwealth legislation now recognise that ‘violence’ includes physical, sexual, emotional and psychological abuse or injury, as well as conduct designed to exert power by restricting access to financial, familial and cultural resources and limiting social autonomy, sometimes referred to as coercive control. For consistency, the term adopted in this bench book is ‘violence’.

The National Plan to End Violence Against Women and Children 2022-2032 [National Plan 2022] encourages nationally consistent definitions of gender-based violence, and provides distinct definitions of intimate partner or domestic violence (“any behaviour within an intimate relationship (including current or past marriages, domestic partnerships or dates) that causes physical, sexual or psychological harm”) and family violence (a broader term referring “not only to violence between intimate partners but also to violence perpetrated by parents (and guardians) against children, between other family members and in family-like settings”, and notes that it is also the term preferred by Aboriginal and Torres Strait Islander peoples, reflecting the occurrence of violence across extended family networks. It also can include forms of modern slavery including forced marriage and servitude.

Terminology - Key Literature

Australian Literature

Australian Human Rights Commission 2022, *Wiyi Yani U Thangani First Nations Women's Safety Policy Forum Outcomes Report* November 2022.

This Report acknowledges that First Nations people prefer the term "family violence" to describe the range of violent behaviour impacting their communities, including across extended families, kinship networks and broader relationships. Sexual assault, often perpetrated my non-family members, was more appropriately identified as sexual violence, rather than "family violence"[27].

Australian Law Reform Commission, *Family Violence: A National Legal Response*, Consultation Paper No 1 (2010); New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, Consultation Paper No 9 (2010).

This Report acknowledges that descriptors such as 'domestic violence', 'family and domestic violence', 'family violence', 'domestic harm', 'domestic abuse', 'domestic control', 'violence against women' and 'intimate partner violence' have frequently been and are often interchangeably adopted in other reports, and by academics and commentators writing in this area. Importantly, the Report acknowledges that although terminology differs, each term 'attempts to refer to the same type of conduct' (p110). The Report is critical of the term 'domestic' and cites almost exclusively the comments made by Fehlberg and Behrens (see reference below) on the disadvantages of this term. However no attempt is made to justify why 'family violence' is the ALRC Report's preferred descriptor other than stating that it is to be used 'to reflect the language used in the Terms of Reference' (p110).

Behrens, Juliet, 'Ending the Silence, But… Family Violence under the *Family Law Reform Act 1995*' (1996) 10 *Australian Journal of Family Law* 35.

This article examines the relevance of the term 'family violence' in the context of amendments made under the *Family Law Reform Act 1995*. Behrens is highly critical of the term, claiming that 'the problem with the term "family violence" is…the picture it paints that violence in the family is something in which all members

are complicit' (p39). The author takes issue with the fact that the term is ungendered and further submits that the descriptor 'is even less acceptable than the more commonly used "domestic violence"' (p39).

Commonwealth of Australia (Department of Social Services) 2022, *National Plan to End Violence Against Women and Children 2022-2032*.

The new National Plan proposes nationally consistent definitions of gender-based violence, to inform and support program design, public and private sector policies and legislation across States and Territories to ensure equality of access to support and justice [37]. In particular, "intimate partner violence", "family violence", "coercive control", "sexual violence" and "consent" are defined [37]-[38] and a detailed glossary is annexed defining relevant terminology [124]-[134].

Council of Australian Governments. (2019). *Fourth action plan: National plan to reduce violence against women and their children 2010-2022*. Canberra, Commonwealth of Australia.

Extract: The Fourth Action Plan sets out eight principles to guide the way all industries, sectors and areas of government work together to address domestic, family and sexual violence. These principles inform 20 practical actions across five priority areas. The priority areas represent the range of responses needed to tackle domestic, family and sexual violence: from primary prevention to improving service and support systems. The Fourth Action Plan commits to leaving no one behind. It recognises the need to respect Aboriginal and Torres Strait Islander communities and listen to the diverse lived experiences of people affected by violence across all of our responses. Commonwealth, state and territory governments will develop a national implementation plan over 2019 that will outline how governments will deliver actions and measure their impact to address the national priority.

Fehlberg, Belinda et al, *Australian Family Law – The Contemporary Context* (Oxford University Press, 2015).

See especially [5.3] Fehlberg and Behrens focus on the term 'family violence' in their analysis. The authors note that behind considerations of the appropriate definition or the types of conduct that fall within the purview of domestic or family violence, there have been long-standing debates regarding appropriate descriptors.

They list those terms that are most commonly applied, including ‘family violence’, ‘domestic violence’, ‘family and domestic violence’ and ‘intimate partner violence’. Although stating that ‘all of these terms are seen to have strengths and drawbacks,’ the authors don’t explain the strengths and drawbacks. They do, however, note that ‘[a] central concern in developing and applying terminology [is] to recognise that the behaviour being described occurs in the context of relationships…but not to allow the words acknowledging this to suggest the behaviour is somehow less serious than violence that occurs in other contexts’ (p134).

Fisher, Stephen, ‘From Violence to Coercive Control: Renaming Men’s Abuse of Women’ (2012) 4 *Australasian Policing* 35.

Fisher begins this article with a statement that ‘social problems are understood and responded to in terms of how they are named’ and that the label assigned to a phenomenon has important implications for those experiencing the issue as well as those seeking to find a solution (p35). The author divides his analysis between five key sections in seeking to demonstrate that the term ‘coercive control’ is a more appropriate descriptor than that of the word ‘violence’. The sections are: ‘gendering violence’, ‘medicalising or individualising violence’, ‘violence as criminal’, ‘avoiding the narrow focus on physical incidents’ and ‘recognising the dynamic and strategic actions of the perpetrator’. The author adopts a feminist analysis of the issues, advocating that gender neutral language masks the reality that domestic violence is overwhelmingly perpetrated by men against women. The author also examines the use of the term ‘violence’, arguing that the risk in using this term is that the focus is primarily on physical acts that cause bodily injury (p36). He offers the term ‘coercive control’ as an alternative descriptor which he contends ‘usefully describes a whole pattern of strategies’ and avoids a narrow focus on physical acts alone (p37).

Harland, Alexandra, Donna Cooper, Zoe Rathus and Renata Alexander, *Family Law Principles* (Thomson Reuters, 2011).

At [6.70] the authors refer to the ‘bewildering array of terms’ used to describe domestic and family violence in the broader context of examining the nature and scope of such violence (p89). They attribute this to various efforts to encapsulate different types of conduct and relationships in a single term, as well as the ‘socio-political contexts that have informed the development of the particular concepts’ (p89). While the authors do not explore either of these points in any detail, they do, however, examine the descriptors ‘domestic violence’

and ‘family violence’. The authors note that the former tends to refer to interpersonal violence that occurs in domestic settings and within family and intimate relationships, and is a term most often attributed to ‘violence by a man against his female partner, including violence perpetrated after separation’ (p.89). This is then contrasted with ‘family violence’ with the authors noting that term is often preferred to describe forms of violence that occur in Indigenous communities and the wider family.

MacDonald, Helen, *What’s in a Name? Definitions and Domestic Violence*, (Domestic Violence and Incest Resource Centre, Brunswick, 1998).

Given the terms ‘domestic violence’, ‘family violence’ and ‘violence against women’ are often referenced in research, policy reports and reform papers, the author argues that it is necessary for these terms to be critically analysed and defined. As the author notes, ‘each name has a history that is ongoing and often contentious’ (p2). MacDonald discusses various definitions of domestic violence, ranging from dictionary definitions to those used by government departments, the United Nations, as well as legal definitions. The different definitions used within Australian state and federal laws are also discussed (though many have since been amended or repealed), and a brief history of laws relating to domestic violence is given. Sub-categories of behaviour such as physical, sexual and emotional violence, as well as economic and child abuse are also discussed.

International Literature

Ashcraft, Catherine, ‘Naming Knowledge: A Language for Reconstructing Domestic Violence and System Gender Inequality’ (2000) 23 *Women and Language* 3.

The author seeks to broaden the options for framing domestic violence to incorporate the concept of domestic control. Ashcraft submits that, ‘[p]roviding terminology that accurately reflects the range, injustice and inequality [of the behaviour] would help prevent [it] from occurring’ (p9). This article is written from a feminist legal theory perspective and the author argues that although attempts have been made to privilege women’s voices and challenge dominant representations of domestic violence, ‘the communicative choices and discursive practices employed in accomplishing these goals have unintentionally…silence[d] certain women's voices and reproduce[d] dominant constructions of domestic violence and gender relations’ (p8).

The importance of this article in the context of appropriate terminology is threefold. Firstly, the author

examines the emergence of descriptors and definitions to describe domestic violence during the battered women's movement of the 1970s. This is useful for providing a historical context and deepening understandings of the development of the term 'domestic violence'. Secondly, Ashcraft makes an observation about naming debates, stating that '[t]he key to providing women with the tools necessary to address complex and varied marital inequalities is ensuring that the terminology remains fluid and flexible' (p7). Finally, the author comments on the importance of retaining the integrity of existing descriptors such as 'domestic violence' to avoid undermining those who currently identify with the term, which is to be balanced with a move towards descriptors that will (hopefully) increase understandings of the dynamics and types of relationships in which the violence occurs.

***Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104 (entered into force generally on 23 February 1994) art 1.**

The United Nations *Declaration on the Elimination of Violence against Women* offers the following definition: 'the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.

DeKeseredy, Walter, and Martin Schwartz, 'Theoretical and Definitional Issues in Violence against Women' in Claire Renzetti, Jeffrey Edleson and Raquel Bergen, *Sourcebook on Violence Against Women* (Sage Publications, 2011) 3.

An important objective of this chapter is to critically analyse narrow, broad, gender-neutral and gender-specific definitions of domestic violence. The authors note that there is no agreed upon definition of violence against women and observe that there is a tension in the act of naming this issue given that 'many people use language that specifically names women as the objects of abuse or names men as the abusers' (p3). Examples include 'woman abuse', 'violence against women' or 'male-to-female violence'. These can be contrasted to the more gender-neutral terms such as 'domestic violence', 'family violence' or 'intimate partner violence'. DeKeseredy and Schwartz clearly favour the use of gender-specific terms and language and do so on the basis that 'women are the overwhelmingly predominant victims of intimate adult violence' (p11). The authors criticise statistical findings in North America using the Conflict Tactics Scale ('CTS') on the basis that

'crude counts of behaviour alone cannot accurately determine gender variations' (p11). These comments, however, are of limited use in the Australian context.

Goodmark, Leigh, *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, 2011).

In this American publication, Goodmark argues that current legal definitions of domestic violence are excessively focused on physical acts, which results in a failure to provide protection from non-physical behaviours, such as psychological and economic abuse and coercive and controlling behaviours. Although the author is not expressly concerned with the topic of labelling, the first two chapters are useful in defining and historicising domestic violence laws over the past 40 years in the United States providing context to the development of the term 'domestic violence', and 'family violence' to a lesser extent (pp29-53).

Kelly, Joan, and Michael Johnson, ' Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476.

Kelly and Johnson set out a short section in this article titled 'Types and Terminologies: Searching for Accurate Descriptors'. The authors use four uncommon terms to describe patterns of violence: 'coercive controlling violence', 'violent resistance', 'situational couple violence' and 'separation-instigated violence'. The authors argue that while these descriptors have limited application, differentiating between types of domestic violence can have important policy implications and can enhance public understanding of the issues.

Kelly, Liz, and Jill Radford, '"Nothing Really Happened": the invalidation of women's experiences of sexual violence' (1990) 10 *Critical Social Policy* 39.

A central theme of Kelly and Radford's argument is that in order to avoid silencing victims and to provide them with a means of speaking about their experiences, we must attempt to name and define the phenomenon. They state that '[n]ames provide social definitions; make visible what is invisible; define as unacceptable what was accepted; make sayable what was unspeakable' (p40). Although the article is primarily focused on definitions of sexual violence, the authors assert the importance of terminology and how this can affect public perceptions of what is regarded as a criminal offence.

Groves, Nicola, and Terry Thomas, *Domestic Violence and Criminal Justice* (Taylor and Francis, 2013).

This book aims to provide an up-to-date and comprehensive introduction to the subject of domestic violence and its interaction with the criminal justice system. The authors dedicate a chapter to naming and defining domestic violence as well as exploring its nature and extent, including the historical and political contexts of related terms. The descriptors explored include ‘domestic violence’, ‘domestic abuse’, ‘intimate partner violence’, ‘family violence’, ‘gender violence’ and ‘coercive control’.

Terminology - Other Bench Books

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

In the chapter on family domestic and sexual violence, it is acknowledged that "[t]here are a range of ways of defining family, domestic and sexual violence" and considers various relevant terms and definitions adopted in literature and Western Australian legislation. Although the term 'family and domestic violence' is used in throughout, the authors do not attempt to explain why this term is preferred over other more commonly used terms.

Terminology - Other Resources

Judicial College of Victoria (2021) *Note 11: Victims of family violence*; Victims of crime in the courtroom: a guide for judicial officers (eManual).

This note explains:

- What is family violence;
- Why victims stay or return to abusive relationships;
- Key points to consider;

An understanding of the dynamics of family violence can help judicial officers avoid unintentionally affirming the perpetrator's narrative in the courtroom or in sentencing reasons.

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women'.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Aboriginal and Torres Strait Islander women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the

justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers'.

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2016).

See the Executive Summary (p6-9) which makes a number of recommendations. It also identifies and discusses key pre-court barriers:

- Lack of knowledge of legal rights;
- Lack of financial independence;
- The importance of integrated support services;
- Poor police responses;
- The impact of pre-arrival experiences and traumatic backgrounds;
- Community pressure on women seeking to protect themselves and their children;
- Uncertainty about immigration status and fear of deportation; and
- The cost of engagement with the legal system.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and
- Unethical and poor professional conduct by interpreters.

Identifies barriers to full participation in attending court:

- The intimidating process of arriving at court;
- Safety while waiting at court;
- Lack of understanding of court processes;
- Difficulty understanding forms, charges, orders or judgments;

- Courtroom dynamics;
- The impact of attitudes and actions of judicial officers;
- The need for judicial officers to receive cultural competency training;
- Lack of availability of men's behaviour change programs; and
- Abuse of court processes by perpetrators.

Understanding domestic and family violence

What it is:

There is no uniform legislative definition of domestic and family violence across Australian jurisdictions. State, territory and federal legislation recognise, in different ways, that domestic and family violence can present in many forms and can occur within a variety of relationships.

The National Plan to End Violence Against Women and Children 2022-2032 [DSS 2022] encourages nationally consistent definitions of gender-based violence, and provides distinct definitions of intimate partner or domestic violence ("any behaviour within an intimate relationship (including current or past marriages, domestic partnerships or dates) that causes physical, sexual or psychological harm") and family violence (a broader term referring "not only to violence between intimate partners but also to violence perpetrated by parents (and guardians) against children, between other family members and in family-like settings", and notes that it is also the term preferred by Aboriginal and Torres Strait Islander peoples, reflecting the occurrence of violence across extended family networks. It also can include forms of modern slavery including forced marriage and servitude.

Some judicial officers may focus only on recent physical violence and view it as a single incident or as a series of discrete incidents [Westmarland et al 2016], rather than as part of a complex pattern of violent or abusive behaviours [Fehlberg & Behrens 2015] and domination including tactics to isolate, degrade, exploit and control victims [Stark 2007]. Others may perceive the cause of the violence as relationship conflict or couple fighting and, on that basis [Hunter 2006], may, for example: emphasise shared responsibility for children; encourage parties to reconcile; make mutual protection orders for a limited period allowing the parties time to either reconcile or separate; or recommend an exchange of unenforceable undertakings where the parties promise they will be of good behaviour towards one another and not commit domestic and family violence [Jordan & Phillips 2013]. Some judicial officers demonstrate inconsistent approaches to the protection of children exposed to domestic and family violence by including conditions in protection orders allowing perpetrators to exercise child contact, or by granting cross orders applied for by perpetrators in an attempt to ensure that their rights in Family Court parenting proceedings are not prejudiced [Wakefield & Taylor 2015]. These judicial perceptions of domestic and family violence may have the effect of minimising or denying the experience and impact of violence for victims

and children and may overlook the risks of future violence.

Over time, judicial understanding of domestic and family violence is developing, and there is growing acknowledgement of its complexity and diversity, including coercive control [Douglas & Ehler 2022]. This bench book underlines a number of different forms of domestic and family violence. Where a person engages in a pattern of behaviours in order to control another person, this pattern of behaviour may be referred to as coercive control. A range of behaviours may underpin domestic and family violence, any of which may be part of a pattern of behaviour: the list is not exhaustive, and some behaviours may overlap or be understood in more than one way and require a range of judicial responses. Judicial officers have identified numerous “red flags” which might indicate the presence of coercive control in matters before them [Douglas & Ehler 2022].

Reported forms of domestic and family violence, actual or threatened, include:

- Physical violence and harm
- Sexual and reproductive abuse
- Economic and financial abuse
- Emotional and psychological abuse
- Cultural and spiritual abuse
- Following, harassing and monitoring
- Social abuse
- Exposing children to domestic and family violence
- Damaging property
- Animal abuse
- Systems abuse
- Forced marriage
- Dowry abuse

Who it affects:

Domestic and family violence can affect any person irrespective of age, gender, socio-economic status or cultural background. It is widely acknowledged however that women are significantly more likely than men to experience domestic and family violence [ANROWS 2018].

The range of relationships within the legislative scope of domestic and family violence also varies across

Australia [DSS 2022]. In all jurisdictions a relationship includes that between current or former intimate partners, and extends to relationships—more prevalent within Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities—between immediate and extended families and other communal or extended kinship relationships of mutual obligation and support.

The primary role of judicial responses to domestic and family violence is to assess and respond to risk and promote the safety of those at the risk of harm.

Certain groups within the community may be at greater risk of experiencing domestic and family violence, may be more vulnerable to its impacts, and may require different judicial responses according to their specific issues and needs. Some people may belong to multiple groups and, as a consequence, may experience heightened risk or vulnerability. These groups may include but are not limited to:

- Women
- People with children
- Children
- Young people
- Older people
- Pregnant people
- People with disability and impairment
- People with mental illness
- People from culturally and linguistically diverse backgrounds
- Aboriginal and Torres Strait Islander people
- People living in regional, rural and remote communities
- People affected by substance misuse
- People who are lesbian, gay, bisexual, transgender, intersex and queer +
- People with poor literacy skills
- Victims as (alleged) perpetrators

Understanding domestic and family violence - Key Literature

Altobelli, Federal Magistrate Tom 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at the Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 2 October 2009).

This paper presents some of the findings and associated research from the 2007 Wingspread Conference, which brought together 37 practitioners and researchers 'to identify and explore conceptual and practical tensions that have hampered effective work with families in which family violence has been identified or alleged' (p1). The paper discusses some of the implications of those findings for the daily practice of family law, including the need to: differentiate families' experiences of family violence, screen and triage family violence effectively, assess the appropriateness of processes and services for different families, and ensure successful outcomes for children.

This paper draws on recognized research in this field to emphasise that there cannot be a 'one size fits all' approach to recognising family violence in family law proceedings, and presses for an understanding of the *variety* of behaviours and typologies of family violence that may occur in abusive relationships (pp12-13, 15). It stresses that understanding that different families experience violence in different ways assists not only in recognising family violence, but also managing effective responses to it in family law proceedings (p15, 19).

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019*.

This is primarily a data report to help inform government policies and plans and to assist in the planning and delivery of violence prevention and intervention programs. It builds on AIHW's inaugural *Family, domestic and sexual violence in Australia 2018 report*. It presents new information on vulnerable groups, such as children and young women. It examines elder abuse in the context of family, domestic and sexual violence, and includes new data on telephone and web-based support services, community attitudes, sexual harassment and stalking. It also includes the latest data on homicides, child protection, hospitals and specialist homelessness services, while noting notable data gaps on various aspects of family, domestic and sexual violence and work underway to fill the gaps and develop new data sources.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence - A National Legal Response, Report No 114 (Australian Law Reform Commission and New South

Wales Law Reform Commission, 2010).

This comprehensive report considers understandings of and legislative definitions of domestic and family violence across Australian jurisdictions. Part B of this report titled ‘Family Violence: A common Interpretative Framework’ provides a wide-ranging review of literature and views about understanding domestic and family violence. From page 300-301 this report includes a discussion of the common features and dynamics of domestic and family violence. At 235 this report identifies that the improvement of the safety of victims of domestic and family violence and that definitions, and understanding, of family violence are key starting points to ensure safety.

Australia’s National Research Organisation for Women’s Safety. *Violence against women: Accurate use of key statistics* (ANROWS, 2018).

This ‘Key Facts’ sheet prevents an overview of statistics sourced primarily from research from the 2016 ABS Personal Safety Survey and Australian Institute of Criminology. It identifies for example that in Australia:

- women are significantly more likely than men to experience domestic and family violence;
- Approximately one quarter of women have experienced at least one incident of violence by an intimate partner;
- On average, one woman a week is killed by her intimate partner;
- Women are most likely to experience physical assault in their home;
- Just over 9 out of 10 women reported that their last incident of physical assault by a male was perpetrated by a man they know (most commonly a former partner);
- Just under 9 out of 10 women reported that their last incident of sexual assault was perpetrated by a man they know (most commonly a former partner); and
- Of women who have experienced violence by a current partner since the age of 15, 82% had never contacted the police.

Australia’s National Research Organisation for Women’s Safety, *Women who kill abusive partners: Understandings of intimate partner violence in the context of self-defence* (ANROWS, 2019).

This resource offers an alternative model of intimate partner violence (IPV) for legal contexts, based on a

social entrapment framework. It focuses on a criminal case, however, it is relevant to instances in which an understanding of facts involving intimate partner violence (IPV) is essential to the application of the law. In particular, it has a resource on pages 9-10 that steps through the use of a "social entrapment framework" to understand IPV. A social entrapment framework recognises, in line with current research, that the victim's ability to resist abuse is constrained by the abuser's behaviour, her available safety options, and broader structural inequities in her life. A social entrapment framework helps to recognise the risks and complexities of leaving a violent relationship, and moves away from reliance on responses that require initiation by the victim and generate a one-off reaction rather than ongoing assistance. Social entrapment framework recognises ongoing risk, and acknowledges flaws in systemic responses to IPV—including recognising that an ineffective or inadequate response can escalate the danger that a victim/survivor is in.

Ayre, Julie, et al., *Examination of the burden of disease of intimate partner violence against women in 2011: Final Report* (ANROWS, 2016).

This report notes that, '[e]xposure to intimate partner violence (IPV) has serious health outcomes for Australian women and their children, and its prevention is a recognised national priority. Burden of disease studies measure the combined impact of living with illness and injury (non-fatal burden) and dying prematurely (fatal burden) on a population. This report estimated the amount of burden that could have been avoided if no adult women in Australia in 2011 had been exposed to IPV during their lifetime. This "attributable burden" is reported in terms of total, non-fatal and fatal burden' (p.7).

Key results for national estimates of burden:

- 'Overall, it was estimated that 1.4% of the disease burden experienced by women aged 18 years and over in 2011 was attributable to physical/sexual IPV by a current or previous cohabiting partner. Anxiety disorders made up the greatest proportion of this attributable burden (35%), followed by depressive disorders (32%) and suicide & self-inflicted injuries (19%) (Figure 5.1). More than one-quarter (27%) of this burden was fatal (Figure 5.2)'.
- 'Physical/sexual IPV was responsible for almost half (45%) of the total burden due to homicide & violence among adult women in 2011 (Figure 5.3)'.
- 'When the definition of IPV was broadened to include physical/ sexual IPV by non-cohabiting partners, it was estimated that 2% of the burden experienced by Australian adult women could have been avoided if

> no exposure to IPV occurred. When emotional abuse was also considered, it was estimated that 2.2% of all burden experienced by adult women was due to IPV (Table 5.5) and could have been avoided if no exposure to IPV occurred' (p.7).

It notes that there has been little change in the rate of burden between 2003 and 2011.

Boxall H & Lawler S 2021. How does domestic violence escalate over time?. *Trends & issues in crime and criminal justice* no. 626. Canberra: Australian Institute of Criminology.

Abstract: A key assumption in the domestic violence literature is that abuse escalates in severity and frequency over time. However, very little is known about how violence and abuse unfolds within intimate relationships and there is no consensus on how escalation should be defined or how prevalent it is.

A narrative review of the literature identified two primary definitions of escalation: a pattern of increasingly frequent and/or severe violent incidents, or the occurrence of specific violent acts (ie outcomes). Escalation appears to be limited to serious or prolific offenders rather than characterising all abusive relationships. However, disparities in prevalence estimates between those provided by victim–survivors and recorded incident data highlight the difficulty of measuring this aspect of abusive relationships.

Boxall, Hayley and Anthony Morgan *Repeat Domestic and Family Violence among Young People*, Research Report No 591, February 2020, Australian Institute of Criminology.

This paper adds to what is known about family violence perpetrated by adolescents. It examines short-term reoffending patterns – including timing, prevalence, the peak period for repeat violence, and cumulative rates – as well as predictors of repeat violence, particularly those relating to prior histories of family violence or breaches of orders, given that this information is readily available to frontline responders. The paper draws on incident data from Victoria Police for almost 4,000 young people aged 12-18 involved in domestic or family violence. Approximately one in four of these young people were involved in repeat violence in the six months following an incident, with the risk peaking at around 30 days following an incident in domestic violence cases and at around three to four weeks for family violence cases. Violence was largely perpetrated against intimate partners or parents. The findings show how the violence histories of young people can be helpful for identifying who will be involved in repeat violence in the short term, and who will be involved in multiple violent incidents. Frequency of prior incidents of violence is a better predictor of future short-term reoffending than

prevalence of prior violence, but they are both useful indicators of future risk.

Bradley, Judge Sarah *'Family and Sexual Violence and the Development of the Law in Queensland and Australia*' (Paper delivered at the launch of the Papua New Guinea Judicial Women's Association, Port Moresby, 22 – 23 November 2012).

In this paper, Bradley J provides an overview of the overlap and conflict between varying jurisdictions' legal frameworks governing domestic, family and sexual violence, particularly in light of *The National Plan to Reduce Violence against Women and their Children 2010 – 2022*. The focus of analysis is on Queensland and Commonwealth legislation. In relation to Queensland, the operation of the *Domestic and Family Violence Protection Act 2012*is explained. Similarly, Commonwealth laws including the *Family Law Act 1975*, and migration and social security law, are described.

Reference is made to the ways in which abusive behaviours are understood in Queensland (p4) and Commonwealth (p5) legislation, and examples of behaviours especially prevalent in the context of elder abuse are highlighted (p5).

Campbell, Elena, Jessica Richter, Jo Howard and Helen Cockburn, *The PIPA Project: Positive Interventions for Perpetrators of Adolescent Violence in the Home (AVITH)* Research Report No 4, March 2020, ANROWS.

The 2016 Victorian Royal Commission into Family Violence found that adolescent family violence was poorly identified and had no considered systemic response. To help address this gap in knowledge, this report investigates the initial legal responses that adolescents and their families receive when they first come to the attention of the legal system. It compares legal and service sector interventions across three jurisdictions at very different stages of legislative, policy and definitional development – Victoria, Western Australia and Tasmania – focusing on awareness of adolescent family violence amongst practitioners and whether and how a legal response was provided. It also examines the characteristics of this form of violence and the impact of responses on families, using data from Victoria Legal Aid regarding 905 adolescents involved in either civil protection order matters or protection order breach matters. The study found that, across all three jurisdictions, current legal responses may not be addressing the objective of reducing risk to families and

indeed may be deterring families from reporting.

Commonwealth of Australia (Department of Social Services) 2022, National Plan to End Violence Against Women and Children 2022-2032.

The new National Plan proposes nationally consistent definitions of gender-based violence, to inform and support program design, public and private sector policies and legislation across States and Territories to ensure equality of access to support and justice [37]. In particular, “intimate partner violence”, “family violence”, “coercive control”, “sexual violence” and “consent” are defined [37]-[38] and a detailed glossary is annexed defining relevant terminology [124]-[134].

Douglas, Heather and Ehler, Hannah (2022) Coercive Control and Judicial Education: A Consultation Report. (Australasian Institute of Judicial Administration).

Based on interviews with 28 judicial officers and 5 research experts this report considers how to best present information about coercive control in the National Domestic and Family Violence Bench Book and the information needed by judicial officers to better understand coercive control. Based on the detailed material outlined in the Report the key themes considered are the key aspects of coercive control that judicial officers seek explanation of; how coercive control should be explained to judicial officers; how judicial officers can respond to coercive control in the court room and general observations and red flags for identifying coercive control.

Participants identified a number of ‘red flags’ for coercive control before separation (2.4.1):

- Intimidating the victim/survivor, causing fear
- Isolation
- Jealousy
- Monitoring
- Attacks on self-confidence
- Loss of autonomy
- Economic abuse

- Intense affection followed by removal of intense affection
- Offender justifying abusive behaviour
- Illicit drugs

Participants identified a number of 'red flags' for coercive control post-separation (2.4.2):

- Threats (to kill respondent, children, extended family, pets, suicide or self-harm)
- Strangulation/hands on the throat
- Harassing
- Monitoring
- Disputes about children's matters
- Victim/survivor downplays or normalises abuse
- Attempts to control court hearings

*Note that many of the matters identified as red flags by the participants may be red flags for coercive control both before and after separation, for example strangulation/hands on the throat.

Dowling, Chistopher and Anthony Morgan, *Is methamphetamine use associated with domestic violence?* (Australian Institute of Criminology Report No. 563 December 2018).

Report abstract:

There is considerable evidence of the impact of methamphetamine use on violent behaviour. This paper presents findings from a review of existing research on the association between methamphetamine use and domestic violence.

Eleven studies met the criteria for inclusion. Domestic violence is common among methamphetamine users; however, methamphetamine users account for a small proportion of all domestic violence offenders.

There is evidence that methamphetamine users are more likely than non-users to perpetrate domestic violence. Importantly, methamphetamine use is frequently present along with other risk factors. This means methamphetamine use probably exacerbates an existing predisposition to violence, rather than causing violent behaviour.

Fehlberg, Belinda et al, and Juliet Behrens, *Australian Family Law – The Contemporary Context* (Oxford University Press, 2015).

See especially [5.3] Fehlberg and Behrens focus on the term 'family violence' in their analysis. The authors note that behind considerations of the appropriate definition or the types of conduct that fall within the purview of domestic or family violence, there have been long-standing debates regarding appropriate descriptors. They list those terms that are most commonly applied, including 'family violence', 'domestic violence', 'family and domestic violence' and 'intimate partner violence'. Although stating that 'all of these terms are seen to have strengths and drawbacks,' the authors don't explain the strengths and drawbacks. They do, however, note that '[a] central concern in developing and applying terminology [is] to recognise that the behaviour being described occurs in the context of relationships…but not to allow the words acknowledging this to suggest the behaviour is somehow less serious than violence that occurs in other contexts' (p134).

Hunter, Rosemary, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733.

See especially 'Judicial Knowledge About Domestic Violence' (from p754) drawing on observations of court proceedings the author notes that magistrates varied greatly in being supportive or minimising harm, affirming or not affirming women, with some questioning why the applicant stayed with her abuser (p755). Several themes emerge from this court observation study. Magistrates'…

- emphasis on physical violence, especially recent incidents, as discrete incidents rather than patterns of abusive behaviour;
- understanding relationship conflict as the cause of violence (resulting in obligations to leave, encouraging reconciliation, making mutual orders, and providing potentially insufficient duration of orders);
- inconsistency around child contact by allowing an exception to protection orders to exercise child contact;
- denying and minimising violence through reactions to stories;
- engaging in narratives that frame women as bad mothers or strategically using intervention orders for the purposes of family law proceedings.

Jordan, Lucinda, and Lydia Phillips, 'Women's Experiences of Surviving Family Violence and Accessing the Magistrates' Court in Geelong, Victoria' (Report, Centre for Rural and Regional Law and Justice, Deakin University, 2013).

Drawing on interviews with 37 women who had survived family violence and 23 workers supporting women survivors this research considers among other things the experience of court processes in relation to domestic violence. Of particular relevance is section 3. The research found:

- many women felt they had a limited opportunity to speak and be heard (from p23)
- women who reported magistrates were fair described magistrates as demonstrating compassion and understanding family violence (from p24)
- some women reported their partners made cross applications which they described as a game to further manipulate and shame them(from p26)
- women had a strong perception that family law was over-emphasised at the expense of their protection (from p27)
- women reported that undertakings were ineffective and inappropriate (from p28)

KPMG for the Commonwealth Department of Social Services (2016) The cost of violence against women and their children in Australia: Final Report.

Extract: KPMG's estimates highlight the risk of experiencing violence faced by women and the extent of the issue for governments and communities in Australia today:

1. This year alone over 1 million women have or will experience violence, emotional abuse and stalking.
2. The cost of violence against women and their children in Australia is $22 billion in 2015-16.
3. Victims and survivors bear $11.3 billion, or 52 per cent, of the total costs.
4. The Australian Government, state and territory governments bear $4.1 billion or 19 per cent of the total costs.
5. The community, children of women experiencing violence, the perpetrators, employers, and friends and family bear$6.5 billion, or 29 per cent, of the total costs.

6. Underrepresentation of Aboriginal and Torres Strait Islander women, pregnant women, women with disability, and women who are homeless within national prevalence estimates may add a further$4 billion to the cost of violence against women and their children in Australia in 2015-16.

Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, Invisible women, invisible violence: Understanding and improving data on the experiences of domestic and family violence and sexual assault for diverse groups of women: State of knowledge paper (ANROWS, 2016).

Although violence is perpetrated against women from all cultures, ages and socio-economic groups, the extent, nature and impact of such violence is not evenly distributed across communities in Australia, and domestic and family violence may present in unique ways in diverse communities. Various aspects of identity may intersect for women in the diverse groups, compounding disadvantage, marginalization, and barriers to help seeking (p 18). There are also tactics of abuse that are specific to particular communities. Women without permanent immigration status in Australia, women from culturally and linguistically diverse (CALD) communities, women in prison, women with disabilities and/or activity limitations, and people identifying as lesbian, gay, bisexual, transsexual, intersex, or queer (LGBTIQ) are vulnerable to tactics of abuse that exploit their unique lived situation. These tactics might include, for example, not complying with immigration processes, taking advantage of a lack of knowledge of local legal systems or rights, taking advantage of dependency when playing a carer role, or threatening to “out” someone’s sexual orientation (pp 18-31). There is limited data on the prevalence of domestic and family violence in diverse communities, and many of the main reporting mechanisms struggle to capture information on diverse groups (p 61), for example, women in the CALD community, or women with disabilities. The outcome of these factors is the invisibility of women from diverse groups and invisibility of the violence which is perpetrated against them.

Morgan, Anthony, Hayley Boxall and Rick Brown, *Targeting repeat domestic violence: Assessing short term risk of reoffending* (Australian Institute of Criminology Report No. 552 June 2018).

Report abstract:

Drawing on repeat victimisation studies, and analysing police data on domestic violence incidents, the current study examined the prevalence and correlates of short-term reoffending.

The results showed that a significant proportion of offenders reoffended in the weeks and months following a domestic violence incident. Individuals who reoffended more quickly were more likely to be involved in multiple incidents in a short period of time. Offenders with a history of domestic violence—particularly more frequent offending—and of breaching violence orders were more likely to reoffend. Most importantly, the risk of reoffending was cumulative, increasing with each subsequent incident.

The findings have important implications for police and other frontline agencies responding to domestic violence, demonstrating the importance of targeted, timely and graduated responses.

National Community Attitudes towards Violence against Women Survey (NCAS) **2017 (ANROWS).**

This website includes information, reports, summaries etc from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS). This survey collected information through mobile and landline telephone interviews with a representative sample of 17,500 Australians aged 16 years and over. It tells us how people understand violence against women, their attitudes towards it, what influences their attitudes, and if there has been a change over time. It also gauges attitudes to gender equality and people's preparedness to intervene when witnessing abuse or disrespect towards women.

Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K., ***"A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence*** **(Research report, 12/2020). Sydney: ANROWS.**

Complex trauma refers to multiple, repeated forms of interpersonal victimisation and the resulting health problems and psychosocial challenges. Women with experiences of complex trauma are a significant but overlooked group of victims and survivors of gender-based violence in Australia. They often have interlinked health and safety needs, and are frequently in contact with crisis services and police. This research project sought to develop a comprehensive picture of how complex trauma is being constructed in public policy and practice, and how it is viewed by women with experiences of complex trauma. It found that at the policy level, complex trauma overlaps with frameworks on violence against women and mental health. However, the impact of complex trauma is not comprehensively addressed by these frameworks, which contributes to the fragmented response to women in distress. The research demonstrated that there is a strong need for a

whole-of-government commitment to the implementation and coordination of trauma-informed practice across sectors.

Stavrou, Efty, Suzanne Poynton and Don Weatherburn, 'Intimate partner violence against women in Australia: related factors and help-seeking behaviours' [2016] 200 *Crime and Justice Bulletin* 1.

The aim of this study was to 'determine which factors were associated with (1) female experiences of intimate partner violence (IPV), (2) female reporting of physical or sexual assault by an intimate partner to the police and (3) females seeking help and support after experiencing IPV'. It found that, '[t]he risk of IPV varies greatly across the community. Factors associated with a higher risk of IPV included being younger, Australian-born, having a long-term health condition, lacking social support, experiencing financial stress, having previously been a victim of child abuse and having experienced emotional abuse by an intimate partner' (p.1).

It also found that, '[w]here the most recent incident of physical or sexual assault in the last two years was perpetrated by an intimate partner, less than one in three assaults were reported to the police. Intimate partner assaults were less likely to be reported to the police if the perpetrator was still a current partner of the victim at the time of the interview, the assault was sexual (not physical) and if the victim perceived the assault was "not a crime" or "not serious enough". Having a physical injury after the incident was associated with an increased likelihood of reporting the assault to the police. Where the most recent incident of violence (assaults and threats) was perpetrated by an intimate partner, a counsellor or social worker was consulted after 30% of all incidents' (p.1).

Tarrant, Stella, Julia Tolmie and George Giudice, *Transforming legal understandings of intimate partner violence: Final report* (ANROWS, 2019).

The report examines homicide trials in which self-defence is raised by women who have killed an abusive intimate partner. It explores how legal professionals and experts understand intimate partner violence (IPV). These understandings influence which facts are selected and presented as relevant to understanding a case, the language used to frame those facts, and the conclusions drawn from them. The report outlines and applies a "social entrapment framework" analysis.A social entrapment framework recognises, in line with current research, that the victim's ability to resist abuse is constrained by the abuser's behaviour, her available safety options, and broader structural inequities in her life. Using a social entrapment framework

requires analysis at three levels:

- documenting the full suite of coercive and controlling behaviours employed by the abuser, including the strategic and responsive dimensions of this behaviour (and the isolation and fear that this creates for the victim);
- examining the responses of family, community and agencies to the abuse; and
- examining the manner in which any structural inequities experienced by the victim supported the abuser's use of violence (including thwarting her attempts to resist the abuse).

The National Council to Reduce Violence against Women and their Children, Domestic Violence Laws in Australia (Commonwealth of Australia, 2009).

This document reviews all State and Territory and New Zealand domestic violence- specific laws providing for the making of protection orders as at 2009. Among other matters, it identifies the range of relationships within the legislative scope of domestic and family violence legislation and identifies how it varies across Australia in terms of the kinds of behaviours covered and the types of orders that can be made.

Wakefield, Shellee and Annabel Taylor, *Judicial education for domestic and family violence: State of Knowledge Paper*, (ANROWS, 2015).

This paper reports on findings from a survey conducted with 66 judicial officers from Victoria and Queensland. The paper also discusses literature previously published about judicial understandings and attitudes to domestic and family violence (see pp16-20).

The survey invited judicial officers' views on domestic and family violence and judicial education for domestic and family violence. Almost half of the participants reported family violence matters was one of their primary work areas. The study found that judicial staff in Australia tend to feel that they have a high level of understanding of domestic and family violence, including for people from diverse backgrounds (p 22). Despite high levels of confidence in their own abilities to understand the dynamics of domestic and family violence, responses were split as to whether respondents thought other judicial officers in their state received sufficient training in domestic and family violence to make informed decisions (pp 25-26).

Webster, Kim, *A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women: Key findings and future directions* (ANROWS, 2016).

This resource provides a summary of *Examination of the burden of disease of intimate partner violence against women in 2011: Final report*. There is an excellent fact sheet on pp.2-4 with an overview of the most recent statistics on the burden on the health of women and their children of intimate partner violence (IPV). An overview of the key findings is available at p.7 of the report. Some of these findings about intimate partner violence (IPV) are that:

- IPV affects one in three women (since the age of 15)
- IPV has serious impacts on women's health including poor mental health, problems during pregnancy and birth, alcohol and illicit drug use, suicide, injuries and homicide.
- IPV contributes an estimated 5.1% to the disease burden in Australian women aged 18-44 years. More than one quarter (27%) of this burden is fatal.
- IPV contributes an estimated 2.2% of the burden in women of all ages.
- Physical/sexual IPV was responsible for almost half (45%) of the total burden due to homicide and violence among adult women in 2011 (see p 21).

International

Hyman, Judge Eugene M. and Liberty Aldrich, 'Rethinking Access to Justice: The Need for a Holistic Response to Victims of Domestic Violence' (2012) 33 *Women's Rights law Reporter* 449.

While this paper has been written by a US based judge his overview of the issues suggests strong similarity with some of the issues reported in the Australian context. Justice Hyman highlights the variety of issues in the court system in addressing domestic violence, including lack of information-sharing, and court structures creating silos for specific legal issues where families experience multi-faceted ones. It discusses the specific court structure of California's superior court system, including the Family, Probate, Juvenile (Dependency and Delinquency) and Criminal Courts, and the training the respective judges receive to deal with domestic violence. It encourages judicial education on domestic violence, and better understandings of the roles of each of the various players at court.

In providing an overview of domestic violence, the paper notes that: ‘Domestic violence manifests itself in many forms. The most commonly recognized forms of abuse are physical aggression and sexual abuse. However, the lesser known forms of abuse that may fall under the radar can be just, if not more, devastating, such as emotional abuse, controlling behavior, intimidation, stalking, and economic deprivation’ (p450).

Hyman, Judge Eugene M; Wanda Lucibello and Emilie Meyer, ‘In Love or In Trouble: Examining Ways Court Professionals Can Better Respond to Victims of Adolescent Partner Violence’ (2010) 61(4) *Juvenile and Family Court Journal* 17.

While this paper has been written by a US based judge his overview of the issues suggests strong similarity with some of the issues reported in the Australian context. In this article Justice Hyman explores adolescent partner violence and the responses to it from the legal system. He observes that research suggests that as many as 45% of high school students have experienced some form of adolescent partner violence. Despite these findings, the legal response to domestic violence has focused on assisting adult victims and has often excluded adolescents. When discussing the nature and characteristics of adolescent partner violence, this article notes that, similar to adult domestic violence, a range of behaviours are used ‘as part of the pattern of controlling behaviour’, including isolation, sexual and physical violence, stalking and emotional manipulation (p20). Furthermore, adolescent partner violence ‘is not limited to, or even typified by, physical assaults’ (p20).

Lo, M., A Domestic Violence Dystopia: Abuse via the Internet of Things and Remedies Under Current Law. California Law Review, *[s. l.]*, v. 109, n. 1, p. 277–315, 2021.

US based note. Abstract: Tactics of domestic violence are nothing new. However, as with various other aspects of modern life, technology threatens disruption. The increasing prevalence of Internet of Things (IoT) devices has given abusers a powerful new tool to expand and magnify the traditional harms of domestic violence, threatening the progress advocates have made in the past thirty years and creating novel dangers for survivors. An IoT device is a “smart,” stand-alone, internet-connected device that can be monitored or controlled from a remote location. They are cheap and increasingly common—the number of IoT-enabled devices in the world is already in the billions and expected to grow quickly. IoT devices allow abusers to overcome geographic and spatial boundaries that would have otherwise prevented them from monitoring, controlling, harassing, and threatening survivors. Various advocates are finding ways to protect survivors, and

the broader public, from these new dangers. In the domestic violence sphere, domestic violence service providers are creating resources for survivors that explain IoT-facilitated abuse and how to better secure their smart devices. In the technology sphere, consumers, businesses, digital experts, and the media are broadcasting the security risks of IoT devices. Unfortunately, significantly fewer outlets describe the legal remedies available for IoT-facilitated abuse. This Note aims to bridge that gap. It demonstrates that IoT facilitated abuse is a form of technology-facilitated domestic violence and explores how society can use current laws to address IoT facilitated abuse. However, it also questions whether the existing remedies are sufficient and offers recommendations for legal and nonlegal changes that will better protect survivors of IoT-facilitated abuse and hold perpetrators accountable.

Special Issue on Coercive Control: *Criminology & Criminal Justice* Volume 18, Issue 1 2018.

Edited by Kate Fitz-Gibbon, Sandra Walklate and Jude McCulloch.

Authors in the special issue cover the following topics:

- What is coercive control and to what extent does it offer a *new* lens for understanding intimate partner abuse?
- How do you distinguish coercive and controlling behaviour in law? And to what degree is coercive control experienced by women in domestically abusive relationships?
- When legislating in the area of domestic violence, should the criminal law remain gender neutral or be framed to reflect the gendered nature of domestic abuse?
- To what extent can an understanding of coercive control inform practitioner views and practice?
- Is legislating for another criminal offence the answer or part of the answer to improving court responses to domestic abuse?
- What challenges and unintended outcomes may arise, or have emerged, in jurisdictions that have introduced a new offence to capture patterns of non-physical violence?

Stark, Evan, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

This book is a key text on domestic and family violence. Although Stark is based in the United States his work

has been highly influential in Australia. In this book Stark explains that domestic and family violence is a pattern of controlling behaviours more akin to terrorism and hostage-taking. Drawing on court records, interviews, and FBI statistics, Stark details coercive strategies that men use to deny women their very personhood, from food logs to micromanaging dress, speech, sexual activity, and work. Stark urges us to move beyond the injury model and focus on this form of victimization. Stark reframes abuse as a liberty crime rather than a crime of assault. He explains how the perpetrator is able to control the victim through a variety of techniques which essentially lead to deprivation of liberty (pp373-374).

Taylor, Gregory, The Chief Public Health Officer's Report on the State of Public Health in Canada, 2016: A Focus on Family Violence in Canada (Public Health Agency of Canada, 2016).

While focused on Canada, this report gives a good overview of the impacts of domestic and family violence on health. It notes the economic costs of family violence (p.15), how violence, abuse and neglect can increase the risk for early death by homicide and suicide (p.16), and examines the impacts of family violence on physical and mental health (see an overview fact-sheet at p.17). The report shows that family violence has indirect impacts such as chronic stress, increasing risky behaviour (such as alcohol consumption, drug taking), and affecting mental health. Other impacts of family violence including negatively affecting social relationships, increased difficulties at school for children, and challenges at the workplace (p.18).

Todd, C, Bryce, J & Franqueira, VNL 2021, 'Technology, cyberstalking and domestic homicide: informing prevention and response strategies', *Policing & Society*, vol. 31, no. 1, pp. 82–99.

UK based study. An emerging concern in relation to the importance of technology and social media in everyday life relates to their ability to facilitate online and offline stalking, domestic violence and escalation to homicide. However, there has been little empirical research or policing and policy attention to this domain. This study examined the extent to which there was evidence of the role of technology and cyberstalking in domestic homicide cases based on the analysis of 41 Domestic Homicide Review (DHR) documents, made available by the Home Office (UK). Three interviews were also conducted with victims or family members of domestic homicide in the UK. It aimed to develop a deeper understanding of the role of technology in facilitating these forms of victimisation to inform further development of investigative practice, risk assessment and safeguarding procedures. Key themes identified by the thematic analysis undertaken related to

behavioural and psychological indicators of cyberstalking, evidence of the role of technology in escalation to homicide and the digital capabilities of law enforcement. Overall, the results indicated that: (1) there was evidence of technology and social media playing a facilitating role in these behaviours, (2) the digital footprints of victims and perpetrators were often overlooked in police investigations and the DHR process and (3) determining the involvement of technology in such cases is important for risk assessment and earlier intervention to prevent escalation of behaviour to domestic homicide. It also indicates the importance of further developing evidence-based approaches to preventing and responding for victims, the police and other practitioners.

Westmarland, N. and Kelly, L., 'Naming and Defining 'Domestic Violence': lessons from research with violent men', (2016) 112 *Feminist Review* 113.

In this paper the authors draw on data from in-depth interviews with men who have used violence and abuse within intimate partner relationships to provide a new lens from which to view the conceptual debates on naming, defining, and understanding 'domestic violence', and the consequent policy, legislative and practice implications in England and Wales. They argue that the reduction of domestic violence to discrete 'incidents' supports and maintains how men themselves talk about their use of violence, and that this in turn overlaps with contentions about the appropriate interventions and responses to domestic violence perpetrators. The authors revisit Hearn's 1998 work, *The Violences of Men*, connecting it to Stark's later concept of coercive control in order to develop and extend understandings of violence through analysis of the words of those that use it.

Understanding domestic and family violence - Other Resources

Bland, Patti, *Manifestations of Violence* – 2 page pdf.

This (USA authored) overview of the multiplicity of behaviours associated with domestic and family violence was presented at the National Conference on Crafting Individualized Services for Women: Responding to Multiple Challenges of Domestic Violence, Sexual Assault, Mental Health Concerns and Substance Abuse, National Training Center on Domestic and Sexual Violence, Austin, Texas, September 10-12, 2001. It may be useful for judicial officers to quickly familiarise themselves with types of actions that fall within emotional, physical, sexual and social/environmental abuse.

Family Court of Australia, *Family Violence Best Practice Principles, 4th edition* (2016).

The Best Practice Principles are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the *Family Law Act* 1975 (Cmth), and provide useful background information for decision makers, legal practitioners and individuals involved in these cases including an explanation of the definition of 'family violence' and 'abuse' under the Family Law Act and the different types of violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the prominence given to the issue of family violence in the Family Law Act, and
- the principles guiding the case management system for the disposition of cases involving allegations of abuse of children.

The Best Practice Principles are a voluntary source of assistance to judicial officers and legal practitioners and are not a fetter to a court's discretion (*Cameron & Walker* (2010) FLC 93-445). These Best Practice Principles are not a substitute for evidence in individual cases.

McCormack, Fiona, *Family Violence: A gendered problem* – pod cast 50 min.

McCormack is the CEO of Domestic Violence Victoria. In this presentation she explains how domestic and

family violence should be framed and understood in terms of power and justice and how she discusses the extent and causes of domestic and family violence.

Non-inquest findings into the death of Rinabel Tiglao Blackmore, Coroners Court of Queensland (Cairns), 4 April 2019.

The following is a summary of the key facts relating to the domestic violence related death of Ms Blackmore and the key findings of Northern Coroner, Nerida Wilson. There are other matters raised in the Coroner's findings relating to police responses that are not covered in this summary.

Key facts:

Ms Blackmore migrated to Australia from the Philippines in 1991; English was not her first language. After separating from her husband (with whom she had three sons) in 2014, she moved from Brisbane to Middlemount in central Queensland to continue a relationship with Mr Dickson that had commenced prior to the separation from her husband. Ms Blackmore was concerned that her family would not approve of her living with a man she was not married to, so she was secretive about her relationship with Mr Dickson, her living arrangements and whereabouts. Ms Blackmore's reluctance to tell her family about the new relationship was a source of consternation for Mr Dickson and was allegedly the trigger for two separate (although causally connected) episodes of domestic violence in the 48 hours prior to her death.

Ms Blackmore spent the 2014 Christmas period in Brisbane whilst Mr Dickson visited friends in Bundaberg. During their time apart, Mr Dickson exhibited controlling and jealous behaviours. He demanded that Ms Blackmore take photos of the people she was with so that he could satisfy himself that she wasn't cheating on him. Mr Dickson sent messages to Ms Blackmore's male friends from her mobile phone, impersonating her, and asking when they were free to have sex again, in an attempt to 'catch her out' for alleged infidelity.

On 28 December 2014, Ms Blackmore travelled from Brisbane to Bundaberg to meet and stay overnight with Mr Dickson at a local motel. An argument ensued in the motel room, with Mr Dickson asking Ms Blackmore why he was her "dirty little secret", and then pushing and grabbing her on the shoulders. They then both went to the motel's front office where the manager witnessed Mr Dickson and Ms Blackmore in a tug of war over a handbag, Ms Blackmore saying she wanted to break up, and Mr Dickson becoming more agitated as he tried to convince Ms Blackmore to get into the car with him. Ms Blackmore whispered to the manager to call the

police. When Mr Dickson went outside to sit in his car, Ms Blackmore told the manager that he (Mr Dickson) had earlier put his hands around her neck, that she was frightened for her life, and that if the manager didn't get the police he (Mr Dickson) would kill her.

The police attended the motel, took statements from the parties, and told Mr Dickson that they would be applying for a protection order on Ms Blackmore's behalf. The police supervised the return of personal effects to Ms Blackmore and the exchange of their respective mobile phones. Ms Blackmore told the police she intended to catch a train to Rockhampton. Mr Dickson then left the motel, as did the police. Not long after however, Mr Dickson returned to the motel and Ms Blackmore told the manager that Mr Dickson had taken $400 from her bag. The manager became concerned for Ms Blackmore's safety and assisted her to be collected by a friend.

The Application for a Protection Order prepared by the police included grounds that it was necessary and desirable to protect the aggrieved due to the respondent's violent nature and history and the aggrieved's level of fear towards the respondent.

Ms Blackmore asked a friend to drive her to Middlemount so she could collect her property and passport from Mr Dickson's unit. They arrived in the early hours of 30 December 2014. Before the friend left Ms Blackmore, they agreed on a code in case Ms Blackmore was in trouble and the police should be called.

Mr Dickson told police that when he arrived at his unit around lunchtime on 30 December 2014, Ms Blackmore was waiting for him so she could retrieve her possessions. He said he and Ms Blackmore had sex on two occasions, they fell asleep, and then argued. He admitted to grabbing Ms Blackmore around the collar bone or shoulder, shaking and squeezing her, resulting in red marks on her shoulders and around her neck. He also admitted to making contact with her lip causing it to bleed. Mr Blackmore claimed that Ms Blackmore was screaming at him to stop, while also crying and saying that she loved him and didn't want to leave him.

Mr Dickson told police that late in the evening of 30 December 2014 he and Ms Blackmore decided to drive to Brisbane in his vehicle. He said initially Ms Blackmore sat in the rear while Mr Dickson drove as she appeared to be searching for something in one of her bags. A later examination of the vehicle revealed that Mr Dickson had taken possession of Ms Blackmore's mobile phone and had put it in the driver's door well. Mr Dickson said Ms Blackmore subsequently climbed over to the front passenger seat, complaining of motion sickness; then another argument ensued involving Mr Dickson screaming verbal abuse at Ms Blackmore. Mr Dickson denied using any physical violence against Ms Blackmore while they were in the vehicle. Mr Dickson told

police he was driving the vehicle at around 100km per hour when Ms Blackmore suddenly opened the door and exited the vehicle. Mr Dickson told police he then took steps to locate Ms Blackmore, keep her alive, contact emergency services and assist in her transfer to hospital.

Ms Blackmore's head injuries resulted in her death on 2 January 2015. There were no alcohol or drugs detected in her system.

Mr Dickson pleaded guilty to (the alternative charge of) manslaughter of Ms Blackmore, and served time. See para 135 on pages 15-16 for the Judge's sentencing remarks.

Key findings by the Coroner:

- Ms Blackmore's death occurred at separation and during a period of prolonged violence perpetrated by her intimate partner. She died within 40 hours of her first and only report of domestic violence to police. In the 40 hours preceding her exit from the vehicle, Ms Blackmore had been subjected to several causally connected episodes of verbal abuse and significant physical violence by Mr Dickson.
- Ms Blackmore's actions were a desperate act of self-preservation. The Coroner found that it is more probable than not that Ms Blackmore exited the vehicle to escape the terror of the events unfolding inside whilst in fear for her life.
- Ms Blackmore was all the more vulnerable by virtue of the fact she was a Filipino woman, English was not her first language, and she resided in Middlemount (a remote and isolated location). Her physical isolation was compounded by her isolation from family, including her children. Her support network and resources were extremely limited.

Our Watch, *Change the Story*.

Our Watch follows an evidence-based approach to determining strategies for prevention of violence against women and their children, conducting analytical research and working with sister organisation, Australia's National Research Organisation for Women's Safety (ANROWS) to identify research priorities for primary prevention. Key resources are located at this link.

Queensland Courts, Domestic violence court process videos (updated June 2018).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Stark, Evan, *Coercive Control* – video 4.31 min.

In this video Stark discusses the central thesis of his book *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007). He explains how domestic and family violence is a pattern of violence. He explains how the perpetrator is able to control the victim through a variety of techniques which essentially lead to deprivation of liberty.

Understanding domestic and family violence - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Teer [2019] ACTSC 334 (29 November 2019) – Australian Capital Territory Supreme Court **[2019] ACTSC 334 (29 November 2019) – Australian Capital Territory Supreme Court**

In sentencing Loukas-Karlsson J made a number of general observations in the context of domestic and family violence, taking into account the observations of judges in previous cases:

At [53]: 'I also take into account the following observations of Underwood J in Parker v The Queen [1994] TASSC 94 at [39]:

> [S]entencing for crimes of domestic violence should proceed in accordance with the following principles expressed by the Alberta Court of Criminal Appeal in R v Brown (1992) 73 CCC (3d) 242 at 249:
>
> 'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live.'

At [54] '… I take into account the following observations from R v Dunn [2004] NSWCCA 41; 144 A Crim R 180 at [47]:

> Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence: firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat.'

R v Gittany (No 5) **[2014] NSWSC 49 (11 February 2014) – New South Wales Supreme Court**

McCallum J at [40]: 'In my view, that history informs the degree of moral culpability of the offence. The

arrogance and sense of entitlement with which Mr Gittany sought to control Lisa Harnum throughout their relationship deny the characterisation of his state of mind in killing her as one of complete and unexpected spontaneity. By an attritional process, he allowed possessiveness and insecurity to overwhelm the most basic respect for her right to live her life as she chose. Although I accept that the intention to kill was formed suddenly and in a state of rage, it was facilitated by a sense of ownership and a lack of any true respect for the autonomy of the woman he claimed to love'.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J: 'An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6–7' ([77]).

DPP v Barnes & Barnes **[2015] VSCA 293 (12 November 2015) – Victorian Court of Appeal**

This was a Crown appeal against sentence. Redlich JA at [68]-[69*]:* 'In sentencing, the judge said this about Trevor's offending: 'I make it plain that I consider that you are the main offender in this criminal enterprise and the whole appalling saga was dictated by your immaturity and inability to control your anger in the context of your possessive and controlling behaviour of Ms Bethune, whom you had subjected to domestic violence on earlier occasions. In sentencing you, the court must denounce your conduct, give emphasis to general deterrence, and impose just punishment. A strong message needs to be sent to males in the community who are inclined to be violent towards their female partners. You do not own them. You have no right … menacingly [to] control them. If you lay a hand on them in anger, the law will not spare you punishment. Men who are bullies towards women usually have some psychological inadequacy. They need to look long and hard at themselves to try to understand why they are inclined to behave with anger and brutality, and seek professional help to overcome such inclinations.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [53]-[54]: 'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

***R v Ritter* [2016] SASCFC 88 (16 August 2016) – Supreme Court of South Australia**

Parker J at [17]-[21]: 'At the time of the offending the appellant and the victim had been in a relationship for approximately two years. His behaviour towards her was violent and controlling. About one month into the relationship the appellant began verbally abusing the victim. This progressed to physical abuse occurring about twice each week. By the last year of the relationship the frequency of assaults had escalated to the point where the appellant was assaulting the victim on a daily basis. The assaults included punching, slapping, kicking, throwing items and spitting. When the victim was threatened or attacked by the appellant she would try to leave their flat, often running into nearby streets and parks and attempting to hide. The appellant would frequently chase her or track her down in order to continue his abuse. The appellant monitored the victim's movements and rarely let her leave the house without him. He also controlled her finances, regularly forcing her to withdraw money from her account for his benefit, including so that he could buy drugs and alcohol. The appellant regularly threatened that if the victim reported any abuse to the police or left the relationship he would harm her and her children. She was too frightened to leave or to report the abuse to police, friends and family'.

***Her Majesty's Attorney-General v O* [2004] TASSC 53 (9 June 2004) – Supreme Court of Tasmania**

Quoting the Canadian decision of *R v Brown* (1992) 73 CCC (3d) 242, 249 (as cited in *Parker v R* [1994]

TASSC 94): '*When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.'*

Lusted v MRB **[2013] TASMC 9 (19 February 2013) – Magistrates' Court of Tasmania**

Magistrate RW Pearce at [68]: 'Family violence is to be abhorred. It is a significant social problem, of concern to the community and the justice system. The parliament saw fit to enact legislation, the *Family Violence Act 2004*, expressly to "provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence". The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage of by perpetrators and further adding to the reluctance of victims to complain'.

Bropho v Hall **[2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [16]: 'The fact that the aggravated assault occurred in a domestic setting is a significant aggravating factor of the offence. An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted, the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence.

Recognising that common feature, it remains important for a court sentencing an offender for that kind of offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner' (which was approved by this court in Gillespie v The State of Western Australia [2016] WASCA 216 [48]).

The State of Western Australia v Cheeseman **[2011] WASCA 15 (19 January 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [3]: 'The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C'.

Dawes v Coyne **[2000] WASCA 134 (19 May 2000) – Supreme Court of Western Australia (Court of Appeal)**

Miller J at [6]: 'The learned Magistrate decided the matter after hearing submissions. He began by stating that it was a tragedy that "domestic matters of this sort get into the criminal court" and made the observation that "both parties had been causing trouble for the police who do not want to be involved in these sort of things". The learned Magistrate's observations that the matters in question were merely "domestic" and should not get into the criminal court were entirely inappropriate. Allegations of unlawful assault and breaches of [the] restraining order were matters properly the subject of a complaint and the proper place for the resolution of those complaints was in the Court of Petty Sessions. Further, the observation that both parties had been causing trouble for the police is difficult to understand from the evidence but whether it be true or not, it was wrong for the learned Magistrate to make the statement that police did not wish to be involved in matters of breach of restraining order and assault in the circumstances of this case'.

***WJ v AT* [2016] QDC 211 (19 August 2016) – District Court of Queensland**

Smith DCJA quoting the explanatory notes to the 2011 bill for the *Domestic and Famil*y Violence Protection Act 2012 (Qld) at [166]: 'Lastly, the Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders.

During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed the concern that in many instances domestic violence orders are made against both people involved.

This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time.

A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings.

Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken' (His Honour's emphasis).

***R v Brown* [2015] ACTSC 65 (5 March 2015) – Supreme Court of the Australian Capital Territory**

Burns J at [4]-[5]: Burns J accepted the opinions and statements he quoted from clinical psychologist, Dr Michael Barry's report. Dr Barry said: 'At the time of the offence, Miss Brown had been in an emotionally and physically abusive relationship for over two years. She described a gradual deterioration in her mental health, reporting low self-worth and feeling overwhelmed, feeling that she did not "fit in anywhere" and she described a "sense of loss in the world". She reported that despite Mr Ruspandini's treatment of her, she felt that he was the only one who she could rely on.

Domestic violence and emotional abuse are behaviours used by one person in a relationship to control the other. Research into the cycle of domestic violence suggests that it is common for victims of domestic violence to blame themselves for the abuse and to experience major disruption in their self and world view. Domestic abuse can have a serious impact on the way a person thinks and interacts with the world around

them. The chronic exposure to violence, or the threat of violence, and the stress and fear resulting from this exposure, can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.

Domestic violence affects a person’s thoughts, feeling and behaviours, and can significantly impact on mental stability. While the effects of physical abuse are obvious, the effects of emotional abuse are easier to hide and harder to repair. It is common for victims of emotional abuse to blame themselves and minimise their abuse, particularly when they are repeatedly told that it is their fault that their partner becomes angry or aggressive’.

Physical violence and harm

Actual or threatened physical violence or harm is among the range of behaviours that characterise domestic and family violence. It is most likely to be experienced by women and perpetrated by their current or former intimate male partner [ABS PSS 2016]. The Australian Bureau of Statistics reported that in 2019 domestic and family violence-related homicides and assaults accounted for over a third of the total numbers; and that women accounted for almost two-thirds of homicide victims, and were between twice and five times as likely to be victims of assault as males [FDV-related offences 2022]. The most common form of physical violence is threats of physical harm, however these are often accompanied by actual physical violence. The levels of violence experienced from a former partner are statistically much higher than from a current partner, and are more likely to injure and invoke in the victim a feeling that their life is in danger [Mouzos & Makkai 2004]. It also is the most likely form of violence to be reported by victims.

A perpetrator may intend to intimidate and induce fear in the victim through physical violence or harm yet cause minor or no visible signs of injury on the victim's body. Victims may be kicked, slapped, bitten, or punched with a fist. They may be pushed, grabbed, or have their arm twisted or hair pulled. They may be hit with an object or have an object thrown at them. They may be burned or scalded, or threatened with a gun, knife or other weapon. The perpetrator may strangle [Training Institute of Strangulation Prevention] or suffocate them. (Note that non-fatal strangulation may cause a brain injury [Other Resources] due to lack of oxygen to the brain). The perpetrator may drive dangerously when the victim or children are passengers in the car, or smoke in the home knowing the victim has a respiratory condition, or lock the victim outside the house during the night [Mouzos & Makkai 2004].

A perpetrator may also commit physical violence or harm in ways that are intended to cause obvious or serious physical injury or death. A number of factors may increase a victim's risk where:

- the perpetrator displays generally high levels of aggression, and patterns of controlling and emotionally abusive behaviour (sometimes identified as coercive control) towards the victim
- the perpetrator misuses alcohol or drugs
- there are multiple episodes of physical violence or harm experienced by the victim or family members
- the victim's children are exposed to physical violence or harm

- the perpetrator strangles the victim
- the victim fears their life is endangered
- the victim is aged between 18 and 24 years [Mouzos & Makkai 2004].

Domestic and family violence may affect the victim's physical health and functioning in acute and chronic ways, even after the violence has stopped. Apart from direct physical injuries, including traumatic brain injury [Other Resources], victims may experience a range of chronic health conditions for example, muscular and joint pain, headache, stomach cramping, vaginal bleeding and pain during sexual intercourse, heart failure, asthma, poor hearing and sight, allergies, malnutrition, hair loss and fatigue. These symptoms may also be mediated through a victim's experience of high levels of stress, reduced healthy behaviours, and limited agency in making healthy lifestyle choices. In addition, domestic and family violence may disrupt a victim's cognitive faculties for processing and coping with trauma resulting in a sense of personal failure and loss of control over their life situation, which may, over time, contribute to mental ill health.

Physical violence and harm may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Physical violence and harm - Key Literature

Note that reports of the Australian Domestic and Family Violence Death Review Network (the Network) which utilise the National Minimum Dataset (NMDS) to identify key trends and patterns in intimate partner homicide with an identified history of domestic and family violence are now found in Death review.

Australia

Australian Bureau of Statistics, *4510.0 - Recorded Crime - Victims, Australia, 2022*.

Victims of Domestic and Family Violence-Related Offences

This chapter presents experimental data about victims of selected Family and Domestic Violence (FDV) – related offences. Victims of selected offences have been determined to be FDV–related where the relationship of offender to victim, as stored on police recording systems, falls within a specified family or domestic relationship or where an FDV flag has been recorded, following a police investigation.

Key findings include:

- FDV-related homicide victims accounted for over a quarter of total homicide victims, and females accounted for over half of all FDV-related homicide victims.
- Regarding FDV-related assault, across selected states and territories 64-78 per cent of victims were female.
- Regarding FDV-related sexual assault 89 per cent of victims were female.

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

- 'Women aged 18 years and over were more likely than men to have experienced either physical violence and/or sexual violence, by a partner since the age of 15' (see Table 3);
- Women were nearly three times more likely to have experienced partner violence than men, with approximately one in six women (17% or 1.6 million) and one in sixteen men (6.1% or 547,600) having experienced partner violence since the age of 15 (see Table 3);
- One in six women (16% or 1.5 million) and one in seventeen men (5.9% or 528,800) experienced physical violence by a partner (see Table 3);
- Approximately 54% (149,600) of women who experienced violence by a current partner, and 68% (931,800) of women who experienced violence by a previous partner, experienced more than one incident of violence from that partner (see Tables 17-18);
- Women were more likely to experience fear of anxiety due to violence from a partner than men (see Tables 20-21).

Brain Injury Australia, 'The Prevalence of Acquired Brain Injury among Victims and Perpetrators of Family Violence' (April 2018).

This resource provides detailed analysis of the prevalence of acquired brain injuries among both victims and perpetrators of family violence. For both victims and perpetrators, brain injury impacts capacity to recover, change and safeguard future wellbeing. This study utilises data obtained from Victorian hospitals between 2006 and 2016 (p 25). Family violence is a significant cause of brain injury, with around 40 percent of victims having sustained a brain injury (pp 29). Moreover, brain injury was associated with 14 of the 17 family violence-related deaths in the study period (p 29). There is also evidence to suggest that rates of brain injury among perpetrators of family violence are disproportionately high, indicating that having suffered a brain injury is a risk factor for future perpetration of family violence (p 19). Finally, the study highlights that the available data is likely to represent the 'tip of the iceberg', with many injuries going unreported or undiagnosed, emphasising the need for additional research in this area (pp 34-5).

Bricknell, Samantha, *Homicide in Australia 2020-21* Statistical Report no. 42 2023, Canberra: Australian Institute of Criminology.

The National Homicide Monitoring Program is Australia's only national data collection on homicide incidents, victims and offenders. This report describes the 210 homicide incidents recorded by Australian state and territory police between 1 July 2020 and 30 June 2021. During this 12-month period there were 221 victims of homicide and 263 identified offenders. The victim and offender were known to each other in 71% of homicide incidents recorded; 18% of homicide incidents involved intimate partners.

Brown, Thea, Samantha Bricknell, Willow Bryant, Samantha Lyneham, Danielle Tyson and Paula Fernandez Arias, *Filicide offenders* (Australian Institute of Criminology Report No. 568 February 2019).

Report abstract:

Filicide is the killing of a child by a parent or parent equivalent. Between 2000–01 and 2011–12, there were 238 incidents of filicide in Australia involving the death of 284 children. This paper examines the characteristics of custodial parents, non-custodial parents and step-parents charged with the murder or manslaughter of their children.

Offender circumstances and characteristics differed according to the offender's gender and custodial relationship with the victim. As filicide is difficult to predict, intervention strategies should focus on families with multiple risk factors and address the needs of parents as well as those of children at risk.

Darshini Ayton, Elizabeth Pritchard and Tess Tsindos, 'Acquired Brain Injury in the Context of Family Violence: A Systematic Scoping Review of Incidence, Prevalence, and Contributing Factors' (2019) *Trauma, Violence & Abuse* 1-15.

Acquired brain injury (ABI) is regarded as the forerunner to, or result of, family violence. ABI is an umbrella term for conditions such as traumatic brain injury (TBI), stroke, aneurysm, brain tumour or vestibular dysfunction. In particular, TBIs are associated with reduced cognitive and physical functioning, negative psychological responses (such as depression and post-traumatic stress disorder), and even death. Family violence may be perpetrated by someone who has previously suffered a TBI and/or the victim may sustain a TBI from violence. Although studies have considered TBIs and family violence separately, there is limited evidence assessing the nexus between these two phenomena. This article presents a systematic review of

current literature regarding incidence, prevalence and contributing factors of brain injury within a family violence context. Results showed that the factors contributing to brain injury within the family violence context had multifactorial causation and varied significantly across the studied populations. A number of biological, behavioural, structural, social and environmental factors were identified as negatively affecting the incidence and prevalence of brain injury and family violence. Biological factors that contributed to being a victim of family violence included age and gender of parent/baby. The social factor of previous child abuse was correlated with ongoing abuse later in life, but is yet to be fully explored. Environmental factors, such as hostile living environments and exposure to natural disasters, also have not been thoroughly investigated in relation to IPV or TBI, but are linked to an increase in parental stress and contributed to greater levels of child maltreatment. One limitation of the review was that the underreporting of family violence may have affected the accuracy and generalisability of incidence and prevalence statistics.

Nemeth, Julianna et al., Provider Perceptions and Domestic Violence (DV) Survivor Experiences of Traumatic and Anoxic-Hypoxic Brain Injury: Implications for DV Advocacy Service Provision, (2019) 28(6) *Journal of Aggression, Maltreatment & Trauma 744-63*

This study sought to 1) characterise provider knowledge, experience and perception of the impact of brain injury (BI) on the experiences of DV survivors within services, and 2) document DV survivors' experiences with abuse exposures that can lead to traumatic or anoxic-hypoxic brain injury along with their perception of how programs address brain injury (p 747). The authors examined data on BI and strangulation collected from five domestic violence advocacy organisations: 11 focus groups were conducted with service providers and interview administered surveys were completed with survivors. Results show a discrepancy between providers' perception of the potential impact of BI on survivors' ability to access services, and the pervasive exposure to incidents of head trauma and strangulation that could cause brain injury among the population. Over 81% of survivors reported having been hit in the head or been made to have their head hit another object at least once, and over 83% of survivors reported being strangled.

Mooney, Rosemary and Deborah Byrne, *Understanding the relationship between family violence and brain injury* (The Brain Injury Association of Tasmania, 2016).

This report provides a summary of the key issues surrounding the complex relationship between injury and

family violence in Australia. It notes that half of the people who perpetrate family violence have an existing brain injury (but not all people living with a brain injury perpetrate family violence). Research demonstrates that there is an association between brain injury and increased aggressive behaviour. Moreover, the types of abuse victims of family violence often report (being hit in the face, head and neck, being shaken, and being choked) are all risk factors for brain injury. Research has established that at least one third of women who have experienced family violence has sustained a brain injury. However, the needs of women who live with traumatic brain injury are not being met (p.1).

It notes that '[v]ictims of family violence are seldom screened for brain injury which means that the phenomenon of brain injury as a consequence of family violence is under reported; the same is true for perpetrators of family violence. Prevalence rates are therefore difficult to estimate due to under reporting, under diagnosis, and under researching of brain injury, making it an 'invisible' problem' (p.1).

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and sexual violence including childhood violence. The report describes the type of violence (including threats of violence) by current and former intimate male partners, and other known and unknown males. The IVAWS measures three distinctive types of violence against women: 1) physical (including threats of physical violence); 2) sexual (including unwanted sexual touching); and 3) psychological (controlling behaviours such as put downs, keeping track of whereabouts).

Noonan, Patrick, Annabel Taylor and Jackie Burke, *Links between alcohol consumption and domestic and sexual violence against women: Key findings and future directions* (ANROWS, 2017).

This literature review found that "there is little evidence that alcohol use is a primary cause of violence against women. The paper does, however, identify that there are clear associations, and in some cases, strong correlations between alcohol use and violence against women, including, for instance, in the severity of the

violence." The relationship between alcohol and violence against women manifests in three ways:

- Alcohol use is linked with the perpetration of violence against women.
- Alcohol use is linked with women's victimisation by violence.
- Alcohol is used as a coping strategy by women who have experienced violence

International

Adam Pritchard, Amy Reckdenwald and Chelsea Nordham, 'Nonfatal Strangulation as Part of Domestic Violence: A Review of Research' (2017) 18(4) *Trauma, Violence & Abuse* 407-424.

Awareness and understanding of non-fatal strangulation in cases of domestic violence has improved significantly in the past 15 years. This article reviews the recent literature on non-fatal strangulation in these circumstances, and highlights the challenges of improving research in this area. The authors 1) analyse the recent history of strangulation as it emerged from criminal justice and medical research within the broader area of domestic violence, and discussed how these changes have led to legal and prosecutorial amendments (page 408); 2) propose a general definition of strangulation and note the inconsistent use of certain terminology in the literature (page 410); 3) consider the research implications within the context of criminology, forensic science, law and medicine (page 412-18); and 4) call for five recommendations to advance practice and research (page 418-20).

April M Zeoli, Rebecca Malinski and Hannah Brenner, 'The Intersection of Firearms and Intimate Partner Homicide in 15 Nations' (2017) Trauma, Violence, & Abuse (online first).

This article explores the use of firearms in the commission of intimate partner homicides in 15 countries (p 1). The sample of countries included 6 in Europe, 3 in Oceania, and 2 each in the Middle East, North America, and Africa (p 3). The results indicate that guns are used in the commission of 11% of intimate partner homicides in Australia (p 4). The report also highlights that Australian law imposes stringent restrictions on gun ownership, particularly in cases of intimate partner violence (p 7), which have been demonstrated to have a substantial impact on reducing numbers of firearm-related homicides (p 9). Comparatively, the US had the highest rate of firearm-related homicides (over 50%), whereas Fiji and the UK had the lowest rates (0% and 3% respectively) (pp 8-9).

Cliffe, Charlotte, Maddalena Miele and Steven Reid, 'Homicide in pregnant and postpartum women worldwide: a review of the literature' (2019) 40(2) Journal of Public Health Policy 80-216

This study reviewed the international literature on maternal homicide, and found that pregnancy-associated homicide is an important contributor to maternal mortality, with rates comparable to suicide. Women murdered during the perinatal period constitute a highly vulnerable group as they are younger, unmarried and more likely to be from minority ethnic groups. Reported worldwide rates of maternal homicide range from 0.97 to 10.6 per 100,000 live births. Rates are highest in the US in comparison to other jurisdictions. Evidence suggests that women who are pregnant may have an increased risk of being a victim of homicide, compared to non-pregnant women. Studies reporting homicide in other jurisdictions do not report as consistently high numbers in the perinatal period, which may be because a lack of data and reliance on national reporting systems which differ significantly by country in method and accuracy.

Fyers, A., & Ensor, B., et. al., *The Homicide Report* (2019).

The Homicide Report is the first publicly searchable database of homicides in New Zealand. It references 1068 cases involving 591 men, 283 women and 194 young people between 2004 and 2019. It aims to determine the reasons behind homicide in New Zealand, and reveals a connection between the homicide rate in a neighbourhood and the level of social and economic deprivation. The Report highlights the extent to which family violence, alcohol and drug abuse contribute to homicidal death. It also identifies all gun-related homicides in the past 15 years. The Report demonstrates the unacceptably high incidence of male aggression, family violence and child abuse. Results show that half of women who die of homicide in New Zealand are killed by a partner or ex-partner. The victims are more likely to be stabbed or asphyxiated than other homicide victims. These homicides are likely to be premeditated rather than unintentional. Further, more than half of child victims are killed by a parent or caregiver.

Messing, JT, Thomas, KA, Ward-Lasher, AL & Brewer, NQ 2021, 'A Comparison of Intimate Partner Violence Strangulation Between Same-Sex and Different-Sex Couples', *Journal of Interpersonal Violence*, vol. 36, no. 5/6, pp. 2887–2905.

US based study. Abstract: Strangulation is a common and dangerous form of intimate partner violence (IPV).

Nonfatal strangulation is a risk factor for homicide; can lead to severe, long-term physical and mental health sequelae; and can be an effective strategy of coercion and control. To date, research has not examined strangulation within same-sex couples. The objective of this cross-sectional, observational research is to identify whether and to what extent the detection of strangulation and coercive control differs between same-sex and different-sex couples in police reports of IPV. Data (n = 2,207) were obtained from a single police department in the southwest United States (2011-2013). Bivariate analyses examined differences in victim and offender demographics, victim injury, violence, and coercive controlling behaviours between same-sex (male-male and female-female) and different-sex couples (female victim-male offender). Logistic regression was used to examine associations between strangulation, victim and offender demographics, coercive controlling behaviours, and couple configuration. Strangulation was reported significantly more often in different-sex (9.8%) than in female and male same-sex couple cases (5.2% and 5.3%, respectively; $p < .05$). Injury, however, was reported more frequently in same-sex than in different-sex couples ($p < .05$). Couple configuration ($p < .05$), coercive control ($p < .05$), and injury ($p < .05$) significantly predict strangulation. Findings suggest that nonfatal strangulation occurs within at least a minority of same-sex couples; it is possible that underdetection by law enforcement makes it appear less common than it actually is. Regardless of couple configuration, timely identification of strangulation and subsequent referral to medical and social service providers is essential for preventing repeated strangulation, life-threatening injury, and the long-term health effects of strangulation.

Meyer JE, Jammula V, Arnett PA. Head Trauma in a Community-Based Sample of Victims of Intimate Partner Violence: Prevalence, Mechanisms of Injury and Symptom Presentation. (2021) Journal of Interpersonal Violence doi:10.1177/08862605211016362

Of 47 female participants recruited from the general community with a history of at least one relationship that included physical violence, 89.4% reported at least one impact to the head and 48.9% at least one impact to the head that resulted in mild traumatic brain injury. 47.8% experienced at least one incident of having difficulty breathing due to a violent act from their partner, and 29.8% reported symptoms consistent with mild brain injury due to lack of oxygen. The most common mechanisms of injury were being hit with a closed fist and being strangled. These high levels of head and brain injury highlights the need for appropriate screening by clinical and community providers.

Michelle Patch, Jocelyn Anderson and Jacquelyn Campbell, 'Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review' (2018) 44(4) *Journal of Emergency Nursing* 384.

This article reviewed the literature on women's injuries and their subsequent experiences in seeking health care after encountering non-fatal intimate partner strangulation (NF-IPS). Research shows that NF-IPS is higher in women than in men. Although injuries may be subtle or minimised, they may have severe health consequences. In recent years, there have been calls for nursing and other health care providers to improve practices related to strangulation screening, assessment and treatment. Overall, NF-IPS was associated with multiple negative physical (eg injuries to head/neck or neurological, vascular or respiratory systems) and psychological (eg anxiety, depression, suicidal ideation or post-traumatic stress) outcomes for women. Studies suggested that women are reluctant to seek health care after being strangled. Reasons for their reluctance include wanting a safe place first, not wanting to share personal experiences, an abuser being present in the room during the visit, and feelings of hopelessness.

National Domestic Violence Fatality Review Initiative, ABOUT NDVFRI (2016).

The National Domestic Violence Fatality Review Initiative (NDVFRI) (US resource) is a unique resource centre that is dedicated to domestic violence fatality review by the Office on Violence Against Women, a branch of the US Department of Justice. Currently, 30 States in the US have a form of domestic violence fatality review. Domestic violence fatality review requires a shift from a culture of blame to a culture of safety. The Initiative aims to provide assistance for assessing domestic violence-related deaths, with the underlying objectives of:

- Preventing domestic violence homicides and domestic violence in the future;
- Preserving battered women's safety;
- Identifying gaps in service delivery and assessing potential methods of remedying these organisational issues;
- Holding domestic violence perpetrators, as well as the agencies and organisations that come into contact with the parties, accountable;
- Providing technical assistance to States which either have implemented or have not implemented domestic violence fatality review.

The website includes a range of resources including reports, videos and webinars.

National Judges Association, *Domestic Violence and the Courtroom: Knowing the Issues… Understanding the Victim* (n.d.).

This resource provides practical guidance for judges in engaging with victims of domestic violence in the courtroom, including particular information about Battered Woman Syndrome (BWS). BWS is 'a collection of psychological symptoms', which is often considered a subcategory of Post Traumatic Stress Disorder (p 10). Women suffering from BWS may act in ways that confuse those who wish to assist them, making it difficult to participate in the legal system, even though they want the abuse to stop. Victims may experience the 'fight' response, in which they become hyper-vigilant to cues of violence, which can impair concentration and lead to anxiety and panic disorders (p 10). Victims may also experience the 'flight' response, which prompts women to mentally retreat from the abuse, which can result in denial, minimisation and disassociation (p 11). Finally, women suffering from BWS may experience memory loss, and other psychological consequences, such as flashbacks to past experiences of abuse, incoherent thought patterns, and dissociation (p 11).

The Disabilities Trust, Making the Link: Female Offending and Brain Injury (2018).

This study focuses on brain injury in female offenders – one of the most vulnerable individuals in the criminal justice system. Female prisoners are twice as likely as male prisoners to experience anxiety and depression, incidences of self-harm, and domestic violence and abuse. In addition, a number of female prisoners may suffer undiagnosed brain injuries, which cause cognitive, behavioural and emotional problems, such as loss of memory, concentration, confusion and increased aggression. From 2016-2018, the Disabilities Trust introduced a Brain Injury Linkworker (BIL) service at HMP/YOI Drake Hall (a female prison in the UK) which provided specialist support to women with a history of brain injury. During the delivery of the BIL service, the study also found that there were 196 reports of brain injuries from severe blows to the head. 96% of female offenders reported experiencing domestic abuse, 62% reported to sustaining a traumatic brain injury (TBI) due to domestic violence, and 33% reported to sustaining their first brain injury prior to committing their first offence.

Violence Policy Centre, 'When Men Murder Women: An Analysis of 2016 Homicide Data' (September 2018).

This annual Report of the Violence Policy Centre in the United States highlights the lethal combination of domestic violence and guns. It provides an analysis of 2016 data, the most recent year for which information is available. The study covers homicides committed by males against females in single victim/single offender incidents, and relies on data from the Federal Bureau of Investigation's Supplementary Homicide Report (SHR).

National statistics from the study include:

- 93% of women killed by men were murdered by a male they knew, and the weapon most commonly used was a gun;
- Females were 13 times more likely to be murdered by a male they knew than by a male stranger;
- Of the homicide victims who knew their attackers, 63% of female victims were wives or intimate acquaintances of their killers;
- 292 women were shot and killed by either their husband or an intimate acquaintance during the course of an argument;
- More female homicides were committed with firearms than with any other weapon, such as knives, bodily force or murder by blunt objects;
- In 2016, 1,809 females were murdered by males in single victim/single offender incidents: 1,188 were white, 517 were black, 55 were Asian or Pacific Islander, 26 were American Indian or Alaskan Native, and in 23 cases the race of the victim was unidentified;
- Black women were disproportionately impacted by lethal domestic violence. In 2016, black females were murdered by men at a rate of 2.62 per 100,000, more than twice the rate of 1.03 per 100,000 for white women;
- In 82% of all incidents where the circumstances could be determined, homicides were unrelated to any other felony crime, such as rape or robbery.

Physical violence and harm - Other Resources

Australia

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

International

Supporting Survivors of Abuse and Brain Injury through Research (Website, 2019)

SOAR (Supporting Survivors of Abuse and Brain Injury through Research) is a multi-disciplinary, community-engaged research partnership between the University of British Columbia (UBC) and Kelowna Women's Shelter. It explores the incidence and effects of traumatic brain injury in women survivors of intimate partner violence. Its work is grounded in recognising trauma, and its effects on survivors. Its three main phases include: psychosocial and lab-based assessment; education and training; and community-based support network. The website also provides links to important media reports, articles and information resources.

National Online Resource Center on Violence Against Women, Special Collection: Traumatic Brain Injury and Domestic Violence: Understanding the Intersections (2011).

This American collection includes information about the links between traumatic brain injury and domestic and family violence and screening tools for advocates in the field of domestic violence as well as other relevant information for recognizing when the person they are supporting has a traumatic brain injury.

***Training Institute of Strangulation Prevention* website (United States).**

Includes information on signs and symptoms and impact of strangulation, and online training resources. This site includes a helpful diagram outlining the signs and symptoms of strangulation.

VAWnet, Understanding the Intersection: TBI and DV (United States) (2019).

VAWnet is an online network, operated by the National Resource Center on Domestic Violence, which focuses on violence against women and other forms of gender-based violence. It is a comprehensive and

readily-accessible source of information for anti-violence advocates, human service professionals, educators, and others who wish to eliminate domestic and sexual violence. In particular, various resources (including fact sheets and reports) on the intersection between traumatic brain injury (TBI) and domestic violence are available for download. For example, some resources provide information about brain injury and its possible implications for domestic violence survivors, while others focus on the early detection of TBI among domestic violence survivors. A screening tool for TBI adapted by domestic violence service providers, as well as training materials, are also included. The website also directs readers to resources which highlight the need to consider the possibility of a TBI in safety planning. Fact sheets and handouts aim to provide advice on how to identify existing injuries, where victims of domestic violence who have sustained brain injuries can find appropriate help, and how to prevent future injury.

Dr Cath White, Dr Margaret Stark and Dr Bernadette Butler, *Non-fatal strangulation: in physical and sexual assault*, Faculty of Forensic & Legal Medicine, Mar 2020.

Fact sheet contains information in relation to methods, incidence and useful definitions of strangulation: the obstruction of blood vessels and/or airway by external pressure to the neck resulting in decreased oxygen (O2) supply to the brain, as opposed to choking, the mechanical obstruction of the windpipe (trachea), such as a stuck piece of food.

It also offers advice as to history details which should be taken from persons reporting strangulation, possible symptoms of strangulation and advice as to appropriate forensic medical assessment.

Physical violence and harm - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Barbara

Ben

Bianca

Brenda

Carol

Cassy

Celia

Celina

Erin

Faith

Fiona

Francis

Gillian

Hilary

Julia

Leah

Leyla

Lisa

Melissa

Sally

Sandra

Susan

Trisha

Yvonne

Physical violence and harm - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Palmer **[2020] ACTSC 13 (3 February 2020) – Australian Capital Territory Supreme Court**

Elkaim J at [15]*"Domestic violence is abhorrent. Choking a person is a serious crime. The offender should not have been anywhere near his victim. He was already on bail for family violence offences against the same victim. When she told him to leave he should have done so. He should not have assaulted her and he certainly should not have choked her."*

R v Pikula **[2015] ACTSC 380 (12 November 2015) – Australian Capital Territory Supreme Court**

Refshauge J at [1]: 'There can be no doubt that one of the marks of a civilised society is that its members can be protected from violence in their lives. While there can, of course, be no guarantee of such protection, nevertheless, the community expects that appropriate steps will be taken to maximise such protection. This is especially true of the need for safety within the family'.

R v Peadon **[2015] ACTSC 132 (14 May 2015) – Australian Capital Territory Supreme Court**

Burns J at [4]:'these offences [were] family violence offences and as such must be treated very seriously by [the] Court. [The] community views with great abhorrence the infliction of violence by people in family relationships'.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J at [77]: 'An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the

victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, “Restorative Justice, Domestic Violence and Family Violence”, Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6–7’.

R v Edigarov **[2001] NSWCCA 436 (5 October 2001) – New South Wales Court of Criminal Appeal**

Wood CJ at [41]: ‘As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996, Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell (2000) NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable’.

R v Dunn **[2004] NSWCCA 41 (23 February 2004) – New South Wales Court of Criminal Appeal**

Adams J at [47]: ‘Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence: firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat. These elements also usually mean that the victim never feels truly safe. Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted’.

R v June Oh Seo **[2019] NSWSC 639 (31 May 2019) – New South Wales Supreme Court**

Wilson J noted At [53]-

> *She was attacked by him in her own home, a home in which he had no right to be, Ms Choi having asked him to leave. Thus did what should have been a place of peace and safety become a place of great danger for Ms Choi.*

At [82] –

> *'Whilst there are men in the community, and it is mostly men, who view women as second class citizens who must bend to their will, when that attitude results in the commission of crime, and particularly violent crime, the courts will impose heavy punishment. Such conduct is never acceptable and it will be strongly repudiated by the courts.'*

Emitja v The Queen **[2016] NTCCA 4 (21 October 2016) – Northern Territory Court of Criminal Appeal**

Grant CJ & Kelly J at [29]:

'The offending is once again a very serious incident of domestic violence committed by the offender. The offender's moral culpability for this offending is very high. The offender engages in domestic violence in order to control the victim and to express his displeasure when she does not behave in a manner that he expects her to behave. … The offender must learn that women are not required to do what men tell them to do. Women are entitled to lead dignified lives free from such violence.'

R v CCU **[2022] QCA 92 (27 May 2022) – Queensland Court of Appeal**

Per Morrison JA [58]-[59]:

The offending here was very serious. It was protracted, violent, demeaning and controlling. It extended beyond the complainant, who suffered time and again from the applicant's abuse. It extended to K's son, and some of the conduct was in view of K's children. It not only involved injury to ease of mind, but physical abuse of a degrading and humiliating kind. Concerningly, it involved an ultimate degradation, the threat of elimination of life itself…. Moreover, the conduct may have been broken by periods where assaults were not carried out, but that does make things better for the applicant. It makes the conduct worse in some respects, because the threat was always there.

R v MCW **[2018] QCA 241 (28 September 2018) – Queensland Court of Appeal**

The Court referred to the *Explanatory Notes for the Criminal Law (Domestic Violence) Amendment Bill (No 2*) 2015 at [39] –

'The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide…'

Director of Public Prosecution v Johnson **[2020] TASCCA 4 (8 April 2020) – Tasmanian Court of Criminal Appeal**

Geason J observed:

"The fact that the respondent's conduct included suffocation has significance to the assessment of the objective seriousness of the offending. Suffocation should be treated with the same level of seriousness as is afforded strangulation or throttling. Such conduct is inherently dangerous, and capable of causing serious consequences within a very short period. It renders victims incapable of acting to protect themselves. As Estcourt J observed in DPP v Foster [2019] TASCCA 15 at [26]- [27], it is a form of dominance and control which has the potential to cause grave psychological harm, serious injury and even death" [33].

Hardwick v Tasmania **[2020] TASCCA 2 (20 March 2020) – Tasmanian Court of Criminal Appeal**

At [52]-[53], the Court stated:

"The dangers attached to choking have been well documented over many years, particularly in homicide cases. Judges sitting in criminal law have become familiar with evidence of pathologists that death in choking cases is usually as a result of pressure applied to the carotid arteries, thereby blocking the arterial blood supply to the brain… In recent years, criminal courts across Australia have come to understand that choking of female victims by male offenders is a prevalent and dangerous feature of violence perpetrated in domestic circumstances."

At [64], the Court noted that:

"The prevalence and devastating impacts of violence perpetrated against women and children in domestic circumstances are well recognised across Australia by the criminal courts and the wider

community. Victims in these cases are vulnerable. The crimes are often committed within the confines of the family home in breach of the sanctity and safety of the home. Choking is a common and dangerous feature."

Director of Public Prosecutions v Foster **[2019] TASCCA 15 (12 September 2019) – Tasmanian Court of Criminal Appeal**

At [29], Estcourt J held:

'Violent behaviour by men towards women in relationships must be condemned and discouraged. Vulnerable women, such as the complainant, are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the courts.'

Her Majesty's Attorney-General v O **[2004] TASSC 53 (9 June 2004) – Tasmanian Supreme Court**

Quoting the Canadian decision of *R v Brown* (1992) 73 CCC (3d) 242, 249 (as cited in *Parker v R* [1994] TASSC 94):

'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.'

DPP v Smith **[2019] VSCA 266 (21 November 2019) – Victorian Court of Appeal**

At [35], the Court stated:

'…[T]hose considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of our community and will not hesitate to impose stern punishment upon wrongdoers. In 2014, this Court sent out what it hoped would be an unequivocal message to would-be perpetrators of domestic violence – that if they offended, they would be sentenced to lengthy terms of

imprisonment. The sentence we are about to impose follows through on that message.'

***Degney v The Queen* [2019] VSCA 183 (19 August 2019) – Victorian Court of Appeal**

At [50], the Court stated:

> '…[T]hose considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of our community and will not hesitate to impose stern punishment upon wrongdoers. In 2014, this Court sent out what it hoped would be an unequivocal message to would-be perpetrators of domestic violence – that if they offended, they would be sentenced to lengthy terms of imprisonment. The sentence we are about to impose follows through on that message.'

At [52], the Court observed:

> 'There has been an increasing community disquiet over violence of males towards their female partners (or ex-partners) and this is one reason why denunciation of this conduct must be given full expression in the sentence.'

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [53]-[54]: 'Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.'

'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of

D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

***DPP v Smeaton* [2007] VSCA 256 (15 November 2007) – Victorian Court of Appeal**

Dodds-Streeton JA at [21]: 'Violence, and in particular violence by men against women as a means of control in current relationships or in relationships which have ended, is a prevalent and even critical social evil'.

***Silva v The State of Western Australia* [2013] WASCA 278 (4 December 2013) – Western Australia Supreme Court (Court of Appeal)**

Buss JA with whom Mazza JA agreed (quoting the sentencing judge):

'The law is clear that disputes between partners, no matter how emotionally hurtful, must be resolved peacefully. People must understand that marriage is not a licence to treat a spouse as a chattel and violence in the course of a marriage breakdown will be met with deterrent sentences' ([42]).

Sexual and reproductive abuse

Australian and international studies demonstrate the prevalence of sexual and reproductive abuse as a form of domestic and family violence that may be part of a broader and complex pattern of abusive behaviours experienced by a victim (sometimes referred to as coercive control).

Sexual abuse as a form of domestic and family violence includes rape, sexual assault, or sexual victimisation perpetrated predominantly by men against women. Behaviours may include: forced, attempted forced or unwanted sexual penetration; forced penetration by a third party, object or an animal; forced prostitution; forced or unwanted sexual touching; non-consensual sharing of nude or sexual images [Henry, Flynn & Powell 2019] or forced partial or total removal of the victim's external genitalia, or other mutilation or injury to the victim's genital organs for reasons that are not medically warranted (sometimes referred to as female genital mutilation or FGM). Any of these behaviours may be facilitated or aggravated by alcohol or drugs, and may also be associated with physical and other forms of domestic and family violence [Mouzos & Makkai 2004]. Most at risk are young women who have separated from their intimate partner and have experienced prior abuse as adults or sexual abuse as children. The Australian Bureau of Statistics reported that in 2021 domestic and family violence-related sexual assault accounted for over a third of the total number, that it is most likely to occur in the age range 25-34 years, and there are six times as many female victims as male victims [ABS FDV-related offences 2022].

Proof of the victim's lack of consent in judicial processes is central to establishing sexually abusive behaviours and their criminality. The issue of consent is profoundly complicated by the nature and circumstances of the relationship between victim and perpetrator. Sexual abuse may be part of a broader pattern of domestic and family violence, and a victim may only comply due to coercion by the perpetrator. Coercion may not necessarily involve physical force; rather, psychological means may be used. For example: demeaning the victim's physical appearance, intelligence and dignity; dictating that the victim meet the perpetrator's sexual demands; or threatening to severely or fatally injure or abandon the victim if those demands are not met.

Australian research indicates that sexual abuse in this context is the least likely form of domestic and family violence to be reported by victims. Unique contributing factors may include a victim's lack of awareness of the

criminality of sexually abusive behaviours, especially where the perpetrator is a current for former partner; cultural or religious beliefs and traditions; a fear of reprisal by the perpetrator against the victim or other family members; a sense of betrayal of trust and violation of intimate personal and psychological boundaries by the perpetrator; debilitating feelings of shame and self-blame; anxiety associated with health and reproductive risks; and an apprehension of re-victimisation through the reporting and judicial processes [Heenan 2004].

Domestic and family violence may commence or escalate, or its patterns may change, during a victim's pregnancy. In some reported cases, the violence lessened and victims came to view pregnancy as a means of self-protection. More often however, the perpetrator is likely to regard the pregnancy and change in family circumstances as a threat to previously held dominance and may intensify abusive behaviours in an effort to reassert control over the victim.

A pregnant person in an abusive relationship is less likely to want or to have planned her pregnancy and may seek a termination to avoid further risk of harm to themselves or the child; to avoid having to parent with the perpetrator; or to better enable her escape from the abusive relationship. However, if the pregnant person is experiencing heightened levels of monitoring and manipulation by the perpetrator, the pregnant person may be prevented from accessing the funds, transport and other means necessary to terminate the pregnancy. Physical and other forms of violence experienced during pregnancy may result in the pregnant person's death or foetal death, pre-term birth, low birth weight, or extreme stress in the mother manifested, for example, in eating and sleep disorders, poor weight gain, inadequate access to antenatal care, misuse of alcohol or drugs, sexually transmitted diseases, and mental illness [Miller et al 2010].

Reproductive violence or abuse, sometimes called reproductive coercion extends to earlier perpetrator behaviours specifically intended to coerce (or end) pregnancy. For example: rape, insisting on unprotected sex, sabotaging the birth control measures (destroying pills, pulling out vaginal rings or contraceptive implants) or forcing a person to use them, exercising financial control so as to restrict the person's access to contraception or abortion, or threatening to leave her if she fails to conceive or refuses an abortion. Where a victim is also experiencing other forms of violence there is an increased risk of unintended pregnancy as the person is more likely to fear the consequences of resisting the perpetrator's coercion, and may be significantly vulnerable to poor reproductive and general health [Moore et al 2010].

Sexual and reproductive abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Sexual and reproductive abuse - Key Literature

Australia

ANROWS, Intimate partner sexual violence: Research synthesis.

This resource provides an overview of ANROWS evidence relating to intimate partner sexual violence (IPSV). It includes key facts on prevalence, as well as an overview of key issues, including evidence that:

- IPSV is a high-risk indicator.
- IPSV has serious and long-lasting effects.
- IPSV usually co-occurs alongside other tactics of DV.
- Community attitudes toward issues of sexual activity and consent show that sexual violence, and in particular IPSV, is not understood well, or taken seriously.
- IPSV is difficult to name and recognise.
- There are many barriers to reporting IPSV.
- Incidents are underreported and hard to prosecute.
- Responses to and services for IPSV need further resourcing and development.
- Education and prevention programs do not sufficiently address IPSV.
- Current research on IPSV faces limitations with small population groups and definitional issues.

Australian Bureau of Statistics, 4510.0 - Recorded Crime - Victims, Australia, 2022.

Victims of Domestic and Family Violence-Related Offences

This chapter presents experimental data about victims of selected Family and Domestic Violence (FDV) – related offences. Victims of selected offences have been determined to be FDV–related where the relationship of offender to victim, as stored on police recording systems, falls within a specified family or domestic relationship or where an FDV flag has been recorded, following a police investigation.

Key findings include:

- FDV-related homicide victims accounted for over a quarter of total homicide victims, and females

accounted for over half of all FDV-related homicide victims.

- Regarding FDV-related assault, across selected states and territories 64-78% of victims were female.
- Regarding FDV-related sexual assault 89% of victims were female.

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women aged 18 years and over about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Almost one in five women reported experiences of sexual violence (18% or 1.7 million), compared with approximately one in twenty men (4.7% or 428,800). Further, '[w]omen were eight times more likely to experience sexual violence by a partner than men. Approximately 5.1% of women (480,200) experienced sexual violence by a partner, compared with approximately 0.6% of men (53,000)'. See Table 3 for more detail.

Campo, Monica (2015) Domestic and family violence in pregnancy and early parenthood: Overview and emerging interventions (Practitioner Resource) Australian Institute of Family Studies, Commonwealth of Australia.

This resource for family violence practitioners highlights the following:

- Women are at an increased risk of experiencing violence from an intimate partner during pregnancy.
- If domestic and family violence already exists, it is likely to increase in severity during pregnancy.
- Young women, aged 18–24 years, are more likely to experience domestic and family violence during pregnancy.
- Unintended pregnancy is often an outcome of an existing abusive relationship.
- Poor birth outcomes (such as low birth weight, premature birth) and post-natal depression are associated

with domestic and family violence during pregnancy.

- The long-term effects of exposure to domestic and family violence in utero are just emerging.
- There are several promising interventions for preventing and reducing violence during pregnancy.
- Pregnancy and early parenthood are opportune times for early intervention as women are more likely to have contact with health and other professionals

Coumarelos, C., Weeks, N., Bernstein, S., Roberts, N., Honey, N., Minter, K., & Carlisle, E. (2023). *Attitudes matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia*. (Research report 02/2023). ANROWS.

This report details the results from the 2021 National Community Attitudes towards Violence against Women Survey (NCAS). The survey sample consisted of 19,100 Australians aged 16 years or over, who were interviewed via mobile telephone. Regarding forms of abuse that are 'always recognized as domestic violence:

- Behaviours threatening physical injury or a forced medical procedure, such as forced contraception or abortion (81–92% of respondents always recognized as domestic violence).
- Non-physical forms of domestic violence involving financial and emotional abuse or control, including tracking via technology (66–75%).
- Violence involving the exploitation of aspects of a partner's identity or experience, such as chronic health conditions, sexual diversity, religion and migrant status, were also less well recognised (66–73%).
- Electronic harassment and abuse, such as via texts, emails, social media and sending unwanted sexual images (68–78%) (p23)

The study provided a number of statements and asked respondents if they agreed with them. For example: women lie about sexual assault as a way of "getting back at men" (34% agree) or because they later regret consensual sexual interactions (24% agree). The study found that 25% of respondents agreed that men might disregard consent because an aroused man "may not realise" the woman does not want to have sex; 18% agreed that sexual assault is primarily committed by strangers, 7% agreed that "genuine" sexual assault victims immediately report their assault to police (7%) and 5% agreed that rape victims would have have evidence of physical injuries.(p25)

Cox, Peta, *Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper* (ANROWS, 2015).

This literature review examines the intersection between sexual assault and domestic violence. In relation to consent, the paper highlights that the ability to provide consent for sexual activity may be compromised when it is occurring within the context of the perpetration of intimate partner violence (IPV). This is because the perpetration of IPV creates a climate of ongoing fear or control (p 29). Additionally, for sexual violence perpetrated by intimate partners, demonstrating lack of consent is complicated because sexual violence may have been perpetrated in a context where consensual relations may have taken place before and/or after the assault, and in the context of established patterns of sexual behaviours that do not include verbalised consent (p 29).

Understandings of consent in established relationships affect how intimate partner sexual violence is framed both by victims as well as third parties. See pages 47-48 for a discussion of the way social norms affect what is understood as “real rape” (non-consensual sexual activity). Importantly, research has found that intimate partner sexual violence is viewed by the community as both less serious and more justifiable than sexual assault by a stranger or acquaintance (p 47). Indeed, the greater the familiarity between the victim/survivor and perpetrator, the greater likelihood that reports will be considered a lie or misinterpretation (p 47).

IPSV victims/survivors themselves often face difficulty in recognising sexual violence as violence, assault or rape (p 26). Similarly, research shows that younger women rarely identify sexually coercive behaviours by boyfriends as sexual assault, and tend to excuse sexually violent behaviour by saying that their own behaviour justified the assault or by pointing to extenuating circumstances (p 48). This again points to the strength of commonly held perceptions of what “counts” as consensual or non-consensual sexual activity.

Heather Douglas and Katherine Kerr, ‘Domestic and family violence, reproductive coercion and the role for law’ (2018) 26(2) *Journal of Law and Medicine* 341-355.

Although sexual abuse has been extensively analysed in the literature, little is known about the extent and nature of reproductive coercion – an issue that has far-reaching consequences which often manifest in poor sexual and reproductive health outcomes, and may also result in pregnancy and parenting in a violent relationship. Reproductive coercion is broadly defined as the interference with a woman’s reproductive and

sexual autonomy. The authors draw on interviews conducted with women who had experienced DFV and were involved with the legal system. Results indicated a link between sexually abusive behaviour and reproductive coercion. Not only does reproductive coercion sometimes occur within a context of violent and controlling behaviours, but those behaviours may reinforce or co-occur with the perpetration of reproductive coercion. Some of the women in the study described being pressured into doing various sexual activities they were not comfortable with. Other women perceived sexual abuse as normal and did not usually name the behaviour as sexual assault or rape. In a violent intimate relationship, the underlying dynamic is one where the abuser uses numerous tactics to assert power and control over his partner. For some women, sex and reproduction are part of that dynamic.

Heenan, Melanie, 'Just "Keeping the Peace": A Reluctance to Respond to Male Partner Violence' (Australian Centre for the Study of Sexual Assault Issues No 1, Australian Institute of Family Studies, 2004).

This review provides a comprehensive overview of a variety of Australian and international research and literature on sexual violence in intimate partner relationships with specific discussion of women's (including Indigenous women) experiences. This review identifies some of the reasons victims might be reluctant to disclose a partner' or ex-partner's sexually abusive behaviour. These include fear of retaliation, fear of rejection by family and friends, fear of the loss of the relationship, feeling ashamed or that they have failed in their perceived duty as a wife, and hope that things will change. A victim may be at a heightened risk of sexual abuse by their ex-partner after the relationship has ended.

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and

perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey. The authors report that 5-7% of women who had a current or former intimate partner reported that their partner had forced them to have sexual intercourse at some stage during their lifetime. A further 3-4% of these women reported that their partners had attempted to force them to have sexual intercourse, and a similar proportion experienced unwanted sexual touching (pp44-46). The authors also consider the under-reporting of sexual violence.

Tarrant, Stella, Julia Tolmie and George Giudice, *Transforming legal understandings of intimate partner violence: Final report* (ANROWS, 2019).

This report analyses a West Australian homicide case. The analysis shows how sexual violence against the defendant who was charged with killing her abusive husband, is rendered invisible in the case. Despite the evidence of sexual violence against the defendant, the sexually abusive behaviours played little or no part in the consideration of previous violence(see in particular pp 83-84). The defendant gave evidence of sexually abusive behaviours including that the deceased had forced her repeatedly to perform sexually in front of Skype cameras and that he had raped her when she resisted watching child sexual abuse on laptops in their bedroom. The report argues that old common law understandings of marital unity and rape immunity, despite law reform, still influence our legal understandings of sexual violence within intimate partnerships.

A summary of implications for policy and practice is also available at this link.

Tarrant, S., Douglas, H. & Tubex, H. (2022) *Sexual Offences: Background* Paper. The Law Reform Commission of Western Australia.

This paper discusses background social issues relevant for considering sexual offence laws. The authors examine the issues from three perspectives: The harmfulness of sexual violence; common misconceptions about sexual violence; and complainants' experiences of the criminal justice system. It provides a thorough literature review of the issues explored. See especially 1.1 which explores sexual violence as controlling behaviour that is embedded in social relations. Section 2 considers commonly held myths and misconceptions about sexual violence.

VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004).

This report is focused on health outcomes associated with intimate partner violence. The research reports that where sexual violence is involved bruising, tears and lacerations to the vaginal area and anus are common (p20). The report also identifies implications for reproductive health including sexually transmitted diseases, urinary tract infections, and terminations of pregnancy and complications of pregnancy (p21).

Zilkens, Renate et al, 'Sexual assault and general body injuries: A detailed cross-sectional Australian study of 1163 women' (2017) 279 *Forensic Science International* 112-120.

Of 1163 Australian women seen at a sexual assault centre, 71% received a general body injury (52% mild, 17% moderate, and 2% severe) (p 115). Moderate to severe injury was observed more frequently in women assaulted by intimate partners than by strangers or acquaintances. In particular, the prevalence of non-fatal strangulation, biting, the use of blunt force and weapons was higher for women assaulted by intimate partners compared to any other group (p 117). The presence of mental illness in the victim also affected the severity of the injury (p 119).

International

Bagwell-Gray, M. et al., Women's Reproductive Coercion and Pregnancy Avoidance: Associations With Homicide Risk, Sexual Violence, and Religious Abuse. (2021) 27 (12-13) Violence Against Women 2294-2312 doi: 10.1177/10778012211005566

This survey study explores patterns of reproductive coercion (RC) and pregnancy avoidance (PA) among

women recruited from domestic violence shelters in the southwestern United States (N = 661). Younger, African American, and Hispanic women were more likely to experience RC. Homicide risk, sexual intimate partner violence (IPV), and religious abuse were associated with RC, and RC and homicide risk were associated with PA. We discuss implications of the associations between RC and PA and their links to religious abuse, sexual IPV, and homicide risk.

Twenty-one percent of the sample indicated that their partner used religious teachings or traditions as a reason to control daily activities. 217 women (33%) experienced reproductive coercion. Specifically, 31% (n = 207) of participants reported their partner tried to get them pregnant when they did not want to be pregnant and 17% (n = 114) reported that their partner physically hurt them or threatened to leave if they did not get pregnant.

Bows, Hannah and Nicole Westmarland, 'Rape of Older People in the United Kingdom: Challenging the 'Real-Rape' Stereotype' (2017) 57 *British Journal of Criminology* 1-17.

While advances have been made in understanding sexual violence broadly, this article addresses the gap in knowledge regarding older victims of rape and sexual violence (p 5). In order to do so, the researchers used freedom of information requests to obtain data from 45 police forces relating to 655 cases (p 6). The findings challenge dominant real-rape stereotypes, which involve a 'white, young victim who is attacked at night by a stranger who is motivated by sexual gratification' (p 3), and can lead to older victims of sexual violence being ignored or disbelieved (pp 3-4). Key findings include:

- The 'overall number of reported offences involving an older victim was low when compared with younger age groups' (p 6);
- Consistent with existing knowledge on younger groups, most victims were female, and most perpetrators were male (pp 7-8);
- Perpetrators of sexual violence against older people were likely to be younger than their victims, with the majority under 60 years of age (p 8);
- Most perpetrators were known to the victim, with around 20% being a partner or husband (p 9); and
- Most of the assaults occurred in the victim's home (p 9).

Center for Disease Control and Prevention, 'Intersection of Intimate Partner Violence and HIV in Women' (February 2014).

This report considers the intersection between women's experiences of intimate partner violence (IPV) and HIV. IPV can be both a risk factor for HIV, and a consequence of HIV (p 2). Exposure to IPV may increase a woman's risk of HIV, through forced sex with an infected partner (p 3), limited or compromised negotiation of safe sex practices, compromised treatment and prevention practices (p 3), and increased risk-taking behaviours (p 1). Women who are HIV-positive experience higher rates of IPV, and are likely to experience more frequent and severe abuse (p 2). Further, some women may be reluctant to be tested and treated for HIV due to fear of violence (p 2).

Miller, Elizabeth, et al, 'Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy' (2010) 81(6) *Contraception* 457.

This paper reports that the prevalence of intimate partner violence reported among women utilizing sexual health services and seeking care in gynecologic and adolescent clinics is generally double these population-based estimates. It reports that such victimization is consistently associated with increased pregnancy and sexually transmitted infection (STI), with abused women demonstrating disproportionately higher rates of seeking care at family planning and other health services related to sexual health, such as HIV and STI testing. Moreover, they report on evidence that unintended pregnancy occurs more commonly in abusive relationships. Forced sex, fear of violence if she refuses sex, and difficulties negotiating contraception and condom use in the context of an abusive relationship all contribute to increased risk for unintended pregnancy and STIs.

Moore, Ann, Lori Frohwirth and Elizabeth Miller, 'Male Reproductive Control of Women Who have Experienced Intimate Partner Violence in the United States' (2010) 70 *Social Sciences and Medicine* 1737.

This article reports on the histories of 71 women aged 18-49 years with a history of intimate partner violence recruited from a family planning clinic, an abortion clinic and a domestic violence shelter in the United States. 53 respondents (74%) identified 'male reproductive control' encompassing pregnancy-promoting behaviours as well as control and abuse during pregnancy in an attempt to influence the pregnancy outcome. The

authors explain that pregnancy promotion involves male partner attempts to impregnate a woman including verbal threats about getting her pregnant, unprotected forced sex, and contraceptive sabotage. Once pregnant, male partners resort to behaviours that threaten a woman if she does not do what he desires with the pregnancy. This paper provides a thorough overview of the literature in the US on the relationship between intimate partner violence and pregnancy/reproductive health, and the characteristics of abusive relationships which affect 'poor pregnancy outcomes'.

Walker, Susan and Sam Rowlands, 'Reproductive control by others: means, perpetrators and effects' (2019) 45(1) BMJ Sex Reproductive Health 61-67

People exert control over women's reproductive rights in various ways, including persuasion or pressure, such as emotional blackmail, societal or family expectations, or threats of or actual physical violence. This article reviews the medical and social science literature on reproductive control of women. Reproductive control can be perpetrated by intimate partners, the wider family or as part of criminal behaviour. Contraceptive sabotage, or 'stealthing', invalidates consent by the covert removal of a condom during sex. Reproductive control is distinct from intimate partner violence, but they overlap to a certain extent. Reproductive control is reported by around one quarter of women who attend sexual and reproductive healthcare services. Therefore, people working in women's health must appreciate its extent in the community, and understand how to use screening tools which detect it.

Sexual and reproductive abuse - Other Bench Books

NSW

Judicial Commission of NSW, *Sexual Assault Trials Handbook* (2022).

This bench book provides considerable discussion of offences and procedure in sexual assault trials. In particular, the relevant literature section includes commentary on this topic including discussion of procedure in prescribed sexual offence cases. There is a particular focus on sexual assault of children in the bench book.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.1 – Sexual abuse provides a number of examples of sexual abuse, and the factors around why it is underreported. Also see 1.1 – Additional Guidance – Common Risk Assessment Framework, for further examples.

For references to sexual abuse in specific contexts (e.g. people from CALD backgrounds) see: 5.6.2 – Particular experiences of family violence.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book cites a number of statistics relevant to sexual violence, including that in Australian Bureau of Statistics ("ABS") data from 2019:

- "there were 8,985 victims of FDV-related sexual assault, which accounted for 33% of all victims of sexual assault;
- there were six times as many female victims of FDV-related sexual assault (60 female victims per 100,000 females) than male victims (10 male victims per 100,000 males); and
- the majority of FDV-related sexual assault victims were aged under 19 years old (72% of male and 52% of female victims)". [13.1.2]

It also cites ABS data from 2016 which found:

- “women are eight times more likely to experience intimate partner sexual violence (IPSV) than men (with approximately 5.1% of women having experienced IPSV, compared with approximately 0.6% of men); and
- 53% of women, compared to 25% of men, experienced sexual harassment during their lifetime”.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Neilson notes in Section 4.2 the ‘[h]igh overlap between domestic violence and sexual coercion/assault: Many (some researchers suggest most) relationships characterized by physical domestic violence also involve sexual coercion and assault. Lawyers and service providers will not always be made aware of this form of domestic violence since sexual abuse disclosure rates are known to be very low. Lawyers and service providers can help by becoming aware of the broad range of behaviors that can constitute sexual abuse and by asking appropriate questions’. Sexual abuse as a factor associated with risk is identified in Section 8.8.1. Further references to sexual assault and abuse are made throughout the bench book, frequently in footnotes, but not expanded on substantially (see e.g. discussion of psychological harm caused by sexual abuse in Supplementary Reference 1: Understanding the nature of domestic violence: assessing violence in context).

Sexual and reproductive abuse - Other Resources

Australia

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

MacDonald, J., Gartoulla, P., Truong, M., Tarzia, L. and Willoughby, M. (2023) Reproductive coercion and abuse (Practice Guide). Australian Government, Australian Institute of Family Studies.

(Overview)

This practice guide describes the evidence on reproductive coercion and abuse (RCA). It covers: (a) what RCA is; (b) strategies used by perpetrators; (c) the impacts of experiencing RCA; (d) factors that influence a person's risk of experiencing RCA; and (e) how to ask about RCA victimisation. Finally, some tips are provided for supporting clients who may be experiencing RCA.

International

Echo Parenting & Education, *The Impact of Trauma* (2017).

This fact sheet explains the lasting impacts of childhood trauma on victims. Examples of impacts include loss of safety, loss of trust and re-enactment of the trauma.

Dr Cath White, Dr Margaret Stark and Dr Bernadette Butler, *Non-fatal strangulation: in physical and sexual assault*, Faculty of Forensic & Legal Medicine, Mar 2020.

Fact sheet contains information in relation to methods, incidence and useful definitions of strangulation: the obstruction of blood vessels and/or airway by external pressure to the neck resulting in decreased oxygen (O2) supply to the brain, as opposed to choking, the mechanical obstruction of the windpipe (trachea), such as a stuck piece of food.

It also offers advice as to history details which should be taken from persons reporting strangulation, possible symptoms of strangulation and advice as to appropriate forensic medical assessment.

Sexual and reproductive abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Celia

Julia

Leah

Leyla

Lisa

Melissa

Susan

Yvonne

Sexual and reproductive abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Smith **[2021] ACTSC 114 (3 June 2021) – Australian Capital Territory Supreme Court**

Mossop J observed:

[25] The sexual intercourse without consent is constituted by the digital penetration of the complainant's vagina. This is a case in which the sexual intercourse can properly be described as an act of sexual violence. There is nothing which suggests that the act was performed for the purposes of sexual gratification. Rather, it was an assault designed to degrade the victim and formed part of a pattern of demeaning and controlling behaviour on the part of the offender. That demeaning and controlling behaviour is an important part of the context in which the offence occurred.

[26] In R v Palmer [2017] ACTSC 357 at [22] I made reference to some of the features that might be taken into account in determining the objective seriousness of an offence of sexual intercourse without consent. In this case, relevant considerations are as follows: the offence was not premeditated; the offender acted alone; the sexual intercourse was brief and involved a single incident of digital penetration; the act occurred in the context of violence that would have caused the victim to fear for her life; the offender's behaviour at the time of the digital penetration and immediately following was, and was designed to be, humiliating or degrading; the victim was vulnerable largely because of her ongoing relationship with the offender; the facts do not disclose any particular protests by the victim but, in the circumstances in which the offending occurred, that is not surprising. While the offending was relatively brief, the various factors to which I have referred puts it at the upper end of the mid range of objective seriousness for this offence.

R v NQ **[2015] ACTSC 308 (14 October 2015) – Australian Capital Territory Supreme Court**

Robinson AJ at [15]: 'There is a need…to send a clear message by way of general deterrence to others that participation in sexual behaviour is a matter of choice not subjugation'.

***Bussey v R* [2020] NSWCCA 280 (16 November 2020) – New South Wales Court of Criminal Appeal**

The seriousness of the offending was not mitigated by the prior sexual relationship between the applicant and the victim. Harrison J (Hoeben CJ and Bellew J agreeing) held at [87]-[88]:

> "Mr Bussey maintained that, but for his Honour's failure to have sufficient regard to the fact that he and RM had, until only a relatively short time before the commission of the offence, been in a close and enthusiastic personal relationship, he would have concluded that Mr Bussey's objective criminality was reduced and would have imposed a less severe sentence. In this sense, it is said that his Honour allegedly failed to have regard to a relevant consideration.
>
> In my opinion, that submission falls foul of the principle that just because it may be possible to contemplate more serious examples of the same offence does not mean that the particular offence being considered is for that reason less serious."

And at [95]-[97], with Hoeben CJ and Bellew J particularly noting their agreement with these remarks:

> "The cases reveal a consistent and commendable emphasis upon the need to consider each offence of sexual assault upon a woman by her partner or former partner with special and particular regard to the circumstances of the case. However, there has in my view been a regrettable tendency in some cases to refer to the fact that the assault occurred within, or following the breakdown of, a relationship as something that might "mitigate" the seriousness of the particular offence. This type of language has the unfortunate potential erroneously to dilute the significance of the offence under consideration. Put simply, the objective seriousness of sexual intercourse without consent cannot be reduced because of factors such as a prior sexual history between an offender and his victim without making unjustified and impermissible assumptions about the effect upon the victim. It depreciates the notion that no means no, whatever other factors may be involved. To accept that a prior relationship can ever operate to mitigate the seriousness of the offending completely abandons that uncontroversial wisdom and reverts to the type of attitude that once saw domestic violence treated as less culpable than other assaults. It also proceeds upon the implicit and unsafe adoption of non-consensual sexual intercourse with a stranger as the default position.
>
> I cannot accept that a statement such as "the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship" is now or could ever have been an

> acceptable, far less correct, summary of the law or that it should continue to influence this Court in the determination of cases such as the present. Violation and defilement of the victim are quintessential aspects of the offence and the victim's familiarity with an assailant can have no bearing upon that fundamental circumstance. Indeed, such an assault, committed by a person with whom the victim may have had a formerly close and respectful relationship, is potentially more likely to exacerbate the seriousness of the offence than otherwise. I cannot accept the proposition that there can be varying degrees of violation and defilement. Such a concept appears to derive from the offensive notion that a man should in certain circumstances be entitled to raise his prior relationship with the victim as some kind of limited excuse for disregarding the absence of consent to an act of intercourse with him to which activity the victim had historically consented."
>
> As I have indicated, Mr Bussey's submissions implicitly rely upon the proposition that the offence of which he was found guilty could have been more serious. The fact that one can imagine the commission of more serious offences of this type is not controversial. It does not, however, mean that the sentence imposed by his Honour for the offence committed by Mr Bussey should somehow be assessed by reference to that fact. It certainly does not mean that the objective seriousness of Count 3 is diminished or reduced because Mr Bussey and RM had previously been in a consensual sexual relationship. Once it is accepted that no means no, that should be the end of the matter."

Director of Public Prosecutions v P **[2007] TASSC 51 (26 June 2007) – Supreme Court of Tasmania**

Crawford J at [16]: Rape amounts to 'a crime of violence, domination and degradation and it usually causes great psychological trauma to the victim. It requires a substantial sentence of imprisonment in most cases'.

Evan J at [23] 'For my part it is significant that the respondent's criminal conduct cannot be categorised as an impetuous response to the break-up of his relationship with the complainant and a manifestation of his love for her. His conduct over the period of in excess of an hour after she first asked him to leave bears all the hallmarks of an assertion of physical and sexual dominion over the complainant.'

R v Mason **[2001] VSCA 62 (2 May 2001) – Victorian Court of Appeal**

Winneke P at [7]-[8]: 'A rape committed in the context, and against the background, of a previous settled

relationship may in certain circumstances be a factor which a court can take into account in mitigation where it can be seen that the impact upon the victim has, for that reason, been less traumatic than otherwise it might have been. But, equally, it is not difficult to imagine a rape, committed by a man who has been in a previous relationship with his victim, which would be every bit as frightening as a rape committed by a stranger. The one thing which the authorities to which this Court has been referred demonstrate is that the crime of rape, whatever the circumstances, and upon whomsoever committed, is regarded by the courts as a grave insult to its victim and a crime which can rarely give rise to a non-custodial sentence.

It should not be forgotten that the crime of rape is an intensely personal crime which, for sentencing purposes, cannot be divorced from its effects on the victim. But the effects include not only those which flow from the physical invasion of the victim's person and security, but also those which flow from the violation of the more intangible intellectual properties of the victim's rights and freedoms. In a society in which there is an increasing number of couples becoming estranged, the courts have a heightened obligation to deter those who have previously lived in a stable relationship with a wife or partner from regarding such wife or partner as akin to a chattel devoid of rights or freedoms, and as an object readily available for their sexual gratification'.

***R v Bastan; DPP v Bastan* [2009] VSCA 157 (4 August 2009) – Victorian Court of Appeal**

The complainant's marriage was arranged by her parents. The applicant became aggressive and she fled to a women's refuge. They were divorced. The applicant masqueraded as another man to the complainant and, once he gained entry to her home, he raped her.

Buchanan JA at [36]: 'I consider that the sentence would generally be regarded as inadequate if imposed upon an offender who tricked his way into the house of a stranger and raped her. The fact that the applicant and the complainant, in the past, had shared a consensual sexual relationship may have played a part in producing this sentence. In my opinion it should have played no part save insofar as those who have been in a relationship should be deterred from asserting any right or power in a like fashion against their former partners. This rape constituted an act of dominion by the applicant over the complainant's body, which is not to be tolerated. In my opinion, the sentence, and in particular the non-parole period, was manifestly inadequate and represents an error that warrants interference by this Court'.

NPA v The State of Western Australia **[2018] WASCA 131 (2 August 2018) – Western Australia Court of Appeal**

Judgment of the Court [7]: 'We respectfully endorse and adopt the following comments of the sentencing judge:

Now, when it comes to sentencing you in a case like this, it's self evident that sexual offending is extremely serious, invading as it does, the victim's personal, sexual rights. Such offending is a gross violation of a person's sexual rights and that's so whether or not you've been in a relationship with the victim.

[The complainant] had been in this relationship with you. She was not your chattel; she was not your thing that you could do with whatever you pleased. She was not available to provide you with sexual favours at your choosing. She has her rights. Those rights include her right to say no.

Now, this is not just a personal right, it's deeper than that, it's her sexual integrity which you violated. She was entitled to refuse you. When she sought to exercise her rights, you overcame her physically in order to penetrate her.

Then, in terms of your offending in February 2015, [the complainant] and her parents were entitled to feel safe in their home. [The complainant] was entitled to feel that she was in her castle and that she would be safe in that castle. She was entitled to remain there without, in any way, being under threat from you to harm her.'

Economic and financial abuse

Studies of domestic and family violence often identify economic abuse as part of a pattern of behaviours [Cortis & Bullen 2015] used by perpetrators to exert control over the victim [Adams et al 2008], sometimes referred to as coercive control. Economic abuse is also known as financial abuse.

Such abuse may include behaviours that exclude the victim from decisions about finances that affect the victim. It may also include controlling the victim's access to finances and income. For example victims may be refused access to, or information about, bank accounts. Access to finances may be a particular concern in cases where the victim has no access to income, for example where a victim is on a visa requiring the perpetrator to provide financial support [Sanders 2007]. Lack of financial independence is reported as a primary reason victims do not leave abusive relationships [Kim & Gray 2008].

Sometimes perpetrators may exploit the victim's finances or coerce the victim to take on debt. Examples include perpetrators taking out credit cards in the victim's name without the victim's knowledge, coercing the victim to sign a contract for the provision of finance, a loan or credit, coercing the victim to sign assets over to the perpetrator or to enable access to line of credit (for example associated with a mortgage [Littwin 2012]).

Behaviours that sabotage the victim's employment may also constitute economic abuse. Such behaviours may result in victims losing their job or being unable to apply for employment. For example the perpetrator may prevent the victim from leaving the house for work or job interviews, or may harass the victim at the workplace resulting in their employment being terminated or hours reduced [Fawole 2008].

Economic abuse may involve coercive behaviours associated with the giving or receiving of dowry at any time before, during or after the marriage. For example, demands for larger gifts or increased cash payments from a victim and their family. A number of individuals can be involved in perpetrating dowry abuse, including in-laws, former spouses and fiancés, and other family members and friends [United Nations 2009].

Economic abuse may jeopardise a victim's economic self-sufficiency resulting in a diminished ability to parent, access healthcare and education, generally to act independently or to leave the relationship [Fawole 2008]. In some cases where victims of economic abuse do leave the relationship they may continue to be legally responsible for long-term debt and loss of assets incurred as a result of the perpetrator's economically

abusive behaviours, which may significantly limit the victim's financial security and future opportunities. For example, some victims report paying off a car loan for many years after leaving the relationship, for a car they have never driven.

Research also demonstrates the systemic continuation of economic abuse post-separation through the courts and government agencies. This may include the ongoing engagement of the victim in legal proceedings so as to prolong the burden and impact of legal costs, for example by undermining the victim's ability to work; or masking income and hiding assets to avoid paying child support [Cameron 2014]. Exemptions enabling victims to opt out of the child support scheme where applying for child support would compromise their safety may have the effect of perpetuating this abuse and further financially disadvantaging low-income victims on welfare [Patrick et al 2008].

Economic abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Economic and financial abuse - Key Literature

Australia

Australian Law Reform Commission, 'Family Violence and Commonwealth Laws – Improving Legal Frameworks' (ALRC Report 117, 2012).Australian National Research Organisation for Women's Safety (2022) *Economic security and intimate partner violence: Research synthesis*. ANROWS.

This synthesis focuses on the nexus of women's safety and women's economic security, and the harms of financial and economic abuse. Primarily, the paper synthesises ANROWS research addressing the relationship between economic security and intimate partner violence. The research considered emphasizes the following points:

- Intimate partner violence has a negative economic impact on victims and survivors
- Women's economic equality and workforce participation are essential components of women's economic security – and their safety
- Women's economic dependence on perpetrators is a significant barrier to leaving
- Economic abuse is often used as a tactic of control and to create fear
- The social security system can affect women's ability to leave violent relationships

Cameron, Prue, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Research Report, Wire Women's Information, 2014).

This research draws on interviews, focus groups and surveys involving more than 200 women. Section four (from p31) focusses on the systemic continuation of financial abuse post-separation and explores abuse perpetrated through the legal system (including tactics of furthering abuse; the emotional cost of legal proceedings; the financial impact of legal costs; vexatious litigation), and Child Support (eg: partner's hiding assets etc to avoid paying child support).

The authors find that a common theme in the women's stories is that on-going engagement with their former partner through the courts, the Child Support Agency and Centrelink, continues, and in some cases facilitates, the pattern of financial abuse for years after the marriage ends (p31). Tactics identified by study participants included: running up legal costs; hiring aggressive, bullying lawyers; using the legal system to

'destroy' their ex-partners; legal proceedings undermining women's ability to work; refusing to comply with parenting orders; contesting parenting orders and masking their income to avoid child support.

Cortis, Natasha, and Jane Bullen, *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence: State of Knowledge paper* (ANROWS, 2015).

This report outlines the state of knowledge about the economic tactics and financial impact of domestic violence, and ways to promote women's economic security during and following violence. Pages 6-8 outline forms of economic abuse experienced in the context of domestic abuse and consider the prevalence and effect of economic abuse. Economic abuse can include, for example, preventing or interfering with women's participation in education, training or employment; with their acquisition or use of economic resources; refusing to contribute to economic resources; or generating economic costs for women (p 1). It is estimated that financial abuse is perpetrated in around 80 percent of abusive relationships (p 7). Violence can also undermine compliance with welfare or employment services, or can act as a barrier to child support (p 2). The report notes that even when tactics of economic abuse are not employed by abusers, domestic and family violence still has economic impacts and results in financial disadvantage: "This disadvantage is experienced in different ways by women in different circumstances. It influences when and how women can avoid or escape violence, and how they can participate in employment and society during and following violence, ultimately undermining women's independence and wellbeing over the life course" (p 1). As a consequence of violence, victim/survivors may have difficulties sustaining education, job searches, or employment.

Cortis, Natasha and Jane Bullen, *Domestic violence and women's economic security: Building Australia's capacity for prevention and redress: Final report* (ANROWS, 2016).

In Australia, it is estimated that financial abuse has been a tactic reported by among 80-90 percent of women who seek support for domestic and family violence (p 11). This report found in interviews with service providers that financial issues are a major factor in a woman's decision to stay in or leave a violent relationship (p 48).

This research report builds on the literature review contained in *Building effective policies and services to promote women's economic security following domestic violence: State of knowledge paper* (Cortis and Bullen, 2015). The statistical material reported here reinforces how domestic violence contributes to high

levels of financial stress among Australian women. Domestic violence is associated with economic stressors which penalise women for a number of years after violence is experienced (p 6). It found that although women affected by violence had similar average incomes to those not affected by violence, and were no more or less likely to participate in paid work, women affected by violence fared much worse on indicators of financial hardship or stress (for example, having more difficulty paying bills, carrying higher average levels of debt, or being more likely to go without food) (p 7).The paper provides several broad system goals for addressing the economic harm associated with violence, including improving system capacity to redress economic harms; that is, to remedy the injustices women experience where loss of resources results from violence (p 8). Some strategies include improving community understanding of the economic issues arising from violence; improving access to child support settlements, and preventing economic loss while waiting for court settlements (p 8).

Kristin Natalier, 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) 26 *Feminist Legal Studies* 121-140.

Economic abuse is a widespread and damaging aspect of intimate partner violence (IPV). Although research has mainly addressed cohabiting couples, women's long-term experiences after separation are seldom explored, and researchers have not developed a gendered analysis of child support-related economic abuse. Interviews with 37 single mothers were conducted to determine how men's deliberate withholding of child support can constitute economic abuse, which may be facilitated through gendered State processes and institutions that order child support transfers. The author argues that the State may facilitate gendered abuse through the design and implementation of the Australian Child Support Program (CSP). Child support-related economic abuse is not the result of a failed system. Instead, it reflects the role of the CSP as regulating, rather than preventing, economic abuse. Findings showed that women participants understood that the withholding of child support by their former partners was a means to control their acquisition and use of money, and undermined their economic security and autonomy. On this basis, women experienced their former partner's behaviours as post-separation economic abuse which, in turn, was normalised and intensified through the CSP policy.

Kutin, Jozica, Roslyn Russell and Mike Reid, 'Economic abuse between intimate partners in Australia: prevalence, health status, disability and financial stress' [2017] *Australian and New Zealand Journal of Public Health* 1.

'This study determined the lifetime prevalence of economic abuse in Australia by age and gender, and the associated risk factors. The lifetime prevalence of economic abuse in the whole sample was 11.5%. Women in all age groups were more likely to experience economic abuse (15.7%) compared to men (7.1%). Disability, health and financial stress status were significant markers of economic abuse. Conclusions: For women, financial stress and disability were important markers of economic abuse. However, prevalence rates were influenced by the measures used and victims' awareness of the abuse, which presents a challenge for screening and monitoring'. The authors state that the implications of these findings for public health were that 'social, health and financial services need to be aware of and screen for the warning signs of this largely hidden form of domestic violence' (p.1).

Patrick, Rebecca, Kay Cook and Hayley McKenzie, 'Domestic Violence and the Exemption from Seeking Child Support: Providing Safety or Legitimizing Ongoing Poverty and Fear' (2008) 42(7) *Social Policy and Administration* 749.

This article examines the experience of low-income women on welfare in Australia and the process of seeking child support from a violent ex-partner. It analyses how the current system around exemptions for child support in the context of domestic violence 'fails to protect women from ongoing abuse while at the same time rendering them financially disadvantaged' (p759).

Segrave, M 2017, *Temporary Migration and Family Violence: An analysis of victimisation, vulnerability and support.* Melbourne: School of Social Sciences, Monash University.

This report draws on detailed cases of 300 women who sought the support service of InTouch Multicultural Centre Against Family Violence over 2015–16. The report draws attention to cases involving abuse related to dowry issues (see p29, 65). It considers limitations of the legal response to this issue.

In one reported case: 'Cultural influences on nature of marriage meant that once she returned to India as a result of the abuse she could not go back to her parents as a married woman cannot do that. The victim-

survivor's family was required to pay a significant dowry for the victim-survivor when she married the perpetrator, and after she returned to India her father convinced her to come back to Australia to stay in the marriage regardless of the circumstances' (p29). In another case: 'The victim-survivor reported in the [intervention order] application that when she arrived all the money and jewellery she was given was taken by the perpetrator and his family, and they were pressuring her to get a dowry for them. She was physically, emotionally and financially abused, and was made to do all the housework, heavy lifting and cooking even whilst pregnant. The victim-survivor had a miscarriage due to the abuse from the perpetrators. When the victim-survivor's cousin came to check in on her the victim-survivor was locked in a room by the perpetrators and [they] threatened to make her disappear if she spoke to her cousin.' (p65)

Singh, S 2018, '*The daughter-in-law questions remittances: changes in the gender of remittances among Indian migrants to Australia"*, *Global Networks*, pp. 1-21.

This article presents a cross-generational analysis of the gendered meanings and politics surrounding monetary remittances. Indian female migrants to Australia, who contribute significantly to household incomes, have recently started to question the sources and directions of remittances. This happens when the woman's earnings are sent, without consultation, to the husband's parents for luxuries, while the family in Australia is struggling. Women in paid work also want to send their earnings to their own parents, particularly if there is financial need. Remittances have become a testing ground for the traditional belief that the husband and his family own the money in the patrilineal marital household. It is possible to interpret male control of remittances without consultation as a form of financial abuse of the wife in the sending household. The article draws on two qualitative studies on five decades of Indian migration to Australia covering 203 people from 112 families.

International

Adams, A.E., Littwin, A.K., & Javorka, M., 'The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence' (2019) *Violence Against Women* 1-19.

The study examined the frequency, nature and effects of non-consensual, credit-related transactions where one partner in an intimate relationship uses coercive control to dominate the other. Coercive control allows abusers to incur debt in their partners' names. An abuser uses coercive control to create an environment which renders refusing a demand or questioning behavior dangerous. The study used a sample of 1,823

female callers to the National Domestic Violence Hotline over an 8-week period. Results showed that coerced debt, from both coercive and fraudulent transactions, is a common problem and is associated with control over financial information, credit damage, and financial dependence on the abuser. This study reaffirms the need for policy reform and victim services that address coerced debt, therefore mitigating a potentially significant economic barrier to safety.

Adams, Adrienne E, et al, 'Development of the Scale of Economic Abuse' (2008) 14(5) *Violence Against Women* 563.

This study recognizes that economic abuse is part of the pattern of behaviors used by batterers to maintain power and control over their partners; it describes the development of the Scale of Economic Abuse. The article reports on interviews conducted with 103 survivors of domestic abuse who responded to measures of economic, physical, and psychological abuse as well as economic hardship. This article includes an analysis of specific forms of economic abuse, and the effect this has on women.

Fawole, Olufunmilayo, 'Economic Violence to Women and Girls: Is It Receiving the Necessary Attention?' (2008) 9(3) *Trauma Violence Abuse* 167.

This article presents a very good, basic overview of economic abuse, though from an International perspective. It considers 'e*conomic violence' as including limited access to funds and credit; controlling access to health care, employment, education, including agricultural resources; exclusion from financial decision making; and discriminatory traditional laws on inheritance, property rights, and use of communal land.*

Kim, Jinseok, and Karen A Gray, 'Leave or Stay? Battered Women's Decision after Intimate Partner Violence' (2008) 23(10) *Journal of Interpersonal Violence* 1465.

This article explains and establishes through empirical research how, amongst other things, a lack of financial independence is a primary reason women do not leave abusive relationships.

Littwin, Angela, 'Coerced Debt: The Role of Consumer Credit in Domestic Violence' (2012) 100 *California Law Review* 951.

This article explains the concept of 'coerced debt' - it ranges from abusers taking out credit cards in their partners' names without their knowledge, to forcing victims to obtain loans for the abuser, to tricking victims into signing 'quit claim' deeds for the family home. It presents empirical data on the nature and scope of coerced debt in the US, and explains how abusive partners use the complex consumer credit system to leave many victims of domestic violence with hundreds or thousands of dollars of coerced debt.

Pollet, Susan, 'Economic Abuse: The Unseen Side of Domestic Violence' (2011) 83(2) *New York State Bar Association Journal* 40.

The article focuses on economic abuse as a form of domestic violence perpetrated against women, commonly, by their intimate partners or ex-partners. It defines economic abuse as controlling financial resources and access to money and prohibiting attendance at school or office with the objective of making an individual (the victim) financially dependent. It also provides the results of a study conducted by the National Coalition against Domestic Violence to examine means of addressing economic abuse, including financial literacy programs for victims.

Postmus, Judy L, et al, 'Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review' (2018) Trauma, Violence & Abuse (onlinefirst).

Accounts of physical abuse often dominate perceptions of intimate partner violence (IPV); however, economic abuse is a frequently hidden form of abuse (p 1). This article reviews the global literature on economic abuse to determine how it is defined, and what measures may be used to capture its prevalence (p 3).

Definitions of economic abuse often focused on economic control, including behaviours such as 'restricting access to finances, refusing to contribute financially for necessities or other items, restricting access to financial information or involvement with financial decision-making, and controlling the household spending' (p 5). Economic exploitation includes behaviours such as 'misusing family finances; damaging property; stealing property, money, or identities; going into debt through coercion or in secret; kicking the victim out of the living situation; using wealth as a weapon or as a threat; selling necessary household or personal items; restricting

access to health care or insurance; and denying or restricting access to transportation' (p 5).

The results indicate that consistency of terminology is increasing, but that further research is needed to deepen this understanding, particularly relating to how language and culture may impact understandings of economic abuse (p 17).

Postmus, Judy L, et al, 'Understanding Economic Abuse in the Lives of Survivors' (2011) 27(3) *Journal of Interpersonal Violence* 411.

This paper furthers knowledge about economic abuse and its relationship with economic self-sufficiency. It presents results from an interview study with victims of domestic violence and identified high levels of economic abuse and that economic abuse is often linked to a decrease in economic self-sufficiency.

Sanders, Cynthia K, 'Domestic Violence, Economic Abuse and Implications of a Program for Building Economic Resources for Low-Income Women: Findings from Interviews with Participants in a Women's Economic Action Program'(Research Report, Center for Social Development, Washington University in St. Louis, April 2007).

This research considers how economic abuse may trap people in abusive relationships. Additionally, it explores how abused women are commonly isolated from financial resources and lack ready access to cash, checking accounts, or charge accounts. See especially pp30-43 for an analysis of how money and economic issues played a role in women's experiences of abuse.

Shoener, Sara, and Erika Sussman, 'Economic Ripple Effect of IPV: Building Partnerships for Systemic Change' (2013) 18(6) *Domestic Violence Report* 83.

The article discusses the reciprocal relationship between intimate partner violence (IPV) and the economic instability created by batterers for their partners through economic sabotage and control. It identifies the dimensions of economic harms experienced by survivors of violence and recommends programmatic responses that address the depth of these harms. It explains the potential of consumer law and other economic legal remedies in providing survivors with tools to address economic abuse.

United Nations, 2009, *Good practices in legislation on "harmful practices" against women*, United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa.

See 3.3.4 Dowry-related violence and harassment. 'Demands for dowry can result in women being harassed, harmed or killed, including women being burned to death, and in deaths of women which are labelled as suicides. It is necessary for dowry to be defined as broadly as possible to capture the full range of exchanges given, or asked for, in the name of dowry.' This paper recommends legislation should 'define dowry-related violence or harassment as any act of violence or harassment associated with the giving or receiving of dowry at any time before, during or after the marriage.' (p20)

Economic and financial abuse - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 1.3.2 discusses the nature of behaviours described as economic abuse. Chapter 1.3 more broadly discusses the nature of behaviours described as domestic violence.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

The Victorian Bench Book identifies economic abuse as a behaviour of family violence in 5.2.1 – Economic abuse. Also see: 1.1 - Economic abuse defining economic abuse in terms of coercion and control, and list a range of examples of this form of behaviour.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book notes the definition of domestic violence used by the Department of Child Protection and Family Support which includes: "…Financial violence includes not giving a woman access to her share of the family's resources, expecting her to manage the household on an impossibly low amount of money and/or criticising and blaming her when she is unable to, monitoring her spending, and incurring debts in her name." (at [13.2.3]). It also notes that women from culturally and linguistically diverse backgrounds may experience dowry abuse, which "may be a coercive demand for larger gifts or more cash from a woman and her family, which may be accompanied by other forms of violence including emotional or economic abuse, stalking or harassment. It may also include mutilation, sexual assault, acid throwing, wife burning, murder, threats to cancel visa sponsorship, threats to annul a marriage, abandonment and demands to terminate a pregnancy (at [13.2.3]).

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Economic and financial abuse is referred to throughout this Bench Book. The interconnection of financial abuse with other behaviours is noted in Section 9.3.1.2, while the act of perpetrators refusing to honour financial and cost obligations is discussed at length in Section 7.4.6. For instance, '[v]iolators avoid compliance with financial obligations as a means to continue to control and harass. Yet financial abuse is as much abuse of any dependent child as it is abuse of the targeted parent … Timely disclosure and payment of support and marital property obligations can help to prevent pressure, as a result of lack of resources, to return to violent homes. Support and property division orders become critically important when custodial parents are in the process of immigrating, since economic self-sufficiency can be an important factor in allowing such persons to remain in Canada'. A number of responses to violators who engage in this form of abuse are also identified in this section. Reference 3.

Economic and financial abuse - Other Resources

Australia

Commonwealth Bank, Financial Abuse Resource Centre.

The Commonwealth Bank has worked in partnership with experts to increase community and industry understanding of financial abuse. With these partners they have developed a number of resources individuals can use to build understanding of financial abuse and improve financial independence.

The websites include the following reports:

- Report one: Understanding Economic and Financial Abuse in Intimate Partner Relationships- The first research paper in the series sheds light on the prevalence, definition and impact of economic and financial abuse. The paper identifies how financial institutions and other organisations can better address economic and financial abuse through customer support measures.
  Download a copy of the key findings
  Download a copy of the report

- Report two: Understanding Economic and Financial Abuse in First Nations Communities -The second research paper builds upon the findings of the first paper by considering how experiences of economic and financial abuse are informed by cultural context with a focus on First Nations Communities.
  Download a copy of the key findings
  Download a copy of the report

- Report three: Understanding Economic and Financial Abuse Across Cultural Contexts - The third research paper examines the available research on economic and financial abuse in diverse cultural contexts and how it may be perpetrated within specific cultural communities.
  Download a copy of the key findings
  Download a copy of the report

- Report four: Understanding Economic and Financial Abuse and Disability in the Context of Domestic and Family Violence -The fourth research paper examines the existing research on disability, economic and financial abuse. The paper focuses specifically on abuse occurring in the context of domestic and family violence, and notes the need for further research focused on the experiences of people with disability in

this context.

Download a copy of the key findings

Download a copy of the report

International

Jenn Glinski Consulting, The post-separation Economic Abuse Wheel.

Based on her research findings, and with permission from Duluth, Jenn Glinski consulting has adapted the original wheel to reflect experiences of economic abuse post-separation. The Post-Separation Economic Abuse wheel highlights the different forms of economic abuse victim-survivors experienced; both by their perpetrators, as well as by systems and processes the perpetrator is able to manipulate. This resource is intended for use by victim-survivors, as well as any charity/organisation/company/system that may come into contact with or support those who have experienced domestic abuse.

It can be downloaded in a readable from the website.

Office of the Assistant Secretary for Planning and Evaluation and the Family and Youth Services Bureau, Division of Family Violence Prevention and Services U.S. Department of Health and Human Services, October 2020 *Understanding Substance Use Coercion as a Barrier to Economic Stability for Survivors of Intimate Partner Violence: Policy Implications*.

This policy brief “seeks to further the limited research, policy, and practice on substance use coercion and to increase awareness about this issue among relevant stakeholders.”

Extract:

WHAT IS SUBSTANCE USE COERCION?

Substance use coercion occurs when perpetrators of intimate partner violence undermine and control their partners through substance-use related tactics and actively keep them from meeting treatment and recovery goals.

WHAT ARE EXAMPLES OF SUBSTANCE USE COERCION?

Substance use coercion can take many forms. For example, an abuser may:

- Force, initiate, or pressure their partner to use substances.
- Sabotage their partner's recovery efforts by deliberately keeping substances around their home.
- Refuse to provide their partner with childcare or transportation needed to participate in substance use treatment.

HOW COMMON IS SUBSTANCE USE COERCION?

A survey of National Domestic Violence Hotline callers who had experienced domestic violence revealed that 43 percent of respondents had experienced at least one of three types of substance use coercion:

- Had a partner pressure or force them to use substances;
- Had a partner threaten to report their substance use to the authorities to keep them from getting something they wanted or needed; and/or
- Were afraid to call the police because a partner said they would not be believed or they would be arrested based on substance use.

Economic and financial abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Barbara

Brenda

Carol

Celina

Erin

Faith

Felicity

Fiona

Hilary

Ingrid

Jane

Jennifer

Leah

Lisa

Mira

Rosa

Sara

Trisha

Yvonne

Economic and financial abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Garrod & Davenort **[2018] FamCA 825 (12 October 2018) – Family Court of Australia**

Bennet J observed:

[376] On the fourth day of trial, the father owed child support in the amount of $1,865.31. I asked how the father was supporting the mother's day to day care of the child. Whilst not provided in evidence in the witness box, in an exchange in the court room, the father looked at the mother and asserted she could afford to pay for nails, a new watch, clothes and her hair to be done and that "she's doing alright" and it was not terribly significant that he was not paying child support. It was an illuminating comment by the father who had clearly observed the mother's presentation closely. The mother explained, I think through her counsel, that her suit was second hand and her watch had been her mother's watch. It discloses a high degree of jealousy and resentment by the father toward the mother. The particularity of his observations and details, including recognising that the mother was not wearing her usual watch, is curious after a separation of almost six years.

[377] The father has always been keen to spend time and communicate with the child. He has not been able to control his antipathy to the mother to the extent necessary to make decisions jointly with her about the child's long term welfare. Fortunately there has not been any long term decisions to make. The father's discharge of his financial obligations to maintain the child has been poor. My impression is that he considers child support to be a benefit to the mother rather than the child and he does not want to enhance the mother's ability to provide for the child.

Nguyen v R **[2021] NSWCCA 118 (18 June 2021) – New South Wales Court of Criminal Appeal**

Among other charges the offender was convicted of dishonestly obtain financial advantage. Using the complainant's laptop, he accessed the complainant's Australian Taxation Office account and lodged an income tax return in the name of the complainant and without her consent. As a result, the ATO transferred

money into the offender's account.

In considering sentencing the offender Walton J noted:

[37] His Honour also found that, irrespective of the motive, the effect of the offending was indirectly to inflict further pain upon the complainant “being financial anxiety and distress to her at a time when the offender was aware of her recovering from giving birth and being attuned to the needs of the newly-born child”. The fact that the fraud was relatively unsophisticated and would have inevitably been detected did not significantly reduce the weight which would be given to the offences because the objective seriousness of the offending overall involved multiple victims. The objective seriousness of the offending should be classified below the mid-range of offending for offences of that kind.

RWT v BZX **[2016] QDC 246 (30 September 2016) – Queensland District Court**

Devereaux SC DCJ at [18] and [26]: ‘The evidence of the respondent’s friend, although about an incident which occurred in 2012, after a separation of the appellant and respondent, confirmed the respondent’s evidence about financial abuse. The friend deposed that the appellant told her, on the telephone, that the respondent must put her redundancy payment into the joint account and must not hold separate accounts, or she would not be able to return to the family.

‘In my view, as I mentioned during submissions, the fact that property settlements in family law matters are still contentious and, indeed, the mother still isn’t even getting face-to-face contact with her own child at the moment, there is every opportunity for the husband to continue his bullying behaviour to try and manipulate the wife into caving in to his demands about the child, about financial affairs, and anything else that he might have a penchant to do in his bullying behaviour. She is absolutely in need of protection. He needs to be kept well away from her’.

R v Ritter **[2016] SASCFC 88 (16 August 2016) – South Australia Supreme Court (Full Court)**

Parker J (Lovell and Nicholson JJ concurring) described the coercive control which the appellant subjected the victim to:

[20] The appellant monitored the victim’s movements and rarely let her leave the house without him. He also

controlled her finances, regularly forcing her to withdraw money from her account for his benefit, including so that he could buy drugs and alcohol.

***Ahmed and Gupta* [2020] FCWA 140 (31 August 2020) – Family Court of Western Australia**

Duncanson J noted:

[102] I am unable to make a finding about each and every incident of alleged family violence. Upon the evidence however, I am satisfied that the mother has been the victim of family violence as defined in s 4AB(1) of the Act, perpetrated by the father. I accept that the father controlled and coerced the mother. I accept that he controlled her financially and isolated her from others. I accept the mother's evidence that on 5 April 2017 the father and Mr B abused her causing her to leave the home with Child A. I am satisfied that the father's behaviour towards the mother caused her to be fearful of him.

Emotional and psychological abuse

Australian and international studies demonstrate the prevalence of emotional and psychological abuse as a form of domestic and family violence that may be part of a broader and complex pattern of abusive behaviours experienced by a victim which may be understood as coercive control.

Emotional or psychological abuse may include verbal, non-verbal or physical acts [Bagshaw et al 2000] by the perpetrator that are intended to exercise dominance, control or coercion over the victim; degrade the victim's emotional or cognitive abilities or sense of self-worth; or induce feelings of fear and intimidation in the victim.

Verbal attacks by the perpetrator may involve jealous control, ridicule, put-downs, name calling and humiliation, and may be focused on the victim's intelligence, sexuality, appearance, capacity as a parent or intimate partner, and unfavourable comparisons with others. For example in a criminal case the male perpetrator's abuse of his female intimate partner included: 'insisting that she sleep outside the house, and without access to amenities such as a toilet; insisting that the children refer to her by demeaning names such as "slut", "whore", "moll", and not "mother", or "mum"; insisting the children not show affection for her; and generally treating her in a humiliating and abusive manner, including attempting to persuade her to engage in a sexual act with a dog.'

Non-verbal and physical acts of emotional or psychological abuse by the perpetrator may also involve:

- stalking or harassing the victim in or around the workplace
- threatening to divorce or abandon the victim, or to have an affair if the victim fails to comply with the perpetrator's demands
- threatening to commit suicide if the victim ends or leaves the relationship
- restricting the victim's contact with family, friends and pets; access to a car or finances; or choice of clothing
- monitoring the victim's whereabouts
- threatening to harm or kill the victim, the children or other family members or pets
- threatening to or actually damaging or destroying the victim's personal property
- associated menacing or intimidatory behaviours or gestures directed repeatedly and strategically at the

victim including angry verbal outbursts, staring, silence, ignoring and withdrawal of affection.

Research indicates that threats of physical violence, restrictions on the victim's freedoms and damage to the victim's personal property are strong predictors of actual violence causing severe injury or death [Mouzos & Makkai 2004].

Past perceptions of emotional or psychological abuse as having fewer, less severe and more transient consequences than physical violence have been superseded by a growing understanding of its impacts on victims including increased rates of serious or chronic illness, disability or impairment, post-traumatic stress disorder, depression, misuse of alcohol and drugs, dysfunctional parenting and long-term low self-esteem [Sackett & Saunders 1999].

In many cases victims describe the cumulative daily emotional or psychological abuse as having a more debilitating effect on their self-esteem and ability to cope with their situation than the physical violence they have also experienced. Victims also report that threats of violence can be as effective as actual violence for the control they exercise and fear they induce, often preventing the victim from leaving the abusive relationship [Follingstad et al 1990].

Emotional and psychological abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Emotional and psychological abuse - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women aged 18 years and over about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

- 'Almost one in four women (23% or 2.2 million) experienced emotional abuse by a current and/or previous partner since the age of 15, compared to just over one in six men (16% or 1.4 million)';
- 6.1% of women (575, 400) reported experiencing emotional abuse by a current partner', and 18% of women (1.7 million) reported experiencing emotional abuse by a previous partner;
- 5.2% of men (473,600) reported experiencing emotional abuse by a current partner', and 12% of men (1 million) reported experiencing emotional abuse by a previous partner.

Refer to Table 27 for more detail.

Bagshaw, Dale, et al, 'Reshaping Responses to Domestic Violence' (Final Report, University of South Australia and Partnerships Against Domestic Violence, April 2000).

This Australian research used a variety of methods including an anonymous 'phone-in' and focus groups. 102 women who were victims/survivors of domestic violence participated in the phone-in. Emotional abuse was reported by 84 per cent of callers. Emotional abuse included a partner's constant comparisons with other women and how this impacted on victims' self-esteem and self-worth. Another form of emotional abuse used by both women and men was emotional withdrawal, such as long periods of silence, which could continue for weeks, sporadic 'sulking' and withdrawal of any interest and engagement with the partner (p22). 89% of callers had experienced verbal abuse. This abuse focused on women's intelligence, sexuality, body image and capacity as a parent and a wife. Women were commonly referred to as 'stupid'. Women often said they

were labelled as ‘sluts’, ‘whores’ etc. Perpetrators were critical of women’s appearance, generally referring to them as ‘fat’ and ‘ugly’. Women were often compared unfavourably to other women. Mothers were often blamed for their children’s behaviour – it was considered to be the result of poor and inadequate parenting for which perpetrators did not take any responsibility (p22). Many callers reported that emotional abuse was often a daily event and that it had long-lasting and negative impacts.

Heather Douglas, Bridget Harris and Molly Dragiewicz, ‘Technology-Facilitated Domestic and Family Violence: Women’s Experiences’ (2018) *British Journal of Criminology*.

The development of technology in recent years has significantly affected women’s experiences of, and responses to, domestic violence. Devices and software, such as smartphones, cameras, Internet-connected devices, computers and platforms such as Facebook, may be used not only by perpetrators to facilitate domestic and family violence (DFV), but also by survivors and their allies to attain empowerment, and seek and share information and support. The article analyses qualitative research that outlined survivors’ experiences of technology-facilitated DFV. It draws on interviews with 65 women on up to three occasions between 2014 and 2017. At the first interview, 55 participants identified technology-facilitated abuse as part of the DFV they experienced. This result was echoed in the following two interviews. Many participants provided examples of technology being used by perpetrators to isolate, stalk and emotionally abuse them. The frequency and nature of abusive behaviours described by the women provided important contextual data to inform future research into technology-facilitated violence and abuse.

Karystianis, G., Adily, A., Schofield, P.W., et. al., ‘Automated Analysis of Domestic Violence Police Reports to Explore Abuse Types and Victim Injuries: Text Mining Study’ (2019) 21(3) *Journal of Medical Internet Research.*

The recording of domestic violence-related events by police is an area that requires further investigation. The study aimed to determine if an automated text mining method could identify abuse types and injuries sustained by domestic violence victims. Using data mining to evaluate 492,393 Australian domestic violence police reports, more than one-third noted victim injuries. The most common abuse type was emotional/verbal at 33.46%, followed by punching at 24.58%, and property damage at 22.27%. Bruising was the most common form of injury (29.03%), followed by cut/abrasion (28.93%), and red marks/signs (23.71%). The findings show

that text mining can automatically extract information from police-recorded domestic violence events. These findings can be used to support further public health research the purpose of which is to assess the profiling of persons of interest involved in domestic violence events, and to change existing intervention policies for abuse victims.

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and sexual violence. In this paper the authors identify that emotionally abusive and controlling behaviours includes behaviours of a current or former intimate partner jealously guarding the woman's interactions with other males, limiting her access to family and friends, and damaging or destroying her property or possessions (pxv). Based on data gathered in the IVAWS survey around 30% of women reported that their current intimate partner called them names, insulted them or 'put them down' (p49).

Patricia Easteal, Lorana Bartels and Reeva Mittal, 'The Importance of Understanding the Victims' 'Reality' of Domestic Violence' (2018) *Alternative Law Journal*.

The authors argue that unconscious assumptions may filter out the diverse experiences and 'realities' of domestic violence victims. This is particularly evident in the differences between the court's perceptions of domestic violence, and the victim's experiences of it. Despite legal and policy reform, these assumptions may continue to affect how relevant legislation is applied and interpreted. The authors consider a small sample of recent Queensland domestic violence order breach cases to underscore the systemic failure in recognising the seriousness and harm of psychological or mental abuses (i.e. the victims' 'reality' of domestic violence), and the lack of understanding of the long-term effects of domestic violence on its victims. The authors conclude that sentencing for domestic violence offences and breaches of protection orders should be underpinned by knowledge of the long-term effects of emotional abuse. Further, an analysis of Queensland cases indicates that the Benchbook is not always applied consistently. Consequently, the authors suggest the

creation of a report that particularises the specific issues in each individual case in order to enhance the knowledge of judicial officers and other stakeholders, and to adjust their lenses so they can better understand the victim's perspective.

International

Adams, A.E., Littwin, A.K., & Javorka, M., 'The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence' (2019) *Violence Against Women* 1-19.

The study examined the frequency, nature and effects of non-consensual, credit-related transactions where one partner in an intimate relationship uses coercive control to dominate the other. Coercive control allows abusers to incur debt in their partners' names. An abuser uses coercive control to create an environment which renders refusing a demand or questioning behavior dangerous. The study used a sample of 1,823 female callers to the National Domestic Violence Hotline over an 8-week period. Results showed that coerced debt, from both coercive and fraudulent transactions, is a common problem and is associated with control over financial information, credit damage, and financial dependence on the abuser. This study reaffirms the need for policy reform and victim services that address coerced debt, therefore mitigating a potentially significant economic barrier to safety.

Follingstad, Diane, et al, 'The Role of Emotional Abuse in Physically Abusive Relationships' (1990) 5(2) *Journal of Family Violence* 107.

This article is one of the earliest articles to focus on emotional abuse and provides a good overview of the literature available in 1990. This article also reports on the results of a study involving 234 women being interviewed to assess the relationship of emotional abuse to physical abuse. Six major types of emotional abuse were identified: threats of abuse, ridicule, jealousy, threats to change the marriage, restriction of freedom and damage to property. 99% of interviewees experienced psychological or emotional abuse. Analyses determined that ridicule was the type of emotional abuse that the highest percentage of participants reported as the most negative form of emotional abuse (p117). The authors speculate that this may be because ridicule is a form of emotional abuse that 'attacks women's sense of self-esteem and destroys their ability to feel good about themselves'. 72% of the women in the study reported that emotional abuse had a more severe impact on them than physical abuse (regardless of the level of physical abuse reported) (p114).

Women reporting that emotional abuse had a more severe impact were more likely to believe that threats would be carried out (p115).

National Judges Association, *Domestic Violence and the Courtroom: Knowing the Issues… Understanding the Victim* (n.d.).

This resource provides practical guidance for judges in engaging with victims of domestic violence in the courtroom, including information on the various forms of emotional abuse. 'Gaslighting' is one such form of emotional abuse, in which the perpetrator undermines the victim's feelings and memories, which distorts the victim's perception of reality, and 'destroys the possibility of honest communication' (p 5). This behaviour also increases feelings of confusion and insecurity in the victim (p 5).

Sackett, Leslie A, and Daniel G Saunders, 'The Impact of Different Forms of Psychological Abuse on Battered Women' (1999) 14(1) *Violence and Victims* 105.

Battered women receiving either shelter (n = 30) or non-shelter services (n = 30) from a domestic violence agency were interviewed regarding psychological abuse and its aftermath. Four types of abuse were derived: ridiculing of traits, criticising behaviour, ignoring, and jealous control. Sheltered women experienced ridicule and jealous control more often than non-sheltered women. For the entire sample, ridiculing of traits was rated as the most severe form. Ignoring was the strongest predictor of low self-esteem. Both psychological abuse and physical abuse contributed independently to depression and low self-esteem. However, fear of being abused was uniquely predicted by psychological abuse.

Sweet, Paige, 'The Sociology of Gaslighting' (2019) 84(5) *American Sociological Review* 851-875

Gaslighting is a form of 'psychological abuse aimed at making victims feel crazy, creating a surreal interpersonal environment'. Despite its increasing recognition as an abusive power tactic, it has largely been ignored by sociologists. This article proposes that gaslighting is primarily a sociological, rather than psychological, phenomenon. It should be understood as stemming from social inequalities, including gender, and being performed in 'power-laden intimate relationships'. This article argues that 'gaslighting is consequential when perpetrators mobilise gender-based stereotypes and structural and institutional

inequalities against victims to manipulate their realities'. Through an analysis of domestic violence as a strategic case study, the author shows how abusers mobilise gendered stereotypes; structural vulnerabilities related to race, nationality, and sexuality; and institutional inequalities against victims to erode their realities.

Walker, Susan and Sam Rowlands, 'Reproductive control by others: means, perpetrators and effects' (2019) 45(1) BMJ Sex Reproductive Health 61-67 Reproductive control by others: means, perpetrators and effects (2019) 45(1) *BMJ Sex Reproductive Health* 61-67

People exert control over women's reproductive rights in various ways, including persuasion or pressure, such as emotional blackmail, societal or family expectations, or threats of or actual physical violence. This article reviews the medical and social science literature on reproductive control of women. Reproductive control can be perpetrated by intimate partners, the wider family or as part of criminal behaviour. Contraceptive sabotage, or 'stealthing', invalidates consent by the covert removal of a condom during sex. Reproductive control is distinct from intimate partner violence, but they overlap to a certain extent. Reproductive control is reported by around one quarter of women who attend sexual and reproductive healthcare services. Therefore, people working in women's health must appreciate its extent in the community, and understand how to use screening tools which detect it.

Emotional and psychological abuse - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 1.3.1 discusses the nature of behaviours described as emotional or psychological abuse. Chapter 1.3 more broadly discusses the nature of behaviours described as domestic violence.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

1.1 - Emotional or psychological abuse defines this behaviour, providing a range of examples. Also see: 5.2.1 – Emotional or psychological abuse providing additional examples to demonstrate the various ways in which perpetrators of family violence abuse victims. For instance: ‘blaming the victim for all relationship problems; constantly comparing the victim with others, in order to undermine self-esteem and self-worth; sporadic sulking; withdrawing all interest and engagement (for example, weeks of silence); and emotional blackmail’.

Further examples are provided in 1.1 – Additional Guidance – Common Risk Assessment Framework.

WA

Western Australia Department of Justice, Equal Justice Bench Book, (2nd edition September 2021).

This Bench Book notes the definition of domestic violence used by the Department of Child Protection and Family Support which includes: “Emotional violence is behaviour that does not accord equal importance and respect to another person's feelings, opinions and experiences. Even though emotional abuse can have a profound and long-term impact on victims it is often the most difficult form of violence to identify. Many emotionally abusive behaviours are not crimes, and therefore victims can find it challenging to obtain protection.” [13.2.3]

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Emotional and psychological abuse are recognised, though not substantively expanded upon, as behaviours of domestic violence throughout this bench book (e.g. Sections 4.4.4, 9.3.1.2, Supplementary Reference 1), and as factors associated with risk (Section 8.8.1). It is suggested that 'psychological abuse produces deeper, longer lasting scars than physical violence' (Supplementary Reference 1), and that risk assessment tools may be ill-equipped to engage with this type of abuse (Section 8.9.2). Further, this bench book also recognises the interconnectedness of emotional abuse with other behaviours: '[e]motional abuse (e.g., threatening, intimidating, coercing, degrading, stalking) and financial abuse (e.g., interfering in ability to work by harassing employers or sabotaging transportation to work, controlling bank accounts and financial decisions, denying educational options, refusing to pay for necessaries of life, hiding or destroying property) and physical/sexual violence are interconnected phenomena. A pattern of emotional or financial abuse, associated with intimidation, domination and control, often escalates into physical or sexual violence' (Section 9.3.1.2).

Emotional and psychological abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Barbara

Ben

Bianca

Brenda

Carol

Celia

Celina

Erin

Faith

Felicity

Fiona

Gillian

Hilary

Ingrid

Jane

Jennifer

Leah

Leyla

Lisa

Melissa

Mira

Rosa

Sara

Susan

Trisha

Yvonne

Emotional and psychological abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***AMB v TMP & Anor* [2019] QDC 100 (21 June 2019) – Queensland District Court**

At [37], Kent DCJ stated:

> '…insults, like many other aspects of human interaction, fall on a continuum of seriousness, from completely trivial to very serious; and at a certain point on the continuum it becomes clear that emotional abuse is involved. Drawing the line at the point where this is reached may not be a precise science, and in part depends on the impact on the individual recipient, depending on their particular robustness or otherwise.'

***Degney v The Queen* [2019] VSCA 183 (19 August 2019) – Victorian Court of Appeal**

At [50], the Court stated:

> '…[T]hose considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of our community and will not hesitate to impose stern punishment upon wrongdoers. In 2014, this Court sent out what it hoped would be an unequivocal message to would-be perpetrators of domestic violence – that if they offended, they would be sentenced to lengthy terms of imprisonment. The sentence we are about to impose follows through on that message.'

At [52], the Court observed:

> 'There has been an increasing community disquiet over violence of males towards their female partners (or ex-partners) and this is one reason why denunciation of this conduct must be given full expression in the sentence.'

***R v Kulczycki* [2018] ACTSC 9 (30 January 2018) – Australian Capital Territory Supreme Court**

(Where the defendant sent the complainant emails and text messages threatening to release a video of the defendant and complainant engaged in sexual activity unless the complainant paid him $20,000) Justice Elkaim remarked on the seriousness of the blackmail in the context of a domestic relationship at [16]: 'blackmail of the type involved in this case must be regarded as serious. This is not so much because of the amount of money demanded but because it involved a threat to breach the privacy of a relationship and to cause severe embarrassment to the complainant'.

***R v Mazaydeh* [2014] ACTSC 325 (13 November 2014) – Australian Capital Territory Supreme Court**

Murrell CJ at [15]-[16]: 'These offences occurred in the context of a previous relationship between the offender and the victim and involved violence within the victim's home, an apparent sense of entitlement on the part of the offender, and humiliation through verbal and text abuse of the victim'.

'The sentencing purposes of punishment, general deterrence and denunciation are very important, as well as the recognition of harm to the victim personally and the community generally through offences of this nature. The victim provided a victim impact statement in which she referred to impacts upon her of the type that frequently result from offences of domestic violence, including feelings of anxiety, difficulty sleeping, difficulty concentrating at work and elsewhere, and an adverse effect on her ability to form relationships. Since the incident, the victim has moved house because she felt unsafe in the apartment where the offence occurred'.

***R v In* [2001] ACTSC 102 (2 November 2001) – Australian Capital Territory Supreme Court**

Crispin J at [24]-[25]: 'In my view the offences which the prisoner committed were too serious to be dealt with in that manner. His wife was confined for an extended period and, whether he now remembers it or not, he behaved in a manner which was clearly calculated to terrify her. He plainly made no attempt to conceal his identity, yet put tape over her eyes. It is difficult to imagine any explanation for that conduct other than that it was calculated to cause fear. Even if he did not intended to carry them out, it is obvious that his threats to kill the children were also made for that purpose. Furthermore, his conduct in turning on the tap in the kitchen, going to his daughter's bedroom and saying in a voice loud enough for his wife to hear "Now take this darling,

I know tastes awful, doesn't it" amounted, in my view, to an exercise in sadistic cruelty. A tape recording of his wife's telephone call to obtain an ambulance was admitted in evidence. It records what one might have expected, a mother almost incoherent with fear that her children may have been poisoned'.

***DMK v CAG* [2016] QDC 106 (15 April 2016) – District Court of Queensland**

Morzone QC DCJ: 'Proof of emotional or psychological abuse depends not only on the inherent behaviour but also its effect of tormenting, intimidating, harassing or offending the subject aggrieved'([43]).

***K v K* [2012] TASMC 3 (25 January 2012) – Magistrates' Court of Tasmania**

Magistrate R W Pearce: In discussing 'verbal abuse': 'It is difficult to characterise or define what words may amount to threats, intimidation or abuse. The same words may in some circumstances amount to a threat or abuse when in other circumstances they may not. Much depends on the background and the context. In some circumstances even the most seemingly innocent words may be highly intimidatory. The court should consider whether one of the parties is in a position of disadvantage, either physically, emotionally, intellectually, socially or economically' ([29]).

***Mayne v Tasmania* [2017] TASSC 38 (29 June 2017) – Supreme Court of Tasmania**

Wood J said at [43]:

> … it is important that deterrent sentences be imposed not merely for crimes that cause grave physical or psychological harm to victims. There is a need to counter the perception that somehow violence of this kind in the home is less serious than the same kind of violence inflicted on a stranger in a public place. Also, acts of violence committed in a family or domestic context causing fear and distress to victims can have debilitating effects upon their well-being or the well-being of a family member witnessing such violence. It is not only violence resulting in visible injury that must be seen as unacceptable, and these victims, as vulnerable members of our society who have experienced fear and trauma, are entitled to the court's protection.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [53]-[54]: 'Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.'

'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and long-lasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

Cultural and spiritual abuse

Australian and international research indicates the need to recognise spiritual and cultural abuse as a form of domestic and family violence that may be part of a broader and complex pattern of behaviours experienced by a victim. While they may be interrelated with broader patterns of physical, psychological, sexual, economic and other forms of violence, spiritual and cultural abuse have unique dimensions where spirituality or cultural identity is central to the victim's way of life, or their personal sense of meaning, purpose and wellbeing [Cares & Cusick 2012].

As with many forms of domestic and family violence, spiritual and cultural abuse are means by which a perpetrator can exercise dominance, control or coercion over a victim (sometimes identified as coercive control) who is especially vulnerable due to their spirituality or cultural identity. Behaviours may include any form of domestic and family violence and may involve the perpetrator:

- belittling the victim's spiritual or cultural worth, beliefs or practices
- violating or preventing the victim's spiritual or cultural practices
- denying the victim access to their spiritual or cultural community
- causing the victim to transgress spiritual or cultural obligations or prohibitions
- forcing on the victim spiritual or cultural beliefs and practices that are in conflict with their own
- manipulating spiritual readings and practices to justify abuse
- misusing the traditions, practices and expectations of the spiritual or cultural community to which the victim belongs as a means of normalising or suppressing the abusive behaviours, silencing the victim, or preventing the victim from seeking support and help [Knickmeyer et al 2010].

Some specific examples [Bent-Goodley & Fowler 2008] of these behaviours include the perpetrator:

- denouncing the victim's prayers as having no purpose or value
- insisting that the victim honour the perpetrator rather than the victim's cultural or spiritual beliefs
- asserting his entitlement to a dowry from the victim's family, or punishing the victim or her family for what he claims to be an insufficient dowry
- forcing the victim to undergo partial or total removal of her external genitalia, or be subjected to any other

injury to her genital organs for reasons that are not medically warranted (sometimes referred to as female genital mutilation or FGM)

- publicly humiliating the victim during spiritual or cultural ceremonies
- preventing the victim from wearing clothing prescribed by spiritual or cultural practices
- preventing the victim from attending their chosen place of worship
- causing the victim to transgress spiritual or cultural belief systems by forcing the victim to drink alcohol or to have intercourse during menstruation
- citing biblical readings in claiming the eternal sanctity of marriage and God's disapproval of divorce [Knickmeyer et al 2010]
- compelling the victim to keep the abuse secret by threatening that disclosure will result in the victim being disbelieved, shunned and shamed by their spiritual or cultural community.

Cultural abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Cultural and spiritual abuse - Key Literature

Australia

Powell, R. & Pepper, M. (2021). National Anglican Family Violence Research Report: Top Line Results. NCLS Research Report. NCLS Research.

Extract: This report provides a top line overview of results from three studies that make up the National Anglican Family Violence Project (NAFVP), undertaken between 2019 and early 2021. The aim of this research project is to investigate the nature and prevalence of intimate partner violence (IPV) among those with a connection to the Anglican Church of Australia.

NAFVP Prevalence Study: How prevalent is intimate partner violence among Australians who identify as Anglican?

Significant observations included:

- The prevalence of intimate partner violence among Anglicans was the same or higher than in the wider Australian community.
- The prevalence of intimate partner violence among church-attending Anglicans was the same or higher than among other Anglicans.
- The prevalence of intimate partner violence was higher among women than men.
- Most Anglican victims of domestic violence did not seek help from Anglican churches.

NAFVP Clergy and Lay Leader Study: What are the attitudes and practices regarding IPV among Anglican clergy and local church leaders?

Significant observations of Clergy and Lay Leader participants included that:

- Clergy and lay leaders were aware of the widespread nature of the problem of domestic violence in Australia, but less aware of its prevalence in church communities.
- Most clergy believed that Scripture is misused by the abuser in Christian families.
- Most clergy had been aware of victims of abuse in their churches and had dealt with specific domestic violence situations as part of their ministry.
- Clergy confidence in their personal capacity to respond to domestic violence was low to moderate.

- A minority of clergy felt very familiar with support services or very confident to refer people to them.

NAFVP Experience Study: What is the nature of experiences of intimate partner violence (IPV) for those with a connection with Anglican churches? How has the Anglican Church featured in these experiences.

Views expressed by participants with a connection with Anglican churches and direct experience of IPV included:

- Faith and church both assist and hinder those who are experiencing domestic violence.
- Although unintended, Christian teachings sometimes contribute to and potentially amplify situations of domestic violence.
- Perpetrators misuse Christian teachings and positional power.

International

Aune, Kristin, and Rebecca Barnes, 'In Churches Too: Church Responses to Domestic Abuse – A Case Study of Cumbria' (March 2018).

This report provides detailed analysis of experiences of, and church responses to, domestic abuse. Particularly, it provides information regarding spiritual abuse, where the perpetrator forces certain beliefs or practices on the victim, prevents the victim from practising their religion, or uses the victim's faith against them (p 28). Overall, the results of the study indicate that women were far more likely than men to report experiences of all forms of abuse, including spiritual abuse (p 33). While substantially less common than other forms of abuse (p 57), spiritual abuse was still reported by a significant number of participants, with 21.8 percent of female participants, 11.1 percent of male participants, and 18.8 percent of all participants reporting at least one experience of spiritual abuse (p 33).

Bagwell-Gray, M. et al., Women's Reproductive Coercion and Pregnancy Avoidance: Associations With Homicide Risk, Sexual Violence, and Religious Abuse. (2021) 27 (12-13) Violence Against Women 2294-2312 doi: 10.1177/10778012211005566

This survey study explores patterns of reproductive coercion (RC) and pregnancy avoidance (PA) among women recruited from domestic violence shelters in the southwestern United States (N = 661). Younger,

African American, and Hispanic women were more likely to experience RC. Homicide risk, sexual intimate partner violence (IPV), and religious abuse were associated with RC, and RC and homicide risk were associated with PA. We discuss implications of the associations between RC and PA and their links to religious abuse, sexual IPV, and homicide risk.

Twenty-one percent of the sample indicated that their partner used religious teachings or traditions as a reason to control daily activities. 217 women (33%) experienced reproductive coercion. Specifically, 31% (n = 207) of participants reported their partner tried to get them pregnant when they did not want to be pregnant and 17% (n = 114) reported that their partner physically hurt them or threatened to leave if they did not get pregnant.

Bent-Goodley, Tricia B, and Dawnovise N Fowler, 'Spiritual and Religious Abuse: Expanding What Is Known About Domestic Violence' (2008) 21 *Journal of Women and Social Work* 282.

This article reports the outcomes of three focus groups in three diverse communities of faith in the African American community. The participants identified forms of spiritual abuse including (p288):

- the abuser telling the victim that God has forgotten her because of her sins,
- abusers who denied a woman's ability to attend church,
- abusers who emphasised the need for the woman to forgive, despite abuse.

Cares, Alison, and Gretchen Cusick, 'Risks and Opportunities of Faith and Culture: The Case of Abused Jewish Women' (2012) 27(5) *Journal of Family Violence* 427.

This article considers how a perpetrator of domestic and family violence may exploit the victim's faith or subculture and, alternatively, how the victim's faith or subculture may be a source of strength and support for the victim. The researchers analysed case files from a Jewish domestic violence services agency. The study found that partners of abused Jewish women often perverted the laws and traditions of Judaism to control their partners. It also found that being part of an integrated cultural and religious community offered support for some victims.

Dehan, Nicole, and Zipi Levi, 'Spiritual Abuse: An Additional Dimension of Abuse Experienced by Abused Haredi (Ultraorthodox) Jewish Wives' (2009) 15(11) *Violence Against Women* 1294.

This article aims to conceptualize *spiritual abuse* as an additional dimension to physical, psychological, sexual, and economic abuse. Based on a small research study involving a group of eight abused women, spiritual abuse is defined by the researchers as any attempt to impair the woman's spiritual life, spiritual self, or spiritual well-being, with three levels of intensity:

- belittling her spiritual worth, beliefs, or deeds;
- preventing her from performing spiritual acts; and
- causing her to transgress spiritual obligations or prohibitions.

The concept and its typology are illustrated by means of examples from the women's abusive experiences.

Ellis, H et al, (2022) 'Religious/Spiritual Abuse and Trauma: A Systematic Review of the Empirical Literature', Spirituality in Clinical Practice, 9(4): 213-231.

The authors sought to review empirical research on religious/spiritual (R/S) abuse and trauma. Their systematic review identified 25 studies that met the inclusion criteria. The empirical findings of the studies are organized into eight sections: (a) definitions of R/S abuse and trauma,(b) prevalence of R/S abuse and trauma, (c) entering/exiting abusive religious communities, (d) the intersection of R/S abuse and trauma and domestic violence, (e) the role of the R/S community in the abuse, (f) negative outcomes associated with R/S abuse and trauma, (g) identity changes associated with R/S abuse and trauma, and (h) prevention and clinical treatment of R/S abuse and trauma. Based on their review the authors define R/S abuse and trauma as a misuse of power in an R/S setting resulting in psychological and spiritual harm. The authors observe that R/S abuse may be inflicted in a secondary way by religious institutions.

Knickmeyer, Nicole, Heidi Levitt and Sharon Horne, 'Putting on Sunday Best: The Silencing of Battered Women within Christian Faith Communities' (2010) 20(1) *Feminism Psychology* 94.

This research reports on a small qualitative interview study involving 10 Christian-identified women from diverse denominations and racial/ethnic and socioeconomic backgrounds who had experienced intimate partner violence. The participants reported forms of spiritual abuse including abusive partners:

- using religious teachings, especially about male leadership and female submission within marriage, manipulatively as a means of exerting total control in the relationship;
- using religious teachings about the sanctity of marriage and God’s disapproval of divorce as a means of maintaining control over the relationship;
- enforcing conformity through the invocation of religious standards along with threats of violence (pp102-104).

Cultural and spiritual abuse - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.1 – Emotional or psychological abuse provides examples of behaviour including spiritual abuse. It notes spiritual abuse may be perpetrated by: 'denying and/or misusing religious beliefs or practices to force victims into subordinate roles; or misusing religious or spiritual traditions to justify physical violence or other forms of abuse'. Also see 1.1 – Additional Guidance – Common Risk Assessment Framework which provides more examples of what can constitute spiritual abuse. Note that the 'Emotional' section of the table also identifies 'criticising beliefs' as an example of that behaviour of family violence.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book notes the definition of domestic violence used by the Department of Child Protection and Family Support (at [13.2.3]) which includes: "…Spiritual violence is any behaviour that denigrates a woman's religious or spiritual beliefs, or prevents her from attending religious gatherings or practising her faith. It also includes harming or threatening to harm women or children in religious or occult rituals, or forcing them to participate in religious activities against their will."

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Although this bench book has a chapter specifically discussing culture and domestic violence, (Chapter 19: Responding to Culture: Use and Misuse of Cultural Evidence), it does not specifically discuss the behaviours around culture and spirituality as a form of abuse.

Cultural and spiritual abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Felicity

Cultural and spiritual abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***R v Kina* [1993] QCA 480 (29 November 1993) – Court of Appeal Queensland**

Fitzgerald P and Davies JA: 'In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice'.

Following, harassing and monitoring

Domestic and family violence behaviours that involve a perpetrator following, harassing or monitoring the victim are forms of stalking or surveillance designed to deprive the victim of privacy, autonomy and a sense of safety. These abusive behaviours may occur while the perpetrator and victim are in an intimate relationship, or they may commence or intensify upon separation [Bagshaw 2000].

The perpetrator's detailed knowledge of the victim's workplace, family, friends, daily routines, regular hangouts, online activities, inclinations, concerns and fears enables the perpetrator to employ an array of abusive tactics that may be overt and intimidating (for example: letting the victim know they are being watched or overheard) or covert and thus difficult for the victim to anticipate, detect or trace (for example: amassing information about the victim's movements that can later be used to monitor, threaten or humiliate the victim [Stark 2007]).

Studies indicate that these abusive behaviours may be accompanied by incidents of theft, trespass and property damage, and are compelling risk factors for all other forms of domestic and family violence. Where the perpetrator and victim have children in common, handover occasions may increase the risk of further violence [Mechanic et al 2000] and provide an opportunity to conceal or check tracking and surveillance devices, as well as a wide range of Internet-connected devices such as smart toys. Children may also be co-opted to facilitate abuse, eg. through sharing a parent's passwords [Dragiewicz et al 2022].

Research [Wesnet 2020] demonstrates a dangerous prevalence of online stalking and online surveillance, which use digital information and associated technologies as tools for the perpetration of domestic and family violence, also known as technology-facilitated abuse, digital abuse or digital coercive control [Harris & Woodlock 2022]. These technologies involve the associated use of social media and online accounts, information communication technologies, computers, tablets, recording equipment, smart phones and other digital devices such as global positioning systems (GPS) or satellite navigators, drones, game consoles, emerging smart, internet-connected systems such as doorbells or cameras. Increasingly, digital systems are recognised as easy, accessible and instantaneous methods by which a perpetrator can control, monitor, humiliate and shame the victim, and make it more difficult for the victim to leave the abusive relationship or seek help.

Technology-facilitated methods are highlighted in the following examples:

- Monitoring and stalking (for example, via Skype, via drones, via location sharing apps such as Find My) the whereabouts and movements of the victim or children in real time.
- Remotely accessing, taking control over and altering or deleting the software and files on a victim's digital device.
- Sending abusive messages – even via online banking - and altering the sender identity information so as render the origin untraceable.
- Visiting offensive websites, and then making contact with the host or bloggers under the guise of the victim, and expressing an interest in violent or abusive pornography or being raped or sexually assaulted.
- Sending text messages to the victim communicating threats and verbal abuse.
- Using social media sites such as Facebook to publicly accuse and blame the victim.
- Accessing a tracking device in the victim's car via any digital device and repeatedly texting the victim to communicate the perpetrator's knowledge of the victim's whereabouts.
- Taking intimate images of the victim (with or without consent) on any digital device and distributing them or threatening to do so; this includes the non-consensual sharing of intimate images, commonly referred to as 'image-based abuse' and sometimes as 'revenge porn' [Henry et al, 2017].
- Installing an application or spyware on the victim's digital device that:
  - allows access to the victim's text messages, emails, social media accounts, camera, call logs, photographs, contacts and browsing history;
  - enables the recording and receiving of the victim's phone calls [Sun 2015];
  - converts the victim's digital device to a remote listening device; or
  - enables unauthorised access to property and accounts via remote access [NSW DV Death Review 2020].
- Impersonating an individual or creating a fake profile of an individual (such as the victim, potential romantic partner, or real or fictious child that reaches out to the victim's children).
- Doxxing (publishing private and identifying information such as name and address).
- Financially harm victims e.g., by making online orders without the victim's consent.

Due to the seemingly elusive or ambiguous nature of some of these abusive behaviours, a victim may feel a

heightened sense of fear and powerlessness, and yet the victim may be the only means by which the police can gather evidence of the behaviours. A significant barrier for victims of technology-facilitated abuse and stalking may be a perception by police or judicial officers that the behaviours are less serious than physical violence and, as a consequence, there may be a tendency to trivialise the victim's experience and minimise the harm suffered, leading to inadequate legal responses. It is important in protection order application proceedings where a victim is seeking protection from these forms of abusive behaviours that the conditions of the protection order specifically address the behaviours. Victims cannot be expected to simply 'go offline' as essential life dimensions are now mediated through technology e.g., paying taxes, searching and applying for jobs.

In some circumstances, victims may use digital technologies as a safety aid in preventing or escaping domestic and family violence [Dragiewicz et al 2022]. However this may also leave the victim vulnerable to accusations of stalking or surveillance-like behaviour. For example, a victim may record repeated incidents of violence with the intention of proving a pattern of violence. Such behaviour may be lawful [Recording and surveillance]. It is important therefore to distinguish between behaviours that are protective on the part of the victim, and those that constitute violence by a perpetrator. There are resources available that provide information about how to ensure safety when engaging with technology [Using technology safely] [WESNET Tech Safety]. In some cases recording private conversations, and maintaining surveillance, may be legally justifiable [Recording and surveillance]. Increasingly private individuals seek to have their recordings of other's private conversations and activities admitted as evidence in legal proceedings in domestic and family violence related cases. Often the recording and surveillance material is collected covertly. Legislative responses to these issues vary across Australia [Recording and surveillance].

Following, harassing or monitoring may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Following, harassing and monitoring - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Stalking was defined in the survey as 'any unwanted contact or attention on more than one occasion that could have caused fear or distress, or multiple types of unwanted contact or behaviour experienced on one occasion only that could have caused fear or distress'. Overall, women were more likely than men to have experienced stalking, with approximately 17% of women (1.6 million), and 6.5% of men (587,000), reporting an experience of stalking since age 15 (see Table 34). '

'Women were more likely to have experienced an episode of stalking by someone they knew than by a stranger', with more than three quarters of female victims knowing their stalker. Further, women were also significantly more likely to be stalked by a man than by a woman (see Table 35). This section also contains information regarding whether victims perceived their experiences of stalking as a crime, and whether they reported the episode to the police (see Table 35).

Bagshaw, Dale, et al, 'Reshaping Responses to Domestic Violence' (Final Report, University of South Australia and Partnerships Against Domestic Violence, April 2000).

This Australian research used a variety of methods including an anonymous 'phone-in' and focus groups. 102 women who were victims/survivors of domestic violence participated in the phone-in. According to the study authors, some of the callers reported 'intense levels of surveillance, which leave women without autonomy.' This experience was exacerbated for women living in rural and remote areas, especially on isolated properties. Strategies of surveillance included (p24):

- ‘not allowing the woman to obtain a driver’s licence or paid employment,
- constant telephone calls to check whereabouts, timing the distances to be travelled (for example, home from work) and/or
- preventing the woman from closing the toilet door.’

The writers commented that callers reported that ‘the law was not seen to take threats seriously and placed an unreasonable onus on the victim to provide dates or other evidence of violence, requiring a level of documentation that is generally impossible for a woman living in a state of constant surveillance’ (p46).

Douglas, Heather, Bridget Harris & Molly Dragiewicz, Technology-facilitated Domestic and Family Violence: Women’s Experiences, (2019) 59(3) *The British Journal of Criminology 551-70*

This article analyses data drawn from interviews undertaken with 55 domestic and family violence survivors in Brisbane, and outlines survivors’ experiences of technology-facilitated domestic and family violence. During the interviews, participants were asked about their experiences of DFV and their engagement with legal processes. Participants provided many examples of technology being used by perpetrators to isolate, stalk and emotionally abuse them and to create a sense of the perpetrator being omnipresent. Although several women used technology to document the abuse, to improve their safety and to stop the abuse, some also pointed to their lack of understanding or skill with respect to technology compared to their abuser. The survivor accounts demonstrate the need to study the context, meaning, motives and outcomes of technology-facilitated activity.

Dragiewicz, Molly, Woodlock, Delanie, Salter, Michael, & Harris, Bridget 'What’s Mum's Password?': Australian Mothers' Perceptions of Children's Involvement in Technology-Facilitated Coercive Control. (2022) 37(1), Journal of Family Violence, 137-149.

This article is based on semi-structured interviews with those 12 mothers. The accounts show how children were directly abused via technology, such father impersonating a child to speak to his daughter and another father calling his daughter “a sneaky bitch” when she refused to provide her mother’s password. Participants recounted how children were drawn into technology-facilitated abuse aimed at the mothers, for example by being asked to provide passwords to abusers or show abusers around their new house via FaceTime. Abuse

often escalated at parental separation as abusers lost some avenues of control but gained access to others.

Flynn, A., Powell, A., & Hindes, S. (2021). Technology-facilitated abuse: A survey of support services stakeholders (Research report, 02/2021). ANROWS

Survey of 338 support service workers. The study found that in the experience of support services workers, foremost comprising domestic and sexual violence services, TFA is a significant and gendered problem with victims facing significant impacts and barriers to help-seeking. Support services workers described TFA as a growing issue for their clients, particularly with the ever-expanding and vast landscape of digital technologies. However, they also identified that there are significant obstacles to helping clients who are experiencing TFA, and expressed concerns over the adequacy of current responses. These include difficulty in finding up-to-date information, TFA not being taken seriously by police and courts, and inadequate responses from technology providers. Support services workers called for these key areas to be improved. They also identified areas in which they need additional support and training, including responding to perpetrators, meeting the needs of diverse clients and strategies for preventing TFA. Overall, the vital, practice-based knowledge from support services workers in this study has allowed us to demonstrate tangible ways in which we can more effectively disrupt, prevent and respond to TFA.

Harris, Anita, Nikki Honey, Kim Webster, Kristen Diemer and Violeta Politoff, *'Young Australians' attitudes to violence against women – Findings from the 2013 National Community Attitudes towards Violence Against Women Survey for respondents 16-24 years'* (2015).

The minimisation of technology-facilitated stalking and abuse is reflected in the Australian 2013 National Community Attitudes towards Violence Against Women Survey. In this survey more than 17,500 telephone interviews were undertaken to compare the attitudes of 16-24 year olds to 35-64 years olds. The study found the majority of young people agreed that tracking a female partner by electronic means without consent was serious. Youth males rated it at an overall seriousness level of 80% while youth females rated it at 87%. This is compared to adult men who rated it at 81% with their female counterparts rating it at 90%. The study also found 52% of youth males and 40% of youth females thought non-consensual electronic tracking of a female partner was acceptable to some degree, compared to 41% of adult males and 29% of adult females.

Harris, Bridget and Delanie Woodlock, Spaceless violence: Women's experiences of technology-facilitated domestic violence in regional, rural and remote areas. Trends and Issues paper 644, (Australian Institute of Criminology, 2022).

Semi-structured interviews and focus groups were conducted with 13 victim–survivors.

The participants detailed the way that technology was incorporated into perpetrators' control and intimidation tactics, often extending and exacerbating the abuse these women experienced. When women separated from the perpetrator, his use of technology often escalated. As opportunities to engage in physical abuse were limited, technology enabled the perpetrator to still reach into the victim's private sphere. While digital coercive control is spaceless, the space in which the woman and the perpetrator are physically located matters. The participants in this research emphasised that rural, remote and regional locations shaped both the manifestations and impacts of abuse, as well as the barriers they experienced when seeking help.

Henry, N., Gavey, N., & Johnson, K. (2022). Image-Based Sexual Abuse as a Means of Coercive Control: Victim-Survivor Experiences. Violence Against Women, online first.

Article reports on a study involving interviews with 29 women and one gender-diverse person who experienced image-based sexual abuse as part of a pattern of "coercive control."

From Conclusion: The interviews demonstrated a diversity of experiences well beyond the paradigm of "revenge porn." A common theme across these interviews was the dynamic of coercive control. Image-based sexual abuse is one of many abusive tactics employed (both technology- and nontechnology-based) to isolate and entrap victims within abusive relationships, or at the end of the relationship, to control, intimidate, punish, and degrade them.

Henry, Nicola, Anastasia Powell and Asher Flynn, *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse - A Summary Report* (RMIT University, 2017).

This summary report presents the results of a national (Australian) online survey of 4,274 participants, 2,406 of which were female (56%) and 1,868 male (44%).Participants ranged in age from 16 to 49, with an average age of 34 years. In addition, 3,764 (88%) participants identified as heterosexual and 510 (12%) identified as lesbian, gay or bisexual (hereafter, LGB). Of those identifying as LGB, 244 identified as female (48%), and

266 (52%) identified as male. Key findings included:

- 1 in 5 Australians have experienced image-based abuse
- Victims of image-based abuse experience high levels of psychological distress
- Women and men are equally likely to report being a victim
- Perpetrators of image-based abuse are most likely to be male, and known to the victim
- Men and young adults are more likely to voluntarily share a nude or sexual image of themselves
- Women are more likely than men to fear for their safety due to image-based abuse
- Abuse risk is higher for those who share sexual selfies, but they are not the only victims
- 1 in 2 Australians with a disability report being a victim of image-based abuse
- 1 in 2 Indigenous Australians report image-based abuse victimisation
- Image-based abuse victimisation is higher for lesbian, gay and bisexual Australians
- Young people aged 16 to 29 years are also at higher risk of image-based abuse
- 4 in 5 Australians agree it should be a crime to share sexual or nude images without permission

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Henry, N., Gavey, N., & Johnson, K. (2022) Image-Based Sexual Abuse as a Means of Coercive Control: Victim-Survivor Experiences. *Violence Against Women*, online first.

https://doi.org/10.1177/10778012221114918

Article reports on a study involving interviews with 29 women and one gender-diverse person who experienced image-based sexual abuse as part of a pattern of "coercive control."

From Conclusion: The interviews demonstrated a diversity of experiences well beyond the paradigm of "revenge porn." A common theme across these interviews was the dynamic of coercive control. Image-based sexual abuse is one of many abusive tactics employed (both technology- and nontechnology-based) to isolate and entrap victims within abusive relationships, or at the end of the relationship, to control, intimidate, punish, and degrade them.

NSW Domestic Violence Death Review Team, *Report 2017-2019*, 2020, NSW Government.

Includes detail on deaths referred to the Coroner, drawing on both data analysis and in-depth case analyses. Useful information about how domestic violence-related homicides and suicides are recorded in NSW.

Powell, Anastasia and Nicola Henry, *'Digital Harassment and Abuse of Adult Australians – A Summary Report'* (2015).

Researchers at RMIT University and La Trobe University examined the extent, nature and impacts of digital harassment and abuse, as well as technology-facilitated sexual violence and harassment. 3000 Australian adults (aged 18 to 54) were surveyed about their experiences of these forms of abuse. Key findings include:

- Overall, men and women were just as likely to report experiencing digital harassment and abuse
- Women were more likely to report experiencing sexual harassment
- Young adults aged 18 to 24 were more likely than any other age groups to experience digital harassment and abuse
- Non-heterosexual identifying adults were significantly more likely to report being the target of both gender and sexuality based harassment
- 1 in 10 Australians reported that someone had posted online or sent onto others a nude or semi-nude image of them without their permission
- Women overwhelmingly experienced digital harassment and abuse from male perpetrators

- Men experienced digital harassment and abuse equally from males and females
- Women were significantly more likely than men to be 'very or extremely upset' by the digital harassment and abuse they experienced
- More women than men reported that they told the person to stop, changed their online details or profile settings, left the site or turned off their device, as a result of their experience

Sun, Charissa, 'Technology-Facilitated Stalking and Abuse: Putting Our Legal Framework to the Test' (2015) (June) *The Law Society Journal of New South Wales* 78.

This article reviews the NSW legal response to what is referred to as 'technology assisted stalking and abuse.' It includes helpful examples of this behaviour:

- making numerous and unwanted calls to a person's mobile phone;
- sending threatening and/or abusive messages (text messaging, Whatsapp, Snapchat, facebook messaging, Twitter);
- hacking into a person's email or social media account to discover information about them;
- hacking into a person's email or social media account to impersonate them and send abusive messages to family/friends of that person;
- using surveillance software and devices to spy on or stalk a person (eg placing a GPS tracker on a person's car, placing a video camera in and around a person's home to monitor both the person and other people who may come to the house); and
- sharing, or threatening to share, intimate pictures of a person.

Woodlock, Delanie, 'The Abuse of Technology in Domestic Violence and Stalking' (2017) 23(5) Violence Against Women 584-602.

This study discusses the increasing prevalence of technology in domestic violence and stalking (p 585). The results demonstrate that technology, including phones, computers, tablets, and social media, is frequently used in intimate partner violence (p 590). The use of technology creates an impression of the perpetrator's omnipresence, for example through constant text messages or phone calls (pp 592, 598), and can isolate (pp

594-6, 598), humiliate and punish the victim (pp 596-7, 599). A particular threat of technology is the sharing of sexualised content online to humiliate victims (p 599).

Women's Health East, *Women online: The intersection of technology, gender and sexism* (Melbourne: Women's Health East, 2018).

The paper examines the intersection of technology, gender and sexism, as well as the prevalence and impacts of cyber violence against women and girls. The authors describe the key drivers of violence, such as gender inequality, and how these interact with the online platforms to create cyber violence. The paper explores 'life online' esp, pp8-12.

Wesnet, Wesnet Second National Survey on Technology Abuse And Domestic Violence In Australia. (2020).

This report explores the 2020 findings of a national Australian survey with 442 frontline DV practitioners about the use of technology by perpetrators.

Almost all survey respondents (99.3%) stated that they had clients who had experienced technology facilitated stalking and abuse.

The type of technology most commonly used by perpetrators was text messaging, with two thirds (60.7%) of practitioners seeing this 'all the time'. Text messages could be used in various ways, from constantly sending messages to victims-survivors, to carefully worded messages that perpetrators would use to cause victim-survivors fear.

Smartphones were the next most commonly used technology (36.1% seeing this 'all the time'). Facebook was also reported to be used frequently by perpetrators to abuse (35.1% noting this as occurring 'all the time').

Respondents noted they were seeing GPS tracking apps used 'all the time' (16.2%) and 'often' (45.6%). Participants noted that because GPS tracking apps such as "Find My" are preloaded on iPhones, that women were often obligated to turn them on, or else they were seen by the perpetrator as having something to hide.

FaceTime was seen as being used to perpetrate technology-facilitated abuse, with almost half seeing this 'often' (42.6%).

iCloud was also noted as commonly used by perpetrators to stalk and place women under surveillance, with almost half (42.2%) observing this 'often'.

Of significance was the high proportion of respondents seeing government accounts such as myGov being misused by perpetrators to abuse women, with almost a third of respondents seeing this 'all the time' (27%) and a further fifth seeing it 'often' (37.8%).

International

Backes, Bethany, Lisa Fedina and Jennifer Holmes, The Criminal Justice System Response to Intimate Partner Stalking: a Systematic Review of Quantitative and Qualitative Research, (2020) ***Journal of Family Violence.***

This international study assesses the range of criminal justice responses to intimate partner stalking (IPS) victimisation and the extent to which these responses are successful in promoting survivor safety, well-being, and justice. The findings identify formal and informal strategies employed by the criminal justice system to address IPS. Successful strategies for mitigating IPS were associated with increased training of law enforcement and prosecution and the granting and enforcement of civil protective orders.

Drouin, Michelle, Jody Ross and Elizabeth Tobin, *Sexting: A new digital vehicle for intimate partner aggression* (2015) 50 *Computers in Human Behaviour* 197.

In this study, the authors examined the relationships between sexting coercion, physical sex coercion, intimate partner violence, and mental health and trauma symptoms within a sample of 480 young adult undergraduates (160 men and 320 women). Approximately one fifth of the sample indicated that they had engaged in sexting when they did not want to. Those who had been coerced into sexting had usually been coerced by subtler tactics (e.g., repeated asking and being made to feel obligated) than more severe forms of coercion (e.g., physical threats). Nevertheless, the trauma related to these acts of coercion both at the time they occurred and now (looking back) were greater for sexting coercion than for physical sex coercion. Moreover, women noted significantly more trauma now (looking back) than at the time the events occurred for sexting coercion. Additionally, those who experienced more instances of sexting coercion also endorsed more symptoms of anxiety, depression, and generalized trauma. Finally, sexting coercion was related to both

physical sex coercion and intimate partner violence, which suggests that sexting coercion may be a form of intimate partner violence, providing perpetrators with a new, digital route for physical and sexual covictimization.

Katz, E., Nikupeteri, A., & Laitinen, M., 'When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence' (2020) *Child Abuse Review*

This article highlights how domestic violence perpetrators can use coercive control against their children after their ex-partner has separated from them. It provides insights into how children experience coercive control post-separation by drawing from two data sets: one from the UK and one from Finland. The data comprised narratives of 29 children and young people aged from 4 to 21 years old. Three overarching themes arose from the data: 1) dangerous fathering that made children frightened and unsafe; 2) 'admirable' fathering, where fathers/father figures appeared as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victims'; and 3) omnipresent fathering that continually constrained children's lives. Dangerous fathering made children's lives frightening, constrained and unpredictable. Admirable fathering was found to be a powerful tool of control when combined with dangerous fathering, because admirable fathering increased father-child emotional bonds and could make children want to see/live with their fathers, whilst dangerous fathering simultaneously made them fearful of him. Admirable fathering was typically aimed at professionals and wider communities, and could occur alongside fathers/father figures stalking, harassing and/or attacking ex-partners and children when they were not in the public eye. Perpetrators aimed to portray themselves as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victim' fathers, and to make their ex-partners seem like perpetrators or deficient mothers. Perpetrators disguised their use of coercive control tactics as 'admirable' behaviour. With respect to omnipresent fathering, children were fearful that their father/father figure could appear at any time to attack, harass, manipulate, upset or kidnap them or their mothers. This behaviour led to some children continuously monitoring their surroundings as a protective strategy. Fathers/father figures were able to maintain some degree of control, domination and emotional power over children even when they were not physically present. The article suggests that robust measures are necessary to prevent coercive control perpetrating fathers/father figures from using father-child relationships to continue exerting coercive control on children and ex-partners.

Lo, M., A Domestic Violence Dystopia: Abuse via the Internet of Things and Remedies Under Current Law. California Law Review, *[s. l.]*, v. 109, n. 1, p. 277–315, 2021.

US based note. Abstract: Tactics of domestic violence are nothing new. However, as with various other aspects of modern life, technology threatens disruption. The increasing prevalence of Internet of Things (IoT) devices has given abusers a powerful new tool to expand and magnify the traditional harms of domestic violence, threatening the progress advocates have made in the past thirty years and creating novel dangers for survivors. An IoT device is a "smart," stand-alone, internet-connected device that can be monitored or controlled from a remote location. They are cheap and increasingly common—the number of IoT-enabled devices in the world is already in the billions and expected to grow quickly. IoT devices allow abusers to overcome geographic and spatial boundaries that would have otherwise prevented them from monitoring, controlling, harassing, and threatening survivors. Various advocates are finding ways to protect survivors, and the broader public, from these new dangers. In the domestic violence sphere, domestic violence service providers are creating resources for survivors that explain IoT-facilitated abuse and how to better secure their smart devices. In the technology sphere, consumers, businesses, digital experts, and the media are broadcasting the security risks of IoT devices. Unfortunately, significantly fewer outlets describe the legal remedies available for IoT-facilitated abuse. This Note aims to bridge that gap. It demonstrates that IoT facilitated abuse is a form of technology-facilitated domestic violence and explores how society can use current laws to address IoT facilitated abuse. However, it also questions whether the existing remedies are sufficient and offers recommendations for legal and nonlegal changes that will better protect survivors of IoT-facilitated abuse and hold perpetrators accountable.

Mechanic, Mindy B, Terri L Weaver and Patricia A Resick, 'Intimate Partner Violence and Stalking Behaviors: Exploration of Patterns and Correlates in a Sample of Acutely Battered Women' (2000) 15(1) *Violence and Victims* 55.

These USA based researchers recruited 114 battered women from shelters, agencies, and from the community at large to complete a survey and an interview about stalking. Results support the view that violent and harassing stalking behaviours occur with high frequency among physically battered women, both while they are in the relationship and after they leave their abusive partners. Emotional and psychological abuse emerged as strong predictors of within- and post-relationship stalking, and contributed significantly to

women's fears of future serious harm or death, even after the effects of physical violence were controlled. The length of time a woman was out of the violent relationship was the strongest predictor of post-separation stalking: stalking increased over time.

Messing, Jill et al., Intersections of Stalking and Technology-Based Abuse: Emerging Definitions, Conceptualization, and Measurement, (2020) *Journal of Family Violence.*

This article analyses stalking and technology-based abuse across 3 samples of IPV survivors (pen-and-paper surveys, web-based surveys and qualitative interviews). Over a 6-year period, data was collected from IPV survivors who received services from domestic violence programs (including shelters). This article highlights the high prevalence of intimate partner stalking, including direct stalking, monitoring, online harassment, and cyberstalking, among shelter and service-seeking survivors of IPV. Around 62-72% of women reported being directly stalked, and 60-63% reported experiencing technology-based abuse by an intimate partner. Women reported monitoring, online harassment, and cyberstalking more readily when directly asked, thereby demonstrating the importance of incorporating technology-based abuse into assessment and intervention.

Stark, Evan, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

This book is a key text on domestic and family violence. Although Stark is based in the United States his work has been highly influential in Australia. In this book Stark explains that domestic and family violence is a pattern of controlling behaviours akin to terrorism and hostage-taking. Drawing on court records, interviews, and FBI statistics, Stark details coercive strategies that men use to deny women their very personhood. He explains that surveillance and stalking include behaviours such as gathering information without the victim's knowledge and letting the victim know she is being watched, and serve as a means of curtailing the victim's activities and isolating her (p457-8).

Stark also discusses what he refers to as 'micro-surveillance', including activities such as going through diaries and drawers etc; monitoring phone calls, bank accounts and movements; or requiring partners to 'check-in' as a form of coercive control used by abusers in relationships (p461-3). Stark notes on p374 surveillance tactics may be extended to the point the victim is essentially confined, amounting to a deprivation of liberty. See this YouTube video of Evan Stark, discussing the central thesis of his book: *Coercive Control:*

The Entrapment of Women in Personal Life.

Following, harassing and monitoring - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

Also see 1.1 – Additional Guidance – Common Risk Assessment Framework which provides multiple examples for different forms of behaviour. It refers to monitoring phone calls as social abuse, and stalking and harassing behaviour as emotional abuse.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

A variety of acts that fall within this behaviour are frequently referred to throughout the bench book, including surveillance, monitoring and stalking as forms of domestic violence (e.g. Sections 4.2, 4.4.4.1, 21.2.5.2), and factors for heightened risk (Section 8.8.1). However, they are not substantively discussed as behaviours.

Also see:

Section 4.6.3: New forms of domestic violence:

- ‘The Issue: Revenge pornography, identity theft, domestic violence and stalking using modern technology (computers, smart phones, geo-positioning equipment, audio enhancement tools, drones and tracking systems) are a growing concern and indeed are now a regular feature of DV cases’;
- Responses: ‘Consider the need to include special safety measures in agreements and court orders (e.g., prohibiting access, direct or indirect, to the targeted party’s smart or cell phone, including any information about the location of the phone; prohibiting possession or use of spy ware or other computer monitoring programs; prohibiting and or specifying allowable forms of contact via social media accounts; prohibiting direct and indirect forms of intimidation, harassment or monitoring by computer or other program or device; prohibiting possession or use of geo-positioning, audio enhancement and tracking systems or programs); prohibiting the possession or use of programs or applications that can affect any aspect of the victim’s residence’;
- See also Section 9.2.2.24: Prohibiting modern forms of domestic violence, which looks at responses to modern forms of stalking and harassment in prohibition orders.

Section 7.4.1: Using litigation to control or harass:

- ‘Some authors assert that heightened litigation in DV cases is a form of harassment, monitoring and stalking’.

Section 7.4.33: When perpetrators tape or videotape the other parent:

- ‘In a domestic violence context, this can be evidence of continuing monitoring, denigration, coercion or control’.

Following, harassing and monitoring - Other Resources

Australia

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

Australian Government Office of the eSafety Commissioner, Collecting evidence.

This website by the Office of the eSafety Commissioner provides information about technology abuse and the importance of collecting evidence when reporting the abuse or threatening behaviour. It emphasises that evidence should only be collected if it is safe to do so. Evidence may be collected by taking screen shots of abusive posts, texts or emails or by saving or copying voicemail messages. The website directs the reader to additional links on how to record stalking and how a person under 18 years of age must follow certain steps for reporting offensive or illegal content.

Commonwealth Bank, Financial Abuse Resource Centre: 'Technology Facilitated Abuse'.

In partnership with WESNET the Commonwealth Bank has developed resources on technology-facilitated abuse. The resources explore how to identify technology-facilitated abuse and the steps individuals can take to increase their digital financial security.

- Digital Financial Security
- How to secure your digital finances
- Beyond Basics: increasing the security of your digital finances
- Digital Financial Security and Relationships

Domestic Violence Resource Centre Victoria, ARC: Using Technology Safely Link.

This website app (available as a mobile app) includes information about how technology may be used to perpetrate domestic and family violence and how victims might appropriately plan for their safety.

MacDonald, J. B, Truong, M., Willoughby, M., & March, E. (2023). Technology-facilitated coercive control (Practice Guide). Melbourne: Child Family Community Australia, Australian Institute of Family Studies.

(Overview)

This practice guide describes the research evidence on technology-facilitated coercive control (TFCC). It covers:

- what TFCC is
- strategies used by perpetrators
- the interaction between face-to-face and technology-facilitated strategies of coercive control
- client groups who may be at an elevated risk of TFCC victimisation
- the impacts of experiencing TFCC
- risks of expecting victim-survivors to stop using technology
- tips for supporting clients who may be experiencing TFCC.

Power and Control Wheel: On Technology and Abuse. (Developed by Wesnet and National Network to End Domestic Violence- NNEDV) Link.

'This diagram illustrates some ways abusers might misuse technology in the context of stalking, domestic and sexual violence. Perpetrators might try to misuse any technology if it enables them to monitor, impersonate, control or harm. Examples of technology abusers misuse include phone interceptors, listening devices and bugs; caller ID spoof and unblock; email, text and instant messages; computer and phone spyware and monitoring; fax machines; assistive devices and relay services; location tracking devices (e.g. GPS) and services; cameras and other recording devices; mobile phones and tablets; social networking and media sites, websites and more.'

Recording and surveillance legislation.

Many private individuals now have access to reliable and inconspicuous recording and surveillance devices. In some cases recording private conversations, and maintaining surveillance, may be legally justifiable.

Increasingly private individuals seek to have their recordings of other's private conversations and activities admitted as evidence in legal proceedings in domestic and family violence related cases. Often the recording and surveillance material is collected covertly. Legislative responses to these issues vary across Australia.

See *Groom v Police* [2015] SASC 101 for a helpful discussion of these issues in the South Australian context.

Place	Relevant statutes:	Applies to:
ACT	*Listening Devices Act 1992* (ACT)	Listening devices
NSW	*Surveillance Devices Act 2007* (NSW)	Listening, optical, surveillance and tracking devices
NT	*Surveillance Devices Act 2007* (NT)	Listening, optical, surveillance and tracking devices
Qld	*Invasion of Privacy Act 1971* (Qld)	Listening devices
SA	*Surveillance Devices Act 2016* (SA)	Surveillance devices
Tas	*Listening Devices Act 1991* (Tas)	Listening devices
Vic	*Surveillance Devices Act 1999* (Vic)	Listening, optical, surveillance and tracking devices
WA	*Surveillance Devices Act 1998* (WA)	Listening, optical, surveillance and tracking devices

See Domestic Violence Resource Centre Victoria, ARC: Laws to Protect for useful guides.

WESNET: The Women's Services Network, Tech Safety. Link.

This website provides downloadable handouts and information sheets on a range of technology and domestic and family violence issues including high-tech stalking; online privacy and safety tips and information and information about assistive technology. The site also includes a guide to staying safe on Facebook.

International

Lee, Kaofeng and Ian Harris, How to Gather Technology Abuse Evidence for Court, Self-represented Litigants Series, Safety Net Project at the National Network to End Domestic Violence (February 2018).

This is a resource to assist self-represented litigants to gather evidence of their experience of technology abuse in a form that will be allowed by a court. It also provides links to additional resources including information about documenting technology abuse and technology safety. Note however that this is an American resource and the helpline number provided is unlikely to be available to those calling from Australia.

The introduction reads: If someone is using technology like text messages, email, or social media (like Facebook) to harass you, this guide will help you "capture" the evidence of the harassment, so you can bring it to court. You might think you can just show the judge your phone in court—but you probably won't be allowed to just show your device. Even if you are allowed, you could risk the court taking your device as evidence. To be sure the judge considers your evidence and that you don't lose your phone (or other device), you need to gather evidence in a form allowed by the court. This guide will provide suggestions on how to capture evidence that can be admitted in court from your devices, such as your cell phone, computer, or tablet (such as an iPad).

Stalking Prevention, Awareness, & Resource Center (SPARC), Fact sheets and Infographics about stalking.

US based research and data underpins the resources.

Stark, Evan, 'Evan Stark, Rutgers University, Author, "Coercive Control"' (Video Interview published online, 12 January 2012).

Evan Stark is a professor in the School of Public Affairs and Administration at Rutgers University. He is noted for his expertise in health issues and in legal aspects of domestic violence. His influential book, *Coercive Control: How Men Entrap Women in Personal Life,* 2007, explains why an expanded view of domestic violence that encompasses coercive control is justified. He asserts that coercive and controlling behaviour is a very common and pernicious form of domestic violence. In this lecture he summaries the core ideas of his book.

- **UCL STEaPP, Tech abuse: how internet connected devices can affect victims of gender-based domestic and sexual violence and abuse (Pamphlet).**

Following, harassing and monitoring - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Barbara

Following, harassing and monitoring - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Kulczycki **[2018] ACTSC 9 (30 January 2018) – Australian Capital Territory Supreme Court**

(Where the defendant sent the complainant emails and text messages threatening to release a video of the defendant and complainant engaged in sexual activity unless the complainant paid him $20,000) Justice Elkaim remarked on the seriousness of the blackmail in the context of a domestic relationship at [16]: 'blackmail of the type involved in this case must be regarded as serious. This is not so much because of the amount of money demanded but because it involved a threat to breach the privacy of a relationship and to cause severe embarrassment to the complainant'.

R v Gittany (No 5) **[2014] NSWSC 49 (11 February 2014) – New South Wales Supreme Court**

McCallum J at [40]: 'In my view, that history informs the degree of moral culpability of the offence. The arrogance and sense of entitlement with which Mr Gittany sought to control Lisa Harnum throughout their relationship deny the characterisation of his state of mind in killing her as one of complete and unexpected spontaneity. By an attritional process, he allowed possessiveness and insecurity to overwhelm the most basic respect for her right to live her life as she chose. Although I accept that the intention to kill was formed suddenly and in a state of rage, it was facilitated by a sense of ownership and a lack of any true respect for the autonomy of the woman he claimed to love'.

R v Foodey **[2003] QCA 310 (25 July 2003) – Queensland Court of Appeal**

Jerrard JA at [11]: 'The applicant's behaviour towards Jennifer Foodey in the two and a half months between their separation and his incarceration was persistently cruel and aggressive. At different times he insulted, degraded, and terrified her. His conduct throughout was in breach of court orders intended to give her protection. Considered in isolation, the sentence imposed by the learned judge does not appear manifestly

excessive, and indeed far from it. The same result occurs if regard is had to other sentences for unlawful stalking imposed or approved by this court.

***R v Millar* [2002] QCA 382 (25 September 2002) – Queensland Court of Appeal**

De Jersey CJ: 'I would say for my part that that is not a feature which should necessarily lead to a lower penalty being imposed, where the stalking follows the break-up of an emotional relationship'.

***MB v Queensland Police Service* [2020] QDC 325 (18 December 2020) – Queensland District Court**

Aggravating features included that these were instances of domestic violence and "the emotional harm done to the victims and the damage, loss and injury caused." …

> "Charge 12 occurred on 27 August 2020 which was a contravention of domestic violence order. The appellant updated his profile status making threatening comments about the complainant, SH. The post named SH and contained threats and disclosed her sexual preferences to several friends. This had a significant emotional impact on the complainant SH. The appellant was interviewed on 29 August 2020 and said he didn't remember posting the comment but went on to say it was true.
>
> "A victim impact statement was tendered as Exhibit 4. The offending caused distress and inconvenience to the complainant SH. She had to move regularly as a result of the conduct of the appellant and suffered defamation to her character. She alleged that total out of pocket expenses was $16,748.84."

***Howe v S* [2013] TASMC 33 (29 July 2013) – Tasmanian Magistrates' Court**

Magistrate M Brett, in the context of the relevant Tasmanian legislation noted: '*Whilst I accept that the term "harass" as used in the general community could well include an element of persistence or repetition, I see no reason why a person cannot be harassed within the context of a Family Violence Order, by one act alone.* This view is in fact consistent with the definition in s.4 of the *Family Violence Act* of the word *"harassing"*… The reference in the definition to *"any one or more of the following actions"* suggests that a single act might be sufficient. Furthermore, it is appropriate, in my view, to interpret the term having regard to the context in which it is used in the order. The reference to *"threaten, harass, abuse or assault"* suggests that the order is

to be understood as providing protection to a person from contact with the respondent which is unwelcome, and might be in various forms or have variable effect' ([12]-[16]).

***Laa v The Queen* [2020] VSCA 136 (28 May 2020) – Victorian Court of Appeal**

[49] '… SMS messages, that were the subject of charge 1, comprised an escalating series of threats sent to Ms M late at night and in the early hours of the morning. Plainly they were calculated to instil fear into her, and to undermine her right to feel safe and secure within her own home.'

Social abuse

A perpetrator of domestic and family violence may exert control over the victim by engaging in behaviours that spatially confine or restrain the victim; assert exclusive possession over the victim; monopolise the victim's skills and resources; or prevent the victim from keeping in touch with social networks, escaping the abusive relationship, or seeking help and support [Bagshaw 2000]. These behaviours may intersect with those known as economic or financial abuse and emotional or psychological abuse. The effect may be to physically and socially isolate the victim, and, over time, undermine the victim's sense of identity, independence and self worth. Typically, a perpetrator will be the victim's current or former intimate partner and, as such, may have special knowledge of the victim's circumstances that may be used to carry out these abusive behaviours [Stark 2007].

To physically isolate the victim, a perpetrator may lock the victim in a cupboard, room or car for long periods. The perpetrator may prevent the victim from leaving the house for work, driving a car, or going out alone or with others by blocking the driveway or hiding the victim's clothes, keys or mobile phone. The perpetrator may forbid the victim to work other than in the home, demanding that domestic chores and sexual acts be performed according to a schedule and standard imposed by the perpetrator.

A perpetrator may also dominate or regulate the victim's external activities and connections. For example, where the victim's income is critical to maintaining the perpetrator's lifestyle, the perpetrator may stalk the victim at the workplace; call repeatedly through the workday; contact co-workers to check on the victim's whereabouts; collect the victim at lunchtime to prevent occasions with co-workers; or force the victim to get a second job. Where the victim has valued relationships with family, friends and neighbours, or ties with a church, club or community group, the perpetrator may erode these connections by preventing the victim from making contact; insisting that the perpetrator accompany the victim; or sabotaging the victim's means of communication by stealing or destroying mail, deleting phone contacts and email messages, or impersonating the victim.

In instances where victims attempt to restore their freedom or reassert their independence by, for example, buying new clothes, making new friends, returning to study or joining a sporting team, the perpetrator may respond by imposing further and more stringent restrictions and monitors on the victim.

Where a perpetrator feels threatened by the prospect that the victim may escape the abusive relationship or seek help and support, the perpetrator may cut off the household telephone connection or destroy the victim's mobile phone; ring the police first to prevent the victim from making a complaint; or cancel the victim's medical or counselling appointments, refuse to drive the victim to the hospital, or deny the victim access to funds to cover necessities.

Research [Outlaw 2009] documents a range of experiences of victims of social abuse. The following are extracts of accounts by victims describing how perpetrators behaved towards them:

- Put down my physical appearance
- Told me I could not manage
- Criticised the way I took care of the house
- Became upset if household chores were not done
- Treated me like a personal servant
- Monitored my time
- Irresponsible with money, but stingy when I needed it
- Jealous or suspicious of my friends and other men
- Turned my family against me
- Accused me of having an affair
- Threatened to have an affair
- Tried to convince me I was crazy.

Social abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Social abuse - Key Literature

Australia

Anastasia Powell, Nicola Henry, Asher Flynn and Adrian Scott, 'Image-based sexual abuse: The extent, nature, and predictors of perpetration in a community sample of Australian residents' (2019) 92 Computers *in Human Behavior* 393-402.

Image-Based Sexual Abuse (IBSA) is defined as the non-consensual taking, distributing and/or making of threats to distribute nude or sexual images. IBSA is becoming increasingly criminalised in various jurisdictions worldwide. This article reports on a national online survey that examined the extent, nature and indicators of self-reported IBSA perpetration among a community sample of Australians aged between 16 and 49 years old. 56.7% of the participants were female, whilst 97.5% were non-Aboriginal and 88.3% were heterosexual. Results showed that 11.1% of participants reported having engaged in some form of IBSA perpetration during their lifetime, with men more likely to report IBSA perpetration than women. Participants reported targeting men and women at similar rates and were more likely to report perpetrating against intimate partners or ex-partners, family members and friends than strangers or acquaintances. Participants who were male, lesbian, gay or bi-sexual, disabled, or accepted sexual image-based abuse myths were more likely to engage in IBSA perpetration.

Australian Government Office of the eSafety Commissioner, *Collecting evidence*.

This website by the Office of the eSafety Commissioner provides information about technology abuse and the importance of collecting evidence when reporting the abuse or threatening behaviour. It emphasises that evidence should only be collected if it is safe to do so. Evidence may be collected by taking screen shots of abusive posts, texts or emails or by saving or copying voicemail messages. The website directs the reader to additional links on how to record stalking and how a person under 18 years of age must follow certain steps for reporting offensive or illegal content.

Bagshaw, Dale, et al, 'Reshaping Responses to Domestic Violence' (Final Report, University of South Australia and Partnerships Against Domestic Violence, April 2000).

This Australian research used a variety of methods including an anonymous 'phone-in' and focus groups. 102 women who were victims/survivors of domestic violence participated in the phone-in. 'Social abuse' was reported by 67 per cent of callers. Social abuse included 'systematic isolation of women from family and friends'. Techniques included perpetrators' ongoing rudeness to family and friends that gradually resulted in reluctance by family and friends to make contact due to concerns that contact would trigger abuse from the perpetrator. Other means by which women were socially isolated included moving to new towns or to the country where they knew nobody and were not allowed to go out and meet people. In some cases women were physically prevented from leaving the home and were kept 'prisoners' in their own homes' (p22-23).

Heather Douglas, Bridget Harris and Molly Dragiewicz, 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2018) *British Journal of Criminology*.

The development of technology in recent years has significantly affected women's experiences of, and responses to, domestic violence. Devices and software, such as smartphones, cameras, Internet-connected devices, computers and platforms such as Facebook, may be used not only by perpetrators to facilitate domestic and family violence (DFV), but also by survivors and their allies to attain empowerment, and seek and share information and support. The article analyses qualitative research that outlined survivors' experiences of technology-facilitated DFV. It draws on interviews with 65 women on up to three occasions between 2014 and 2017. At the first interview, 55 participants identified technology-facilitated abuse as part of the DFV they experienced. This result was echoed in the following two interviews. Many participants provided examples of technology being used by perpetrators to isolate, stalk and emotionally abuse them. The frequency and nature of abusive behaviours described by the women provided important contextual data to inform future research into technology-facilitated violence and abuse.

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among

respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Kristin Natalier, 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) 26 *Feminist Legal Studies* 121-140.

Economic abuse is a widespread and damaging aspect of intimate partner violence (IPV). Although research has mainly addressed cohabiting couples, women's long-term experiences after separation are seldom explored, and researchers have not developed a gendered analysis of child support-related economic abuse. Interviews with 37 single mothers were conducted to determine how men's deliberate withholding of child support can constitute economic abuse, which may be facilitated through gendered State processes and institutions that order child support transfers. The author argues that the State may facilitate gendered abuse through the design and implementation of the Australian Child Support Program (CSP). Child support-related economic abuse is not the result of a failed system. Instead, it reflects the role of the CSP as regulating, rather than preventing, economic abuse. Findings showed that women participants understood that the withholding of child support by their former partners was a means to control their acquisition and use of money, and undermined their economic security and autonomy. On this basis, women experienced their former partner's behaviours as post-separation economic abuse which, in turn, was normalised and intensified through the CSP policy.

Rees, Susan, and Bob Pease, *Refugee Settlement, Safety and Well-being: Exploring Domestic and Family Violence in Refugee Communities* (Paper 4 of the Violence Against Women Community Attitudes Project, Immigrant Women's Domestic Violence Service, 2006).

The researchers undertook focus groups with 78 participants (men and women) from refugee communities in Victoria. Social isolation was identified as a form of domestic and family violence with participants identifying that abusive partners may intentionally keep victims from social and community contact. Significantly, the study found that the experience of being a refugee is frequently isolating because of unemployment, limited finances and inadequate English language skills. This isolation places refugee women at an increased high

risk of domestic and family violence (pp28-29).

International

Harrington Conner, Dana, 'Financial Freedom: Women, Money and Domestic Abuse' (2013-2014) 20 *William and Mary Journal of Women and the Law* 339.

This article is mainly focussed on domestic and family violence and economic abuse in the USA however the author presents a useful literature review explaining how socially abusive behaviours may contribute to the isolation of the victim (pp366-369). The author identifies that a woman's strong community and family ties may help to ensure her safety if she is abused while weak community and family ties promote risk. Community ties may include family, friends, neighbours and co-workers and these ties may be called 'social capital'. The perpetrator of abuse may actively work to destroy an abused person's social capital through restricting contact with neighbours, friends and co-workers, resulting in loss of support for the abused person and increased levels of control by the abuser. The author notes that isolation prevents "would-be" witnesses from observing injuries or acts of abuse, the procurement of photographic evidence, calls to law enforcement, and intervention by third parties. The author also observes that the abuser may restrict the victim's use of a car or telephone, having the effect of preventing her from calling for help and maintaining or increasing her social isolation.

Johnson, Margaret E, 'Redefining Harm, Reimagining Remedies and Reclaiming Domestic Violence Law ' (2009) 42 *University of California Davis Law Review* 1107.

This article criticises the USA focus on physical abuse in the context of domestic and family violence. At pp 1119, 1121-1122 the article discusses how abusers use isolating behaviours (including socially, economically and tangibly – i.e. no access to a car) in an effort to control the victim.

Outlaw, Maureen, 'No One Type of Intimate Partner Abuse: Exploring Physical and Non-Physical Abuse Among Intimate Partners' (2009) 24 *Journal of Family Violence* 263.

This article reports on a survey of 8,000 women and 8000 men conducted in the USA in 1994-1996. A sub-sample of 11,291 people who responded that they had current partners is examined. Respondents were

asked about the experience of abuse within their relationships. In this article the author describes social abuse as generally involving an imposed isolation—victims are cut-off from family and friends, whether by threat, force, or persuasion. Social abuse includes circumstances in which a current partner limits contact with family and friends, insists on knowing where the victim is at all times, or insists on changing residences, even if s/he doesn't want or need to. The article identifies a strong correlation between social abuse and physical abuse.

Stark, Evan, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

This book is a key text on domestic and family violence. Although Stark is based in the United States his work has been highly influential in Australia. In this book Stark explains that domestic and family violence is a pattern of controlling behaviours akin to terrorism and hostage-taking. Drawing on court records, interviews, and FBI statistics, Stark details coercive strategies that men use to deny women their very personhood, from food logs to micromanaging dress, speech, sexual activity, and work. Stark urges us to move beyond the injury model and focus on this form of victimization. Stark reframes abuse as a liberty crime rather than a crime of assault. He explains how the perpetrator is able to control the victim through a variety of techniques which essentially lead to deprivation of liberty (pp 373-374). He identifies that isolation from friends, family, work and help (i.e. doctors and services) is part of domestic and family violence (pp 373-374; 469-471; 474-476; 478-486). See this You Tube video of Evan Stark, discussing the central thesis of his book *Coercive Control: The Entrapment of Women in Personal Life*.

Social abuse - Other Bench Books

NSW

Judicial Commission of NSW, *Sentencing Bench Book* (2022).

[18-715] 'Factors relevant to the seriousness of an offence' considers NSW case law dealing with domestic violence as a factor in assessing the seriousness of kidnapping offences, in particular in relation to "detain for advantage in a domestic context".

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

'There is growing social recognition that a wide range of behaviours may constitute domestic violence. This is reflected in the Domestic and Family Violence Protection Act 2012 (Qld), which now provides that domestic violence includes the following acts… [list of acts from s 8 of the Act]' (pp29-30).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.1 – Emotional or psychological abuse lists additional examples to the Family Violence Protection Act to describe social abuse including: 'systematic isolation from family and friends through techniques such as ongoing rudeness to family and friends to alienate them; instigating and controlling the move to a location where the victim has no established social circle or employment opportunities; and forbidding or physically preventing the victim from going out and meeting people'.

Also see 1.1 – Additional Guidance – Common Risk Assessment Framework which provides more examples of social abuse such as public humiliation and imprison the victim at home.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book notes the definition of domestic violence used by the Department of Child Protection and

Family Support (at [13.2.3]} which includes: "…Social violence is behaviour that limits, controls or interferes with a woman's social activities or relationships with others, such as controlling her movements and denying her access to family and friends. [For example] excessive questioning; monitoring movements and social media communications; preventing the victim from contact with people who share the victim's culture or language; and spreading lies about the victim through their support network as to discredit the victim."

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Social isolation is recognised as a method of domination and control throughout this bench book (e.g. Sections 4.2, 11.1.13). Also see the discussion on the use of social isolation for people in same sex relationships (i.e. threatening to disclose their sexual orientation to their family and friends) in Section 8.8.3.

Social abuse - Other Resources

Evan Stark, 'Evan Stark, Rutgers University, Author, "Coercive Control"' (Video Interview published online, 12 January 2012).

Evan Stark is a professor in the School of Public Affairs and Administration at Rutgers University. He is noted for his expertise in health issues and in legal aspects of domestic violence. His influential book, *Coercive Control: How Men Entrap Women in Personal Life,* 2007, explains why an expanded view of domestic violence that encompasses coercive control is justified. He asserts that coercive and controlling behaviour is a very common and pernicious form of domestic violence. In this lecture he summaries the core ideas of his book.

Social abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Barbara

Ben

Brenda

Carol

Celina

Erin

Faith

Felicity

Julia

Leah

Leyla

Lisa

Rosa

Trisha

Yvonne

Social abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Lusted v MRB **[2013] TASMC 9 (19 February 2013) – Magistrates' Court of Tasmania**

Magistrate RW Pearce at [68]: 'Family violence is to be abhorred. It is a significant social problem, of concern to the community and the justice system. The parliament saw fit to enact legislation, the *Family Violence Act 2004*, expressly to "provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence". The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage of by perpetrators and further adding to the reluctance of victims to complain'.

Bropho v Hall **[2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [16]: 'The fact that the aggravated assault occurred in a domestic setting is a significant aggravating factor of the offence. An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted, the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence. Recognising that common feature, it remains important for a court sentencing an offender for that kind of

offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner' (which was approved by this court in Gillespie v The State of Western Australia [2016] WASCA 216 [48]).

The State of Western Australia v Cheeseman **[2011] WASCA 15 (19 January 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [2]-[3]: 'The sentencing judge said: 'The decision to suspend [the sentence of imprisonment] or not is difficult but you are I think a person in whom I can grant suspension, and primarily because of your acceptance of responsibility in these unique circumstances in which there was a matrimonial breakdown, if you like, that you have reconciled, that your partner wants you back, that there is a child of your union and that you are a person who can get employment readily within the community and thereby if the system can rehabilitate you to assume full responsibility for your family through looking after them financially and by getting back into work, then rehabilitation perhaps outweighs the requirement for you to serve the term (ts 20)'.

'The circumstances to which the sentencing judge referred are neither unique nor mitigatory. The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C'.

Exposing children to domestic and family violence

When domestic and family violence occurs between adults in families with children, those children are exposed to that violence. A significant number of Australian children are exposed to violence perpetrated most often against their mother by their father or their mother's current or former male partner [Richards 2011]. Much higher rates of exposure occur among Aboriginal and Torres Strait Islander communities [Flood & Fergus 2008]. According to the 2016 Australian Bureau of Statistics' Personal Safety Survey, approximately 50% of women 'who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence'. Further, almost 70% of women who had children in their care when they 'experienced violence by a previous partner reported that the children had seen or heard the violence' [ABS PSS 2016]. Children do not however need to see or hear the domestic and family violence to be exposed to it.

Childhood exposure to domestic and family violence [FCFCA 2021] may be direct or indirect, with either form having the potential to cause significant harm [Canada DV BB 2020].

Examples include [Richards 2011]:

- Assault prior to birth
- Attempting to stop the violence or defend a parent
- Being threatened, harmed or abused by the perpetrator in order to control or intimidate the victim, for example: being used as a weapon or hostage; being blamed for the violence
- Being forced to watch or participate in the violence, or spy on a parent.
- Witnessing the violence
- Witnessing a parent's physical injuries
- Being neglected as a consequence of a parent's injuries
- Sleeping during the violence, or overhearing the violence from another room and taking measures to avoid being affected, for example: turning up the volume; sleeping with pillows over the ears; leaving the house and walking the streets
- Witnessing damage and destruction to furniture, toys and other family belongings

- Witnessing harm to family pets, or becoming aware that a pet has been given away, harmed or killed
- Experiencing the aftermath of the violence, for example: having to seek emergency assistance; witnessing a parent being interviewed or arrested by police; attending to a parent's injuries; having to interact with the perpetrator; knowing a parent may be stalked; coping with their own trauma, distress and injuries; assuming the care of family members; missing school; being removed home and community because they are not safe; being isolated from family and friends.
- Being forced into poverty or homelessness as a consequence of the perpetrator's economic abuse
- Growing up in an environment of stress without stability or security, and without appropriate adult role models.

A perpetrator may also use a range of tactics to undermine or destroy the relationship between mother and child [Hooker et al 2016]. Depending on the child's age, the perpetrator may deliberately abuse the victim in front of the child so as to induce fear in the child or a sense that their mother is weak and unable to protect herself. The perpetrator may discredit the victim's mothering skills by accusing her of being a bad mother, or he may coach and recruit the child in the perpetration of the violence, or isolate the victim and children from family, friends and other sources of support and care. Over time these corrosive and manipulative behaviours may increasingly restrict and control all aspects of the everyday lives of victims and their children, including their sense of reality and their capacity to act competently and assertively; and may ultimately impair their physical, emotional and mental health and wellbeing.

Different children in the same family may give dramatically different statements and testimony as a consequence of different experiences, for example one child may be the targeted child, another may be the protected child [Canada DV BB 2020].

It should be noted too that notwithstanding the extent of exposure to domestic and family violence a child may be reluctant to disclose their experiences or feelings for fear of not being believed or making the situation worse, or because they have been groomed or coerced not to disclose [Hart 2004]. The prevalence of exposure may also cause the child to perceive violence as normal and disclosure as unnecessary.

Parents and caregivers who perpetrate domestic and family violence are far more likely than other parents and caregivers to also perpetrate direct forms of child abuse and engage in negative parenting practices. The affected children in their care are also more likely to experience multiple additional adversities such as exposure to other forms of physical, sexual and emotional violence and abuse in the home, at school, and in

the community [Canada DV BB 2020]. A child's exposure to domestic and family violence at any age may result in a range of poor psychological, behavioural and physical outcomes including depression, anxiety, trauma symptoms, increased aggression, antisocial behaviour, temperament and mood problems, impaired cognitive functioning, learning and schooling difficulties, low self-esteem, pervasive fear, peer conflict, loneliness, increased likelihood of alcohol or substance misuse, and vulnerability to unemployment and homelessness. It is also possible that domestic and family violence -exposed children may as adults exhibit attitudes and behaviours that reflect their childhood experiences [Sety 2011].

Exposing children to domestic and family violence may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Exposing children to domestic and family violence - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Approximately 50% of women 'who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence'. Further, almost 70% of women who had children in their care when they 'experienced violence by a previous partner reported that the children had seen or heard the violence'. Approximately 60% of men 'who had children in their care when they experienced violence by a previous partner reported that the children had seen or heard the violence'. See Tables 17-18 for further detail.

Australia's National Research Organisation for Women's Safety, *Research summary: The impacts of domestic and family violence on children* (2nd ed., ANROWS, 2018).

This summary outlines the major issues identified in ANROWS research relevant to children, the factors preventing effective service delivery, and the policy and practice changes recommended by the researchers.

Some key points include (pp 1-2):

- there is a greater likelihood of "impaired parenting" (e.g. parent irritability or inconsistency/low parenting efficacy) in homes with domestic and family violence;
- children are more likely to experience physical and verbal parental conflict after their parents separate;
- a significant number of mothers found that their children had started copying abusive attitudes and behaviours; and
- child protection agencies were less likely to investigate cases reported for domestic and family violence

vs. reports for other matters.

Australia's National Research Organisation for Women's Safety. *Violence against women: Accurate use of key statistics* (ANROWS, 2018).

This short resource includes a summary of information from the 2016 Australian Bureau of Statistics Personal Safety Survey on the numbers of pregnant women and children exposed to family and domestic violence (p 6). It states that an estimated 187,800 women who have experienced violence by a current partner have been pregnant during the relationship (and of these women, nearly one in five experienced violence during pregnancy). For violence perpetrated by previous partners, this percentage increased significantly: nearly half of women who experienced violence by a previous partner and were pregnant at some point in that relationship experienced violence during their pregnancy. Additionally, 65 percent of women who had children in their care when they experienced violence by a current or former partner reported that the children had seen or heard the violence (p 8).

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This literature review cites statistics from a US study collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as a pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Flood, Michael, and Lara Fergus, *An Assault on Our Future: The Impact of Violence on Young People and Their Relationships* (Report, The White Ribbon Foundation, 2008).

Drawing on statistics from the National Crime Prevention Survey (2001) this paper reports that Aboriginal and Torres Strait Islander young people were significantly more likely to have witnessed physical domestic violence against their mother or step-mother than other young people (42%, compared to 23% for all respondents) (p11).

Hart, Amanda, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *Australian Journal of Family Law* 170.

This article points out that children may find it difficult to disclose violence because of a fear of not being believed and the possibility of making the situation worse. The article notes that children need to be included in determinations of what is in their best interests (p174).

Hooker, Leesa, Rae Kaspiew, and Angela Taft, *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper* (ANROWS, 2016).

This comprehensive state of knowledge paper is the first of a three part mixed-methods research project addressing parenting and abuse tactics. This paper presents the current state of knowledge on parenting in the context of DFV by examining the following four research questions:

- What is the prevalence of DFV among parents?
- How does DFV impact on parenting capacity?
- What are the methods and behaviours that perpetrators use to disrupt the mother---child relationship?
- What interventions exist to strengthen and support a positive and healthy mother--child relationship?

This review identifies that DFV may impact negatively on women and children and the parenting capacity of both perpetrators and victims is affected. Altered mother--child relationships may occur due to deliberate undermining of the mother's parenting, and children are often used by perpetrators as tools to abuse mothers and exert control and coercion (p 2).

The report points out that violence does not end when couples separate. It specifically identifies the legal system as a tool of abuse used by perpetrators, and that poor understanding by legal professionals can heighten the risks for women and children (p 2).

Although there is limited information on the parenting style of abusive fathers, abusive men as fathers have been characterised by researchers and victims as authoritarian, under-involved, self-centred and manipulative. These men also engage in high levels of substance abuse. Children exposed to partner violence in the home by their father/stepfather are at heightened risk of child maltreatment including child sexual abuse (p 2).

The report suggests that supportive care includes improved understanding and collaboration between child protection, family law, and domestic violence advocacy services (p 2).

The report also identified issues with forced contact through court:

- Shared parenting can leave mothers and children exposed to continuing abuse (p 26).
- Post-separation matters, including negotiation of property, parenting and child support can be used by abusive ex-partners to maintain power and control (p 27).
- Women feel pressured by lawyers to agree to co-parenting arrangements even though children's safety may be at risk, or make decisions in an environment of fear, pragmatic concern, and family ideology (e.g. perpetrators playing on guilt about "breaking up" the family) (p 28).
- Awareness amongst court staff in screening for family violence and safety concerns still remains problematic, despite legal and policy reform (p 28).

Humphreys, Cathy and Lucy Healey, *PAThways and Research Into Collaborative Inter-Agency practice: Collaborative work across the child protection and specialist domestic and family violence interface: Final report* (ANROWS, 2017).

PAThways and Research In Collaborative Inter-Agency practice (the PATRICIA Project) is an action research project focused on the collaborative relationship between specialist community-based domestic and family violence support services for women and their children, and statutory child protection organisations.

The study found that even when domestic and family violence was the focus of an initial child protection

report, it was poorly addressed—for example, no link being made between an abusive father's patterns of behaviour and the barriers they caused to the healthy, daily functioning of the family (p 12). The study also found that collaborations between child protection and domestic and family violence services showed a lack of engagement with the family law system. Evidence of the impact of abuse on children was rarely adequately recorded in child protection files, and family law issues were rarely addressed in ways that would enable the protection of children from ongoing contact with an abusive father (p 14).

Kaspiew, Rae, et al., *Domestic and family violence and parenting: Mixed method insights into impact and support needs – Final report* (ANROWS, 2017).

This report focused on:

- inter-parental conflict (IPC) in families and impacts on the emotional health and parenting behaviours of mothers and fathers and child functioning;
- how domestic and family violence (DFV) experienced before separation, after separation, or both affects parents' emotional health and parent–child relationships; and
- mothers' experiences of engagement with services in the domestic and family violence, child protection, and family law systems in the context of DFV.

Overall, it found that any exposure to IPC or DFV is associated with poorer wellbeing outcomes for mothers and children in both intact and separated families (compared with families where such exposure does not occur). Sustained exposure to IPC and DFV is particularly damaging (p 13). The impacts of DFV on mothering and mother–child relationships are multiple and often continue post-separation (p 10).

The findings also show that for a significant proportion of families, exposure to IPC and DFV is sustained after separation, and it escalates for some (p 12).

The results point to the importance of early reduction in family conflict, and the need for approaches post-separation that prioritise the reduction of exposure to IPC and DFV. This includes the need for approaches to help women and children repair relationships that have been damaged as a result of DFV (p 14).

Kaspiew, Rae, et al., *Domestic and family violence and parenting: Mixed method insights into impact and support needs – Key findings and future directions* (ANROWS, 2017).

In interviews with 50 women across Australia with experience of family violence, the study found that controlling and coercive behaviours were the most common tactic of abuse used by abusive fathers, which included setting rigid routines and/or having unreasonable expectations about children's behaviour. Out of the 50 women interviewed, 45 described direct abuse toward their children, including psychological, emotional, physical, and sexual abuse, as well as witnessing abuse or being a direct victim of incidents that targeted the mother at the same time (p 3).

The report identified negative fathering behaviours occurring before and after separation, in addition to behaviour that was directly abusive to children. This includes (p 5):

- inattentive and inconsistent fathering;
- manipulative behaviours that had the effect of undermining relationships between mothers and children (often through the use of material resources);
- the exertion of controlling tactics in relation to mothers and children; and
- the manifestation of behaviours and negative attitudes to women in general and the mothers in particular, including abusive and denigrating attitudes that were adopted by some of the children (also, e.g. playing the "good" parent").

The study found that courts give limited capacity to women to challenge the ongoing parenting role of the abusive parent due to priority placed on "meaningful relationships" and women's concerns that they may be seen as an "alienating" parent (p 5).

The findings from the longitudinal quantitative analysis in the study showed that children who live with such violence are more likely to have a range of health, development and social problems (p 4).

Meyer, S, Reeves, E, Fitz-Gibbon, K. The intergenerational transmission of family violence: Mothers' perceptions of children's experiences and use of violence in the home. *Child & Family Social Work*. 2021; 1– 9.

Abstract: Intimate partner violence (IPV) on average affects one in four women, with the majority of victim survivors identifying as mothers in national survey data. Children experiencing parental IPV are now equally understood as victims. Extensive research documents the short- and long-term impacts of children's experiences of IPV on their safety and wellbeing. More recently, research has started to examine adolescent

children's use of violence in the home as adolescent family violence (AFV). Contributing to this emerging body of research, we draw on narrative interview data from mothers who participated in a larger study on IPV, help-seeking and the perceived impact on children to better understand how mothers make sense of children's use of violence in the home. Mothers identified an emergence of AFV in male children with childhood experiences of adult IPV. Although mothers' experiences of adult and adolescent violence highlight their dual victimisation, mothers frame their abusive children as victims rather than perpetrators. Implications for future research, policy and trauma-informed practice are discussed.

Powell, Anastasia and Suellen Murray, 'Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand' (2008) 17(4) *Social and Legal Studies* 453.

This article discusses the relationship between domestic violence responses, child protection responses and family law responses, where a child witnesses or experiences domestic violence. It identifies that (p467):

'Where domestic violence responses, child protection responses and family law responses collide, a mother may simultaneously be constructed as being responsible for protecting her children from the influence of an ex-partner's violence, in need of support and protection herself, and responsible for facilitating the other parent's contact with children.'

'Similarly, children may be simultaneously constructed as primary 'victims' in need of protection from exposure to parental violence, as secondary victims who can be protected from exposure to a father's violence by supporting/protecting the mother, or as 'witnesses' of parental conflict who will benefit most from equal contact with both parents. Domestic violence itself is understood differently throughout these contested discourses…'

Richards, Kelly, 'Children's Exposure to Domestic Violence in Australia' (2011) 419 *Trends and Issues in Crime and Criminal Justice* 1.

This paper presents a helpful overview of relevant literature. It identifies that children who live in homes characterised by violence between parents, or directed at one parent by another, have been called the 'silent', 'forgotten', 'unintended', 'invisible' and/or 'secondary' victims of domestic violence.

It summarises the research that demonstrates that witnessing domestic and family violence can involve a

broad range of incidents, including the child:

- hearing the violence;
- being used as a physical weapon;
- being forced to watch or participate in assaults;
- being forced to spy on a parent;
- being informed that they are to blame for the violence because of their behaviour;
- being used as a hostage;
- defending a parent against the violence; and/or
- intervening to stop the violence.

It summarises research on the impact of domestic and family violence on children in the aftermath of violence including:

- having to telephone for emergency assistance;
- seeing a parent's injuries after the violence and having to assist in 'patching up' a parent;
- having their own injuries and/or trauma to cope with;
- dealing with a parent who alternates between violence and a caring role;
- seeing the parents being arrested; and
- having to leave home with a parent and/or dislocation from family, friends and school.

Sety, Megan, 'The Impact of Domestic Violence on Children: A Literature Review' (Report, Australian Domestic and Family Violence Clearinghouse, 1 August 2011).

This review identifies that:

- Children experience serious emotional, psychological, social, behavioural and developmental consequences as a result of experiencing violence.
- Infants and young children are especially at risk.
- Perpetrators often attack or undermine the mother-child relationship and use children in committing violence, such as threats to harm the children.

- Children continue to be at risk from the effects of violence during and after parents' separation.
- Children experience significant risks in shared parenting arrangements when the arrangement involves substantial shared time with the violent parent.
- The evidence shows that false allegations of domestic violence and child abuse are rare. There is, however, evidence to suggest that perpetrators often deny or minimise their use of violence.

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Tomison, Adam M, 'Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence' (National Child Protection Clearinghouse Issues Paper No 13, Australian Institute of Family Studies, June 2000).

This article reviews the research about the relationship between domestic violence and various forms of child maltreatment. In particular it points to the high proportion of cases of emotional abuse of children identified by child protection workers in families where there is domestic and family violence and to the mild association between presence of domestic violence and a higher than expected proportion of children sustaining injuries. Pages 8-9 of this article discusses the variety of ways a child may be exposed to domestic violence, including as a hostage to ensure the mother's return home and forcing a child to watch assaults.

Wolbers, H, Boxall, H., and Morgan A. (2023) Exposure to intimate partner violence and the physical and emotional abuse of children: Results from a national survey of female carers. Research Report 26, Australian Institute of Criminology.

Abstract: Drawing on a large sample of female carers living in Australia (n=3,775), this study aims to document and explore children and young people's experiences of abuse in the past 12 months. We focus on children's exposure to intimate partner violence (IPV) perpetrated against their female carers, as well as children being the target of direct physical and emotional abuse themselves.

Overall, a significant proportion of respondents who had a child in their care during the past 12 months said that a child was exposed to IPV perpetrated against them (14.1%). One in nine said a child in their care had been the target of direct abuse perpetrated by their current or most recent former partner (11.5%). Critically, one-third of respondents who experienced IPV said a child was exposed to the violence at least once in the past 12 months (34.8%).

A number of factors were associated with an increased likelihood of children being subjected to direct abuse. These included the characteristics of respondents and their relationships, children and households. We also present evidence linking economic factors, including changes in employment, with the direct abuse of children.

International

Edleson, Jeffrey L, 'Children's Witnessing of Adult Domestic Violence' (1999) 14(8) *Journal of Interpersonal Violence* 839.

In this foundational article, the author reviews 31 research articles published since 1989. As a result of the review, the author attempts to 'expand common definitions of how children witness adult domestic violence by showing how children not only see violence but also hear it occurring, are used as part of it, and experience its aftermath' (p16). A variety of behavioural, emotional, and cognitive-functioning problems among children were found to be associated with exposure to domestic violence. The author identifies factors that appear to moderate the impact of witnessing violence (eg whether the child was also abused, child gender and age and time since last exposure to violence).

Holt, Amanda, 'Adolescent-to-Parent Abuse as a Form of "Domestic Violence": A Conceptual Review' (2016) 17(5) *Trauma, Violence, & Abuse* 490-499.

This article discusses adolescent-to-parent abuse (APA), varied forms of abusive behaviour perpetrated by a child toward a parent (p 490). Mothers are more likely to be victims of APA than fathers (p 490), and correlations have been identified between APA and abusive behaviours within a young person's dating relationships (p 491). As a distinct form of abuse, it is not necessarily appropriate to approach APA within a traditional domestic violence framework (p 496). Responding to APA raises issues separate from youth crime and domestic and family violence more broadly:

- Parental responsibility orders are inappropriate in cases where the burdened parent is a victim of the perpetrator's APA, as such orders may cause revictimisation (p 492).
- Attitudes that place responsibility or blame on the victim parent must be avoided, as they may lead to victim blaming in cases of APA (p 493).
- The gendered focus on these issues should be reduced in APA cases, in order to properly engage with the child-parent abuse dynamic (p 495).

Jane E M Callaghan et al, 'Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse' (2015) *Journal of Interpersonal Violence* (online).

This article investigates children's experiences with domestic and family violence (DFV), through interviews with 21 children who have been victims of DFV (p 7). The results indicate that children are aware of patterns of coercive control, and the impacts of such abuse (pp 10-3). Such experiences result in an increased sense of constraint, which children may develop specific strategies to cope with (pp 14-6).

Significantly, the article raises children's direct agency in coping with, and responding to, DFV, highlighting the inaccuracy of treating children as merely passive witnesses (pp 17-20). Accordingly, the authors recommend that professional responses to DFV better recognise children's agency, moving beyond perceptions of them as passive witnesses, and tailor strategies for children as direct victims (pp 22, 23-4).

Jofre-Bonet, Mireia, Melcior Rossello-Roig, Victoria Serra-Sastre, *The Blow of Domestic Violence on Children's Health Outcomes* (City University London, London School of Economics, 2016).

This study examines the effect of domestic violence on children's health outcomes. Drawing results from the UK Millennium Cohort Study, the authors found that 'there was a strong negative externality of household violence on children's health outcomes'. Children living in a household where there was domestic violence appeared to be between 55% and 61% less likely to have their health rated as Excellent'. This paper 'not only sheds light on the negative impact of domestic violence on children's health but provides a robust quantification of this effect'.

Simon Lapierre et al., 'Difficult but Close Relationships: Children's Perspectives on Relationships With Their Mothers in the Context of Domestic Violence' (2018) 24(9) *Violence Against Women* 1023-1038.

Despite a recent focus in the literature on mother-child relationships, there is a limited understanding of children's perspectives on their relationships with their mothers. This article reports the findings from a participative and qualitative study involving Canadian children who experienced domestic violence, and focuses on their perspectives on their relationships with their mothers under those circumstances. 46 individual interviews were conducted with children to gather their experiences. Results showed that women's

and children's victimisations are inextricably linked. Notwithstanding the negative effects of domestic violence on mother-child relationships, the participants' mothers played a significant role in their children's lives and had close relationships with them. Communication was also found to be an important element in mother-child relationships. However, several participants stated that the communication with their mothers was limited whilst they lived with the domestic violence perpetrator. As the participants experienced domestic violence alongside their mothers, the results also revealed a dynamic of mutual protectiveness. Overall, the findings emphasised the need for policies and practices that support mother-child relationships in the context of domestic violence, as well as programs that support mother-child relationships or facilitate mother-child communication.

Exposing children to domestic and family violence - Other Bench Books

NSW

Judicial Commission of NSW, *Equality before the Law: Bench Book* (2022).

Chapter 6 ‘Children and young people’ provides detailed information about children giving evidence and their compellability. This discussion includes information about communication issues such as level and style of language.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 14.10 discusses the special provisions for the protection of children, including in relation to giving evidence, where a child is a protected witness, and cross-examination.

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

In the context of examining the reasons for the differential treatment of children in the criminal justice system, at pp.151-153, the bench book looks at the issue of child development and immaturity. It notes: ‘It is well recognised today that childhood and adolescence are key developmental phases, and that early experiences can affect that development. Parenting, including parental absence, plays a fundamental role in how children come to perceive themselves, as well as the world around them and how they interact with it. This includes matters such as the understanding of right and wrong, impulse control, and the taking of responsibility for one’s actions’. The bench book provides a discussion of the science regarding children’s development before stating, ‘where children are neglected or abused (particularly if severely or for prolonged periods), they are likely to progress into in a chronic state of fear and to respond accordingly. Such hyper arousal is to the detriment of other functions and also tends to mean these children struggle to comprehend any later attempts at nurturing and kindness’.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

1.1 - Causing a child to hear, witness or be exposed to family violence discusses this behaviour, including a short list of examples, and noting evidence is 'increasingly revealing the devastating impacts that domestic violence can have on children, both as the primary victim of the violence and also witnessing violence, or the effects of violence, between parents'.

Also see, 5.3 – Children, generally, and especially 5.3.2 – Children's experiences of family violence and 5.3.5 – Impacts of family violence on children. This section of the Bench Book includes a specific section on 5.3.4 – Indigenous children.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 5 provides detailed information about children giving evidence and their compellability in various proceedings including Family Law proceedings and restraining order proceedings [5.3]. It includes information about communication issues including level and style of language [5.2.4].

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

The bench book has an entire chapter devoted to children's exposure to domestic violence: Chapter 6: Children: Impact of Domestic Violence & Evidence of Children'. Most relevant are Sections 6.2.3: The extent of exposure, 6.2.4: What constitutes exposure?, and myths about children in Sections 6.2.5 and 6.2.6. The bench book highlights that children are often overlooked in domestic violence proceedings (Section 6.2), and goes on to discuss the different types of harm experienced by children of different ages and how to respond to evidence from them (Section 6.3). Approaches for '[d]esigning agreements and orders to limit child harm' are also considered (Section 6.4), and implementing appropriate court procedures in relation to children testifying are also considered.

Also see Supplementary Reference 2: Children and Domestic Violence, which discusses the varying levels of exposure of children witnessing domestic violence, and complexities of domestic violence and child abuse.

Exposing children to domestic and family violence - Other Resources

Echo Parenting & Education, *The Impact of Trauma* (2017).

This fact sheet explains the lasting impacts of childhood trauma on victims. Examples of impacts include loss of safety, loss of trust and re-enactment of the trauma.

Federal Circuit and Family Court of Australia, The impact of family violence on children (2021).

This fact sheet provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

Exposing children to domestic and family violence - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Erin

Gillian

Leah

Susan

Exposing children to domestic and family violence - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Laa v The Queen **[2020] VSCA 136 (28 May 2020) – Victorian Court of Appeal**

[52] 'The courts have made it clear that acts of violence in a domestic setting, and in particular by men towards women, are utterly abhorrent and unacceptable. In this case, the infliction by the applicant of the assaults on Ms M, in the presence of their frightened young children, was a serious aggravating factor to the offending. It was a serious breach of his duty as a parent towards his own children. In assaulting their mother before their eyes, he set an appalling example to each of them, and in particular to his son.'

Boden & Boden **[2018] FCCA 82 (25 January 2018) – Federal Circuit Court of Australia**

Judge Willis remarked at [247]:

> I have the impression that the mother has significant insight into her own behaviour and that of all of the children. She is acutely aware and has the skills to deal with Z and Y cutting themselves, of them suffering depression and anxiety and having self-esteem issues. Some of these issues will, no doubt, be directly related to their exposure to family violence. Day in day out, experts in this Court talk about the effect of family violence in children and their inability to sustain relationships, become depressed and blame themselves for breakdowns. All of these things have happened for Y and Z.

R v Bell **[2005] ACTSC 123 (1 December 2005) – Australian Capital Territory Supreme Court**

Higgins CJ at [30]: Domestic violence, 'is a pernicious and evil phenomenon not only because of the immediate trauma to the victim. Its evil influence spreads to children as well. It is no coincidence that, in my experience, young offenders, more often than not, present with a family history of domestic violence. It used to be regarded as a family matter, to be kept private. Victims would be made to feel humiliated, and ashamed to complain; in truth it is entirely the criminal conduct of the perpetrator which is at fault. It is entirely in the

public interest that such conduct be exposed and deterred'.

Pasa v Bell **[2014] ACTSC 303 (30 October 2014) – Australian Capital Territory Supreme Court**

Murrell CJ at [16]: 'When considering the sentencing purposes set out in s 7 of the Sentencing Act, including general and personal deterrence, a sentencing court is entitled to consider the fact that an offence involved domestic violence, and that the violence has occurred at the victim's home. An offence involving domestic violence is one that involves abuse of a partner, former partner or other family member (using the term "family" in the broadest sense). Frequently, such offences occur in the home, where the inhibitions of an offender may be lowered, the impact on the victim may be heightened (as she or he is made to feel that a formerly safe place has been violated) and the occurrence of the offence is more readily concealed. Further, where a domestic violence offence occurs in the victim's home, it is often associated with secondary abuse to other family members'.

R v Eckermann **[2013] NSWCCA 188 (15 August 2013) – New South Wales Court of Criminal Appeal**

Price J at [54]: 'When women (and men) enter into a new domestic relationship, they are entitled to do so without the threat of violence from a former partner. This is particularly so when there are children of the prior relationship as acts of violence towards a parent particularly when committed in the children's presence have the potential to impact severely upon their well-being and future development'.

Allen v Kerr **[2009] TASSC 10 (25 February 2009) – Supreme Court of Tasmania**

Porter J at [13]: '*Violence witnessed by children in the domestic environment not only is distressing (usually the victim is a parent or someone in the place of a parent), but it also serves to desensitise impressionable minds to violence, and to encourage the notion that resort to violence is acceptable*'.

Mayne v Tasmania **[2017] TASSC 38 (29 June 2017) – Supreme Court of Tasmania**

Wood J said at [43]:

> … it is important that deterrent sentences be imposed not merely for crimes that cause grave physical or psychological harm to victims. There is a need to counter the perception that somehow violence of this kind in the home is less serious than the same kind of violence inflicted on a stranger in a public place. Also, acts of violence committed in a family or domestic context causing fear and distress to victims can have debilitating effects upon their well-being or the well-being of a family member witnessing such violence. It is not only violence resulting in visible injury that must be seen as unacceptable, and these victims, as vulnerable members of our society who have experienced fear and trauma, are entitled to the court's protection.

Bropho v Hall **[2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [18]-[19]: ‘ *A person exposed to domestic violence in his early life goes on as an adult to perpetrate the violence to which he was exposed as a child, damaging members of his community in the same way he was damaged as a child. For that reason, the fact that the appellant's offence was committed in the presence of children was a significant aggravating factor. The courts are not in a position to solve all of the social problems which contribute to this cycle of violence. However, sentences imposed by courts should contribute, so far as they can within the constraints of the sentencing process, to attempts to break the cycle by giving proper weight to the need for community protection in the sentences which they impose’.*

Damaging property

A perpetrator of domestic and family violence may engage in a range of behaviours so as to exert control over or induce fear in the victim. Damaging property may intersect with other behaviours such as emotional or psychological abuse [Mouzos et al 2004], economic abuse [Sanders 2015], physical violence or harm, and sexual or reproductive abuse to produce a complex pattern of violence, the seriousness of which may intensify as the behaviours combine and escalate [Canada DV BB 2020]. For example, victims experience significantly higher levels of physical violence where the perpetrator has also damaged property [Mouzos et al 2004].

Instances reported in Australian research demonstrate the various ways perpetrators seek to control, intimidate, threaten, injure, demean or isolate victims by interfering with property, which may in some cases include abuse of pets and assistance animals. They may steal, damage or destroy personal property that is shared between the victim and perpetrator, owned by or in the possession of the victim, or otherwise used or enjoyed by the victim or the victim's children or other family members. For example, the perpetrator may steal the victim's ATM or bank account access card and empty the victim's account of funds to prevent the victim from leaving the abusive relationship. The perpetrator may cut the telephone cord while the victim attempts to call police; or vandalise or wreck household furnishings or personal effects (including mobile phones and other digital devices) and clothing that the victim has paid for or are sentimental to the victim. The perpetrator may steal, or immobilise or tamper with the victim's car, or use the car as a weapon, for example to run the victim over so as to injure them or hinder their escape. The perpetrator may also attack the victim's home by breaking windows, chopping holes in the roof, or driving a vehicle into a wall [Klein et al 1992-1993].

Damaging property may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Damaging property - Key Literature

Australia

Karystianis, G., Adily, A., Schofield, P.W., et. al., 'Automated Analysis of Domestic Violence Police Reports to Explore Abuse Types and Victim Injuries: Text Mining Study' (2019) 21(3) *Journal of Medical Internet Research.*

The recording of domestic violence-related events by police is an area that requires further investigation. The study aimed to determine if an automated text mining method could identify abuse types and injuries sustained by domestic violence victims. Using data mining to evaluate 492,393 Australian domestic violence police reports, more than one-third noted victim injuries. The most common abuse type was emotional/verbal at 33.46%, followed by punching at 24.58%, and property damage at 22.27%. Bruising was the most common form of injury (29.03%), followed by cut/abrasion (28.93%), and red marks/signs (23.71%). The findings show that text mining can automatically extract information from police-recorded domestic violence events. These findings can be used to support further public health research the purpose of which is to assess the profiling of persons of interest involved in domestic violence events, and to change existing intervention policies for abuse victims.

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and sexual violence. In this paper the authors describe damage and destruction of property as a form of emotional abuse. The authors find that women whose current partners damaged or destroyed property or possessions, reported levels of physical violence almost eight times higher during the previous 12 months than the average for current intimate partner violence in general (23% versus 3%) (p48).

International

Follingstad, Diane R, et al, 'The Role of Emotional Abuse in Physically Abusive Relationships' (1990) 5(2) *Journal of Family Violence* 107.

This study reports on a qualitative study in which 234 women were interviewed to assess the relationship of emotional abuse to physical abuse. Six major types of emotional abuse were identified. One of the types of emotional abuse identified was damage or destruction of the personal property of the victim. The article provides examples of this form of abuse, including the abuser selecting a favourite personal object belonging to the victim and destroying it or cutting up clothes or tearing up favourite pictures in front of the victim (p109).

Klein, Catherine F, and Leslye E Orloff, 'Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law' (1992-1993) 21 *Hofstra Law Review* 801.

This comprehensive article overviews American statutes and case law in relation to domestic violence civil protection orders. While the law is not relevant here, there is a useful discussion of property damage as a form of domestic and family violence (at p872-874) explaining that perpetrators often damage the victim's property in order to 'terrorise, threaten and exert control' over the victim. This article reports on a number of cases where protection orders were issued in circumstances where perpetrators have: destroyed furniture; broken windows and skylights; chopped holes in the roof with an axe; driven a truck through a garage wall; damaged the victim's car; destroyed household property; destroyed pets (a form of property) and destroyed items of sentimental value to the victim.

Pollet, Susan, 'Economic Abuse: The Unseen Side of Domestic Violence' (2011) 83(2) *New York State Bar Association Journal* 40.

The article focuses on economic abuse as a form of domestic violence perpetrated against women, commonly, by their intimate partners or ex-partners. The article describes damaging, or destroying property as a form of economic abuse in those cases where it has implications for the victim's autonomy.

Sanders, Cynthia K, 'Economic Abuse in the Lives of Women Abused by an Intimate Partner: A Qualitative Study' (2015) 21(1) *Violence Against Women* 3.

This article presents research from a qualitative study involving 30 interviewees. The study examined the role of financial issues and economic factors in the lives of women who have experienced domestic and family violence. 'Stealing and Destruction of Property' is considered at p20-21 as a form of abuse. Interviewees gave examples including the destruction of a motor vehicle which was the victim's form of transport and destruction of furniture and children's toys. Victims also spoke of having to hide property including documents to ensure they were kept safe.

Damaging property - Other Bench Books

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

'There is growing social recognition that a wide range of behaviours may constitute domestic violence. This is reflected in the Domestic and Family Violence Protection Act 2012 (Qld), which now provides that domestic violence includes the following acts…damaging a person's property or threatening to do so' (s 8) (pp29-30).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.1 – Emotional or psychological abuse: this section lists destroying property as a form of psychological abuse.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book notes the definition of domestic violence used by the Department of Child Protection and Family Support (at [13.2.3]) which includes: "…Physical violence is any actual or threatened attack on another person's physical safety and bodily integrity. In addition to threatened or actual harm to people, it includes harming or threatening to harm pets or possessions."

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

This bench book recognises property damage as a behaviour of domestic violence throughout the book (e.g. Section 4.2). It notes that damaging property may occur as an interconnected form of abuse with other behaviours: '[e]motional abuse … financial abuse and physical/sexual violence are interconnected phenomena. A pattern of emotional or financial abuse, associated with intimidation, domination and control, often escalates into physical or sexual violence' (Section 9.3.1.2).

In considering responses to domestic violence, the bench book specifically discusses orders relating to personal property, explaining that: ‘[a]ttention to details such as immediate possession of specific items of personal property may be insignificant in terms of absolute value yet can make an enormous difference to family members with limited resources who are attempting to leave violent relationships. Attention to such details can make the difference between putting an end to intimidation, harassment and abuse, and allowing it to continue’ (Section 9.3.5). For instance, orders should consider including provisions to prevent damage to: vehicles; identity papers, visas, passports and immigration documents; diaries; aids for disability (e.g. wheelchairs); and children’s toys, clothing and pets (Section 9.3.5.2).

Damaging property - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Ben

Carol

Celina

Faith

Felicity

Fiona

Francis

Gillian

Ingrid

Jane

Jennifer

Julia

Lisa

Melissa

Mira

Rosa

Sara

Trisha

Yvonne

Damaging property - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Laa v The Queen **[2020] VSCA 136 (28 May 2020) – Victorian Court of Appeal**

[50] *'… confrontational aggravated burglaries, in the setting of an underlying domestic dispute, are all too prevalent in our society. They are calculated to cause lasting and serious physical and emotional harm to the victim. By their nature, such offences have the potential to escalate into incidents that result in serious harm and, on occasion, human tragedy. For that reason, general deterrence is a sentencing purpose of particular significance in such cases. It is important that the courts, by sentences imposed in such cases, make it clear that those persons who contemplate indulging in such a form of conduct will, upon apprehension, lose their right to be at liberty in society for a substantial period of time.'*

[51] *'In addition, it is important, in cases such as this, that the courts express their condemnation of the kind of conduct engaged in by the applicant. Ms M was entitled to feel safe and secure in her own home. The offending in this case constituted a serious violation by the applicant of that fundamental right.'*

BJH v CJH **[2016] QDC 27 (26 February 2016) – District Court of Queensland**

Rackermann DCJ at [11]: 'The action of the appellant in seizing the aggrieved's mobile telephone was behaviour which, in the circumstances, was coercive - being designed to compel the aggrieved to do something which she did not wish to do (ie come downstairs to discuss matters of concern to the appellant). Further, the appellant responded to the aggrieved's attempt to get her telephone back by, amongst other things, throwing the phone onto the floor thereby damaging it. That the phone was discarded in a throwing motion had support in the evidence'.

Groenewege v Tasmania **[2013] TASCCA 7 (26 July 2013) – Court of Criminal Appeal of Tasmania**

Porter J at [52]-[53]: 'The appellant intentionally set fire to the house and intentionally caused its entire destruction. His motive for doing so was to exact some sort of vengeance on his estranged wife intending to destroy his wife's interest in the building and its availability as a home. He told police that he set the fire "because if I couldn't have it, no one could". He also caused the destruction of the home of his four young children, one of whom suffers from a significant disability. He caused the total destruction of the belongings of the whole of his family'.

'This was obsessive and possessive conduct, involving some violence, committed in the aftermath of a broken relationship. It is the type of conduct which simply cannot be tolerated. Ms Hartnett submitted that the arson crime could be also regarded as a crime of family violence, in addition to the crime of assault. As such the course of conduct involved a breach of trust: Parker v R 57/1994 (AustLII [1994] TASSC 94) per Underwood J at 11. It is unnecessary to decide whether the label of family violence can be correctly applied to the crime of arson in these circumstances. The notions underlying the concept of a breach of trust are effectively the same. To intentionally deprive a spouse of his or her home in such a way amounts to very hurtful subjugation, and exploits a position of vulnerability'.

DPP v Meyers **[2014] VSCA 314 (4 December 2014) – Victorian Court of Appeal**

The Court at [45] and [46]: 'We would wish to endorse the remarks in Filiz about the particular seriousness of offending involving former domestic partners. Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking. Although the cases under consideration do not fall into that worst category, they are symptomatic of what can fairly be described as an epidemic of domestic violence'.

'General deterrence is, accordingly, a sentencing principle of great importance in cases such as these. Those who might, in a mood of anger or frustration or bitterness, contemplate this kind of violent entry into the home of a former spouse or partner must realise that, if they do so, they will almost certainly spend a long time in prison'.

The State of Western Australia v Bennett **[2009] WASCA 93 (26 May 2009) – Supreme Court of Western Australia (Court of Appeal)**

Miller JA at [50]: ‘It cannot be doubted that the offence of arson committed in this instance was serious enough to bring it within the category of 'very serious cases of arson' in which a range of sentences of 4 to 7 years' imprisonment, in 'pre-transitional' terms, has been identified. This is so because the respondent's offending was apparently motivated by revenge, it caused the destruction of a residential building, and it was against the background of a violent domestic relationship’.

Rimington v The State of Western Australia **[2015] WASCA 102 (29 May 2015) – Supreme Court of Western Australia (Court of Appeal)**

Beech J at [69]: ‘The sentencing judge correctly identified a number of features of the appellant's offending that made it a very serious example of the offence of arson: (1) the appellant lit three fires over a period of approximately 1 hour; (2) the offences involved a degree of preparation; (3) the offences were founded on the appellant's anger towards his ex-wife. His intention was to destroy the properties that he set on fire in order to defeat his ex-wife's claim to those properties; (4) the appellant acted with 'grim determination'; (5) the offences endangered the lives and safety of a number of people; (6) the fires the subject of counts 3 and 4 were lit at homes in residential areas and caused fear and distress to people living nearby; (7) the fires caused very extensive damage totalling approximately $1.5 million; (8) at both the Honeyeater Loop and Piggot Way properties, the appellant sought to deflect the concerns of a neighbour who saw the appellant preparing to light a fire; (9) as the victim impact statement reveals, the appellant's offences have had devastating and enduring effects on his former wife and on their children’.

Animal abuse

Victims of domestic and family violence may rely on family pets for emotional support while trying to cope with the abusive relationship. A perpetrator may exploit this emotional bond by using overt threats and actual harm to pets in order to further control or intimidate the victim [Roguski 2012]. This behaviour has also been described as a form of emotional abuse [Faver & Strand 2007]. Children may be exposed to animal abuse in the context of domestic and family violence [Ascione et al 2007]. It is recognised that perpetrators may initiate or continue animal abuse post separation; and that threats of abuse to animals may contribute to some victims delaying leaving or returning to the abusive relationship due to concerns for the welfare of family pets, thus increasing the victim's exposure to the possibility of further violence [Ascione et al 2007]. Abuse or threats of abuse have particular implications if the victim has a disability or mental illness and the animal is a service or assistance animal such as a guide dog [Harpur & Douglas 2015].

Some examples of animal abuse include: being skinned alive; beaten against a tree with a crowbar; punched, beaten, or kicked; shot; fed gunpowder; hung; thrown across the room; or subjected to acts of bestiality. Animals may also suffer in other ways, for example, exposing themselves to physical harm by attempting to protect their guardians during an abusive episode, and suffering severe anxiety and distress at witnessing the abuse of their guardian.

Perpetrators who abuse animals are more likely to have committed violent crimes and property and drug-related offences. Perpetrators may sometimes use animals as weapons against victims; and threats of harm to animals may be used to coerce victims to commit illegal acts [Ascione et al 2007], for example there are reported instances of the victim being forced by the perpetrator to watch animal-related pornography or to engage in sexual activities with animals. Victims in these circumstances may feel a great sense of desperation and anguish at having to violate their own value systems [Faver & Strand 2007].

Some victims in the process of leaving an abusive relationship may be unable to make alternative safe arrangements for the care of their pets, for example due to lack of funds or lack of suitable shelter accommodation for animals or for people with animals. In some cases, victims may give away or abandon their pets with the possible consequence of heightening the trauma experienced due to the domestic and family violence. In other cases, the victim may feel they have no choice but to leave the pets in the

perpetrator's care, which may result in the perpetrator neglecting, threatening to or actually harming or killing the pets, or otherwise using them to continue to exercise control over the victim, including using the ongoing threats or potential for harm as a means of coercing the victim to return to the abusive relationship to protect the pets [Faver & Strand 2007].

Animal abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control. While animal abuse may also be understood as a form of damage to property many argue this approach denies the sentience of animals [Taylor & Fraser 2019].

Animal abuse - Key Literature

Australia

Harpur, Paul, and Heather Douglas, 'Disability and Domestic Violence: Protecting Survivors' Human Rights' (2015) 23 (3) *Griffith Law Review* 405.

This paper reviews the literature in relation to domestic violence, the legal system and disability. It considers how disability domestic violence may be manifested eg pp 408-411 identifies that those victims who require support from their partners for daily tasks can be especially vulnerable to abuse (e.g. leaving a person who requires assistance off the toilet on the toilet for hours). Victims who rely on mobility aids, medication or medical technologies are especially vulnerable to partners who restrict access. It notes that people with disabilities have significantly different relationships with their pets when pets are service animals (e.g. guide dogs for blind and deaf people) – perpetrators who threaten or harm pets can have an extremely disabling impact upon a survivor with a disability; threatening to injure or immobilise a service animal is particularly distressing for a person who relies on that animal for their independence.

Kotzmann, J., Bagaric, M Wolf, G. & Stonebridge, M. Addressing the impact of animal abuse: The need for legal recognition of abused pets as sentient victims of domestic violence in Australia. (2022) 45(1) *University of New South Wales Law Journal* 184-208.

This article reviews current literature about animal abuse in the context of domestic violence (pp187-196) It then proposes introducing laws that recognise such animals as sentient victims of domestic violence arguing that this would enable courts to make orders protecting these animals, which would safeguard their welfare and ensure that people with whom they live who are also experiencing domestic violence can escape without worrying about the fate of their animals and it would convey the seriousness of animal cruelty, and might increase support for and awareness of programs for rehoming abused animals, and training of people involved with animals to identify and report animal abuse.

Tania Signal, Nik Taylor, Karena Burke and Luke Brownlow, 'Double Jeopardy: Insurance, Animal Harm, and Domestic Violence' (2018) 24(6) *Violence Against Women* 718.

This article analyses the overlap between animal harm and insurance discrimination for victims/survivors of domestic violence (DV). Deliberate harm of animals is an indicator of antisocial behaviours, including DV perpetration (p 719). Companion animals may hold special emotional significance for victims of DV, especially when they are also targeted for abuse. Adult victims of DV often risk their own wellbeing to protect their companion animals by delaying leaving, or returning to, a violent relationship. An online search of Australian insurance companies was conducted to assess different policy stipulations regarding companion animals, and to determine whether non-accidental injury caused by an intimate partner would be covered. The authors also discuss the implications of exclusion criteria for victims/survivors of DV, shelters for animals implicated in a violent and/or abusive domestic relationship, and, more broadly, for cross or mandatory reporting (of animal harm) initiatives. The findings suggested that the majority of companies offering companion animal insurance in Australia refuse to pay the treatment costs for animals deliberately injured within a family violence context, which adds emotional and financial stress on human victims of DV (pp 722-3). The authors highlight the need to reconsider current approaches to violence, and to recognise the nuances of DV, especially where animals are involved. Not only does covering costs associated with harm to animals suffered as a result of DV in insurance policies ensure that the animals get treatment, but it also alleviates the pressure from their carers, who already experience high levels of stress and trauma.

Taylor, Nik & Fraser, Heather (2019) *Companion animals and domestic violence: Rescuing me, rescuing you (Palgrave Studies in Animals and Social Problems)* Palgrave Macmillan, Switzerland.

Abstract: In this book, Nik Taylor and Heather Fraser consider how we might better understand human-animal companionship in the context of domestic violence. The authors advocate an intersectional feminist understanding, drawing on a variety of data from numerous projects they have conducted with people, about their companion animals and links between domestic violence and animal abuse, arguing for a new understanding that enables animals to be constituted as victims of domestic violence in their own right. The chapters analyse the mutual, loving connections that can be formed across species, and in households where there is domestic violence. *Companion Animals and Domestic Violence* also speaks to the potentially soothing, healing and recovery oriented aspects of human-companion animal relationships before, during and after the violence, and will be of interest to various academic disciplines including social work, anthropology, sociology, philosophy, geography, as well as to professionals working in domestic violence or animal welfare service provision.

Volant, Anne M, et al, 'The Relationship Between Domestic Violence and Animal Abuse: An Australian Study' (2008) 23(9) *Journal of Interpersonal Violence* 1277.

This article reports on the first Australian research to examine the connection between domestic violence and animal abuse. 102 women recruited through 24 domestic violence services in the state of Victoria and a nondomestic violence comparison group (102 women) recruited from the community were interviewed by telephone for this study. Significantly higher rates of partner pet abuse, partner threats of pet abuse, and pet abuse by other family members were found in the violent families compared with the nondomestic violence group. As hypothesized, children from the violent families were reported by their mothers to have witnessed and committed significantly more animal abuse than children from the nonviolent families. Logistic regression analyses revealed, for the group as a whole, that a woman whose partner had threatened the pets was 5 times more likely to belong to the intimate partner violence group.

International

Ascione, Frank R, et al, 'Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women' (2007) 13(4) *Violence Against Women* 354.

Drawing on available literature this study identifies the following reasons for attention to animal abuse in the context of domestic violence (see p355 of this article for relevant references):

- Pets are often viewed as companions or even family members, and some may view animal abuse as another form of family violence.
- Women who are victims of domestic violence may be especially devastated when batterers threaten and/or actually harm family pets.
- If children are present, animal abuse may be an additional form of violence to which they are exposed.
- Individuals who abuse animals are more likely to have been arrested for violent crimes and property and drug-related offences and to self-report engaging in delinquent behaviour.
- Animals may sometimes be used as weapons against domestic violence victims.
- Threats of harm to family pets may be used to coerce women who are battered into committing illegal acts at the behest of the batterer.
- Concern for the welfare of family pets may be an obstacle to some women's seeking safety.

The article also reports on a study of 101 women residing at domestic violence shelters (S group) and another 120 women who were not in shelter and reported that they had not experienced domestic violence (NS group). The S group women were nearly 11 times more likely to report that their partner had hurt or killed pets than a comparison group of women who said they had not experienced intimate violence (NS group). The vast majority of shelter women described being emotionally close to their pets and distraught by the abuse family pets experienced. Children were often exposed to pet abuse, and most reported being distressed by these experiences.

Campbell, AM, Thompson, SL, Harris, TL & Wiehe, SE 2021, 'Intimate Partner Violence and Pet Abuse: Responding Law Enforcement Officers' Observations and Victim Reports From the Scene', *Journal of Interpersonal Violence*, vol. 36, no. 5/6, pp. 2353–2372.

US based study. Abstract: The risk of harm/injury in homes where intimate partner violence (IPV) occurs is not limited to humans; animals reside in as many as 80% of these homes and may be at substantial risk of suffering severe or fatal injury. Gaining a better understanding of IPV-pet abuse overlap is imperative in more accurately identifying the risks of harm for all individuals and animals residing in these homes. The objectives of this study were to utilize law enforcement officers' observations and IPV victim reports from the scene of the incident to (a) determine the prevalence of pet abuse perpetration among suspects involved in IPV incidents, (b) compare characteristics of IPV incidents and the home environments in which they occur when the suspect has a history of pet abuse with incidents involving suspects with no reported history of pet abuse, and (c) compare IPV incident outcomes involving suspects with a history of pet abuse with those involving suspects with no reported history of pet abuse. IPV victims residing in homes with a suspect who has a history of pet abuse often describe "extremely high-risk" environments. With nearly 80% reporting concern that they will eventually be killed by the suspect, victims in these environments should be considered at significant risk of suffering serious injury or death. In addition, IPV victims involved in incidents with a suspect that has a history of pet abuse were significantly more likely to have had at least one prior unreported IPV incident with the suspect (80%) and to have ever been strangled (76%) or forced to have sex with the suspect (26%). Effective prevention/detection/intervention strategies are likely to require multidisciplinary collaboration and safety plans that address the substantial risk of harm/injury for all adults, children, and animals residing in the home.

Faver, Catherine A, and Elizabeth B Strand, 'Fear, Guilt, and Grief: Harm to Pets and the Emotional Abuse of Women' (2007) 7(1) *Journal of Emotional Abuse* 51.

This article reviews the literature regarding the emotional impact of pet abuse on abused women. It argues that harm inflicted on pets by a perpetrator is a form of emotional abuse. The article recommends among other things that service providers should include questions about pets and pet abuse in all assessments.

Fitzgerald, A. J., Barrett, B. J., Stevenson, R., & Cheung, C. H. (2019). Animal Maltreatment in the Context of Intimate Partner Violence: A Manifestation of Power and Control? Violence Against Women, 25(15), 1806–1828.

The study aimed to understand why animal abuse and IPV commonly co-occur. One hundred female survivors of IPV from sixteen emergency shelters were surveyed for the study. Fifty-five of these respondents had at least one pet at the time of their abusive relationship. The survey questions were designed to identify the sociodemographic of participants as well as to discover how the participants perceived motivation for and the intentionality of any animal maltreatment at the hands of their abusive partners. More specifically, researchers measured animal abuse using the Partner's Treatment of Animals Scale (PTAS) which assessed: (a) emotional abuse of animals; (b) threats to harm; (3) physical neglect; (4) physical abuse: and (e) severe physical abuse. The study hypothesised "that survivors' perceptions of their abusers' mistreatment of their pets as premediated and as intended to upset or control them would be significantly associated with higher levels of the five types of animal maltreatment measured by the PTAS" (1815/10).

Results: 89.1% of the women who kept pets during their abusive relationship reported at least one incident of animal maltreatment by their abusive partner. "The most common forms of pet abuse enacted by the perpetrators include threats to get rid of a pet (65.5%), scaring or intimidating a pet on purpose (60%), smacking a pet (56.4%), and throwing an object at a pet (50.9%)" (1815). At the extreme end of the abuse, 10.9% reported their partner breaking a pet's bones and 14.5% reported their partner killing the pet (1815).

Discussion: The findings of the study were consistent with the existing literature investigating the occurrence of pet abuse during abusive relationships. In particular, the results supported the notion that "survivors of IPV perceive that maltreatment of their pets is driven by their partner's desire to cause them emotional harm and/or to enact power and control over them" (1823)/ "that emotional abuse, threats against, and neglect of animals in the context of IPV are perceived by survivors to be part of the broader matrix of power and control

tactics that perpetrators use to control them and/or cause them psychological harm". The study did note, however, that there are some forms of animal maltreatment that are not perceived by IPV survivors in this way, highlighting "the need to move beyond monolithic constructions of ‘animal abuse’ as a singular construct to consider the ways in which different types of animal maltreatment may have distinct correlates with IPV against women" (1823).

Other findings in the study include:

- Participants in the study did not perceive the animal abuse to be premeditated.
- While the survivors in our sample tended to understand the emotional abuse, neglect and threats against their pets as intentional and as motivated to exert and/or to regain power and control, the same is not true of physical animal abuse, particularly severe physical animal abuse.

Randour, M. L., González, D., Schurr, E. M., & Conforti, S. (2023). Pet Protection Orders for Domestic Violence Survivors: Are They Being Used? *Violence Against Women*, *0*(0). 10.1177/10778012231176197

This study examines if and how pet protection orders have been used by domestic violence survivors in the 36 states and the District of Columbia in which they have been enacted. A review of court websites determined if there was a specific item to include a pet in the temporary and/or final protection order. In addition, individual court administrators were contacted in various states to determine if statistics were available on the number of pet protection orders issued. Another mode of investigation included examining appropriate websites in each state to ascertain if the state issued a report on domestic violence statistics, and if so, if that report contained information on pet protection orders. Only one state, New York, keeps track of the number of protection orders that have been issued that include pets.

Riggs DW, Taylor N, Fraser H, Donovan C, Signal T. *The Link Between Domestic Violence and Abuse and Animal Cruelty in the Intimate Relationships of People of Diverse Genders and/or Sexualities: A Binational Study*. J Interpers Violence.2021 Mar;36(5-6):NP3169-NP3195. PMID: 29683079.

“Of 503 people (all self-identified as having a diverse gender and /or sexuality) living in either Australia or the

UK, 1/5 of those who had experienced IPV reported that animal cruelty had been perpetuated by the violent or abusive partner, associated with greater psychological distress and lower levels of social support."

Roguski, Michael, 'Pets as Pawns: The Co-existence of Animal Cruelty and Family Violence' (Report, Royal New Zealand Society for the Prevention of Cruelty to Animals and the National Collective of Independent Women's Refuges, 2012).

This New Zealand study draws on 30 interviews with clients of women's refuges, 30 interviews with community stakeholders identified as having some involvement/knowledge of the co-existence of animal cruelty and family violence, the results of a survey of 203 Women's Refuge clients, and the results of a survey of 17 local NZSPCA managers. The study identified that it was common for perpetrators to use overt threats and actual harm to animals as a mechanism to attain and maintain control of their family members. The study determined that cruelty to animals was often present in family violence situations. The study also identified that cruelty to animals by perpetrators post-separation was common and that threats to animals had contributed to some survivors of family violence delaying leaving the relationship.

Animal abuse - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

The Victorian Bench Book briefly refers to animal abuse as an example of emotional or psychological abuse in the following sections:

5.2.1 – Emotional or psychological abuse: psychological abuse includes 'abusing pets in front of family members'.

Also see 1.1 – Additional Guidance – Common Risk Assessment Framework, lists harming or killing pets as an example of emotional abuse.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

This bench book discusses animal abuse as a form of domestic violence in Section 4.6.4: Animal cruelty and domestic violence:

- 'The Issue: Research studies have demonstrated consistently and repeatedly an association between domestic violence and cruelty to animals. Animal cruelty is used in some domestic violence cases to terrorize intimate partners and to punish, control or silence children. Protection of animals has also been cited … as one of the reasons family members remain or return to abusive homes.
- Potential response: Agreements and orders that secure the safety of pets can enhance safety while offering comfort to children.' For further discussion in connection with civil protection orders, see Chapter 9.3.5.2.

Animal abuse - Other Resources

- **Phillips, Allie (National District Attorneys Association), *Understanding the Link between Violence to Animals and People: A Guidebook for Criminal Justice Professionals* (2014).**

Animal abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Jennifer

Lisa

Sandra

Animal abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Mazaydeh **[2014] ACTSC 325 (13 November 2014) – Australian Capital Territory Supreme Court**

The offender was a former partner of the female complainant. He refused to leave her apartment, attempted to choke her and held a knife to the throat of her cat.

Murrell CJ at [9]: 'The threat to cause damage to the victim's cat was particularly upsetting to the victim, and the offender was no doubt well aware of the victim's affection for her cat. He seized the cat and held a knife to its throat. That would have been quite devastating for the victim'.

And at [15]-[16]: 'These offences occurred in the context of a previous relationship between the offender and the victim and involved violence within the victim's home, an apparent sense of entitlement on the part of the offender, and humiliation through verbal and text abuse of the victim.

'The sentencing purposes of punishment, general deterrence and denunciation are very important, as well as the recognition of harm to the victim personally and the community generally through offences of this nature. The victim provided a victim impact statement in which she referred to impacts upon her of the type that frequently result from offences of domestic violence, including feelings of anxiety, difficulty sleeping, difficulty concentrating at work and elsewhere, and an adverse effect on her ability to form relationships. Since the incident, the victim has moved house because she felt unsafe in the apartment where the offence occurred'.

R v McLaughlin **[2015] ACTSC 201 (16 July 2015) – Australian Capital Territory Supreme Court**

The offender started kicking the dogs in front of his wife and children. The wife asked him to stop and he punched her several times.

In assessing the objective seriousness of the offences, Burns J took into account that the offender was significantly larger than the victim, that the offences occurred in the context of a domestic relationship and that the children were present during the attack. Burns J considered the offender's conduct to be 'cowardly,

shameful and rightly characterised as criminal' ([7]). A victim impact statement was also prepared by the victim, explaining the trauma and anxiety the offences caused her and the children. Burns J noted that 'As is so often the case in domestic violence offences, the long term burden of your violence will not only be felt by your wife, but also by your children'.

***R v French* [2020] NSWDC 767 (17 December 2020) – New South Wales District Court**

Priestley SC DCJ found at [13]-[14]:

"The offender argued that what occurred was no more than was necessary to commit the offence, at least in respect of planning. In my view this offending was more than opportunistic. The offender went looking for the cat; it was not as if the cat did something immediately before the offending to irritate the offender and he acted impulsively. It is gratuitous cruelty. The elements of the offence include to commit a serious act of cruelty, and that the animal is killed or seriously injured. In this case as to the first mentioned element, the act of cruelty was reasonably brief in its execution; just how long the cat suffered is not known. As to the second mentioned element, the result is death, not injury, making the offending in my view more serious.

There was some debate based on the animal being a domestic pet compared to some authorities referring to animals that would not normally be considered pets, with the Crown arguing it is a more serious matter if a pet. From the animal's point of view this is a point that is of utter indifference. Yet in the context of offending surrounded in circumstances of domestic violence I tend to the view that it does make it a more serious offence."

***Marrah v The Queen* [2014] VSCA 119 (18 June 2014) – Victorian Court of Appeal**

The applicant physically and sexually assaulted his partner and threatened to kill her and her dog.

Tate JA at [25]: 'The gravity of the offending was aggravated by the fact that the applicant was at the time the subject of an intervention order, which he flagrantly disregarded. Offending of this nature is too often perpetrated by men whose response to difficulties in a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. The sentences must convey the unmistakeable message that male partners have no right to subject their female

partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship'.

***DPP v Neve* [2013] VSC 488 (13 September 2013) – Supreme Court of Victoria**

Bell J at [70]: 'In relation to the charge of criminal damage (charge 1), yours is a serious example of this crime. The property concerned was Frank, Ms Fuller's beloved dog. I infer from the circumstances that you killed the dog to inflict severe hurt and suffering on Ms Fuller, which she did and does feel. I accept the submission of your counsel that in normal circumstances a first-time offender, such as yourself, would not be given a sentence of imprisonment for this kind of offence. But the circumstances of your killing of the dog make such a sentence warranted, especially having regard to denunciation and general deterrence. It should not be fully concurrent as is counts materially and individually in the criminality of your conduct and the suffering of the victim'.

Systems abuse

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament.

The Bill amends *Family Law Act 1975* to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act 1975*.

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Australian and international bench books [Other Bench Books] alert judicial officers to various forms of systems abuse or abuse of processes that may be used by perpetrators in the course of domestic and family violence related proceedings to reassert their power and control over the victim. The *National Plan to End Violence against Women and Children 2022-2032* [National Plan 2022] observes that perpetrators of domestic and family violence may manipulate legal and other systems to control, threaten and harass a current or former partner. More broadly, as identified in the Western Australian Court of Appeal decision *Baron v Walsh* [2014] WASCA 124, recourse to legally available processes, when used by a party with improper intent or purpose, could amount to malicious prosecution, abuse of process or a criminal offence.

Research has also recognised that a party to proceedings in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party [Kaspiew et al Synthesis 2015]. These tactics may be referred to in legislation and other bench books and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process.

Perpetrators of domestic and family violence who seek to control the victim before, during or after separation may make multiple applications and complaints in multiple systems (for example, the courts, Child Support Agency, Centrelink [Cameron 2014] child protection [Douglas & Fell 2020]) in relation to a protection order [Reeves 2020], breach, parenting [Kaspiew 2005], divorce, property, child and welfare support and other matters with the intention of interrupting, deferring, prolonging or dismissing judicial and administrative processes, which may result in depleting the victim's financial resources and emotional wellbeing, and adversely impacting the victim's capacity to maintain employment or to care for children [National Plan 2022]. In the court system, this tactic is

sometimes known as ‘burning off’, and is prevalent where, on the one hand, a victim lacks the financial resources to engage legal representation (and is therefore forced to self-represent), and on the other hand, the perpetrator is either financially well-resourced or prepared to incur significant debt (and is therefore able to engage solicitors and counsel, and fund multiple actions over extended periods) [Hover: ALRC 2019]. Where the perpetrator is aware that the victim may be in a financial position to engage legal representation, the perpetrator may use a different tactic known as ‘conflicting out’, which involves seeking preliminary advice from multiple lawyers (this is a particular concern in regional, rural and remote communities) so as to deny the victim access to legal representation on the basis of conflict of interest.

Although there is a widespread belief in the community that mothers frequently fabricate allegations to influence family law proceedings, the research to date indicates that it is more likely that they will be reluctant to raise allegations for fear of having their motives questioned [Laing 2010], and that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators [Jaffe et al 2008]. A 2015 evaluation [Kaspiew et al Synthesis 2015] of the 2012 Family Violence Amendments to the *Family Law Act 1975* (Cth) recognises that parties to proceedings in the Family Court of Australia may use those proceedings as a means of perpetuating harassment of the other party. For example, a parent who is also a perpetrator of domestic and family violence may use this tactic, while the perpetrator or their lawyer states to the court that they ‘just want to see their children’. [Laing 2010]

Cross applications for domestic and family violence protection orders may be used by some perpetrators to intimidate the victim into withdrawing their application, resulting in mutual withdrawal and an end to proceedings. This tactic may also be seen as an extension of the violence itself [Wangmann 2010]. Perpetrators in these circumstances may seek a cross order to neutralise the effect of the victim’s order (or order obtained on the victim’s behalf) on the operation of the presumption/exemption. While some cross applications may be genuine where both parties face a threat of violence and are equally in need of protection from one another, those that constitute intimidation may have the effect of trivialising or silencing the victim’s claims for protection. The consequent risk is that dangerous behaviour may be misinterpreted or overlooked by the court, and the victim may be left unprotected [Douglas & Fitzgerald 2013].

Victims from culturally and linguistically diverse backgrounds who may be unfamiliar with Australian legal systems, have limited or no English literacy skills and uncertain or contested immigration status, may be particularly vulnerable to further abuse by the perpetrator through judicial processes. Some commonly

reported examples include the perpetrator: failing to appear in court; repeatedly seeking adjournments; appealing decisions on tenuous grounds; obtaining a protection order against the victim and misleading the victim into breaching the order; objecting to or refusing to consent to the victim's application for divorce; and giving false evidence to the court that the victim's motivation in applying for a protection order is to obtain an advantage in the immigration/visa process [JCCD, Path to Justice (CALD) 2016].

Research indicates that a court's failure to respond adequately or appropriately to a victim's allegations of domestic and family violence may constitute a form of abuse that is secondary to that already being experienced by the victim. In the context of judicial proceedings, a victim may feel intimidated, isolated or neglected by, for example: having to sit in proximity to the perpetrator and their family and friends in the courtroom; experiencing condescending, reproachful or diminishing language or demeanour from defence lawyers or judicial officers; feeling unable to effectively advocate on behalf of children in their care; or enduring the ongoing economic impact of being a party to judicial proceedings [Hover: ALRC 2019]. In these circumstances, judicial officers may need to weigh up and assess the requirements for procedural fairness and access to justice against protection of the victim from further abuse through the perpetrator's exploitation of the justice system.

Systems abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Systems abuse - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

This report identifies that 'vexatious applications in protection order proceedings under state and territory family violence legislation can be a means for a person to misuse the legal system to harass or intimidate a victim of family violence. In addition, because the existence of certain kinds of protection order is a relevant consideration to be taken into account by a court when making orders under the Family Law Act, vexatious applications for protection orders have the potential to affect the operation of both the family law and state and territory family violence regimes.' (p473)

[6.166] (p291) Noted that reforms 'should play a significant role in minimising the risk of litigation abuse—especially in the vexatious use of cross applications for protection orders.'

[18.28] *False evidence given in protection order proceedings:* State and territory family violence legislation generally deals with persons who give false evidence or make false allegations or denials by using provisions relating to vexatious applications or other legislation protecting court processes. A person who gives false evidence may also be charged with a number of offences, including perjury, false swearing and false testimony.

[18.29] (p837) In some circumstances, a court's ability to award costs against a person who brings an application for, or to revoke, a protection order that is 'deliberately false' or made in 'bad faith' is linked to vexatious application provisions.

[18.224] (p880) Vexatious litigation may arise in a number of ways in protection order proceedings. For example, repeated applications for a protection order may be made against the same person based on the same or similar allegations and by the respondent to vary or revoke a protection order. Cross applications for protection orders may also be made without legal grounds. [18.225] While such applications may not, in themselves, be vexatious, where they are repeated or made without legal grounds, concerns arise that people who have committed family violence may use the legal system to further harass, control and abuse the victim.

[17.29] (p764) It is particularly important that if family violence matters have been litigated that they are not re-litigated in another proceeding. Where family violence is at play such re-litigation can be a tactic of further abuse.

Cameron, Prue, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Research Report, Wire Women's Information, 2014).

This research draws on interviews, focus groups and surveys involving more than 200 women. Section four (from p31) focusses on the systemic continuation of financial abuse post-separation and explores abuse perpetrated through the legal system (including tactics of furthering abuse; the emotional cost of legal proceedings; the financial impact of legal costs; vexatious litigation), and Child Support (eg: partner's hiding assets etc to avoid paying child support).

The authors find that a common theme in the women's stories is that on-going engagement with their former partner through the courts, the Child Support Agency and Centrelink, continues, and in some cases facilitates, the pattern of financial abuse for years after the marriage ends (p31). Tactics identified by study participants included: running up legal costs; hiring aggressive, bullying lawyers; using the legal system to 'destroy' their ex-partners; legal proceedings undermining women's ability to work; refusing to comply with parenting orders; contesting parenting orders and masking their income to avoid child support.

Chung, Donna et al (2020). Prioritising women's safety in Australian perpetrator interventions: Mapping the purpose and practices of partner contact (2020). Sydney: ANROWS.

This project documents the practices of men's behaviour change programmes (MBCPs) in contacting victims/survivors and children of participants. The project considers how partner contact is operating in Australia, its strengths and challenges, and the experiences of victim/survivors who received partner contact support.

- Lack of partner contact as part of an MBCP can lead to some perpetrators using their participation in the program to perpetrate abuse towards the victim/survivor and/or other family members.
- Partner contact is labour-intensive, under-resourced, and often a secondary priority.
- There is currently a lack of consistency in partner contact practices and interventions, and limited

awareness about existing guidelines and standards.

- Perpetrator accountability has been a growing focus of work in Australia since the launch of the National Plan to Reduce Violence against Women and their Children 2010–2022 and the subsequent National Outcome Standards for Perpetrator Interventions.
- Men's behaviour change programs (MBCPs) are a key site of perpetrator accountability that aim to improve safety for women and children.
- Partner contact is known and understood to be a critical element of MBCPs, however a review of literature shows that little has been documented in Australia about safety practices in this context.

The report's key recommendations are:

- Partner contact support should be offered to all women (either directly or through organisational partnerships) through all MBCPs.
- National minimum practice standards for partner support as a component of MBCPs should be developed, and these standards should be formally recognised within contractual arrangements and funding service agreements.
- Partner contact services should be resourced and funded in ways that enable those national minimum practice standards to be met, and that ensure women have ongoing access to support irrespective of a perpetrator's MBCP attendance.

Commonwealth of Australia (Department of Social Services) 2022, National Plan to End Violence Against Women and Children 2022-2032.

The Glossary provides a definition of systems abuse which acknowledges perpetrators may manipulate legal and other systems in order to exert control over, threaten and harass a current or former partner, by making multiple applications and complaints in multiple systems (eg courts, Child Support, Centrelink) in relation to protections orders breach, parenting, divorce, property, child and welfare support and other matters to interrupt defer, prolong or dismiss judicial and administrative processes. This may deplete a victim's financial resources and emotional well-being and adversely impact the victim's capacity to maintain employment or care for children. It references Douglas (2018) and this bench book.

Douglas, H & Fell, E 2020, 'Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence', *Journal of Family Violence*, vol. 35, no. 8, pp. 827–837, viewed 24 March 2021.

Abstract: Coercive control is increasingly recognized as fundamental to women's experiences of domestic and family violence (DFV). Systems abuse is also being increasingly recognized by researchers as a tactic of coercive control in the context of DFV. This article explores the phenomenon of abusive partners or ex-partners making malicious false reports of child maltreatment to child protective services as an aspect of coercive control and systems abuse. The article draws on interviews with 65 women who have been victims of DFV, focusing on the experiences of 11 of the interviewees who have been maliciously reported, or received threats that they will be reported, to child protection services by an abusive ex-partner. Those interviewees who had been the victim of malicious reports of child maltreatment by an abusive partner or ex-partner experienced substantial negative impacts. The article concludes that improved investigation processes and investigating both parties, where the reporting party has been found to be a perpetrator of DFV, may better support victims of DFV and deter perpetrators from this form of abuse.

Douglas, Heather, and Robin Fitzgerald, 'Legal Processes And Gendered Violence: Cross-Applications For Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article reviews cross-applications and orders in Queensland's courts (2008-2010). It identifies concerns around the misuse of DVPOs for vindictive, strategic or tactical reasons (pp58; 60-62). Tactics include cross-orders being used to pressure the other party to mutually withdraw their application (p86).

Douglas, Heather, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) Criminology & Criminal Justice 84-99.

This article explores how legal engagement can be used to exercise coercive control over a former intimate partner, through interviews with victims of domestic and family violence (DFV) who engaged with the legal system (p 87). The results indicate that women's engagement with the legal system is often experienced as an extension of coercive control (from p 88). Legal systems abuse may be adopted by perpetrators as a

means of exerting coercive control when other avenues have ceased due to the relationship having ended (p 85). Specific instances of legal systems abuse may include frequent requests for adjournments (pp 88-9), making counter-allegations (pp 89-90), calling irrelevant witnesses (pp 90-1), and initiating excessive litigation in the Family Court (p 91).

Legal responses to legal systems abuse may include having vexatious cases thrown out, pursuing criminal charges, and restraining the abuser from future litigation (pp 92-3). Actions can also be taken by justice personnel, such as adopting an empathetic approach to engaging with victims (p 93), recognising coercive control as central to DFV (pp 94-5), rigorously upholding ethical standards (p 95), and co-ordinating responses with other elements of the legal system (p 95). It is argued that improved understanding of DFV and coercive control by legal professionals may help to prevent future opportunities for legal systems abuse (pp 94-5).

Finch, Emma and Patricia Easteal, 'Vexatious litigation in family law and coercive control: Ways to improve legal remedies and better protect the victims' (2017) 7 Family Law Review 103.

This article examines whether the current Australian family law legislation and court processes adequately protect parties from vexatious litigation. The Family Court has the highest rate of vexatious litigants in Australia (p 105).

The study surveyed ten lawyers on their experience in litigation with vexatious litigants (p 105). The most important issues were:

- controlling behaviours, including persistent litigation and cross-examination (p 106-7);
- effects, including emotional and legal costs (p 107-8); and
- the high threshold necessary to declare a litigant as vexatious (p 109).

The authors recommend suggestions for judicial officers to shield individuals from vexatious proceedings. Notably:

- making more liberal use of costs orders, including making more severe costs orders, and making the vexatious party bear the respondent party's costs (p 113-14);
- case management (pp 112-13); and
- improved communication between courts, to prevent litigants from instigating proceedings in multiple

jurisdictions (p 113).

The article also recommends legislative changes, including lowering the threshold to declare a vexatious litigant, and prohibiting self-represented litigants from cross-examining their alleged victims (pp 110-12).

Francia, L., Millear, P., & Sharman R., 'Addressing family violence post separation – mothers and fathers' experiences from Australia' (2019) *Journal of Child Custody.*

Family violence has been described as the 'core business of the Family Court', and child custody decisions continue to be made on a discretionary basis in the best interests of the child. The study focuses on family violence and separated parents' experiences in the Australian family law system. By means of an analysis of (n40) interviews of separated mothers and fathers, it found that contact with the Australian family law system caused considerable anxiety and distress. Separated parents noted gendered narratives within the system, with mothers referred to as 'alienating' or 'vindictive' and fathers referred to as 'abusers' or 'perpetrators'. The majority of parents also noted that their concerns, primarily around family violence, were rarely taken seriously. When parents reported concerns for their own or their children's safety, they were either not believed or experienced lip service of their concerns without appropriate investigation. Further, separated parents found that professionals, such as child protection workers, judges, police and independent children's lawyers, lacked adequate knowledge or competence in relation to family violence. They also noted coercion by some professionals within the family law system. The article also highlights the 'devastating emotional and psychological aftermath' experienced not only by separated parents, but also their children. In summary, the authors suggest that the Australian family law system may not sufficiently meet the complex needs of families experiencing family violence.

Kaspiew, Rae, et al., *Domestic and family violence and parenting: Mixed method insights into impact and support needs – Key findings and future directions* (ANROWS, 2017).

In interviews with women across Australia with experience of family violence, the study found that controlling and coercive behaviours were the most common tactic of abuse used by abusive fathers, which included setting rigid routines and/or having unreasonable expectations about children's behaviour. Out of the 50 women interviewed, 45 described direct abuse toward their children, including psychological, emotional, physical, and sexual abuse, as well as witnessing abuse or being a direct victim of incidents that targeted the

mother at the same time (p 3). The research identified systems abuse is common. For example systems abuse type behaviours by perpetrators included (p 6):

- exploiting the intersections between family law, child protection, and criminal legal systems to their advantage;
- raising counter-allegations and unjustifiable applications in family law or personal protection orders;
- manipulative engagement with family law services;
- non-compliance with court orders; and
- exhausting women's legal and financial resources.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family law and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of the practices and perspectives of family law system professionals(*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- the Court Outcomes Project (CO Project) involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts; and

- an analysis of published judgments applying to the 2012 family violence amendments.

One of the ‘Key messages’ from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the ‘prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent’ (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, ‘Violence in Contested Children’s Cases: An Empirical Exploration’ (2005) 19 *Australian Journal of Family Law* 112.

This article presents an empirically-based analysis of the treatment of violence in litigated children’s cases.

The author cites growing recognition of the use of litigation, particularly in relation to children, as a control tactic and this was evident in the sample. In a number of cases, there were repeated applications in relation to residence and contact which the mothers claimed were motivated by a desire to harass them, rather than a genuine concern for the children. These cases had the common features of:

- long running litigation,
- a background of violence and
- high levels of denigration against the mothers.

There was judicial acknowledgment in some cases that legal proceedings were being used as a means of harassment (p119).

Notes psychological and judicial approaches may obscure the extent and relevance of a history of violence:

- there is a tendency within judicial discourse to view violence in an 'incident based' way which fails to acknowledge that it is part of an ongoing system of violence and control.
- fails to connect pre-separation violence with post-separation control tactics, in which litigation can play a key part.
- fails to apprehend the gendered dynamics of power that subsist in violent relationships. (p138)

Kaye, M et al., Compromised 'consent' in Australian Family Law Proceedings. (2021) 35(1) International Journal of Law Policy and the Family 1-25, doi: 10.1093/lawfam/ebab033

Drawing on data from a large study that explored the experiences of self-represented litigants (SRLs) in Australian family law proceedings involving allegations about family violence, this article examines the pressures experienced by female SRLs, who are victims of family violence, to consent to orders. These pressures include judicial pressure, lawyers' practices, fear of their former partner, and the financial and emotional costs of litigation. These pressures are significant and can impede the extent to which these agreements can be viewed as consensual. Participants reported that these significant and intersecting pressures resulted in them 'agreeing' to orders that they saw as unsafe, or financial orders that were less than they were entitled to.

Laing, Lesley, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Faculty of Education and Social Work, University of Sydney, 2010).

This research reports on the experiences of 22 women who were involved in the family law system following their separation from a relationship in which they had experienced domestic violence. In particular see section titled: "'He just wants to see his children' – a lens for excusing men's behaviour" (from pp47-49) that draws on a number of excerpts detailing how fathers have manipulated police to harass and intimidate mothers (e.g. calling police to her house alleging she'd threatened to kill her children; turning up late for contact)

Laing, Lesley, *'It's Like this Maze You Have Make Your Way Through': Women's Experiences of Seeking a Domestic Violence Protection Order in NSW* (Faculty of Education and Social Work, University of Sydney, 2013).

This research reports on interviews with 40 women who attempted to obtain a domestic violence protection order in Sydney. The report highlights examples of police being used as a form of control, such as the abusive partner calling the police on their partner (p34), and the impact cross-applications have on women required to pay for legal advice to defend them.

Parkinson, Patrick, Judy Cashmore and Judi Single, 'Post-Separation Conflict and the Use of Family Violence Orders' (2011) 33(1) *Sydney Law Review* 1.

- Analysis of the use of family violence orders (FVO) during post separation conflict of 181 parents in 164 different families across Australia. Includes, in a number of cases, accounts from both of the former partners, giving their different perspectives of the same events.
- The research demonstrates the wide range of situations in which FVOs may be sought. While applicants reported a valid legal basis for applying for family violence orders, orders were also sought for 'collateral purposes' such as determining the occupancy of the home on separation or maintaining boundaries between newly separated parents. In certain cases they were used as well for purposes connected with the family law dispute, on legal advice (p1).
- Notes cases where respondents viewed the application for FVOs as tactical, for example to gain advantage in family law proceedings. 'It is difficult to assess such views of FVO applications with only one side of the story, particularly given the evidence that some men seriously minimised the level of their own violence, and also that men may not recognise how frightening their behaviour might be to their former partners. Nonetheless, there were certainly accounts by men of women, or their new partners, seeking FVOs where the timing seemed tactical and where the cases were apparently thrown out.' (p32)

Rathus, Z, 2020, A history of the use of the concept of parental alienation in the Australian family law system: contradictions, collisions and their consequences, *Journal of Social Welfare and Family Law*, 42:1, 5-17, DOI: 10.1080/09649069.2019.170192

Abstract: This paper presents insights into the history and current deployment of the concept of parental alienation in the Australian family law system. It begins in 1989, when an article on parental alienation syndrome was first published in an Australian law journal. It then traces aspects of the socio-legal and social

science research, gender politics, law reform and jurisprudence of the following 30 years, paying attention to moments of significant change. The impacts of major amendments that emphasise the desirability of post-separation shared parenting outcomes in 1996 and 2006 are specifically considered. More recently, in 2012, reforms intended to improve the family law system's response to domestic and family violence were introduced. The history reveals an irreconcilable tension between the 'benefit' of 'meaningful' post-separation parent-child relationships and the protection of children from harm. When mothers' allegations of violence in the family are disbelieved, minimised or dismissed, they are transformed from victims of abuse into perpetrators of abuse – alienators of children from their fathers. Their actions and attitudes collide with the shared parenting philosophy. This is arguably an inescapable consequence of a family law system that struggles to deal effectively with family violence in the context of a strong shared parenting regime.

Reeves, E. (2020) Family violence, protection orders and systems abuse: views of legal practitioners. Current Issues in Criminal Justice, 32(1): 91-110 10.1080/10345329.2019.1665816

The findings of this research suggest that male perpetrators may use the FVIO system to commit 'systems abuse' by encouraging police officers to apply for a FVIO against the genuine victim-survivor. It is argued that there is a strong need for a greater recognition of systems abuse within the police and the judiciary in order to prevent the FVIO system from serving as a tool of abuse readily available to perpetrators of family violence.

Reeves, E. 'I'm Not at All Protected and I Think Other Women Should Know That, That They're Not Protected Either': Victim–Survivors' Experiences of 'Misidentification' in Victoria's Family Violence System. (2021) 10 (4) International Journal for Crime, Justice and Social Democracy 39-51.

This article explores the impacts of misidentification on the lives of women victim–survivors of family violence in Victoria (Australia). Using data from interviews with 32 system stakeholders and survey responses from 11 women who have experienced misidentification in Victoria, this study explores misidentification within the family violence intervention order system. It demonstrates that being misidentified as a predominant aggressor on a family violence intervention order can have a significant impact on women's lives and their access to safety.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 *University of New South Wales Law Journal* 945.

This article reviews cross-applications and orders in NSW courts (2002-2003). The article argues that the use of cross-applications is a form of harassment or a bargaining tool (from p967). The article draws on interviews with women and professionals who suggest cross-applications are 'a possible extension of the violence and abuse itself' and identify that 'the use of the law against victims of domestic violence is rarely depicted as part of their continuing experience of violence, yet it is seen that way by victims and clearly evidences a type of act that is directed at exerting control (or reasserting control)' (p968).

International

Clements, K., et al., (2022) The Use of Children as a Tactic of Intimate Partner Violence and its Relationship to Survivors' Mental Health. Journal of Family Violence, 37: 1049-1055. https://doi.org/10.1007/s10896-021-00330-0

Abstract: Although prior research has established that intimate partner violence (IPV) often leads to increased depression, anxiety and post-traumatic stress disorder (PTSD), little is known about how often abusive partners and ex-partners use survivors' children as an abuse tactic, nor whether this form of IPV also is detrimental to survivors' mental health. The current study interviewed 299 unstably housed survivors of intimate partner violence shortly after they sought services from a domestic violence agency. All participants were parents of minor children. In-person interviews asked about abuse experienced in the prior six months, including the ways children were used as a form of IPV. Participants were also asked about their current depression, anxiety, and symptoms of PTSD. As hypothesized, the majority of parents reported their abusive partners and ex-partners had used their children as a form of IPV to control and hurt them. Further, after controlling for other forms of IPV, use of the children significantly predicted both increased anxiety and greater number of PTSD symptoms. Results show the importance of focusing on the use of children as a common and injurious form of abuse used against survivors of intimate partner violence (IPV).

Gutowski, E.R., Goodman, L.A. Coercive Control in the Courtroom: The Legal Abuse Scale (LAS). (2022). Online first Journal of Family Violence doi:10.1007/s10896-022-00408-3

This article highlights various forms of legal systems abuse as part of domestic and family violence. The

authors observe that intimate partner violence survivors seeking safety and justice for themselves and their children through family court and other legal systems may instead encounter their partners' misuse of court processes to further enact coercive control. To illuminate this harmful process, this study sought to create a measure of legal abuse. The authors developed and piloted a list of 27 potential items on the basis of consultation with 23 experts, qualitative interviews, and existing literature. They then administered them to a sample of 222 survivor-mothers who had been involved in family law proceedings. The analyses yielded the 14-item Legal Abuse Scale.

Jaffe, Peter G., Janet R. Johnston, Claire V. Crooks, Nicholas Bala, *'Custody disputes involving allegations of Domestic violence: toward a differentiated approach to parenting plans'* (2008) 46(3) Family Court Review 500.

Premised on the understanding that domestic violence is a broad concept that encompasses a wide range of behaviors from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim, this article addresses the need for a differentiated approach to developing parenting plans after separation when domestic violence is alleged. A method of assessing risk by screening for the potency, pattern, and primary perpetrator of the violence is proposed as a foundation for generating hypotheses about the type of and potential for future violence as well as parental functioning. This kind of differential screening for risk in cases where domestic violence is alleged provides preliminary guidance in identifying parenting arrangements that are appropriate for the specific child and family and, if confirmed by a more in-depth assessment, may be the basis for a long-term plan.

Regarding the credibility of allegations of child maltreatment, domestic violence and parental abuse of drugs and alcohol, the authors (at pp506-509) write there is virtually no research on the extent to which spousal abuse allegations are clearly false and maliciously fabricated, but this issue is becoming an increasing concern for the justice system …it is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators (Jaffe et al., 2003; Johnston, Lee, et al., 2005; Shaffer & Bala, 2003).

Klein, Andrew, 'Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges' (National Institute of Justice (US), 2009).

This report reviews research in the United States on domestic violence to determine what works best in protecting victims and stopping abuse. The section on judicial responses (from p52) is helpful. It recommends:

- Judges should strive to create user-friendly, safe court environments for petitioners, be sympathetic to the parties before them, but firm with respondents once abuse has been determined. Thus, victim concerns are validated, and respondents' abusive behaviors are clearly condemned. (p60) (Based on limited studies on the impact of judicial demeanour.)
- Judicial attention before trial to address the risk to victims posed by alleged abusers will result in quicker case resolution and decrease re-abuse by defendants who fail to show for trial. (p62) (based on multiple studies).
- Judges should respond to noncompliant abusers immediately to safeguard victims. (p72) (based on multiple studies).

Miller, Susan L, and Nicole L Smolter, '"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking' (2011) 17(5) *Violence Against Women* 637.

Drawing on interviews with women who have exited violent relationships, attorneys, and practitioners/policy specialists, this US research considers the continuation of control as women encounter "paper abuse." The article reports on the 'barrage' of frivolous lawsuits, false reports of child abuse, and other system-related manipulations that exert power, force contact, and financially burdens ex-partners. The article draws parallels between paper abuse and stalking, in that they both involve harassing behaviours, however paper abuse is distinct in that it uses legal options rather than criminal acts to perpetrate abuse (p641). That fact means it requires documentation so that it is not overlooked or justified as exercising legitimate legal rights.

Neilson, Linda, 'Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases' (2004) 42(3) *Family Court Review* 411.

This article explores issues associated with mutual claims of domestic violence in the context of research on

gender and violence, and in the context of litigation tactics commonly employed by perpetrators in child custody and access cases. It identifies:

- Heightened litigation may be a form of stalking (p419).
- Notes that demeanour and presentation are not reliable indicators 'as many abusive partners are both manipulative and highly skilled at presenting positive public images of self.' (p420)
- Litigation tactics are often designed to discredit victim witnesses, such as claiming infidelity or promiscuity to deflect attention from abuse, attempting to discredit minute details of testimony or arguing 'parental alienation' (p422-24)

The author provides suggestions for assessing mutual claims of abuse and responding to litigation tactics (specifically, mutual claims of abuse).

- Careful scrutiny of past conduct and the power and control dynamics of the relationship are critical to accurate assessment when intimate partners make allegations of abuse against each other. (p425)
- Careful consideration of context. Context includes indicators of domination and control in the relationship in association with: patterns of violent action (including emotional abuse) over time, social and cultural context, victim vulnerability, and psychological (as well as physical) impact. Victim fears and perceptions are particularly important. (427)

Neilson, Linda, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (criminal, family, child protection): A Family Law, Domestic Violence Perspective* (2nd ed, 2013).

The importance of awareness by judicial officers of litigation tactics is referred to throughout this report, examples are identified:

- perpetrators attempting to introduce evidence of psychological harm from domestic violence as evidence of unfitness to parent, pp5, 17.
- making spurious complaints to social service and investigation agencies, and engaging in litigation tactics to deflect responsibility, p28.
- using litigation tactics to confuse police etc, p31.
- setting up the party convicted of resistance violence to engage in technical breaches p83.
- a perpetrator's attempts to introduce covert audio or video recordings can actually constitute evidence of

continuing monitoring, stalking or surveillance of the targeted parent, or of attempting to ‘set up’ the targeted parent as a litigation tactic p122

Nonomura, R; et al., (2021). When the Family Court Becomes the Continuation of Family Violence After Separation: Understanding Litigation Abuse. *Family Violence & Family Law Brief* (14). London, Ontario: Centre for Research & Education on Violence Against Women & Children. ISBN: 978-1-988412-61-0

This Canadian resource, focused on the family court, recognizes ‘litigation abuse’ as a gendered phenomenon. It highlights some of the possible ways a court may respond to litigation abuse. It observes that the court may regard this as a form of family violence to consider in making decisions about parenting time and responsibilities, or, as a factor in allowing the victim to relocate with the children.

- If a court finds that litigation abuse has occurred, this may affect an award for “costs,” requiring a party who has behaved “unreasonably” in the course of litigation to pay part or all of the legal fees and litigation costs of the other party.
- A person who has been the subject of repeated, unmerited court applications may make an application to have another person declared a “vexatious litigant,” preventing the person who has abused the legal process from bringing further court proceedings.
- In limited circumstances the courts may make a restraining order to prohibit certain types of behaviours associated with the court process, such as a prohibition on posting abusive information related to the proceedings on the internet.

Ptacek, James, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999).

This book was one of the first to look at the role of judges in the domestic violence protection order process. Ptacek approaches the issue using three inquiries. He asks: “What do judges do with their authority in restraining order hearings? How do judges interpret their role in responding to woman battering? What effect do judges have on women seeking restraining orders?” (ix).

Ptacek's research was conducted primarily through interviews. He consulted widely with women in shelters, staff at shelters, feminist lawyers, judges, court support staff, and criminal justice researchers. He focused on two courts in Massachussetts that are considered to treat battered women with respect and take seriously their allegations. However, Ptacek identifies types of judicial behaviour can negatively affect victims in court. This form of abuse is sometimes referred to as 'secondary abuse'.

Ptacek has illustrated the judicial responses reinforce women's entrapment in a diagram available here and extracted in the table below. Many of the issues relate to perpetrators' misuse of court process as a way to further their abuse of the victim.

Neglecting women's fears	> ignoring women's fears > lack of safe waiting areas in courthouse > lack of coordination with police and probation > inadequate training of court personnel
Courtroom intimidation	> inattention to the impact of a courtroom on victims > bureaucratic and indifferent treatment of abused women > failure to provide women with information about their legal options
Condescending or harsh demeanour	> patronising displays of authority > harsh or hostile remarks > racist attitudes toward women of colour > bias against unmarried women
Furthering women's isolation	> failure to provide advocates > lack of resources for non-English speakers > lack of resources for deaf and disabled women > lack of coordination with community resources
Minimising, denying, and blaming	> mirroring batterers' actions by making light of the abuse > saying the abuse didn't happen > saying she caused it > making her feel guilty > saying it's just a "lovers' quarrel"

Neglecting the needs of children	failing to see how batterers manipulate women through their children no space in the courthouse for children lack of concern for safety of children
Colluding with violent men	showing greater concern for defendants than for women seeking protection unwillingness to impose sanctions on batterers joking and bonding with defendants
Blindness to the economic aspects of battering	ignoring women's requests for child support and restitution bias against women on welfare

Conversely, Ptacek has also illustrated how the judicial responses that empower battered women in a diagram available here and extracted in the table below.

Prioritising women's safety	asking about women's fears asking about weapons confiscating weapons training court personnel on battering making a safe space for women to wait for hearings
Making the court hospitable to abused women	providing a separate restraining order office informing women of their legal options providing translators making the building handicap accessible
Supportive judicial demeanour	listening to abused women asking questions looking women in the eye recognising the complexity of women's circumstances and choices
Connecting women with resources	Providing advocates for battered women developing relationships with shelters, batterers' programs, and community services
Taking the violence seriously	communicating through words and actions that the court will not tolerate

	battering > encouraging women to return to the court if they need to
Focusing on the needs of children	> demonstrating concern for the safety of children > making space in the courthouse for children > recognising the effects of battering on children
Imposing sanctions on violent men	> imposing sanctions for violating court orders > refusing to joke and bond with violent men > correcting institutional bias toward men
Addressing the economic aspects of battering	> asking whether women need child support > connecting women with community resources around housing and financial assistance

Tutty, L., Radtke, L. & Nixon, K. (2023) "He Tells People He's Going to Kill My Children": Post-Separation Coercive Control in Men Who Perpetrate IPV. Violence Against Women, online first, doi 10.1177/10778012231166408

This research examined men's use of coercive controlling tactics against female partners after separation. This mixed-methods study is based on secondary analysis of interviews / surveys involving 346 Canadian women who experienced coercive controlling tactics used by their ex-partners (86.4% identified at least one). The researchers also interviewed another 34 women. The article found that 'abusive partners used numerous strategies to coercively control their ex-partners by stalking/harassing them, using financial abuse and discrediting the women to various authorities' after separation.

Ward, David, 'Recognising and Preventing Abusive Litigation Against Domestic Violence Survivors' (2015-2016) 14 *Seattle Journal for Social Justice* 429.

This US study interviewed 10 survivors of domestic violence and their lawyers. It identifies different types of abusive litigation tactics (pp 434-47), including seeking sole custody of children, portraying themselves as the victim, initiating frivolous litigation, filing excessively long applications (pp 434-47). It also offers

recommendations for judicial officers to respond to abusive litigation, including: having one judicial officer oversee all the litigation, imposing sanctions rather than relying primarily on verbal admonishments, limiting or placing conditions on court filings (457-63).

Systems abuse - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapters 5.5 and 14.15 discuss the court's power to make a permanent stay of proceedings where an application for a protection order is considered an abuse of process.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.1 discusses the court's power to make vexatious litigation restraint orders. 3.7 discusses the court's power to make a costs order where the application was frivolous, vexatious or made in bad faith.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section [13.9.2] notes: 'In some circumstances Family Court proceedings or orders have been used by a perpetrator of family or domestic violence to reassert their power and control'.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 7: Perpetration Characteristics and Litigation Tactics 'discusses options in response to the rationalizations and litigation tactics of domestic violators who engage in the coercive, controlling, dominating aspects of domestic violence in order to gain the upper hand in family and child protection litigation'.

Section 7.4: Perpetrator litigation tactics discusses the use of litigation to control or harass: '[p]rotracted litigation not only forces the targeted parent into continuing contact with the domestic violator, it also depletes resources, increases stress, and interferes with recovery from domestic violence'. The section goes onto consider judicial responses to litigation tactics, including:

- Including explicit findings in judgments relating to and denouncing the misuse of litigation;
- Engaging in coordinated case management and information sharing;
- Exercising the court's authority to prevent abuse of process by declaring a litigant to be vexatious;
- Potential cost options (e.g. interim cost orders);
- Appeal options (i.e. appealing orders is a litigation tactic; responses include requiring security for costs or requiring the appellant to comply with existing orders before entertaining the appeal);
- Avoiding orders that enable harassment and control;
- Additional options in response to excessive litigation (e.g. cost orders to pay for targeted parent's legal representation; prohibit the presence of the abusive party during discovery of documents).

Section 7.4.2: Responding to allegations of the targeted partner's unlawful conduct

- This tactic may be used to discourage survivors from contacting police where survivors have been previously arrested based on the perpetrator's allegations
- See also '6.4.6 When the parties present mirror claims', describing tactics of the batterer to accuse the victim of behaviours similar to his own to distract from his abuse

Section 7.4.12: Interpreting information when only one party is physically present

- This increases the risk of, e.g., orders being enforced without contemplating DV or abuse

Section 7.4.23: When the perpetrator makes spurious child abuse claims

Section 7.4.24: When perpetrators enlist grandparents

- Describes instances where perpetrators' family members 'seek to be added as parties to litigation against the mother'

Section 7.4.28: When perpetrators make complaints against professionals (such as police, evaluators, therapists, supervisors of access, child protection authorities, mediators, lawyers, and judges), and Section 7.4.29: When the perpetrator threatens service providers, lawyers and judges

- Refers to instances of hiring and firing lawyers, and making multiple complaints, dragging out the process for the victim for extended periods of time and prolonging contact and control

Section 7.4.3: When the perpetrator insists on mutual protection orders

Section 7.4.32: When perpetrators file retaliatory parallel claims in multiple courts

Section 5.3: Detection and prevention of intimidation in discovery proceedings and hearings

- This section notes the continued tactics of intimidation and harassment targeted persons may experience in court, emphasising they may be quite subtle. Some possible judicial responses to such actions are identified:
  - Monitoring cross examination, and ensuring this is conducted by a lawyer;
  - Redirecting perpetrator's testimony to relevant issues;
  - Enabling the victim to testify without directly facing the perpetrator (e.g. via video link of from behind a screen);
  - Providing separate waiting rooms for the parties;
  - Staggering the parties' entrances and exits;

- It should be noted that '[s]tressful surroundings can exaggerate underlying psychological reactions and harm produced by domestic violence. Witnesses are being asked to recount traumatic abuse and violence by persons who breached an intimate trust. In such circumstances, it is particularly important for lawyers and service providers, particularly male professionals, to put the witness at ease and to ensure that all questions are phrased in a non-threatening, non-accusatory manner' (Section 5.3.3).

Systems abuse - Other Resources

Australia

Australian Government: Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System: Final Report*, ALRC Report 135 (March 2019).

In a 2019 report investigating the family law system the Australian Law Reform Commission included a section in which it recognised and discussed a variety of misuses of processes and systems associated with family law interactions (footnotes omitted):

Misuse of processes and systems

10.26 Stakeholders raised the issue of behaviour involving engagement, and non-engagement, with various family law and other systems and processes to achieve ends other than those for which the processes are designed, in the context of family violence. Higher court use and higher rates of unsuccessful engagement with FDR are associated with patterns of violence marked as part of a pattern of coercive control. Research and analysis over a long period of time has highlighted a range of behaviours that can occur in this context, with submissions providing examples of:

- manipulation in engagement with Family Relationship Centre services either prior to lodging a court application or when mandated by a court order;
- refusing to attend meetings, rescheduling meetings, or refusing to sign documents;
- seeking preliminary advice to create a conflict of interest and prevent the other party from obtaining legal advice, using litigation to waste the resources of the other party, and using the threat of indemnity costs to intimidate the other party;
- repeated engagement with parenting orders programs over issues that have been dealt with by other services over a number of years;
- instigating and re-instigating legal proceedings in multiple courts, including applications for final orders and for enforcement of parenting orders in the family courts;
- repeated applications to the court in the same matter, including in relation to recovery orders;
- prolonging court proceedings by requiring adjournments and challenging interim and procedural determinations, sometimes with the intent to and effect of exhausting legal funding (legal aid or private

resources), also known as ‘burning off’;

- making cross-applications in proceedings for personal protection orders;
- using processes in one court to obtain an advantage in another, for example, using family court processes to gain evidence that is also relevant to a criminal matter;
- self-representing in court to create opportunities to personally cross-examine victims about family violence, sexual abuse allegations, and other sensitive issues;
- using evidence gathering processes, including subpoenas, to obtain access to sensitive personal material such as the victim’s therapeutic counselling records or sexual assault service records;
- making multiple notifications to child protection agencies or making notifications to child protection agencies in relation to trivial matters;
- challenging and appealing child support determinations;
- deliberately not engaging or delaying engagement with FDR services to delay resolution or force the other party to self-represent in court; and
- non-disclosure of income and assets in property and financial matters.

10.27 Misuse of processes and systems can impede post-separation re-establishment and recovery from the effects of family violence, as well as parenting compromising capacity and the emotional and other resources available to meet children’s needs. It also has significant implications for the efficiency of the system and access to the system.

Family Court of Australia, *Family Violence Best Practice Principles, 4th edition* (2016).

The Best Practice Principles are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the *Family Law Act* 1975 (Cmth), and provide useful background information for decision makers, legal practitioners and individuals involved in these cases including an explanation of the definition of ‘family violence’ and ‘abuse’ under the Family Law Act and the different types of violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the prominence given to the issue of family violence in the Family Law Act, and

- the principles guiding the case management system for the disposition of cases involving allegations of abuse of children.

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2016).

See the Executive Summary (p6-9) which makes a number of recommendations. It also identifies and discusses key pre-court barriers:

- Lack of knowledge of legal rights;
- Lack of financial independence;
- The importance of integrated support services;
- Poor police responses;
- The impact of pre-arrival experiences and traumatic backgrounds;
- Community pressure on women seeking to protect themselves and their children;
- Uncertainty about immigration status and fear of deportation; and
- The cost of engagement with the legal system.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and
- Unethical and poor professional conduct by interpreters.

Identifies barriers to full participation in attending court:

- The intimidating process of arriving at court;
- Safety while waiting at court;
- Lack of understanding of court processes;

- Difficulty understanding forms, charges, orders or judgments;
- Courtroom dynamics;
- The impact of attitudes and actions of judicial officers;
- The need for judicial officers to receive cultural competency training;
- Lack of availability of men's behaviour change programs; and
- Abuse of court processes by perpetrators.

International

- **Colorado Coalition Against Domestic Violence,** ***False allegations of abuse - or not? Understanding the reality of domestic violence & sexual assault*** **(n.d.).**

Systems abuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Ben

Bianca

Carol

Erin

Faith

Felicity

Fiona

Francis

Gillian

Hilary

Ingrid

Jane

Lisa

Sandra

Systems abuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Walpole & Secretary, Department of Communities and Justice **[2020] FamCAFC 65 (25 March 2020) – Family Court of Australia (Full Court)**

Ryan and Aldridge JJ criticised the role of the Secretary of the Department of Communities and Justice (NSW) as the Central Authority in pursuing the matter:

[78] *'We have been troubled by what occurred in this case and it is timely to mention the importance of adherence to Model Litigant guidelines. The NSW Guidelines, which apply to the Central Authority, requires more than merely acting honestly and in accordance with the law and court rules. Essentially, the guidelines require that the Central Authority acts with complete propriety and in accordance with the highest professional standards. Relevantly, this includes not requiring the other party to prove a matter which the state or an agency knows to be true.'*

[79] *'In this case, the application disclosed the father's final term of imprisonment in NSW. Even though the Requesting Authority knew that the father was permanently banned from Australia, had effectively been deported and had lived in New Zealand for many years, it would seem that no attempt was made to establish his criminal antecedents or the involvement (if any) of child protection agencies in New Zealand in relation to his other children. The same applies in NSW. To be fair, the Requesting Authority and the Central Authority disclosed the mother's application for a protection order and thereby flagged that, on the mother's case, serious risk issues arose.'*

[80] *'It is our understanding that systems are in place in NSW which enable the Central Authority to access/request information from the NSW Police. We assume New Zealand operates in the same fashion. Thus, the Requesting Authority and Central Authority were able to examine and present the father's complete criminal history and an entire set of COPS records. Instead, it was left to the mother and the ICL to gather records from New Zealand and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was*

not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious.'

***Theophane & Hunt* [2014] FamCA 1038 (24 November 2014) – Family Court of Australia**

The father lodged a number of vexatious family law applications including: agreeing to consent orders but still pressing on with interim applications for different orders to those which he had just agreed upon; alleging a contravention without any factual material properly supporting it; application seeking injunctions of previous orders of the court x 2; application to appeal a decision where there was no sufficient change of circumstance to warrant fresh proceedings; application for interim relief to remove the Independent Children's Lawyer.

Tree J at [243]: 'It will be appreciated that I have not formed the view that the father's entire conduct, whether in instituting proceedings or in conducting them, has been vexatious. However I am satisfied that on numerous occasions, either the proceedings have been instituted vexatiously or they have been conducted vexatiously. I am therefore satisfied that the father has frequently instituted or conducted vexatious proceedings'.

***GRP v ABQ* [2020] QDC 272 (28 October 2020) – Queensland District Court**

In considering whether to make a TPO against the respondent, her Honour had regard to the principle in the Act that: "In circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified" and the respondent's submission that this principle recognises that: "A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings" (at [34]-[35]).

***Groom v Police* [2020] SASCA 1 (22 January 2021) – South Australian Court of Appeal**

The Court not only dismissed the application for permission to appeal but also held at [10]-[11] that:

> "In our view, the latest material filed in support of the application for permission to appeal demonstrates that the applicant continues to attempt to relitigate matters previously ventilated and considered in the

> Magistrates Court, by the various Judges of this Court and by the Full Court.
>
> We consider the current application for permission to appeal, in the circumstances, to be an abuse of process."

The Court referred the matter to the Attorney-General to consider whether there were proper grounds for an application to be made under s 39 of the *Supreme Court Act 1935* (SA) to stay any further proceedings sought to be instituted by the applicant (at [12]-[13]).

Cannell v G; G v Cannell **[2018] TASSC 55 (1 November 2018) – Tasmanian Supreme Court**

The defendant was charged with contravention of a protection order when the defendant approached the complainant on numerous occasions to serve her with an application for a restraining order:

Brett J: 'The evidence overwhelmingly supported the magistrate's conclusion that the defendant had harassed the complainant by following her, and that following her was deliberate and intentional…. Whilst the service of documents on the complainant was a legitimate purpose, it did not justify conduct on the part of the defendant that was in breach of the [protection] order. It goes without saying that there were other ways of achieving that legitimate purpose which did not involve contravention of the family violence order.' [63]

Baron v Walsh **[2014] WASCA 124 (18 June 2014) – Western Australia Supreme Court (Court of Appeal)**

McLure P at [63]: *'the intent or purpose with which legally available procedures are threatened or used can result in the commission of a tort (malicious prosecution, abuse of process) or a criminal offence…Further, the commencement or maintenance of legal proceedings for an improper collateral purpose is a tort: Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509; Flower & Hart (a firm) v White Industries (Qld) Pty Ltd [1999] FCA 773; (1999) 163 ALR 744. A knowingly frivolous and vexatious claim is also an abuse of process.'*

Her Honour went on at [65]: *'To threaten and/or take detrimental action against a person to achieve a collateral outcome is improper (at least) and is to behave in a manner that is intimidating, even if the action involves a person availing himself of legally available procedures. I do not intend to suggest that this is an exhaustive statement of behaviour that is intimidating.'*

Conomy v Maden **[2016] WASCA 30 (18 February 2016) – Western Australia Supreme Court (Court of Appeal)**

The Court at [117]: 'The paramount responsibility which a judicial officer presiding over a criminal trial owes to the community is ensuring that the accused person receives a fair trial. However, the judicial officer also owes other concurrent responsibilities to the community. In a case such as the present they include a responsibility to see that the accused does not utilise the proceedings as a vehicle for harassment of the alleged victim. The exercise of that responsibility will require vigilance in confining an accused person to asking questions which are relevant to the issues raised for the court's determination'.

Forced marriage

A forced marriage exists when a person marries without freely and fully consenting as a result of being coerced, threatened or deceived, or because they are incapable of understanding the nature and effect of a marriage ceremony, for reasons including age or mental capacity [Cth Department of Home Affairs Forced Marriage website]. This is different from an arranged marriage where both parties consent to the marriage being organised by their families [McGuire 2014]. Causing a person to enter a forced marriage is a criminal offence under the Commonwealth *Criminal Code Act (1995)*; and due to the absence of 'real consent', a forced marriage would be void under the Commonwealth *Marriage Act (1961)*.

Forced marriage is conceptualised as a slavery-like practice because it deprives people of their equal enjoyment and exercise of basic human rights and freedoms. The circumstances in which a person is coerced, threatened or deceived so as to diminish or negate their capacity to voluntarily consent to marriage may also involve a range of domestic and family violence behaviours, including physical violence, honour-based violence, threats to kill or harm, restriction of movement or psychological oppression. These behaviours may be perpetrated by the other party or members of either party's family who seek to control behaviour that challenges cultural norms, to protect family honour, or to prevent a marriage that is considered unsuitable [McGuire 2014]. The person may be sent overseas to be forcibly married, or seek asylum in Australia to avoid forced marriage in their country of origin; or a non-citizen forcibly married in Australia may fear being returned to their country of origin and having to face family punishment.

Available data in Australia indicates forced marriage is a practice that disproportionately affects women and girls [Karma Nirvana 2008]. However reliable data for Australia is not available as forced marriage is believed to be significantly underreported [McGuire 2014]. Some of the reasons for underreporting include: social stigma, family pressure, financial constraints, actual and threatened further violence and abuse, concerns about the welfare of children, lack of access to legal information or representation, and fear of deportation where the perpetrator threatens to withdraw sponsorship of the victim's temporary immigration visa.

Children at risk of forced marriage may, under the *Family Law Act 1975*, apply to the Family Court of Australia for parenting orders prohibiting conduct that would enable the marriage, for example confiscating passports, restraining the child's removal from the country, or placing the child on the Airport Watch List. Currently, there

are no equivalent provisions available to adults at risk of forced marriage; however they may seek protection under applicable domestic and family violence legislation.

Forced marriage may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Forced marriage - Key Literature

Australia

Lyneham, S., & Bricknell, S. (2018), When saying no is not an option: Forced marriage in Australia and New Zealand, Australian Institute of Criminology.

This Australian research explores the context of forced marriage, drawing on interviews with stakeholders (24 interviews with 38 participants), focus groups with stakeholders and community members (5 focus groups with 47 participants), interviews with victim/survivors (6 interviews with 7 participants) and victim/survivor case files (n=10).

'Findings from the research suggest that forced marriage tends to be associated with families and communities characterised by social conservatism, a commitment to tradition and a strict adherence to prescribed behavioural conduct. This environment can produce intense pressure to conform and consequently limited autonomy, often, for women and girls and those (male or female) perceived to be 'different'. The latter includes persons with a disability, those whose sexual preference or sexual behaviour is at odds with desired norms, and those who have aspirations to independent living. In such circumstances, choice is often curbed. This is particularly so for a family interest matter such as marriage.' (p. vii).

McGuire, Magdalena, *'The Right to Refuse: Examining Forced Marriage in Australia'* (Report: Good Shepherd Youth & Family Service, Domestic Violence Victoria and Good ShepherdAustralia New Zealand, 2014).

This project drew on *The Right to Refuse* forum (a cross-sectoral forum on forced marriage which was held by the research partners) and the literature to devise some key findings about forced marriage. These findings include:

- Forced marriage is a form of violence against women and girls. It can lead to a range of negative consequences for victims, including physical, sexual, and psychological violence, economic abuse, denial of education, social isolation, and mental health problems
- Forced marriage and arranged marriage are two distinct practices. While forced marriage is unlawful and harmful, arranged marriage is an acceptable practice (to the extent that it allows potential partners to

consent to the marriage). Currently, there is little awareness in the community about the difference between forced marriage and arranged marriage.

- Little is known about the prevalence and manifestation of forced marriage in Australia. Nonetheless, it is clear that forced marriage happens to a diverse range of women and girls in the Australian community. Young women and women with cognitive impairments can be particularly at risk of experiencing forced marriage.
- Forced marriage cases are complex and cross over multiple service sectors. It is rare for victims of forced marriage to present with only one problem for which they require assistance.
- Many women and girls who have experienced forced marriage will require the assistance of domestic violence support services. Domestic violence services can be the first place where forced marriage is identified and responded to.
- Women and girls who have experienced forced marriage can be reluctant to engage with services. A key way to address this barrier is to establish a relationship of trust between the victim of forced marriage and a worker within the relevant service.

Simmons, F & Wong G. Learning from lived experience: Australia's legal response to forced marriage. (2021) 44(4) *University of New South Wales Law Journal* 1619-1662.

This article explains forced marriage in the Australian context and highlights its prevalence (p1620-1628). The article also explores the limitations of the current approach to forced marriage in Australia. The paper then draws on a qualitative study with eight survivors of forced marriage in Australia to explore their reflections of the experience of forced marriage and the legal response.

Vidal, Laura, *Opportunities to Respond to Forced Marriage within Australia's Domestic and Family Violence Framework* Issues Paper, 2019, Good Shepherd.

Currently in Australia, responses to the practice of forced marriage are heavily embedded within a criminal justice framework. This paper considers whether there are opportunities to prevent and respond to forced marriage within existing and more holistic domestic and family violence laws and policies instead. It discusses the relationship between forced marriage and family violence, the drivers and impacts of forced marriage, the gendered nature of family violence and forced marriage, policy and legislative responses, general trends in

legislative responses, existing intervention orders, and the proposed forced marriage protection order scheme. A table noting where forced marriage is recognised within current Commonwealth and state and territory legislation is included as an appendix.

International

Karma Nirvana, *'Survivors of Honour Based Violence and Forced Marriage in the UK'* (Sample study, 2008).

On 11th April 2008 a dedicated line for reporting honour based violence (HBV) issues was opened in the United Kingdom. 1069 calls were received in the four months since inception. The aim of this report is to provide an overview of all the calls received by the line and then more detailed analysis of a sample size of approximately 10% (100 calls). Findings include:

- 65% of callers were the actual victims of abuse.
- The vast majority of victims were female (89%).
- Approximately one third of all victims were below 22 years of age. 11% of victims were aged 16 years and under, whilst the highest percentage of victims were aged 17 years of age (16%).
- A large percentage of victims were Muslim and of Pakistani origin
- Members of the victim's immediate family (including husbands and partners) were the main perpetrators of abuse.
- Forced marriage and honour based violence were the main triggers for abuse.
- Almost 80% of all callers quoted forced marriage as the type of abuse being perpetrated against them and approx. 70% quoted HBV. Other forms of abuse reported included physical, emotional, psychological, reluctant sponsor, financial, sexual and abuse of children.

Love, H., Dank, M., Esthappan, S., & Zweig, J. (2019) *Navigating an Unclear Terrain: Challenges in Recognizing, Naming, and Accessing Services for "Forced Marriage."* Violence Against Women, 25(9), 1138–1159.

In exploring the nature of forced marriages and filling the gap in existing research related to the practice in the United States, the study sought to answer the following questions: (1) what factors put an individual at risk of

forced marriage; (2) how do social norms influence and support the practice of forced marriage; (3) how do people forced marriages are imposed on seek help; and (4) how are service providers and justice system stakeholders responding to cases of forced marriage. To answer these questions, interviews were conducted with 24 members of the South Asian community in the Washington, DC metropolitan area who had experienced forced marriage either directly or knew someone who had. Eleven of these interviewees had first-hand experiences with the practice (these participants will be referred to as ‘respondents’). Fifteen relevant stakeholders such as service providers, counsellors and religious leaders were also interviewed.

The study provided that the existing – although limited - literature exploring the practice of forced marriage has found that the parties the marriages are imposed upon face several barriers when trying to access help. The interviews conducted during the study supported these findings. The main barriers identified were: lack of awareness of services; difficulties in disclosing forced marriage, especially to professionals; and inadequate service provision options offered to people who experience forced marriage

Respondents’ Experiences

Most participants provided that they had very limited access to information about services for forced marriage and/or associated rights or were unaware that they existed altogether. "In some cases, respondents’ unawareness of services was compounded by the fact that the term ‘forced marriage’ did not fit their understanding of their experience" (1147). Counsellors and other service providers reported a similar reluctance to use the term. When respondents were aware of forced marriage services, they reported that they were often reluctant to access them due to the "stigma associated with intimate violence and with disclosing details of one’s personal life to others" (1148). Stakeholders provided that in addition to this stigma, power and gender dynamics within clients’ families or fear of family members being subjected to criminal ramifications also acted as barriers to respondents seeking help.

Most of the participants "agreed that responding to forced marriage is more complex than arresting those who are ‘forcing’ the marriage" (1150). In fact, many respondents were reluctant to engage in exit strategies that required them to be separated from family members despite the fears of service providers that remaining with or returning to family would allow respondents to be subjected to coercion again. Instead, respondents believed that either nuanced policy responses or "services aimed at addressing he structural causes that facilitate power imbalances and victimisation within relationships, rather than services narrowed to focus on a specific crime or instance of abuse" would be more effective (1150).

Stakeholders’ Experiences

Stakeholders reported that they faced several barriers while trying to deliver services to clients. The three most common were: inconsistent organisational understandings of forced marriage; the lack of standardised methods for identifying clients; and the unmet need for cultural competency. Most stakeholders reported that their organisations did not have a working definition of forced marriage and that they personally only have very limited exposure to forced marriage cases.

When stakeholders did claim to understand the concept, there were large inconsistencies between their definitions. For example, some stakeholders described cases of forced marriage as falling "along a spectrum of coercion in which their clients faced pressure but did not view themselves as victims of force" while others thought of the concept as a form of gender-based violence. The article provided that these inconsistencies "hold tangible ramifications for the quality of services clients receive" and were indicative of the need for increased training. The article also noted that Along with these inconsistencies, "[s]ervice providers also differed in their methods for screening and identifying clients" (1152).

Forced marriage - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.6.2 discusses forced marriage as a particular experience of family violence experienced by people from a CALD community.

Forced marriage - Other Resources

Anti-Slavery Australia, *My Blue Sky* (2015).

'My Blue Sky is Australia's first website dedicated to forced marriage prevention, information, referrals and legal advice. The site empowers vulnerable people and those who support them to access resources, links to Australian support services, and direct legal assistance through phone, text message, email and secure online locker room. My Blue Sky is an Australian Government funded initiative of Anti-Slavery Australia'. The website also provides information about the meaning of forced marriage and law governing it, information targeted at specific age brackets and information for teachers and health professionals.

Commonwealth Department of Home Affairs, Forced Marriage advice website.

The Commonwealth *Criminal Code Act 1995* (as amended) contains offences regarding forced marriage. It is illegal to cause a person to enter a forced marriage, and to be a party to a forced marriage. Being a party to a forced marriage means agreeing to marry a person who you know or suspect is a victim of forced marriage, unless you are a victim of the forced marriage yourself. The website covers the following issues:

- Australia's response to forced marriage
- Australia's forced marriage offences
- Other laws relating to forced marriage
- Signs that someone may be at risk of forced marriage
- Forced marriage community pack
- Forced marriage community pack documents in community language
- Support and advice

HM Government, Multi-agency practice guidelines: handling cases of forced Marriage, 2014.

A UK government resource developed alongside the statutory guidance "The Right to Choose" issued in 2008 under the Forced Marriage (Civil Protection) Act 2007. The statutory guidance sets out the responsibilities of Chief Executives, Directors and Senior Managers within agencies involved with handling cases of forced

marriage.

This document seeks to supplement the statutory guidance with advice and support to front line practitioners who have responsibilities to safeguard children and protect adults from the abuses associated with forced marriage. It sets out a multi-agency response and encourages agencies to cooperate and work together closely to protect victims.

Judicial Council of Victoria and Judicial Council on Cultural Diversity, Modern Slavery: Guidance for Australian Courts, (2021).

Modern slavery is an umbrella term which encompasses:

- Slavery;
- Slavery-like practices (servitude);
- Organ trafficking,
- Trafficking in persons (including children);
- Forced labour or services (including deceptive recruiting);
- Debt bondage; and
- Forced marriage.

All of these practices have been criminalised through Divisions 270 and 271 of the Criminal Code Act 1995 (Cth) ('Criminal Code'). This Guide.

Notably, forced marriage occurs where one or both parties do not fully and freely consent to the marriage because of coercion, threat or deception, or where one or both parties is incapable of understanding the nature and effect of a marriage ceremony, including for reasons such as age or mental capacity. Forced marriage also occurs where either party to the marriage is under the age of 16. (p14). This guide provides helpful information about this offence and responses to it.

Forced marriage - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Leyla

Forced marriage - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***Kreet v Sampir* [2011] FamCA 22 (18 January 2011); (2011) 252 FLR 234; (2011) 44 Fam LR 405 – Family Court of Australia**

Cronin J at [39] and [43]: '[D]uress is not defined in the Act, but there was no reason to give it any other meaning than that which is normally known to the law. It must be oppression or coercion to such a degree that consent vanishes: *In the Marriage of S* (1980) FLC 90-820'. Here, 'the wife's physical state at the time of the ceremony was such that she was physically and mentally overborne. Her consent was not real because it was obtained by duress'.

Dowry abuse

Whilst some types of family violence are experienced in all communities, there are certain forms of family violence that arise in culturally and linguistically diverse communities. One notable example is dowry abuse, which is particularly prevalent in India, Pakistan, Sri Lanka and the Middle East, though not confined to any ethnic, cultural or religious group [Senate 2019]. Given Australia's status as a multicultural nation, dowry abuse has become an increasing problem.

Dowry is the practice of transferring money, property, goods or other gifts from a person to their spouse's family. The United Nations Division for the Advancement of Women defines dowry-related violence as 'any act of violence or harassment associated with the giving or receiving of dowry at any time before, during or after the marriage' [United Nations 2009]. The practice of dowry is abused when coercive demands are made for further or larger gifts from a victim and their family. These demands are often coupled with acts of physical, emotional or economic abuse, threats, harassment or stalking. Research suggests that dowry abuse can also include abandonment, acid throwing, demands to terminate pregnancy, mutilation, murder, sexual assault, and threats to cancel visa sponsorship or to annul a marriage [GSANZ & inTouch 2018]. Numerous individuals may be involved in perpetrating dowry abuse, such as in-laws, former spouses and fiancés, and other family members and friends [United Nations 2009].

Dowry abuse has been reported to be linked to poor mental health and suicides in women. The Royal Australian and New Zealand College of Psychiatrists have observed that culturally and linguistically diverse women found it difficult to recognise the abuse and seek help due to, for example, fears of cultural and social isolation, and pressures from within the community to maintain the family unit [RANZCP 2018]. It is also widely noted that dowry-related violence may be exacerbated by a victim's immigration status. The Family Violence Response Centre reports that their staff observed that women were less likely to report abuse because of their precarious living situation; work restrictions and ineligibility for government support payments; the isolation of living in a new country; and the fear of deportation to their home country and associated feelings of shame. Women who did seek help, however, have encountered barriers because there is limited understanding and awareness among police, social workers and the legal profession about what dowry is, how it is practiced, and how it can be linked to family violence.

There are currently no laws in Australia that criminalise the practice of dowry or dowry abuse. There have been increasing calls for dowry-related violence to be included in the definition of economic abuse in all Australian legislation [Senate 2019]. Victoria recently legislated to refer to dowry abuse as an example of family violence in s 5(1)(a) of the *Family Violence Protection Act 2008*. Dowry abuse is also mentioned in the Western Australian *Restraining Orders Act 1997* under the definition of family violence in s 5A(2)(ha).

Dowry abuse may be one aspect of a complex pattern of behaviours engaged in by perpetrators in order to control another person, sometimes referred to as coercive control.

Dowry abuse - Key Literature

Australia

Good Shepherd Australian New Zealand and InTouch Multicultural Centre Against Family Violence, Submission to the Senate Standing Committee on Legal and Constitutional Affairs: The practice of dowry and the incidence of dowry abuse in Australia, 16 August 2018.

This submission observes that dowry practices differ between South Asian and North African communities in Australia: in South Asian communities it is characterised by gifts from the wife's family to the husband's family; in North African communities it is characterised by gifts from the husband's family to the wife's family.

It observes that Indian laws recognised dowry as "a key factor that underpins domestic violence". "The practice of dowry does however have the potential to become exploitative and harmful when it is practised in a way that involves force, fraud, coercion, threats and violence (sexual, physical and psychological)." It recommends dowry abuse be included in definitions of family violence in Australia.

Harmony Alliance. Emerging insights from our national survey on dowry abuse. Canberra: Harmony Alliance, 2020.

This paper highlights significant findings from their national survey on dowry abuse, noting respondents were overall very familiar with the practice of dowry and abusive behaviours linked to dowry demands. Most common behaviours connected to dowry demands were verbal abuse, humiliation and controlling behaviours. Other examples identified included murder, reproductive control, child abuse, threats of deportation, family insult and use of family court proceedings against the woman.

O'Connor, M., 'Dowry-related domestic violence and complex posttraumatic stress disorder: a case report' (2017) 25(4) *Australasian Psychiatry* 351-353.

This paper highlights the mental health impact of coercive dowry demands, drawing on a specific case study of a South Asian migrant woman whose husband was dissatisfied with her dowry and inflicted significant emotional and physical trauma as a result. His dissatisfaction with the dowry was found to be a principal reason for the abuse, violence and threats perpetrated against his wife. Although the author acknowledges

that the exact prevalence of dowry-related domestic violence is uncertain in Australia, it is proposed that the problem is substantial, especially given that two dowry-related murders have been reported in Victoria.

O'Connor, M and Lee, A. The health impacts of dowry abuse on South Asian communities in Australia, Med J Aust 2022; 216 (1): 11-13. || doi: 10.5694/mja2.51358

This article considers the health impacts of dowry abuse particular to the Indian-born Australian population including family violence and associated mental harm.

"Abuse associated with dowry includes controlling and coercive behaviour by the husband and his family who pressure, threaten or demand substantial gifts from the woman and her family in the context of the marriage. Among migrant communities in Australia, dowry abuse can manifest in demands for gold jewellery, white goods, gifts, or cash to start a business or buy a house. Refusal to comply with demands for dowry may be associated with threats, violence, verbal harassment, criticism and abandonment. A series of high profile family violence murders in Australia in the Indian community in 2012–2016 were in part related to dowry issues."

The article refers to the results of the Harmony Alliance 2020 national survey on dowry abuse in which respondents identified behaviours connected with dowry demands:

- verbal abuse (85% of respondents);
- humiliation (77%); and
- controlling behaviour (77%).

32% of respondents reported either experiencing dowry abuse themselves or knowing someone who had.

O'Connor, M., et al., 2019, *Understanding Dowry and Dowry Abuse in Australia*, AustralAsian Centre for Human Rights and Health.

Dowry-related violence may be exacerbated by a victim's immigration status. The Family Violence Response Centre reports that their staff observed that women were less likely to report abuse because of their precarious living situation; work restrictions and ineligibility for government support payments; the isolation of

living in a new country; and the fear of deportation to their home country and associated feelings of shame. Women who did seek help, however, have encountered barriers because there is limited understanding and awareness among police, social workers and the legal profession about what dowry is, how it is practiced, and how it can be linked to family violence.

Royal Australian and New Zealand College of Psychiatrists, Submission 9 to The Senate, Legal and Constitutional Affairs References Committee enquiry into the *Practice of dowry and the incidence of dowry abuse in Australia*.

The Royal Australian and New Zealand College of Psychiatrists have observed that culturally and linguistically diverse women found it difficult to recognise the abuse and seek help due to, for example, fears of cultural and social isolation, and pressures from within the community to maintain the family unit (p4).

safe steps Family Violence Response Centre, Submission 14 to The Senate, Legal and Constitutional Affairs References Committee enquiry into the *Practice of dowry and the incidence of dowry abuse in Australia*.

The Family Violence Response Centre reports that their staff observed that women were less likely to report abuse because of their precarious living situation; work restrictions and ineligibility for government support payments; the isolation of living in a new country; and the fear of deportation to their home country and associated feelings of shame. (p8)

The Senate, Legal and Constitutional Affairs References Committee, 2019, *Practice of dowry and the incidence of dowry abuse in Australia*.

In June 2018, the Australian Senate remitted an inquiry into the nature of dowry as a cultural practice and the incidence of dowry abuse in Australia to the Legal and Constitutional Affairs References Committee. The Final Report of the *Practice of Dowry and the Incidence of Dowry Abuse in Australia* was delivered on 14 February 2019. The Committee aimed to explore the practice of dowry and the adequacy of current Australian policy frameworks regarding dowry abuse. The Report, however, did not explicitly define ‘dowry’, which presented issues in relation to collecting and presenting evidence.

The Report's main objectives were to explore *inter alia*:

- the extent, nature and prevalence of dowry in Australia, both before and after marriage;
- reports of dowry abuse, including potential links to family violence, slavery and financial abuse;
- links between dowry, dowry abuse and forced marriage; and
- the adequacy of the family law system, including how divorce and property settlement proceedings deal with dowry and dowry abuse.

It outlined 12 recommendations to government to address dowry abuse in Australia. Although the Report did not propose to criminalise the practice of dowry in its entirety, it did recommend an approach that recognises dowry abuse as economic abuse within the context of family violence, and suggested that it be included in the *Family Law Act 1975* (Cth).

Segrave, M., and Vidal, L., 'Dowry abuse: it's a growing problem in Australia, but new laws aren't the answer' (2019) *Monash University Lens.*

The authors explore legislative frameworks surrounding dowry abuse and argue that "a key response must be to implement effective legislation covering economic abuse more generally, rather than singling out certain cultural practices". Quantifying the practice of dowry in Australia, and the extent to which it is used as a form of abuse or coercion, is difficult; however, it does exist among certain Australian communities, and the need to implement measures addressing it are only recently being considered. The authors also refer to the Report, *Practice of dowry and the incidence of dowry abuse in Australia,* and a joint submission noting "the slippage between dowry abuse, arranged and forced marriage and the absence of a clear definition of dowry abuse (given the many forms of payments that occur in the context of marriage, including dowry, dower, bride price, bride service)".

International

United Nations, 2009, *Good practices in legislation on "harmful practices" against women*, United Nations Division for the Advancement of Women and United Nations Economic Commission for Africa.

See 3.3.4 Dowry-related violence and harassment. 'Demands for dowry can result in women being harassed,

harmed or killed, including women being burned to death, and in deaths of women which are labelled as suicides. It is necessary for dowry to be defined as broadly as possible to capture the full range of exchanges given, or asked for, in the name of dowry.' This paper recommends legislation should 'define dowry-related violence or harassment as any act of violence or harassment associated with the giving or receiving of dowry at any time before, during or after the marriage.' (p20)

Dowry abuse - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.6.2 discusses dowry-related violence as a particular experience of family violence experienced by people from a CALD community.

Coercive control

Understanding coercive control

Coercive control is almost always an underpinning dynamic of family and domestic violence: Perpetrators exert power and dominance of victim-survivors using patterns of abusive behaviour over time [National Plan 2022]that create fear and deny victim-survivors liberty and autonomy [Stark 2007].

There is no single agreed definition of coercive control [Boxall & Morgan 2021]. However, research consistently identifies that the behaviours and tactics associated with coercive control can be subtle [Douglas & Ehler 2022], difficult to identify and different in each relationship [Stark & Hester 2019]. Coercive control manifests and is experienced in various ways in different class and cultural contexts. The impacts of coercive control are pervasive, and can be physical, emotional, psychological, spiritual, cultural, social and financial. Impacts are also intersecting and cumulative, rather than incident-specific. Victim-survivors commonly describe coercive control as feeling like 'walking on eggshells' and report they need to ask permission to do small everyday things and fear the repercussions of not fulfilling their abuser's expectations or demands.

Use of retaliatory violence or self-defence against a perpetrator are not coercive control.

Coercive control is mainly perpetrated by men against women [Stark 2007] . Perpetrators can exert power and dominance over victim-survivors in current and former intimate partner relationships. Coercive control can also be perpetrated in broader family relationships, such as against children or young people by parents or relatives, against parents or elders by adult children or grandchildren, or between siblings. Coercive control is particularly prevalent in relationships where there is an imbalance of power [Stark & Hester 2019]. Professor Evan Stark has described coercive control as "a pattern of domination that includes tactics to isolate, degrade, exploit and control" victims [Stark 2007].

The behaviours associated with coercive control can take many different forms including any of the forms of domestic and family violence considered in this benchbook. Common behaviours that may be used by perpetrators as part of coercive control include but are not limited to:

- emotional manipulation including humiliation and threats,
- surveillance and monitoring, often carried out online,

- isolation from friends and family,
- rigid rules about where the person can eat, sleep or pray,
- placing limits on economic autonomy.

As coercive control depends on context, evidence or information about the context may assist the decision-maker to identify coercive control and help ensure the victim-survivor is not misidentified as a perpetrator.

In situations involving coercive control the abuser draws on their specific knowledge of the victim to entrap the victim, and the tactics used to assert control may change over time [Stark 2007]:

- The abuser may target the victim's children to extend their control over the victim, sometimes using children as a tool of surveillance or intimidation [Katz et al 2020].
- The abuser's attack on the victim's autonomy can involve utilising systems [VE: Bianca], including the legal system (sometimes referred to as 'systems abuse').

Research has identified that domestic and family violence is rarely a single incident, rather it is a pattern of behaviour that may or may not include physical force, and extends beyond the home and beyond the duration of a relationship [Kelly et al 2014]. These patterns of behaviour may occur throughout a relationship, or may be initiated or exacerbated at times of heightened risk, for example, pregnancy, attempted or actual separation [Bruton & Tyson 2017], and during court proceedings [Douglas & Ehler 2022].

Some judicial officers have considered coercive control. A selection of examples are contained in the Cases tab attached to this subsection.

In some relationships physical violence is part of the pattern of coercive control but incidents of physical violence may be routine, minor and frequently repeated [Stark 2007]. Other victims-survivors report that physical violence is rare or a once off or occurred early in the relationship, but establishes the abuser's capacity and potential for physical violence [Douglas 2021]. Some people who experience coercive control do not experience physical violence [Boxall & Morgan 2021].

Coercive control can be damaging even when there is no physical violence. Many victim-survivors identify that non-physical abuse deeply impacts on their sense of self and freedom, and often continues to affect them years after separation [Bagshaw et al 2011]. Many victim-survivors of domestic and family violence report that the most difficult forms of abuse they experienced were non-physical forms of abuse, especially emotional

abuse [Douglas 2021].

The community and broader service and response system, including law enforcement and the courts, can typically focus on physical violence and single or episodic acts of violence in isolation, rather than considering patterns of physical and non-physical behaviour over time and their cumulative impacts [Stark & Hester 2019]. This can make it easy for perpetrators to hide their actions from systems and can lead to a perpetrator's subtle and highly contextualised abuse, and the compounding impact of coercive control, being overlooked and/or minimised. Incident-based responses can also heighten the risks of misidentifying the victim-survivor as the perpetrator [Nancarrow et al 2020].

Researchers have suggested that coercive control is a common thread running through risk identification and assessment for domestic violence [Myhill & Hohl 2019].

In NSW, a detailed analysis of intimate partner homicides between 2008-2016 demonstrated that 99% (111/112) of the homicides were preceded by coercive control [NSW DV Death Review 2020]. The Queensland Domestic and Family Violence Review and Advisory Board in its 2018-19 Annual Report reported evidence of controlling behaviours by 39.4 per cent and obsessive and/or jealous behaviours by 37.8 per cent of family and domestic violence homicide offenders between 2006 and 2018 [Queensland Government Domestic and Family Violence Death Review 2019] (see also Death review).

Coercive control - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response *(ALRC Report 114)* 2010.

Abstract: This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. Chapter 12 discussed penalties and sentencing for breach of protection orders. The report notes that: 'The overwhelming majority of stakeholders that addressed this issue were in favour of sanctions that could help to change the behaviour of those who commit violence. Therefore, there was support for 'perpetrator programs' such as violence and drug and alcohol rehabilitation programs; probation with special conditions, such as attending 'perpetrators' courses or counselling'; men's behaviour programs; psychiatric assessment and treatment; anger management programs; and educational programs on family violence with 'therapeutic interventions'' (at [12.172].) Other options raised (as an alternative to imprisonment) included community service orders (provided the work associated with the penalty is 'meaningful, constructive and rehabilitative') (at [12.173])

The underlying issue in Chapters 13 and 14 is the way in which the criminal law accounts for the nature and dynamics of family violence. Criminal laws are traditionally perceived as 'incident-based', in that they are focused upon discrete acts forming the basis of individual offences. As identified in Chapter 5, family violence is characterised by patterns of controlling, coercive or dominating behaviour and may include both physical and non-physical violence [13.2].

Australia's National Research Organisation for Women's Safety. (2021). *Defining and responding to coercive control: Policy brief* (ANROWS Insights, 01/2021). Sydney: ANROWS.

Abstract: This policy brief aims to assist policymakers developing legal or policy and practice frameworks to prevent or respond to coercive control in relation to domestic and family violence (DFV). It addresses three considerations emerging from current debates on this topic. The first is the need for consistent definition of coercive control and its relationship to the definition of DFV in policy and legislative settings, Australia-wide. The second key consideration, criminalising coercive control, necessitates making an assessment of whether the existing evidence base supports the creation of a specific offence. The third involves reforming the culture

of response to DFV, in and around the legal system and in other settings. In considering changes to the way we define and respond to coercive control, it is also necessary to keep front of mind the barriers that diverse groups of women face in our existing justice system, and mitigate risks and unintended consequences of legislative and policy change.

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports on the findings from the analysis of data from two national online surveys (one for adults and one for children), which collected quantitative data and also allowed for qualitative comments about family violence and its impact on parenting and parenting arrangements. The study included adults and children who had separated after 1995 and after the introduction of the Family Law (Shared Parental Responsibility) Amendment Act (Cth) in 2006. The researchers gained the views of a total of 1,153 adults (90%) and children (10%).

Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports.

See in particular at p 53 – 'Some women felt powerless over arrangements to share care of the children with the fathers and felt they had been pressured into unfair agreements. For example, one woman who used services before the 2006 reforms said: 'The power he held over me during the relationship continued afterwards in regard to parenting arrangements and finances'. See also at p 55 where reports of confusion about the meaning of 'equal shared parental responsibility' are discussed.

Beckwith, S., Lowe, L., Wall, L., Stevens, E., Carson, R., Kaspiew, R., MacDonald, J, B., McEwan, J., Willoughby, M., (2023). Coercive Control Literature Review – Final report. (Research Report). Melbourne: Australian Institute of Family Studies.

This report presents a comprehensive literature review of resources focused on the growing understanding of

coercive control in an Australian context.

Stephanie Beckwith, Lauren Lowe, Liz Wall, Emily Stevens, Rachel Carson, Rae Kaspiew, Jasmine B. MacDonald, Jade McEwen and Melissa Willoughby, *Coercive control Literature Review: Final Report* (Australian Institute of Family Studies, 2023).

Overview: This report presents a literature review on coercive control in the context of domestic and family violence, with a particular focus on the understanding of, and responses to coercive control in the Australian context. Commissioned by the Australian Attorney-General's Department, this review focuses on identifying, summarising, analysing and synthesising the existing Australian academic research and evaluations on coercive control. The review highlights the complexities of defining, recognising, and responding to coercive control and identifies relevant gaps in the evidence base. Drawing from a range of quantitative and qualitative studies across scholarly and grey literature, including non-government reports, government and parliamentary reports, peak body reports, and position papers, this review captures the growing recognition of coercively controlling behaviour in the context of family and domestic violence.

Boxall H & Morgan A 2021. Experiences of coercive control among Australian women. Statistical Bulletin no. 30. Canberra: Australian Institute of Criminology.

Abstract: Awareness of coercive control within the context of abusive intimate relationships is greater than ever before in Australia. However, there is limited research examining the different patterns and characteristics of abuse, particularly among large Australian samples.

This study examines the characteristics of violence and abuse reported by 1,023 Australian women who had recently experienced coercive control by their current or former partner. The most frequently reported behaviours were jealousy and suspicion of friends, constant insults, monitoring of movements and financial abuse. Over half of the respondents also reported experiencing physical forms of abuse (54%), including severe forms such as non-fatal strangulation (27%). One in three of these women also reported experiencing sexual violence during the survey period (30%). Women were much more likely to seek advice or support when they had also experienced physical or sexual forms of abuse.

Bruton, Crystal and Danielle Tyson, 'Leaving Violent Men: A Study of Women's Experiences of Separation in Victoria, Australia' (2017) 51(3) *Australian & New Zealand Journal of Criminology* 339-354 https://doi.org/10.1177/0004865817746711

This article explores women's experiences of leaving abusive relationships and seeks to combat assumptions about the nature of such relationships through in-depth interviews with 12 women who had separated from their male intimate partners (p 5). While separation is broadly recognised as a key time for increased risk of violence towards women and their children (p 1), studies demonstrate that most people believe women are able to leave violent relationships, and do not understand why they might stay (p 2). Such views place the responsibility for ending the violence on women, but in reality, these relationships often include complex circumstances, and the 'stay/leave binary' is rarely applicable (p 2). The results indicate that women's experiences of coercive control significantly affected their decision-making in the context of separation (p 6):

- Many women feared leaving because they were aware that separation may provoke retaliatory violence, with some experiencing an escalation of abusive behaviour when they attempted to leave (p 7);
- Many women were motivated to leave the relationship in order to protect their children, especially where violence became directed towards the children (p 8);
- Women's attempts to leave their relationships were often hindered by their partner's control over their finances (p 9); and
- Women adopted strategies to manage their safety both during and following separation (pp 9-10), and many women experienced escalating violence after separation (pp 11-12).

Commonwealth of Australia (Department of Social Services) 2022, National Plan to End Violence Against Women and Children 2022-2032.

The new National Plan acknowledges that coercive control is often as significant part of a victim's experience of domestic and family violence. It recognises that a pattern of abuse may include [37]:

- physical abuse (including sexual abuse);
- monitoring the victim's actions;
- restricting freedom or independence;
- social abuse;

- using threats and intimidation;
- emotional of psychological abuse (including spiritual and religious abuse);
- financial abuse;
- sexual coercion;
- reproductive coercion;
- lateral violence;
- systems abuse;
- technology-facilitated abuse; and
- animal abuse.

Domestic and Family Violence Death Review and Advisory Board (Qld), 2018–19 Annual Report, 2019, Queensland Government.

Includes detail on domestic and family violence related deaths referred to the Coroner. Useful information about how domestic violence-related suicides are recorded in Queensland.

Douglas, H. *Women, Intimate Partner Violence and the Law* (2021; OUP).

Abstract: This text explores the results of an interview study involving interviews with 65 women who had experienced domestic and family violence over three years. See chapter 3: Most women reported that the most difficult form of abuse they dealt with were forms of non-physical abuse, especially emotional abuse. Many women identified that non-physical abuse deeply impacted on their sense of self and freedom, and that it continued to affect them for years. Other forms of non-physical abuse that were also highlighted by the women included abusive tactics targeting their role as a mother, isolation within the relationship, financial abuse. The women in the study highlighted the particular impacts of non-physical forms of abuse, including isolation, financial abuse and threats about their visas, for women from culturally and linguistically diverse backgrounds especially those women with insecure visa status.

Douglas H. Legal systems abuse and coercive control. *Criminology & Criminal Justice*. 2018;18(1):84-99.

Abstract: This article considers how legal engagement can be an opportunity to exercise coercive control over a former intimate partner. Drawing on interviews with 65 women who engaged with the legal system as a result of violence in their intimate relationships, this article explores how women's engagement with the legal system is frequently experienced as an extension of an intimate partner's coercive control. It builds on existing research showing how legal processes provide an opportunity for perpetrators to continue and even expand their repertoire of coercive and controlling behaviours post-separation. I refer to this as legal systems abuse. This article explores women's reported experiences and considers how expectations of equality of access to justice and fair hearing; concepts that underpin legal processes, can be reconciled with legal engagements that seek to end coercive and controlling behaviours. The article concludes that improved understanding of domestic and family violence as coercive control by legal actors may help to circumvent the opportunities for legal systems abuse.

Douglas, Heather and Ehler, Hannah (2022) Coercive Control and Judicial Education: A Consultation Report. (Australasian Institute of Judicial Administration).

Based on interviews with 28 judicial officers and 5 research experts this report considers how to best present information about coercive control in the National Domestic and Family Violence Bench Book and the information needed by judicial officers to better understand coercive control. Based on the detailed material outlined in the Report the key themes considered are the key aspects of coercive control that judicial officers seek explanation of; how coercive control should be explained to judicial officers; how judicial officers can respond to coercive control in the court room and general observations and red flags for identifying coercive control.

Fitz-Gibbon, Kate; Reeves, Ellen; Meyer, Silke; Walklate, Sandra (2023): Victim-survivors' views on and expectations for the criminalisation of coercive control in Australia: Findings from a national survey. Monash University. Report.

This report presents findings from a national survey of 1261 Victim-survivors of coercive control. The survey examined victim-survivors' views on the criminalisation of coercive control. It found that 87.5% of respondents

believed that coercive control should be criminalised. 93% thought that criminalisation would improve awareness of coercive control. 72% of respondents thought that criminalisation of coercive control would make victims safer 31% of First Nations respondents thought that criminalising coercive control would make victim-survivors safer.

Henry, N., Gavey, N., & Johnson, K. (2022) Image-Based Sexual Abuse as a Means of Coercive Control: Victim-Survivor Experiences. *Violence Against Women*, online first. https://doi.org/10.1177/10778012221114918.

Article reports on a study involving interviews with 29 women and one gender-diverse person who experienced image-based sexual abuse as part of a pattern of "coercive control."

From Conclusion: The interviews demonstrated a diversity of experiences well beyond the paradigm of "revenge porn." A common theme across these interviews was the dynamic of coercive control. Image-based sexual abuse is one of many abusive tactics employed (both technology- and nontechnology-based) to isolate and entrap victims within abusive relationships, or at the end of the relationship, to control, intimidate, punish, and degrade them.

Joint Select Committee on Coercive Control, *Coercive control in domestic relationships*. Report 1/57– June 2021, Parliament of New South Wales.

The report of the Joint Select Committee on Coercive Control found that "NSW laws do not respond well to coercive control as a type of abuse, and there is poor understanding of it in our community." The Inquiry sought to identify better ways to respond to coercive control across the New South Wales community.

Chapter 2, "What is coercive control", summarises coercive control:

> Coercive control is a pattern of abuse that degrades, humiliates and isolates victims, and takes away their freedom and autonomy. It has severe psychological impacts on victims. While it does not always involve physical violence, it is a common factor in intimate partner homicides.

This chapter highlights the findings of the New South Wales Death Review Team that in 99% of intimate partner homicides from March 2008 to June 2016 'the relationship between the domestic violence victim and

the domestic violence abuser was characterised by the abuser's use of coercive and controlling behaviours towards the victim. In each of these cases the domestic violence abuser (all male) perpetrated various forms of abuse against the victim, including psychological abuse and emotional abuse.'

The chapter acknowledges the evidence of the NSW Office of the Director of Public Prosecutions that 'many people have great difficulty recognising … behaviour that constitutes coercive control.' It also highlights different ways abusers may exploit the individual cultural and personal characteristics of victims to abuse and control them. It also highlights the impacts of coercive control, including case studies of the impacts of psychological abuse, economic abuse, isolation and financial dependence and using temporary visa status to control victims.

Meeting of Attorneys-General (2022) *Consultation Draft: National Principles to Address Coercive Control in family and Domestic Violence*. Australian Government, Attorney-General's Department.

The Consultation Draft sets out 8 National Principles which include (but are not limited to) a focus on:

- a shared understanding of the common features of coercive control
- understanding the traumatic and pervasive impacts of coercive control
- taking an intersectional approach to understanding features and impacts of coercive control.

*Note final principles are expected to be available in 2023.

Miller P *et al.* 2016. Alcohol/Drug-Involved Family Violence in Australia (ADIVA). NDLERF monograph no. 68. Canberra: Australian Institute of Criminology.

Abstract: Family and domestic violence (FDV) is a significant social issue that causes major social harm across Australia and in response, Commonwealth, state and territory governments have implemented various policy interventions. However, there is, to date, little evidence about what approach is most effective at reducing this violence, and very little research into how specific agencies, like police, can intervene on specific contributing factors of FDV, especially those that might be preventable. Despite the extensive evidence demonstrating the role that alcohol and, to a lesser extent, illicit and other drug use/abuse plays in FDV, there is a lack of information about how interventions that address this issue might be used by police or other agencies to reduce violence.

Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the "person most in need of protection" in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

Abstract: This in-house project was conducted by ANROWS. It aimed to support the effective identification of the "person most in need of protection" in cases where there is some ambiguity about who perpetrated domestic violence and abuse.

The research responded to a recommendation of the Queensland Domestic Violence Death Review and Advisory Board in its 2016-17 Annual Report. The Advisory Board reported that in just under half (44.4%) of all cases of female deaths subject to the review, the woman had been identified as a respondent to a domestic and family violence (DFV) protection order on at least one occasion. Further, in nearly all of the DFV-related deaths of Aboriginal people, the deceased had been recorded as both respondent and aggrieved prior to their death (p. 82). The Board's report recommended research to identify how best to respond to the person most in need of protection where there are mutual allegations of violence and abuse (Recommendation 16).

Responding to that recommendation, the research used a mixed methods approach. This included a national analysis of statistical data (domestic violence order applications, police-issued orders and related criminal charges) and a national desktop review of existing legislative and police requirements and guidance on identifying the DFV victim or perpetrator. The project also involved an in-depth case study of Queensland as a state that has already incorporated the concept of the person most in need of protection into legislation.

The final report emphasises the need for improved guidance for police on identifying patterns of coercive control, and guidance for magistrates on how and when they can dismiss inappropriate applications and/or orders. It recommends clarifying processes of decision-making and accountability between police and the courts as a way of addressing the current ambiguity surrounding responsibility for the determination of the person most in need of protection.

NSW Domestic Violence Death Review Team, *Report 2017-2019* , 2020, NSW Government.

Includes detail on deaths referred to the Coroner, drawing on both data analysis and in-depth case analyses.

Useful information about how domestic violence-related homicides and suicides are recorded in NSW.

Victorian Systemic Review of Family Violence Deaths, *Family Violence Related Homicides, 1 January 2011-31 December 2015*, June 2020, Coroner's Court of Victoria.

Includes detail on domestic and family violence deaths referred to the Coroner.

Wangmann, J. (2022) Law reform processes and criminalising coercive control, 48(1) *Australian Feminist Law Journal* 57-86 doi: 10.1080/13200968.2022.2138186

This article examines three Australian law reform processes established to address coercive control: the New South Wales (NSW) Joint Select Committee on Coercive Control, the Queensland Women's Safety and Justice Taskforce, and the exposure Bill released for comment in South Australia (SA). The key question for these law reform processes was whether coercive control should be criminalised following the introduction of such offences in the United Kingdom (UK) and Ireland. Ultimately all three Australian processes answered this question in the affirmative. The article explores the distinct differences in the processes undertaken, including the extent of participation from different groups in society, the level of engagement with implementation issues, and the degree to which the recommended new offence was positioned more critically within what we know about law reform in response to gender-based violence.

Walklate, S. et al., (2022) In control, out of control or losing control? Making sense of men's reported experiences of coercive control through the lens of hegemonic masculinity. *Journal of Criminology*, online first, doi: 10.1177/26338076221127452

This article is based on data derived from a national online survey conducted in Australia in 2021. The aim of this paper is to explore, and better understand male reported experiences of coercive control victimisation. The survey was completed by 1261 people who identified as victim-survivors of coercive control, 206 (17%) of whom identified as men. The paper explores the men's responses.

The authors observe: 'The range of reported experiences of coercive control among this sample reflects remarkable symmetry with what is known about coercive control more generally and reflects similar

experiences to that documented among women victim-survivors.' (p10)

Women's Safety and Justice Taskforce (2021) Hear her voice volume 2 (Brisbane, Women's Safety and Justice Taskforce).

See pp 206- 229 where the Taskforce reports on submissions it received about judicial officers.

Examples of unsatisfactory treatment of victims by judicial officers are listed at p209 and include:

- judicial officers refusing to grant protection orders and instead, telling victims to go to the family courts.
- judicial officers refusing to put any protection orders in place unless the respondent came to court and then placing the burden on the victim to go away and collect further evidence to get protection.
- a judicial officer requiring victims to provide a letter from a medical practitioner before they would allow the victim to make an application that the victim not be cross-examined by the perpetrator.
- judicial officers applying the law inconsistently, including in relation to coercive control.
- a judicial officer who described a perpetrator placing surveillance cameras throughout the house to watch the movements of the victim as merely being signs of an unhealthy relationship breakdown rather than domestic violence.
- a victim making her own application felt unable to pursue it due to a lack of support and inconsistent guidance from the judicial officer.
- a judicial officer who, without speaking to the aggrieved, dismissed an application for a protection order on the basis that the respondent had contacted the court to advise that they were overseas and unlikely to return.

International

Bonomi, A.E., Martin, D. Domestic Abusers: Expert Triangulators, New Victim Advocacy Models to Buffer Against It. *J Fam Viol* 36, 383–388 (2021). https://doi.org/10.1007/s10896-020-00156-2.

Domestic abuse continues when abusers are behind bars, through voice or video calling or writing to victims from jail. New, emerging models of system response demonstrate that timely, competent, readily available professional advocacy services and options—delivered through electronic pathways—can buffer against this form of abuse. This research uses case examples to illustrate how detained abusers manipulate and tamper

with their victim, along with successful interventions by victim advocates via text message.

L. Kevin Hamberger, Sadie E. Larsen, Amy Lehrner, Coercive control in intimate partner violence, Aggression and Violent Behavior, Volume 37, 2017, Pages 1-11, ISSN 1359-1789.

Abstract: The construct of coercive control has been central to many conceptualizations of intimate partner violence (IPV), yet there is widespread inconsistency in the literature regarding how this construct is defined and measured. This article provides a comprehensive literature review on coercive control in regards to conceptualizations, definitions, operationalization, and measurement; and attempts to provide a synthesis and recommendations for future research. A summary and critique of measures used to assess coercive control in IPV is provided. At least three facets of coercive control are identified: 1) intentionality or goal orientation in the abuser (versus motivation), 2) a negative perception of the controlling behavior by the victim, and 3) the ability of the abuser to obtain control through the deployment of a credible threat. Measurement challenges and opportunities posed by such a multifaceted definition are discussed.

Katz, E (2016) Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control, Child Abuse Review Vol. 25, 46-59.

Abstract: This article begins to build knowledge of how non-violent coercive controlling behaviours can be central to children's experiences of domestic violence. It considers how children can be harmed by, and resist, coercive controlling tactics perpetrated by their father/father-figure against their mother. Already, we know much about how women/mothers experience non-physical forms of domestic violence, including psychological/emotional/verbal and financial abuse, isolation, and monitoring of their activities. However, this knowledge has not yet reached most children and domestic violence research, which tends to focus on children's exposure to physical violence. In this qualitative study, 30 participants from the UK, 15 mothers and 15 of their children (most aged 10-14) who had separated from domestic violence perpetrators, participated in semi-structured interviews. All participants were living in the community. Using the 'Framework' approach to thematically analyse the data, findings indicated that perpetrators'/fathers' coercive control often prevented children from spending time with mothers and grandparents, visiting other children's houses, and engaging in extra-curricular activities. These non-violent behaviours from perpetrators/fathers placed children in isolated, disempowering and constrained worlds which could hamper children's resilience and development and

contribute to emotional/behavioural problems. Implications for practice and the need to empower children in these circumstances are discussed.

Katz, E., Nikupeteri, A., & Laitinen, M., 'When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence' (2020) *Child Abuse Review*.

Abstract: This article highlights how domestic violence perpetrators can use coercive control against their children after their ex-partner has separated from them. It provides insights into how children experience coercive control post-separation by drawing from two data sets: one from the UK and one from Finland. The data comprised narratives of 29 children and young people aged from 4 to 21 years old. Three overarching themes arose from the data: 1) dangerous fathering that made children frightened and unsafe; 2) 'admirable' fathering, where fathers/father figures appeared as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victims'; and 3) omnipresent fathering that continually constrained children's lives. Dangerous fathering made children's lives frightening, constrained and unpredictable. Admirable fathering was found to be a powerful tool of control when combined with dangerous fathering, because admirable fathering increased father-child emotional bonds and could make children want to see/live with their fathers, whilst dangerous fathering simultaneously made them fearful of him. Admirable fathering was typically aimed at professionals and wider communities, and could occur alongside fathers/father figures stalking, harassing and/or attacking ex-partners and children when they were not in the public eye. Perpetrators aimed to portray themselves as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victim' fathers, and to make their ex-partners seem like perpetrators or deficient mothers. Perpetrators disguised their use of coercive control tactics as 'admirable' behaviour. With respect to omnipresent fathering, children were fearful that their father/father figure could appear at any time to attack, harass, manipulate, upset or kidnap them or their mothers. This behaviour led to some children continuously monitoring their surroundings as a protective strategy. Fathers/father figures were able to maintain some degree of control, domination and emotional power over children even when they were not physically present. The article suggests that robust measures are necessary to prevent coercive control perpetrating fathers/father figures from using father-child relationships to continue exerting coercive control on children and ex-partners.

Kelly, Liz; Nicola Sharp and Renate Klein *Finding the Costs of Freedom How women and children rebuild their lives after domestic violence* 2014, Solace Woman's Aid.

See especially pages 11-12 where the authors draw on Evan Stark's research to explain the concept of coercive control. 'The concept of coercive control recognises that it is the everydayness of living with unpredictability which saps women's energy, depletes their sense of self and isolates them from others: it decreases their 'space for action'… intimate partner violence is rarely a single incident but a pattern of behaviour that extends beyond physical force, beyond the home and beyond the duration of a relationship. The concept of 'coercive control' is particularly insightful since he argues that physical and sexual abuse is interwoven with three equally important tactics: control, intimidation and isolation. It is their toxic combination which entraps leading him to argue that domestic violence is not a simple crime of assault but a 'liberty crime' which creates conditions of un-freedom … Coercive control is distinctive in that it draws on personalised knowledge of women's movements, habits, resources and vulnerabilities.' (references removed).

Myhill A, Hohl K. The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence. *Journal of Interpersonal Violence*. 2019; 34(21-22):4477-4497.

Abstract: Research on risk assessment for domestic violence has to date focused primarily on the predictive power of individual risk factors and the statistical validity of risk assessment tools in predicting future physical assault in sub-sets of cases dealt with by the police. This study uses data from risk assessment forms from a random sample of cases of domestic violence reported to the police. An innovative latent trait model is used to test whether a cluster of risk factors associated with coercive control is most representative of the type of abuse that comes to the attention of the police. Factors associated with a course of coercive and controlling conduct, including perpetrators' threats, controlling behavior and sexual coercion, and victims' isolation and fear, had highest item loadings and were thus the most representative of the overall construct. Sub-lethal physical violence—choking and use of weapons—was also consistent with a course of controlling conduct. Whether a physical injury was sustained during the current incident, however, was not associated consistently either with the typical pattern of abuse or with other context-specific risk factors such as separation from the perpetrator. Implications for police practice and the design of risk assessment tools are discussed. We conclude that coercive control is the "golden thread" running through risk identification and assessment for domestic violence and that risk assessment tools structured around coercive control can help police officers move beyond an "incident-by-incident" response and toward identifying the dangerous patterns of behavior that precede domestic homicide.

Stark, Evan, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007).

This book is a key text on domestic and family violence. Although Stark is based in the United States his work has been highly influential in Australia. In this book Stark explains that domestic and family violence is a pattern of controlling behaviours more akin to terrorism and hostage-taking. Drawing on court records, interviews, and FBI statistics, Stark details coercive strategies that men use to deny women their very personhood, from food logs to micromanaging dress, speech, sexual activity, and work. Stark urges us to move beyond the injury model and focus on this form of victimization. Stark reframes abuse as a liberty crime rather than a crime of assault. He explains how the perpetrator is able to control the victim through a variety of techniques which essentially lead to deprivation of liberty (pp373-374).

Stark Evan, Hester Marianne. Coercive Control: Update and Review. Violence Against Women. 2019;25(1):81-104.

This article reviews the background, introduction, and critical response to new criminal offenses of coercive control in England/Wales and Scotland. How the new Scottish offense is implemented will determine whether it can overcome the shortcomings of the English law. We then review new evidence on four dimensions of coercive control: the relationship between “control” and “violence,” coercive control in same-sex couples, measuring coercive control, and children’s experience of coercive control. Coercive control is not a type of violence. Indeed, level of control predicts a range of negative outcomes heretofore associated with physical abuse, including post-separation violence and sexual assault; important differences in coercive control dynamics distinguish male homosexual from lesbian couples; measuring coercive control requires innovative ways of aggregating and categorizing data; and how children experience coercive control is a problem area that offers enormous promise for the years ahead.

Tutty, L., Radtke & Nixon, K. (2023) “He Tells People That I am Going to Kill My Children”: Post-Separation Coercive Control in Men Who Perpetrate IPV. Violence Against Women, online first, doi 10.1177/10778012231166408

This research examined men’s use of coercive controlling tactics against female partners after separation.

This mixed-methods study is based on secondary analysis of interviews / surveys involving 346 Canadian women who experienced coercive controlling tactics used by their ex-partners (86.4% identified at least one). The researchers also interviewed another 34 women. The article found that 'abusive partners used numerous strategies to coercively control their ex-partners by stalking/harassing them, using financial abuse and discrediting the women to various authorities' after separation.

Woodyatt, Cory and Rob Stephenson, 'Emotional intimate partner violence experienced by men in same-sex relationships' (2016) 18(10) *Culture, Health and Sexuality* 1137-1149.

Abstract: This US study is the first to examine the types, antecedents and experiences of emotional intimate partner violence ('IPV') that occur between male partners (p 1145). The study conducted 10 focus group discussions with gay and bisexual men (n = 64 participants) (p 1140). The study found that gay and bisexual men perceive emotional IPV to be commonplace and the 'most threatening form of intimate partner violence' (p 1144-6). The participants identified the most common antecedents to be jealousy, power differentials, and internalised homophobia (p 1143). The descriptions of emotional IPV in male-male relationships is similar to male-female relationships, but some coercive behaviours manifest differently (p 1145). For example, threatening to disclose a partner's sexual identity was identified as an example of emotional violence and coercive control (p 1145).

Coercive control - Other Resources

Australia

Australasian Institute of Judicial Administration (2022), Recognising and responding to coercive control: Materials on coercive control for judicial officers' continuing professional education.

As a result of that consultation Professor Douglas and Ms Hannah Ehler produced the following report:

'Coercive Control and Judicial Education: A Consultation Report' by Douglas & Ehler [Douglas & Ehler 2022].

Based on the Consultation Report and with input from the AIJA's advisory committee, Professor Douglas, and Ms Greta Robenstone, produced the following resources to facilitate judicial education about coercive control:

1. Slides for education sessions: 'Recognising and Responding to Coercive Control'.
2. Speaker's Notes for the slides: 'Recognising and Responding to Coercive Control'.
3. A video 'Coercive Control: Recognition and Response', featuring members of the judiciary discussing coercive control.

International

Evan Stark, 'Evan Stark, Rutgers University, Author, "Coercive Control"' (Video Interview published online, 12 January 2012).

Evan Stark is a professor in the School of Public Affairs and Administration at Rutgers University. He is noted for his expertise in health issues and in legal aspects of domestic violence. His influential book, *Coercive Control: How Men Entrap Women in Personal Life,* 2007, explains why an expanded view of domestic violence that encompasses coercive control is justified. He asserts that coercive and controlling behaviour is a very common and pernicious form of domestic violence. In this lecture he summaries the core ideas of his book.

Professor Evan Stark, Evan Stark, Rutgers University, Author "Coercive Control" Video interview published online: Coercive Control and Children", 10 April 2017.

In this video, Professor Evan Stark, forensic social worker and author of ‘Coercive Control’ talks to Welsh Women’s Aid about how he’s discovered controlling behaviour affects children and young people.

Scottish Women’s Legal Aid, “Hidden in Plain Sight - Coercive Control and Domestic Abuse” Video animation published 4 July 2019.

This animation explains how coercive control operates to limit the victim’s freedom.

Coercive control - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Barbara

Ben

Bianca

Carol

Celina

Erin

Faith

Fiona

Francis

Jane

Jennifer

Julia

Leah

Lisa

Mira

Sandra

Susan

Trisha

Yvonne

Coercive control - Cases

***Behn & Ziomek* [2019] FamCA 298 (10 May 2019) – Family Court of Australia**

McClelland DCJ recognized that the father was using repeated litigation in a way that amounted to coercive and controlling conduct:

[245] Additionally, I find that the manner in which the father has conducted himself throughout this litigation amounts to coercive and controlling conduct as against the mother. As set out above and annexed to these Reasons for Judgment, the father has brought an excessive number of interim applications, including two Contravention Applications. In that regard, during cross-examination, Ms O gave the following evidence:

> Question: … Would you suggest that, should the Court reinstate a regime whereby the father spends time with the child, that the father will continue to do such things as use the Court system to control the mother?
>
> Answer: That's another very common feature of perpetrators of coercive controlling family violence. Yes. Continued litigation. And that in turn has a negative impact not just on the other parties but on the children obviously because coming before – having to be interviewed by someone like me over and over again or the ICL, or whomever it is, is an incredibly stressful experience for children.

[246] It was not disputed that in the period between 19 April 2016 and 10 May 2016, at the request of the father, the Police attended the mother's home on seven occasions to conduct welfare checks on the child. I am also satisfied that the father acted in a coercive and controlling manner by requesting that the Police conduct such a number of unnecessary welfare checks on the child.

[247] I am further satisfied that the father has sought to exercise control over the mother by dictating to her the appropriate medical treatment for the child and when the child should commence school. I set out the evidence relevant to that issue below.

***Garrod & Davenort* [2018] FamCA 825 (12 October 2018) – Family Court of Australia**

Bennett J was critical of the Regulation 7 Family Consultant's handling of the matter:

[219] The Regulation 7 Family Consultant agreed with Ms Lewis, counsel for the mother, that the flagrant breach of orders so the father can get what he wants is consistent with him engaging in coercive controlling

violence. It is particularly concerning that the father's poor behaviours were not based on a lack of control but on a prerogative of his needs and desires. That indicates to me that very significant changes in attitude and behaviour are required to be undertaken by the father.

Bennett J noted that family violence is not to be assessed on a sliding scale focused solely on physical violence:

[220] …The Regulation 7 Family Consultant did not recognise the father's conduct to Ms O or the mother as being on the higher end of family violence. His manipulative behaviours were insidious and should have been identified as such. The Regulation 7 Family Consultant has assessed family violence on a scale which was an error. Family violence is not to be assessed on a sliding scale. Every child is entitled to be kept safe from harm. Precautions must be proportionate to the harm identified. It does not follow that a cessation of time is reserved only for perpetrators of physically life threatening violence. My strong impression is that the Regulation 7 Family Consultant had regard to some physical violence perpetrated by the father towards the mother but largely gleaned over the coercive controlling violence of the father.

And later, noting the Family Violence Best Practice Principles definition of coercive controlling violence:

[223] …Coercive controlling violence is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control, and does not always involve physical harm. [referring to the Family Violence Best Practice Principles, Edition 4, December 2016, Family Court of Australia, 8.] It is inconceivable that the Regulation 7 Family Consultant could have had regard to the definition of violence in which the father was engaged.

Maluka & Maluka **[2009] FamCA 647 (24 July 2009) – Family Court of Australia**

In this case Benjamin J made several comments about coercive control:

[396] In many ways the facts as between the parties that I have determined in this case fit most, if not all, of the indicators of coercive controlling violence. The father has used coercion, control, violence, intimidation and threats throughout the relationship, including after separation. He seeks to intimidate and control the mother with the attendant violence, abuse, isolation and aggression. From time to time he focuses this on the children. He dominates and controls the children, particularly X, but his behaviour with regard to Y and her reaction to his verbal abuse of her in June 2008 is indicative of his continuing coercive controlling violence.

[397] The father exercised economic power to control and manipulate the mother and effectively the children. He endeavoured to isolate the mother and in effect continues to do so. In that process he denies or minimises his involvement and culpability.

[399] The effect of that long term violence, control and manipulation imposed by the father on the mother has from time to time undermined the mother's parental authority and undermined her parenting role…

***Carter and Wilson* [2023] FedCFamC1A 9 (10 February 2023) – Federal Circuit and Family Court of Australia (Division 1)**

Per: Bennett J

74. "Coercive control" is a technical phrase in social science literature. It is a concatenation of coercive behaviour and controlling behaviour and is a subcategory of one or both types of behaviour. Whilst the term "coercive control" has been attributed a legal definition in legislation in some jurisdictions, s 4AB of the Act does not do so. Accordingly, it would be an error to describe the behaviour defined in s 4AB as merely "coercive controlling behaviour" or "coercive and controlling behaviour" because to do so could exclude behaviour which is controlling but not coercive or coercive but not controlling, as well as behaviour which cannot be said to constitute a course of conduct. This would limit the ambit of s 4AB in a manner not intended.

75. If the legislature intended to provide a definition of "coercive control", it would have done so. The very wide definition in s 4AB(1) coupled with the non-exhaustive list in s 4AB(2) conveys an intention of width. Therefore, when s 4AB is interpreted and its application to a particular set of facts considered, there needs to be a consideration of whether the application of the definition meets the purpose of the statute.

80. Before leaving this general discussion about the interpretation of s 4AB, I observe that a finding of family violence for the purpose of s 4AB does not require the Court to be satisfied that the perpetrator *intended* to perpetrate family violence as defined in s 4AB …

***Wylder v Wylder* [2022] FedCFamC2F 1366 (9 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

Although the father claimed to be the victim of physical violence from the mother, what concerned Judge Vasta was the father's coercive control of the mother:

81. However, it is not the spectre of physical violence that concerns this Court; rather, it is the spectre of coercive control. Whilst it had been documented that the parents had separated on occasions, the mother said that the father spoke to her in such a way that she felt compelled to return to the relationship. The father denies any such conduct.

82. What has been of concern is the documented history of the litigation. It is incongruous that the mother would make the complaints that she made during the previous filing in this Court (BRC 11666/2019); have a Court make an order that mandated supervised visits between the father and the child; and, then choose to ignore that and, instead, come to a compromise solution with the father that gave him unsupervised equal time with the child.

83. There seems to be no other rational explanation for this other than the father implementing coercive control over the mother to the extent that she felt that she had no other choice but to comply with the father's demands. The judicious use of covertly recorded conversations with one parent by the other parent and then referring to selective excerpts is a feature that is often found in cases of coercive control.

84. In this case, the father did give to the Court such selective recordings. The father pointed to one particular recording where the mother made an "*admission*" that the father was the favoured parent by the child. In another recording, the mother "*admitted*" that the father treated her like a queen. In another recording, the mother is said to convey that she arranged custody arrangements for her financial benefit. In a further recording, the mother has "*conceded*" that she was "*not going back to court again*". And in a final recording, the mother "*admitted*" that the father would never hurt his daughter.

85. These recordings were used by the father to intimidate the mother into not pursuing any parenting matter because these recordings would be used against her, as if they were repudiations of her stance. Of course, they have little evidentiary value as they are excerpts from a larger conversation upon which the Court has no information, and therefore, no context.

86. The behaviour in making constant notifications to the Department of Child Safety can also be seen as a

manifestation of the coercive control. Further, posting the videos to social media can also be seen as a manifestation of coercive control. One such video records a “Tik Tok” dance that the mother had uploaded to social media. The father recorded himself watching the video where the father made derogatory comments suggesting that the manner of solo dancing in the video was not befitting that of a woman who had a boyfriend, let alone a woman who was a mother.

87. ….

88. The father will attempt to draw the child into his world; a world where the mother is evil and cannot be trusted and a world where institutions such as the police and the Courts are malevolent and must be resisted. This was perfectly illustrated by the manner in which the father dealt with the child when making the videos. He ignored what the child was saying and imposed his own version of the facts and would not brook any variation to that. The child will never be truly free under the care of the father and she will not have the opportunity to grow and experience life because she will be made to conform to his world view.

89. And this is just part of the danger that the father represents. The evidence that the father planned to do harm to his treating psychiatrist because that psychiatrist would not support his application for a pension is concerning enough. But when this is added to the father’s manipulation of the mother to avoid having to endure supervised visits with the child, the reaction of the father to police attempting to serve him with the police protection order, the obsessive determination with which he wished to expose a “rapist” at the school, his Facebook comments to a Member of Parliament as to his capacity for violence and the nonchalance with which he violated a Court order and injunction about posting on social media, the jeopardy at which he places X cannot be overstated.

90. There are absolutely no safeguards that the Court could put in place that would allow the father to have any form of contact with X and yet keep the child safe.

91. It is never an easy task for a Court to make orders that prohibit contact between a parent and child, however there are those rare cases where such an order is the only order that can be made in the best interests of the child. This is one of those cases.

***Heilig & Cabiness* [2011] FMCAfam 97 (2 March 2011) – Federal Magistrates’ Court of Australia**

Altobelli FM recognised the coercive and controlling behaviour of the father:

[10] He has a long history of law breaking, and there is very little evidence of conscience in his functioning. His controlling abusive behaviour towards young partners I find flabbergasting. The description of his severely burning Ms Cabiness' arm when he considered the coffee she had made for him was ‘crap’ is appalling. The description of his behaviour is almost of treating them as slaves, while enjoying humiliating them.

In paragraph [30], Altobelli FM favourably refers to research quoted in the decision of the Court of Criminal Appeal on the Crown manifest inadequacy appeal in relation to the father’s sentencing for violent offending against the mother and other former domestic partners, cited as R v Hamid [2006] NSWCCA 302 (20 September 2006) at [77]:

An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, “Restorative Justice, Domestic Violence and Family Violence”, Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pages 6-7.

R v Smith **[2021] ACTSC 114 (3 June 2021) – Australian Capital Territory Supreme Court**

Mossop J observed:

[25] The sexual intercourse without consent is constituted by the digital penetration of the complainant’s vagina. This is a case in which the sexual intercourse can properly be described as an act of sexual violence. There is nothing which suggests that the act was performed for the purposes of sexual gratification. Rather, it was an assault designed to degrade the victim and formed part of a pattern of demeaning and controlling behaviour on the part of the offender. That demeaning and controlling behaviour is an important part of the context in which the offence occurred.

R v NX (No 2) **[2019] ACTSC 131 (24 May 2019) – Australian Capital Territory Supreme Court**

In considering the objective seriousness of the offence, Mossop J observed:

[31] The offending in the present case includes very serious offending occurring in a context having features of domestic violence. Those include that the offending was directed to maintaining control over the victim by destroying her property and means of transport and blaming her for the offender's unlawful conduct. The victim was more vulnerable by reason of her need to care for and protect her young child. Her young child was present during some of the offences.

R v Brown **[2015] ACTSC 65 (5 March 2015) – Australian Capital Territory Supreme Court**

Burns J accepted the opinions and statements he quoted from clinical psychologist, Dr Michael Barry's report.

[4] … Dr Barry said:

At the time of the offence, Miss Brown had been in an emotionally and physically abusive relationship for over two years. She described a gradual deterioration in her mental health, reporting low self-worth and feeling overwhelmed, feeling that she did not "fit in anywhere" and she described a "sense of loss in the world". She reported that despite Mr Ruspandini's treatment of her, she felt that he was the only one who she could rely on. Domestic violence and emotional abuse are behaviours used by one person in a relationship to control the other. Research into the cycle of domestic violence suggests that it is common for victims of domestic violence to blame themselves for the abuse and to experience major disruption in their self and world view. Domestic abuse can have a serious impact on the way a person thinks and interacts with the world around them. The chronic exposure to violence, or the threat of violence, and the stress and fear resulting from this exposure, can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.

Domestic violence affects a person's thoughts, feeling and behaviours, and can significantly impact on mental stability. While the effects of physical abuse are obvious, the effects of emotional abuse are easier to hide and harder to repair. It is common for victims of emotional abuse to blame themselves and minimise their abuse, particularly when they are repeatedly told that it is their fault that their partner becomes angry or aggressive.

[5] I accept the opinions and statements which I have just quoted from Dr Barry's report.

***Roberts v Smorhun* [2013] ACTSC 218 (1 November 2013) – Australian Capital Territory Supreme Court**

Refshauge J referred to dicta of the Alberta Court of Appeal in R v Brown (1992) 73 CCC (3d) that:

[81] When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.

Refshauge J noted that this statement had been cited with approval by the Court of Criminal Appeal of the Supreme Court of Tasmania in Parker v R [1994] TASSC 94 (21 July 1994) and in the NSW Court of Criminal Appeal in R v Hamid [2006] NSWCCA 302 (20 September 2006). [82]

***Purcell v O'Reilly* [2018] ACTSC 60 (9 March 2018) – Australian Capital Territory Supreme Court**

Penfold J observed:

[48] … the incident giving rise to Mr Purcell's conviction, and its source in Mr Purcell's determination to examine the victim's mobile phone, seem to reflect both an attempt to exercise power or control over his former wife and a belief that this was justified. For this reason, the incident as a whole may legitimately be treated as more serious than it would have been if the TV had been destroyed in anger or frustration generated by some event unrelated to conflict between Mr Purcell and his former wife.

***R v Brown* [2015] ACTSC 65 (5 March 2015) – Australian Capital Territory Supreme Court**

Burns J at [4]-[5]: Burns J accepted the opinions and statements he quoted from clinical psychologist, Dr Michael Barry's report. Dr Barry said: 'At the time of the offence, Miss Brown had been in an emotionally and physically abusive relationship for over two years. She described a gradual deterioration in her mental health,

reporting low self-worth and feeling overwhelmed, feeling that she did not “fit in anywhere” and she described a “sense of loss in the world”. She reported that despite Mr Ruspandini’s treatment of her, she felt that he was the only one who she could rely on.

Domestic violence and emotional abuse are behaviours used by one person in a relationship to control the other. Research into the cycle of domestic violence suggests that it is common for victims of domestic violence to blame themselves for the abuse and to experience major disruption in their self and world view. Domestic abuse can have a serious impact on the way a person thinks and interacts with the world around them. The chronic exposure to violence, or the threat of violence, and the stress and fear resulting from this exposure, can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.

Domestic violence affects a person’s thoughts, feeling and behaviours, and can significantly impact on mental stability. While the effects of physical abuse are obvious, the effects of emotional abuse are easier to hide and harder to repair. It is common for victims of emotional abuse to blame themselves and minimise their abuse, particularly when they are repeatedly told that it is their fault that their partner becomes angry or aggressive’.

Love v Kumar **[2018] ACTMC 23 (31 October 2018) – Australian Capital Territory Magistrates’ Court**

In finding the accused assaulted his wife Special Magistrate Hunter OAM observed:

[207] Taken together the evidence if accepted of giving information to officials at Immigration, the refusal to recant that information, the bruise to the head which is consistent with the allegation on 18th and the general information such as not allowing Ms Devi to have a phone, not allow her to contact her brother and the like which could lead to a conclusion that the defendant was controlling her life, (which is not unknown in domestic violence situations). It also leads to a conclusion that Ms Devi is speaking the truth and should be believed.

And:

[209] I am also satisfied that she had been controlled at least to some extent. That is supported by uncontroverted evidence that she had to secret a SIM card so that she could contact her family and brother by phone. This is consistent with the evidence from her brother that she had no access to contact him except

by public phone until he gave her the SIM card. I am also satisfied she had limited access to friends and family. That evidence was corroborated by her brother and by the fact she used the SIM card he gave her to make the various phone calls she made to family and friends. I also note the Defendant had alluded to that control in some of his answers in the ROI such as those referred to by Prosecution counsel in her submissions.

[Note: This decision was unsuccessfully appealed *Kumar v Love* [2019] ACTSC 238 (30 August 2019) – Australian Capital Territory Supreme Court]

***Yaman v R* [2020] NSWCCA 239 (25 September 2020) – New South Wales Court of Criminal Appeal**

[135] The right of all women to determine their own path in life must be protected and upheld by the courts. Where a woman's right is ignored or disregarded by an offender, that right must be vindicated, including by punitive and strongly deterrent sentences where necessary.

[136] The applicant had failed to accept that his former partner had chosen a life that did not include him and, by the commission of a violent crime against her, he sought to force her to resume a relationship with him. His act had to be denounced; stern punishment had to be imposed, and the applicant and others deterred from future conduct of that nature.

***Le v R* [2020] NSWCCA 238 (23 September 2020) – New South Wales Court of Criminal Appeal**

Adamson J observed:

[215]: Thus, it was, for example, for the jury to determine whether the applicant's conduct in proposing dinner with the complainant's family on the evening of Sunday 15 October 2017 was inconsistent with that of a man who had just assaulted the complainant and caused her serious injury which, to his knowledge, had resulted in at least a substantial bruise on her hip and in her having difficulty walking. One might postulate, as Mr Dhanji did in argument, that it would be odd for a man who had assaulted his partner to want to expose her to the gaze of her family soon after the event when the effects of the injury would still have been obvious. On the other hand, a jury might regard it as consistent with their plainly abusive relationship that the applicant would oscillate between drug-fuelled violence and affectionate, inclusive gestures to perpetuate the complainant's emotional dependency on him and her compliance with the dictates of their relationship. The jury might have

regarded the applicant's conduct in expressing concern about the complainant's welfare, including her consumption of alcohol, as a smoke screen to assuage her family's concerns.

[223]: None of the matters referred to above is, as Mr Dhanji would have it, a matter of "making excuses" for the complainant's inconsistencies. The jury could have formed the view that the complainant was prepared to endure an injury inflicted by the applicant if it was one from which she could recover because she had come to love and depend on him, both financially and emotionally, and believed that he loved her. The jury might have considered that once the complainant appreciated, as she did at the end of October 2017, that he had fractured her hip and that she would have to undergo a serious operation, she realised that he had not been acting in her interests and had permanently harmed her. It was open to the jury to infer that, from that time on, she stopped making excuses for him, as she had done up until that point, both when confiding in her aunt and in telling the police on the first occasion in October 2017 before she knew of the diagnosis. The jury might have considered that this was what led the complainant to participate in a recorded interview in November 2017, having been so reluctant to go on the record or identify the applicant when she was taken to the police station on 24 October 2017 following her call to Triple-0. The jury could have formed the view that the complainant was prepared to endure an injury inflicted by the applicant if it was one from which she could recover because she had come to love and depend on him, both financially and emotionally, and believed that he loved her. The jury might have considered that once the complainant appreciated, as she did at the end of October 2017, that he had fractured her hip and that she would have to undergo a serious operation, she realised that he had not been acting in her interests and had permanently harmed her.

[225] The complainant's conduct towards the applicant involved the inevitable conflict inherent in an abusive relationship: notwithstanding that he hurt her, she loved him and did not want to lose him. It may be that when she called police on 24 October 2017, she did so to assist her in her dual aims of keeping the relationship with the applicant on foot and yet stopping him from assaulting her. Her descriptions to her aunt and to the police of how she sustained the injury to her hip were broadly consistent. I do not consider it to be of any particular significance whether she reported a single kick or more. It is understandable that the jury might have considered that the diagnosis caused her to rethink the relationship and stop making excuses for the applicant.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J commented:

[77] An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6–7'.

And:

[403] I am satisfied that the father represents a real danger to the mother and the children of continuing his coercive controlling violence and that the mother ought to have the ability to bring up these children free of that behaviour and its consequential fear and the children ought to be able to escape the direct and indirect consequences of that behaviour and the actuality of that behaviour by the father.

R v Argyle (a pseudonym) **[2021] NSWDC 267 (18 June 2021) – New South Wales District Court**

Whitford SC DCJ observed:

[50] On [the victim] Ms Argyle's meeting with and experience of [the accused] Steadman, and his influence over her, [the clinical psychologist] Ms Pratley observed:

…(her) anxiety and posttraumatic symptomatology meant that she believed she had no choice but to participate in the abuse by Steadman, or face physical or sexual harm herself, which she believed put her unborn child at risk. Ms Argyle's trauma history and low self-esteem contribute to her lack of agency…and… impaired problem-solving capacity… (which would be intensified with low cognitive capacity).

…(her) account indicates that she was subject to a pattern of ongoing intimidation by Steadman, which constituted coercive control…

[69] [A factor that diminishes Ms Argyle's culpability is] her experience of the coercive controlling behaviour of Steadman and the attendant duress and fear that he would harm her unborn child and/or herself. Duress in relation to her fear for her unborn child was clearly raised with police in her interview and there is a

foundation, in a combination of the agreed facts and the expert reports, for a reasonable conclusion that she was operating under a form of duress. In the whole of the circumstances, Ms Argyle was under the coercive control of Steadman and was unable to think through the consequences either of her actions or of her failure to respond differently to, and to report, what had happened to her sister.

R v Aumash **[2020] NSWDC 168 (1 May 2020) – New South Wales District Court**

Haesler SC DCJ observed:

[33]-[34] In earlier messages Aumash had sought to control, threaten, and demean Ms White. His intention this day was clear. It was part of a pattern of behaviour. He also sought to cajole her into dropping the charges and excusing his criminal actions toward her. I can infer from those facts that the messages were similar in content to those sent on other days. That conclusion can be drawn beyond reasonable doubt.

The extent of his harassment and the motivation for his actions this day make this a particularly serious example of offences of this type. It requires a custodial sentence: s17 *Crimes Act 1914 (Cth)*.

R v Bohun **[2019] NSWDC 807 (25 October 2019) – New South Wales District Court**

[33] That Ms Smit and the offender had been in a domestic relationship does not in any way mitigate the offending behaviour. It appears that Ms Smit was personally targeted. Given the breach matters, it does here show that there is pattern of physical and mental violence towards Ms Smit, requiring denunciation.

[34] Here, there could be no clearer example of the exercise of coercive power and control. It may be that at the time, Bohun thought what he did was justified. There could be no justification for such violence. Such behaviour poses a continued threat to victims. They never truly feel safe. Denunciation and appropriate punishment is required. In such matters, the way we do it is by locking someone up: R v Dunn (2004) 144 A Crim R 180.

[35] Gaol, however, puts this offender in cells with other men who are capable of or have demonstrated misogynist violence against their partners. Gaol breaks prosocial bonds. Gaol encourages links with other criminals. Gaols are intrinsically violent environments, and unfortunately can have a crime producing effect rather than discouraging violent crime. Nevertheless, the vulnerable position of Ms Smit must be considered

and her dignity vindicated.

***Emitja v The Queen* [2016] NTCCA 4 (21 October 2016) – Northern Territory Court of Criminal Appeal**

Grant CJ and Kelly J noted the sentencing judge's remarks in relation to the course of conduct in which the appellant engaged with approval:

[28]: It is clear that the appellant had in the years prior to the present offending subjected the victim to a course of repeated violence in the domestic context which left the victim in a state of perpetual fear for her person. This is reflected in the Victim Impact Statement dated 5 March 2014, in which the victim stated:

> I get really stressed out by [the appellant]. I get scared when I see him cause I know each time he's going to hurt me. He goes and tells his family I'm to blame for him going to prison and then they come and threaten me. That DVO doesn't work. It doesn't stop him from coming near me and hurting me. The only time I feel safe is when [the appellant] is in prison.

[29]: It was this course of conduct to which the sentencing judge was referring when he observed:

> The offending is once again a very serious incident of domestic violence committed by the offender. The offender's moral culpability for this offending is very high. The offender engages in domestic violence in order to control the victim and to express his displeasure when she does not behave in a manner that he expects her to behave. The offence was committed while [the offender was] subject to [a] DVO once again. The victim was seriously injured.

Grant CJ and Kelly J held the offender's pattern of coercive controlling behaviour rendered spontaneity less relevant to the assessment of the objective seriousness of the offence:

[52] We do not accept the submission made on behalf of the appellant that the objective seriousness of the offence was lower because it was not premeditated. First, the absence of a factor which would elevate the seriousness of the offending is not a matter of mitigation. Secondly, as the respondent submitted, the offending was the epitome of a particularly pernicious form of domestic violence in which a violent and controlling male seeks to exercise dominion over a female victim; a type of offending in which each episode is spontaneous but part of a pattern which renders spontaneity less relevant to the assessment of the objective seriousness of the offence than it might be in relation to other types of offence. The appellant's history of relevant offending has already been detailed. It shows that the offending the subject of this appeal was simply

the latest incident in a deliberate and violent pattern of behaviour engaged in by the appellant for the purposes of intimidating and controlling the victim. The circumstances of the offence under consideration involved direct defiance of the domestic violence order then in place, as have the circumstances of many of the other incidents which form part of the appellant's pattern of behaviour. The instant offence was in no way "an uncharacteristic aberration".

The Queen v Haji-Noor **[2007] NTCCA 7 (18 May 2007) – Northern Territory Court of Criminal Appeal**

Angel J highlighted the sentencing judge's comments that only the offender is to blame for his behaviour:

[31] …It is not uncommon for men in your position to harbour a belief that their former partner had been unreasonable. Nor is it uncommon for violent men in your position to harbour a belief that the former partner has brought the violence on themselves by being unreasonable. You and others like you must learn that only you are to blame for the situation in which you now find yourself. The female victim is not the true cause of your violent behaviour over the years or in February 2006. You and others who are tempted to behave like you must understand that they are not entitled to use physical violence and, if they do, they will go to gaol.

As to the male victim, it is not uncommon for men in your position to become angry and violent towards the new friend or partner. Those people are also vulnerable to attacks by men like you. It is not a case of saying they are men and can look after themselves. As your violence and the consequences well demonstrate, such men are vulnerable to violent attacks by men in your position and they too are entitled to the full protection of the law. Men in your position must understand that if they attack new friends or partners they will go to gaol. For this reason also, general deterrence is particularly significant.

Southwood J noted:

[185] The crime committed by the respondent was nonetheless a serious crime. It was part of a pattern of fundamentally oppressive and coercive behaviour in which the respondent deliberately engaged to dominate and control Ms Hawksworth.

The Queen v Kerridge **[2021] NTSC (sentencing) (1 November 2021) – Northern Territory Supreme Court**

Mildren AJ recognised the offender's controlling behaviour in sentencing:

(p7) I have not dealt in detail with all of the assaults and bad behaviour you had exhibited towards the complainant over the whole period of the relationship. Suffice it to say that during the relationship, you were extremely controlling and demanding.

She not only had fulltime employment, but she had to run the finances of your business which ran at a loss, obtain extra money by repairing bicycles and second-hand white goods and furniture, feed you and the children and attend to the children's schooling, ensure that your alcohol was ready for you when you came home after work and to generally act as your personal servant.

You demanded that she send photos of her breasts to you on numerous occasions, as is evidenced by the text messages. You blame her for the fact that there was not enough money to meet all of the expenses, while at the same time, you indulge yourself in your hobby of repairing cars and other vehicles which you ordered both from Queensland and in Alice Springs.

When money was tight, you became angry and violent towards her, regardless of whether this was her fault or not. The level of violence, punishment and degradation that you dealt her was extreme. The words "domestic violence" are inadequate to properly describe the torment that you caused her to suffer. Your behaviour was callous, controlling and sadistic

The Queen v Lynch **[2021] NTSC SCC22033629 (4 October 2021) (Sentence) – Northern Territory Supreme Court**

Grant CJ recognised the offender's coercive and controlling behaviours in sentencing:

[2] You entered into a relationship with the victim in 2018. She had a young daughter at that time. She then fell pregnant with your child, after which time you started to become more possessive and controlling of her. You would not let her visit friends and relatives, and you were verbally abusive to her, particularly in relation to her mothering skills. However, you had never hit her during the course of the relationship prior to the events in question in this case….She left the house where she was staying with you and returned with police so that she could pick up her infant son. That was because she was too scared to do so by herself. She then returned to Tennant Creek, but you continued to contact her and her family, demanding that she return to Alice Springs.

[3] You told your ex-wife that your purpose in going to Tennant Creek was that you were concerned about the welfare of your infant son. I think the objective reality is that you knew that the victim had resumed seeing her former partner, and that you were both jealous of that relationship and resentful that the former partner was having any part to play in your son's life.

[7] However, I do accept that alcohol was not a contributing factor in this offending. I am not sure whether that works in your favour or not. It seems to suggest that you are unable to resist your possessive and controlling urges even when you are sober…..The reason for that [the offender not showing any remorse], Mr Lynch, I suspect, is that you considered and you still consider that you were in the right, because you felt that the victim – your former partner – was not looking after your son in a manner which you considered to be suitable; and because you consider that you are entitled to impose your will in that respect on your domestic partners. That is reflected, as I say, in your long history of domestic violence offending.

Inquest into the Death of HD **(Name Suppressed)** **[2021] NTLC 029** **– Northern Territory Coroners Court**

The following extract provides an example of the way in which the deceased's vulnerabilities were used by the partner to justify his controlling behaviour:

[70]: HD's partner was from time to time said to be manipulative and controlling. When questioned about his controlling ways he generally indicated that HD was an alcoholic and he needed to know where she was to either stop her drinking or so as to assist her when she was intoxicated. It appeared to explain his tracking her phone. Her alcoholism was provided as the reason he removed her from the house or used force to keep her there. The same might be said when he escorted her to the police station and asked that her bail be breached for drinking. Perhaps it might be seen in his insistence that he pick her up from work or when he intercepted her at the bus stop.

[71] It is difficult however to see her alcoholism as the reason for him reading her texts and having access to her social media accounts. There are instances where he attempted to warn off a person he thought she was having an affair with using her own Messenger account. It also doesn't explain the constant messaging and telephone calls when she was with her father in Queensland. It appears they were more to do with his belief that she may be talking to another male.

***MNT v MEE* [2020] QDC 126 (20 May 2020) – Queensland District Court**

Byrne QC DCJ accepted that the first instance decision was based on "more than merely a finding of a singular act of domestic violence, being economic abuse constituted by the one act of the unilateral forgiveness of the debt." [73], holding that domestic violence was proved by evidence of the appellant's controlling behaviours:

[75] Although I am not satisfied that the incident involving the unilateral forgiveness of the debt owed by the appellant's son amounts to economic abuse as defined, I do consider that it comprises an aspect of overall controlling behaviour or emotional or psychological abuse, in the relevant senses. It is, in my view, not sensible in light of the timing and sequence of events to reach any other conclusion. The forgiveness of the debt the month before the appellant spoke to solicitors about family law proceedings suggests on the face of it that it was deliberate attempt to remove the asset (i.e. the debt owing) from the property pool which would inevitably be the subject of focus in the family law proceedings. That neither the appellant nor his son could satisfactorily explain how and why that occurred supports that view.

[77] I am satisfied, as was the Magistrate, that the evidence concerning the manner in which the respondent's property was dealt with amounts to controlling behaviour in the overall context of the relationship, and that contributed to the respondent's fear for her own wellbeing and safety. In addition to the express findings of the Magistrate, I also include the removal of the go-cart and placing it in the weather, the respondent being told what chairs she could sit on and the moving of her clothing and other property from the residence to variously the garage and into the weather in this class of evidence…

[79] I am satisfied, as was the Magistrate, that the incident involving the appellant getting into the bed already occupied by the respondent, at a time after they had commenced living apart on the one property, forms part of that controlling behaviour as described.

[81] I too am satisfied, as was the Magistrate, that the condition of the house and the lack of approvals for work done was another aspect of the appellant's controlling behaviour towards the respondent.

[83] …I am satisfied that the admitted failure by the appellant to attend in any meaningful way to the rectification in the roughly two months between the council notice and the hearing (i.e. more than the 20 business days allowed by the Council notice) is both domestic violence in that it is controlling behaviour which limited the lawful use of the premises and potentially affected the asset base for the intended family law proceedings, and evidences the nature of the previous relationship involving controlling behaviour by the

appellant towards the respondent.

***CPS v CNJ* [2014] QDC 47 (21 March 2014) – Queensland District Court**

Dearden DCJ observed:

[18] I am not persuaded (contrary to the submissions made on behalf of the appellant) that the learned magistrate erred in concluding that "continuous contact and comments" made by the appellant were capable of constituting domestic violence.

[19] The definition of "domestic violence" includes behaviour that is "emotionally or psychologically abusive" [Domestic and Family Violence Protection Act ["DFVPA"] s 8(1)(b)] and/or "is threatening" [DFVPA s 8(1)(d)] and/or "coercive" [DFVPA s 8(1)(e)] or "in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing of that of someone else". [DFVPA s 8(1)(f)] It was open to the learned magistrate to conclude, on the basis of the respondent's sworn affidavit … and cross examination, … that the appellant's conduct, verbal and by text, fell within one or more of the categories in DFVPA s 8(1).

[20] I am therefore not persuaded that the learned magistrate fell into error in concluding that the appellant's conduct subsequent to the end of the relationship was harassment which amounted to "domestic violence".

***MAA v SAG* [2013] QDC 31 (28 February 2013) – Queensland District Court**

McGinness DCJ was satisfied at [44]:

[44] …The appellant's numerous complaints about the aggrieved to government bodies alleging child abuse and mistreatment were unjustified and an abuse of process as were his complaints to organizations about the aggrieved's doctor and lawyer. The appellant did not dispute that he lodged most of these complaints. I consider that one of the purposes of lodging these complainants was to harass and intimidate the aggrieved. I accept the aggrieved's evidence that she felt intimidated and harassed when she became aware of the complaints;

The aggrieved and her daughters were also subjected to repeated investigations due to the appellant's complaints. For example, she and her children were interviewed by police on a number of occasions. None of

the complaints were substantiated. This is further evidence of harassment suffered by the aggrieved and her three daughters at the hands of the appellant.

***SHW v ABC* [2021] QDC 151 (13 August 2021) – Queensland District Court**

In finding the learned Magistrate erred in refusing to grant a restraining order against the respondent because it was not necessary or desirable to protect the appellant from future domestic violence Richards DCJ found:

[37] Even accepting the Magistrate's findings that the respondent was not likely to be violent towards the appellant in the future, his passive aggressive acts such as going to Paluma the day before she was due to arrive, refusing to hand over furniture, and handing over the wrong keys to his solicitors so when the appellant did attend Paluma, she would be unable to enter the cabin, all amount to controlling and emotionally abusive behaviour that has the potential to be repeated during the course of the property settlement. Contact is inevitable during that period.

[38] In my view the magistrate erred in finding that it was not necessary or desirable to protect the appellant from future domestic violence.

***NK v Director-General, Department of Justice and Attorney-General* [2021] QCAT 270 (30 July 2021) – Queensland Civil and Administrative Tribunal**

In confirming the decision of the Director-General, Department of Justice and Attorney-General on 28 February 2020 to issue NK a negative working with children notice Member Hughes observed in relation to the applicant's former partner's attempts to seek termination of a protection order made against the applicant:

[18] More alarming is evidence of controlling behaviour since the Order. In seeking to terminate the Order, NK's ex-partner said:

> I feel I contributed to the incidence (sic) occurring due to my treatment of [NK] including acting verbally abusive towards him, I believe I provoked him to become angry with me.
>
> I was pressured by my friends to take on (sic) order out against [NK]. My friends were always unhappy that I didn't have time to socialise with them when I was spending time with [NK].

> I have a really good relationship with [NK's] family; they are very supportive of me. I don't wish to ruin the relationship I have with them by having this order.

[19] I do not accept these statements as proof of their content. Rather, they are evidence of coercive control: victim self-blame and shame, social isolation and in-law pressure. Domestic violence manifests in many forms: physical, psychological, emotional and financial. They are all abhorrent and unacceptable.

Applicant SIL v Scheme Manager, Victim Assist Queensland, Department of Justice and Attorney-General **[2021] QCAT 237 (13 July 2021) – Queensland Civil and Administrative Tribunal**

Member Cranwell accepted that the applicant's husband had used complaints to the Queensland Police Service as a means to control the applicant:

[41] …In relation to the incidents on 27 March 2018 and 5 April 2018, Person A made complaints to the Queensland Police Service. The applicant submitted that Person A used complaints to the Queensland Police Service as a means of controlling her. I would be inclined to accept this submission, given that the there is no record of the Queensland Police Service ever having conducted an investigation in relation to either incident. The Queensland Police Service simply recorded Person A's version of events without speaking to the applicant.

Warne v The Queen **[2020] SASCFC 124 (21 December 2020) – South Australian Supreme Court (Full Court)**

Hughes J (Peek and Stanley JJ agreeing) noted a controlling course of conduct:

[51] The course of conduct in February 2017 was sustained and violent. The appellant caused injuries to the victim and also sought to control her with frightening and dangerous behaviour tending to place her in fear for her life and to submit. That was reinforced by the explicit threat made by the appellant to the victim whilst he directed a firearm at her at close range. There has been no expression of remorse or contrition by the appellant, or any indication of insight on his part with respect to his conduct.

[52] The February course of conduct perpetuated and escalated the earlier incidents of control exerted by violence by the appellant over the victim. This Court has recognised the need to place offending such as this

within the context of the relationship and the manner by which such incidents effect control through fear. In R v Saunders [[2017] SASCFC 86 at [41]], Hinton J, with whom Peek J agreed, said:

> In R v Hamid [[2006] NSWCCA 302 (20 September 2006) at [21]], Johnson J, with whom Hunt AJA and Latham J agreed, said after referring to a number of authorities dealing with sentencing in cases of domestic violence: 'These judicial statements are complemented by criminological research concerning domestic violence. An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control': J Stubbs, "Restorative Justice, Domestic Violence and Family Violence, Australian Domestic and Family Violence Clearing House", Issues Paper 9, 2004, pages 6-7.

***R v Saunders* [2017] SASCFC 86 (27 July 2017) – South Australia Supreme Court (Full Court)**

In commenting on sentencing for domestic violence matters Hinton J observed:

[41] In R v Hamid [2006] NSWCCA 302, at [77]–[78], Johnson J, with whom Hunt AJA and Latham J agreed, said after referring to a number of authorities dealing with sentencing in cases of domestic violence:

> These judicial statements are complemented by criminological research concerning domestic violence. An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence, Australian Domestic and Family Violence Clearing House", Issues Paper 9, 2004, pages 6-7.

And:

[43] Intervention orders comprise one component of the Government's response to domestic violence in this State. In concluding his speech on the motion that the Intervention Orders (Prevention of Abuse) Bill be a read a second time the Attorney-General said:

> In enacting these reforms, Parliament will be sending a clear message that it will not tolerate the use of violence to control or intimidate another person, particularly in a domestic setting; that it recognises and abhors the lasting psychological and emotional damage to children from exposure to such violence; that it expects perpetrators to accept full responsibility for their violent behaviour; and that the paramount consideration is always the protection and future safety of the victims of abuse and the children who are exposed to it.

[44]: It must be borne in mind that the abuse which intervention orders are intended to protect against, can take many forms. Physical violence is but one. Emotional and psychological harm is often debilitating and equally often profoundly so.

R v Ritter **[2016] SASCFC 88 (16 August 2016) – South Australia Supreme Court (Full Court)**

Parker J (Lovell and Nicholson JJ concurring) described the coercive control which the appellant subjected the victim to:

[17] At the time of the offending the appellant and the victim had been in a relationship for approximately two years. His behaviour towards her was violent and controlling.

[18] About one month into the relationship the appellant began verbally abusing the victim. This progressed to physical abuse occurring about twice each week. By the last year of the relationship the frequency of assaults had escalated to the point where the appellant was assaulting the victim on a daily basis. The assaults included punching, slapping, kicking, throwing items and spitting.

[19] When the victim was threatened or attacked by the appellant she would try to leave their flat, often running into nearby streets and parks and attempting to hide. The appellant would frequently chase her or track her down in order to continue his abuse.

[20] The appellant monitored the victim's movements and rarely let her leave the house without him. He also controlled her finances, regularly forcing her to withdraw money from her account for his benefit, including so that he could buy drugs and alcohol.

[21] The appellant regularly threatened that if the victim reported any abuse to the police or left the relationship he would harm her and her children. She was too frightened to leave or to report the abuse to police, friends and family.

R v Rogers **[2020] SADC 72 (16 June 2020) – South Australian District Court**

Tracey J noted that abusive and violent relationships give rise to behaviours that are difficult to comprehend and that should not alone be the basis for disbelieving a complainant:

[273] SE's behaviour in contacting police, making statements on some occasions and not others, withdrawing complaints, denying incidents occurred, allowing the accused back into her life and seeking variation to intervention orders, are behaviours that too commonly feature in cases involving serious domestic violence. Abusive and violent relationships give rise to behaviours that to anyone who has not had that experience, may seem simply too odd or counterintuitive to be believed.

R v Hanks **[2019] SADC 139 (16 September 2019) – South Australian District Court**

In her reasons for judgement Chapman J made a number of observations:

As to the complainant's fear of the accused:

[127] In cross-examination, it was suggested to the complainant the accused did not threaten her with violence in any way if she did not park in that spot. She responded, 'When you're in a domestic violence relationship it gets to the point where they don't need to threaten you. I'm terrified. He controlled absolutely everything that I did, the whole aspect of my life he controlled. I'm not going to argue against him. If he says to me 'Park there', I park there because it's either park there and risk a fine and that later or don't park there and get hit, and to me I take the easy option.'

As to the impact of the complainant's lies on her credibility:

[159] It is a serious matter for the complainant to have told those lies. I have considered the extent to which her admitted lies impact upon her credibility. Whilst I do not condone or excuse that conduct, there is a credible explanation. She was in a violent and controlling relationship with the accused. She was in fear of

him. She knew that if he was angry, she was in danger of being harmed. She adopted behaviours which she believed would minimise his anger. They included not informing on him to the police and doing what she was told to do. I accept her explanation. I do not consider her admitted lies detract from her credibility.

As to the complainant's failure to mention specific incidents to police:

[176] The accused controlled her through his violence. She tried to manage her safety by doing as he said and by minimising police involvement. I do not consider the failure of the complainant to mention various matters to the police in her subsequent statements about every aspect of the course of events that day (the accused fighting with Mr Cooper; the accused punching her in the car) detracts from her credibility or reliability.

As to the complainant's decision to seek the withdrawal of charges against the accused:

[203] The fact the complainant changed her mind about pressing charges against the accused and said she was the one to hit the accused does not cause me to doubt her evidence about what happened. This assault is alleged to have occurred against the background of a violent relationship in which the accused controlled and manipulated the complainant. She was scared of him and what he might do to her if she proceeded with charges against him.

Director of Public Prosecution v Johnson **[2020] TASCCA 4 (8 April 2020) – Tasmanian Court of Criminal Appeal**

Wood J considered the appellant's behaviour as an attempt to control and manipulate the complainant to avoid prosecution and that the offender was aware of the danger he posed to the complainant:

[4] His moral culpability with respect to the crimes of assault and indeed, all the offences, was high. Before he committed these crimes, he knew he had reacted with violence towards the complainant in the past and he knew that he was prone to jealousy and possessiveness. In short, he knew he represented a danger to the complainant. … Subsequent to the assaults, his conduct of stalking was domineering, relentless and subsisted over days. The court orders protecting the complainant had no impact on his conduct. He then interfered with the prosecution in a way that was calculated to succeed by sending messages and letters while he was in prison. He was determined to control and manipulate the complainant to avoid prosecution.

Geason J considered Brett J's sentencing comments as to the appellant's attempts to control the victim and

his own father with approval:

[29] …During that time, you constantly attempted to contact the complainant by telephoning her, and sending her text messages on numerous occasions. I have been provided with a sample of the text messages. They demonstrate an apparently obsessive persistence in seeking to bend the complainant to your will. There is a mixture of repeated threats and emotional manipulation, all of which are clearly designed to persuade the complainant to continue a relationship with you. It would seem that on occasion the complainant did engage in conversation with you about the future.

However, during this period, she also felt upset, scared and frightened and on at least one occasion, told you to leave her alone.

However, you were also persistent in your efforts to persuade [your father] to do what you wanted, and again relied on a combination of overbearing conduct and emotional manipulation. He attempted to contact the complainant, at your urging, on numerous occasions during the relevant period, although was only successful in actually making contact with her a couple of times.

Geason J considered the suffocation of the victim as a form of controlling behaviour:

[33] The fact that the respondent's conduct included suffocation has significance to the assessment of the objective seriousness of the offending. Suffocation should be treated with the same level of seriousness as is afforded strangulation or throttling. Such conduct is inherently dangerous, and capable of causing serious consequences within a very short period. It renders victims incapable of acting to protect themselves. As Estcourt J observed in DPP v Foster [2019] TASCCA 15 at [26]- [27], it is a form of dominance and control which has the potential to cause grave psychological harm, serious injury and even death.

Geason J identified the stalking as part of pattern of behaviour aimed at controlling the complainant:

[36] The stalking conduct is to be considered in the context of the earlier assaults and as part of a pattern of behaviour. It evidences the respondent's possessiveness. It was intended to engender fear in the complainant, and to make her comply with his wishes. As the learned sentencing judge noted, some of the messages demonstrated "an obsessive persistence in seeking to bend the complainant to your will.

Director of Public Prosecutions v Foster **[2019] TASCCA 15 (12 September 2019) – Tasmanian Court of Criminal Appeal**

Estcourt J (Brett J and Marshall AJ concurring) observed the controlling nature of strangulation:

[26] Each of the identified incidents involved vicious and cowardly attacks by the respondent on a woman. Lest it be thought that grabbing the complainant by the throat and applying pressure is somehow less insidious than punching or kicking, it has been noted in an article by Heather Douglas and Robin Fitzgerald entitled "Strangulation, Domestic Violence and the Legal Response", published in the (2014) 36 (2) Sydney Law Review 231, that strangulation is a form of power and control that can have devastating psychological long-term effects on its victims in addition to a potentially fatal outcome.

Gregson v Tasmania **[2018] TASCCA 14 (31 August 2018) – Tasmanian Court of Criminal Appeal**

In agreeing with Martin AJ, Geason J observed:

[4] Violence in relationships takes many forms. In whatever guise, whether physical or psychological, it involves the exertion of power and control over another. The victims of such violence are diminished by it, often succumbing to mental and bodily injuries that ruin their lives.

[5] It is a particularly insidious crime because it is difficult to detect. And an all too common consequence of this abuse is that its victims may be so broken or fearful that they do not report it.

[6] It follows that, in sentencing for offences of this type, general deterrence is a significant factor.

[7] The complainant is entitled to the full protection of the law, and the vindication of this Court.

Director of Public Prosecutions v Karklins **[2018] TASCCA 6 (20 April 2018) – Tasmanian Court of Criminal Appeal**

Geason J commented on the seriousness of systems abuse achieved by emotional manipulation:

[56] The respondent's attempts to frustrate his prosecution should also be seen as particularly serious matters. They were a cynical exercise in emotional blackmail. That these offences occurred while the

respondent was subject to an interim family violence order is an aggravating factor. Domestic violence typically occurs behind closed doors, making detection inherently difficult. Relationship dynamics frequently militate against a prosecution. Conduct directed at interfering with the prosecutorial process undermines the system intended to afford protection to victims of violence, making an inherently difficult process more so. When it is effective the opportunity for court intervention is foregone. Such intervention might be lifesaving. This offending should be viewed as striking at the heart of legislative attempts to provide protection to the vulnerable. It should be accepted in cases of family violence that attempts to interfere with the due administration of justice by the means of emotional manipulation of a vulnerable victim is a serious matter the consequences of which will always be severe.

And noted that the lack of express threats to achieve that end was not a mitigating factor:

[86] Finally, I note that in sentencing, the learned sentencing judge said of the respondent's attempts to dissuade the complainant from pursuing a prosecution that, "as to the steps he later took to pressure the complainant to change her story, none of his approaches contained express threats of violence or intimidation". I do not consider that that in any way mitigates the conduct. Such conduct would be aggravating, but the absence of an aggravating feature, does not serve to mitigate the seriousness of the conduct which was admitted. Nor does the observation recognise that intimidation through manipulation can occur by means other than actual threats and violence, a proposition particularly pertinent in the context of relationships.

And required denunciation:

[94] The assaults perpetrated on the complainant were serious. They resulted in her becoming unconscious on two occasions. She feared for her life, and her baby. She was threatened with death. The subsequent interference with the prosecution of this offending was perpetrated on multiple occasions, and sought to manipulate the complainant by playing upon her vulnerability. The respondent's methods were devious and require the strongest denunciation.

State of Tasmania v Matthew John Davey **(Sentence)** **[2021] TASSC unreported (10 December 2021)** **– Tasmanian Supreme Court**

In sentencing Brett J acknowledged the extent of the accused’s coercive and controlling behaviours towards

the victim:

… I am satisfied that in your case, the evidence established the tendencies asserted by the prosecution, and that it was these tendencies which defined your approach to the relationship. In particular, I am satisfied that you engaged in a continuous and marked pattern of coercive control over the complainant. I accept the complainant's evidence that you constantly monitored her whereabouts, including by conducting or making her believe that you were conducting electronic surveillance of her communications and movements. You restricted her movements, both by demand but also from time to time by disabling or damaging her motor vehicle. You restricted and controlled her relationships with others, and demanded and expected complete loyalty from her.

You regularly utilised verbal threats and threatening conduct towards her in order to maintain this control. These included threats of burning, or the use of fire against her or her property. On a number of occasions, you made it clear to her that if she ever left you, you would find and kill her. You described to her the very specific ways that you would do this. In my view, the complainant's evidence about the extent of your controlling behaviour was vividly demonstrated by the telephone intercept and listening device recordings, and the surveillance footage, as well as the evidence of independent witnesses who saw particular events. I also accept the evidence of the complainant's mother about this issue. I found her generally to be a credible and reliable witness.

State of Tasmania v Levi Joseph David Hall **(Sentence)** **[2021] TASSC unreported (27 September 2021) – Tasmanian Supreme Court**

Comments on passing sentence Pearce J:

I do not accept the submission however that this is not a serious example of the crime. It is possible to think of factors which might have made the crime even worse, for example permanent or disabling physical injuries or sexual crimes. However, over many months you exposed the complainant to a terrifying and degrading ordeal, apparently without any insight into the seriousness of your offending. You targeted her with the type of violent, abusive and controlling conduct which the community rightly condemns. You betrayed her trust and affection, took advantage of her vulnerability, blamed her for your own acts, all with the intention of making her fearful and compliant.

***State of Tasmania v ARJ* (Sentence) [2021] TASSC unreported (11 March 2021) – Tasmanian Supreme Court**

Pearce J acknowledged that inconsistencies in the victim's accounts of the events did not detract from her credibility:

(pp2-3) Mindful of the need for care in any case in which the prosecution depends substantially on the evidence of a single witness, the complainant's account was persuasive and compelling. There were some inconsistencies in the accounts she gave over time to the attending police, to the nurse examiner at the hospital, in the statutory declaration she gave to another police officer and her evidence to the jury, but those inconsistencies do not undermine my confidence in her general truthfulness. She was faced with describing highly traumatic events on multiple occasions mostly when she was in stressful and distressing circumstances, and when the specific instances of violence she was asked to identify and detail were, I am satisfied, not the only instances of similar violence she was subjected to during the indictment period. Some confusion or mistake is not inconsistent with the truth of her account.

***Baker v Barratt* [2019] TASSC 28 (4 July 2019) – Tasmanian Supreme Court**

Geason J cited the Magistrate's reasons for decision (which focused on the defendant's controlling behaviour including Visa threats) with approval:

[12]… The defendant appeared in his video interview to be a controlling person. He admitted that he insulted – sorry, he admitted that he insisted that he owned the two phones, which apparently the couple had between them, he insisted it was his phone, both phones were his phone, and he refused the use of the phone to his partner at will because he owned them, that's what he said. That he would threaten to contact the Immigration officer or the Immigration lawyer if he argued with his partner and gave evidence today that he did on the occasion of the 1st February. He made consistent references – numerous references, I didn't count them but well in excess of twelve references to the fact that she'd lacked respect for him and he didn't receive the respect from the complainant that he deserved. He freely admitted that he called her a cunt but denied that it was abusive and was surprised that the police thought that there was anything untoward in that language. He said that he owed – that she owed everything to him and that she was an ungrateful person. He did however support significant parts of the complainant's evidence and lots of the complainant's isn't really in dispute….

….The defendant's controlling manner, well I've referred to his own evidence, he denies he controls her, it's quite apparent to me that he does control her and he thinks that she – that she owes him something and that – in his evidence in chief – it was only when I brought up the question of love that he even mentioned it. A fiancé visa's not – this sounds more like a partnership, you keep – you do the right thing by me, you give me some financial support, you drive me around and I'll support you on a fiancé visa. Now he is controlling, he admits – he doesn't admit he's controlling but what he's admitted to is controlling behaviour and it's consistent again with her version…

Lusted v MRB **[2013] TASMC 9 (19 February 2013) – Tasmanian Magistrates' Court**

Magistrate Pearce admitted relationship evidence:

[60] I have also determined to admit the relationship evidence. I consider that it is relevant to removing the implausibility that might otherwise be attributed to MG's account of the assaults charged if the assaults were thought to be isolated incidents, and any implausibility associated with the way each party is said to have behaved on those particular occasions. It may be relevant in supporting an inference that the defendant wished to exercise control and domination over the complainant and so acted violently towards her. It also tends to support the prosecution contention that MG feared MRB and, for a period of time, tried to hide what was happening, did not complain to others, lied about what really happened and that she tolerated violence to preserve the relationship.

Magistrate Pearce commented on the difficulty of prosecuting family violence matters:

[68] …The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage

of by perpetrators and further adding to the reluctance of victims to complain.

***Dunford v The Queen* [2021] VSCA 304 (9 November 2021) – Victorian Court of Appeal**

In relation to the charges of attempt to pervert the course of justice Beach JA observed:

[25] In relation to the objective seriousness of the applicant's offending and his moral culpability, the judge said:

> …Only five days after you were remanded into custody on these charges, and an intervention order had issued, you were on the phone to your father and your brother asking them to ask the complainant to drop the false imprisonment charge, with a view to minimising the amount of time you would spend in custody for these matters. Though neither proceeded to contact the complainant, I understand another family member did speak to her.

***Baker (a pseudonym) v The Queen* [2021] VSCA 158 (9 June 2021) – Victorian Court of Appeal**

McLeish and Osborn JJA observed:

36 Moreover, this offending involved aggravating features which distinguish it from offending of less seriousness. It took place in the context of a history of violence, manipulation and coercion against Ms Anderson and involved an attempt to pervert the course of justice in respect of his own serious offending. That serves to make the attempt itself more serious. Further, the offending had the especially unpleasant features of seeking to exploit Ms Anderson's emotional and psychological vulnerability by threatening her ability to access the ashes of her stillborn child and also threatening her dignity and right to privacy with the exposure of intimate images.

37 An attempt by a perpetrator of family violence to prevent a victim from seeking the full protection of the law and their physical and emotional safety is a very serious matter which calls for general deterrence and denunciation….

40 … Charge 8 involved repeated attempts by the applicant to conceal his wrongdoing over the previous 18 months, by means of emotional and physical threats directed at Ms Anderson. It was distinct offending that called for significant additional punishment.

***Mercer (a pseudonym) v The Queen* [2021] VSCA 132 (14 May 2021) – Victorian Court of Appeal**

The court made the following observations relevant to coercive control at [64]-[65]:

> "In our view, the answer to the applicant's contention regarding the 'attempt to pervert' sentence is to be found in the judge's sentencing reasons. As noted earlier, her Honour said:
>
> > You attempted to persuade a victim to withdraw her allegation to police. This is reprehensible – it was motivated by your self-interest and need for control. While it was unaccompanied by threats or violence, it was protracted and repeated and it preyed upon [the complainant's] vulnerabilities. And of course it was also committed in breach of your intervention order, which was also unsuccessful in preventing you from continuing to control [her].
>
> In our view, the applicant's persistent and cynical assertion of control over the complainant, and his exploitation of her known vulnerabilities, made this case just as serious as if there had been explicit threats or actual violence. The transcripts of the calls make plain his exertion of coercive psychological pressure on her, encouraging her to think that they can 'work things out' between them and asking questions like 'Do you want me to get out or not?' The fact that the conduct about which he was asking her to lie involved his own criminal violence against her was a further aggravating feature. In our view, the applicant's moral culpability for this offence was high.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Neave JA and Kyrou AJA observed:

[54] The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect

their ability to participate in paid work and have [43] [o]ther serious financial effects.

***DPP v O'Neill* [2015] VSCA 325 (2 December 2015) – Victorian Court of Appeal**

In describing the respondent's relationship with the deceased Warren CJ, Redlich JA and Kaye JA observed:

[7] The deceased was the dominant partner in the relationship, with the respondent by and large acquiescing to the deceased's directions. Over the term of the relationship there was regular verbal conflict which intensified with time. The respondent told his psychologist how he was abused and humiliated in front of others by the deceased. Sometimes the conflicts involved verbal abuse and sometimes pushing and shoving. He also told the psychologist that the deceased was sexually demanding of him and if he declined the deceased's approaches he would call him a 'frigid bitch'. The respondent said he felt as if the deceased treated him as his own property. Despite all this, the deceased was regarded by the respondent as being loving and affectionate towards him.

Their Honours noted the sentencing judge's comments recognising the dominance and control the deceased exercised over the respondent:

[27] The personalities of both the deceased and the respondent were considered by the judge. Her Honour said this:

Mr Rattle was strong, confident and successful. He also had a dominant, controlling personality; everything had to be done his way, both personally and professionally. No doubt that was part of the key to his professional success. And, because of your own psychological make-up, you felt inadequate; it suited you to be with someone who took control and made all the decisions. But many of your mutual friends have described how Mr Rattle used to demean and belittle you in public. He frequently complained to them that you were not satisfying him sexually. In front of others, he would call you lazy, a parasite; he would threaten to send you back to where you came from. He was critical of your lack of business acumen. There were financial and business pressures on the relationship. In the work context, he treated you like the office boy, not his partner.

The Queen v Donker **[2018] VSC 210 (11 May 2018) – Victorian Supreme Court**

Having outlined a history of controlling and violent behaviour by the deceased towards the accused at [5]-[9] and the physical violence to which the accused was subjected immediately prior to the instant offending Croucher J noted:

[72] While the law in this State does not excuse anyone – whether of uncommonly sturdy or brittle disposition – from criminal liability for otherwise unlawful actions based on provocation alone, the same law does not demand that victims of abuse of the kind and extent to which Ms Donker was subjected be super-resilient before provocation can operate in mitigation of sentence. Rather, the law attempts to strike a balance that recognizes human frailty in the face of extremely difficult circumstances, and allows that moral culpability may be reduced in such cases. This is such a case. As I say, I think it is very likely that any ordinary person, facing the circumstances which confronted Ms Donker and fixed with her history of exposure to family violence by Mr Powell, would lose self-control and act in a violent manner towards him.

DPP v Paulino **(Sentence) [2017] VSC 794 (21 December 2017) – Victorian Supreme Court**

In sentencing the accused for murdering his wife Bell J observed:

[27] … The nature and gravity of this offending is significantly aggravated by the considerations to which I have referred, but particularly the contextual considerations, which are quite specific to the crime of murder that you committed as a man upon your estranged wife as a woman. By these I mean the threats that you made towards Teresa, the character assassination with abuse of various kinds, including promiscuity, and spurious allegations of involvement in pornography, the nuisance-calling, following and unwelcome contact, and the breach of the intervention order. These were not random measures but represented a pattern of coercive control. Teresa had a right to personal dignity and autonomy, to physical and psychological integrity and to live an independent and fulfilling life free of fear from your violence. While always being a loving mother to Daniel and Luke, she struggled heroically to realise that life, and won a lot of ground against great odds. She was trying to be a positive role model for her sons. Motivated by jealousy, hatred and rage, you first tried to defeat her and then you punished her, which led to the murder. While the murder would mean that Teresa no longer had a life to live, it was the culmination of a pattern of behaviour aimed at preventing her from living the life she chose. Such was the particular nature of the offending, which is all the more grave

for it.

Lydon v Lydon **[2008] WASCA 8 (8 February 2008) – Western Australia Court of Appeal**

Le Miere AJA, with whom Pullin JA agreed, considered what is meant by the term ‘emotional abuse’ in determining whether the appellant had committed an act of family and domestic violence under s 6(1) of the Restraining Orders Act 1997 (WA).

Le Miere AJA held that:

[49] Emotional abuse is not defined in the Act. Emotional abuse involves improper or inappropriate behaviour, verbal or non-verbal, that adversely impacts upon another person's emotional wellbeing. Emotional abuse improperly excites strong unwelcome feelings in another. Emotional abuse may involve coercion by intimidation, inducing fear, stalking, or harassment, that is words, conduct or action, usually repeated or persistent that, being directed at a specific person, annoys, alarms or causes substantial emotional distress to that person.

[50] There are two aspects to emotional abuse. The first is the adverse impact upon another person's emotional wellbeing. The second is the behaviour that causes the negative impact upon the emotional wellbeing of another.

Riddoch v Chiera **[2020] WASC 114 (7 April 2020) – Western Australia Supreme Court**

In holding that the Magistrate’s interruptions of counsel’s plea in mitigation did not found leave to appeal McGrath J observed:

[26] His Honour raised with counsel immediately his concerns regarding the description of the relationship as being 'toxic'. His Honour directly challenged counsel as to whether a submission was effectively being made that the victim was to blame. Counsel then positively engaged with the judicial officer, clarifying the submission. I do not accept the contention that the magistrate denied Mr Riddoch the procedural right to agitate an issue in mitigation. Mr Riddoch's counsel reframed this part of her submission, which concerned the improvements Mr Riddoch had made to his life since the offending.

***Bropho v Hall* [2015] WASC 50 (9 February 2015) – Western Australia Supreme Court**

Mitchell J (as his Honour then was) considered the impact of the aggravating factor of an assault committed in circumstances of a domestic relationship and observed:

[16] An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted, the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence. Recognising that common feature, it remains important for a court sentencing an offender for that kind of offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner.

***Ahmed and Gupta* [2020] FCWA 140 (31 August 2020) – Family Court of Western Australia**

Duncanson J observed:

[139] Although I have not been able to make findings as to specific incidents of family violence I am satisfied that the father's controlling behaviour of the mother amounts to family violence perpetrated by him against her. I am unsure as to the extent to which the father's cultural beliefs may have contributed to this. The mother deposed that she believed the father's expectation of bringing her to Australia was so that she could be a domestic help and be a subservient [sic] to him and his brother in the house. In contrast the father said he had been living in Australia for 16 years, Australian culture comes first and the religion is his second option …

***Shelley and Dickens* [2020] FCWA 52 (3 April 2020) – Family Court of Western Australia**

Tyson J observed:

[241] The father has also behaved in a controlling and coercive manner, which falls within the definition of family violence. For example, he prevented the mother talking to her family by removing the telephone from her on the yacht; he demanded the mother answer his calls when in hospital after G's birth and suggested the maternal grandmother required his permission to provide assistance with meals after G was born.

Dempsey & Brahms **[2017] FCWA 59 (12 May 2017) – Family Court of Western Australia**

Thakray CJ observed:

[15] Contrary to what some of his associates and family believe, I find that the father is an aggressive, controlling and manipulative man. He has a propensity to bend the truth, and appears skilled at turning accusations against him back onto the accuser. He demonstrated no insight into the way that he made the lives of the mother and her adult sons (and to a slightly lesser extent his own children) a complete misery. He is quite oblivious to the harm his violent, abusive and controlling behaviour has caused.

[111] The father has engaged in coercive, controlling and abusive behaviour toward the mother and children over many years. Apart from his physical and verbal abuse of the mother, I accept that the father has damaged every vehicle she has ever owned (sometimes when children have been in the vehicle and sometimes when they have been observing).

[112] In my view, all five of the mother's children have suffered psychological harm as a result of their exposure to the father's violence and abuse and the ongoing conflict between the mother and father. This is likely to be one of the main reasons for Child A's poor behaviour and also for Child B's nightmares and long-term self-harming, including her habit, developed very early in life, of twisting her hair until she was almost completely bald on one side of her head. It would seem the child least damaged by the father's behaviour has been Child C who has had significantly less involvement with him than the other children.

[113] I accept that the mother remained in the relationship for as long as she did because of the father's manipulative behaviour and because she considered this was the best way to keep her and the children safe. The father's manipulation has included his efforts to drive a wedge between the mother and her friends and between the mother and the children.

[114] I accept that the father has not been charged with any offences arising out of his conduct towards the mother but that is far from conclusive. As I have mentioned, the father is skilled at deflecting accusations.

Protection order

Under the National Domestic Violence Order Scheme, protection orders made in any Australian jurisdiction on or after 25 November 2017 are automatically recognised and enforceable nationally.

Protection orders made before 25 November 2017 (except Victorian protection orders and New Zealand protection orders registered in Victoria, which are recognised retrospectively) are not automatically recognised and enforceable in other jurisdictions. All jurisdictions have legislation to enable protection orders made before 25 November 2017 to become nationally recognised by being ‘declared’ as a protection order recognised under the scheme. The protected person may apply to any local court in Australia for such a declaration.

While there are differences in the nature and scope of domestic and family violence legislation across Australian States and Territories, all contain provisions for certain courts in each jurisdiction to make civil orders (usually on application by police or an individual) specifically to protect victims – or persons at risk – of domestic and family violence occurring in the context of a range of relationships, including those between current or former intimate partners.

The objects of these orders, generally, is to protect victims from future domestic and family violence. They recognise that: a range of behaviours – physical and non-physical – can constitute domestic and family violence; that most often these are patterns of behaviour occurring over time rather than one-off incidents; and that victims and other affected parties are likely to require protection over extended periods. The wording and conditions of orders vary widely within and across jurisdictions depending on the facts of the particular case and the circumstances and experiences of the parties involved.

The terms used to identify these orders also vary across jurisdictions and these terms are set out in the table below:

Jurisdiction	Relevant legislation	Commonly-issued orders
Australian Capital Territory	*Family Violence Act 2016* (ACT)	family violence order
New South Wales	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)	apprehended domestic violence order
Northern Territory	*Domestic and Family Violence Act 2007* (NT)	domestic violence order
Queensland	*Domestic and Family Violence Protection Act 2012* (Qld)	domestic violence order
South Australia	*Intervention Orders (Prevention of Abuse) Act 2009* (SA)	intervention order
Tasmania	*Family Violence Act 2004* (Tas)	family violence order
Victoria	*Family Violence Protection Act 2008* (Vic)	family violence intervention order
Western Australia	*Restraining Orders Act 1997* (WA)	family violence restraining order

For convenience, this bench book uses the collective term, ‘protection order’, except where it is necessary to refer to an order issued under specific legislation, for example in the case summaries.

It is important to note that when a person in whose favour a protection order has been made makes an application for the registration of that order in another state or territory, the applicant must detail the precise nature – including the name – of the order previously made. Wording or conditions that differ from what may be considered standard in the other state or territory do not prevent registration of the order.

Parties

There is no widespread consensus among researchers, service providers and practitioners as to the most appropriate terms for identifying parties to domestic and family violence related proceedings. However, key literature assists in substantiating terminology choices.

The term ‘victim’ may be ascribed to those individuals who have experienced or are experiencing domestic and family violence. In doing so, it is acknowledged that the term has attracted considerable criticism for implying powerlessness, or failing to resonate with those who do not feel helpless, who defend themselves or who are ambivalent about their relationship to the person perpetrating the violence [Fine 1989]. Those who do not support the ‘victim’ label may express a preference for the term ‘survivor’, connoting a degree of empowerment [Fernandez 2010]. However, the term ‘survivor’ may be problematic in its implication that those individuals who do not escape domestic and family violence are somehow weak or voluntarily consented to the behaviour; and therefore the term ‘victim’ may more aptly reflect their experience [Meyersfeld 2010].

The term ‘perpetrator’ is used to describe a person who perpetrates domestic and family violence against another person with whom they are in a relevant relationship (as legislatively defined), irrespective of whether they have been charged with an offence or held criminally responsible for any behaviour.

The terms ‘victim’ and ‘perpetrator’ are the most commonly used among police and judicial officers in domestic and family violence related proceedings (for parties both alleged and proven to be a victim or a perpetrator) and, for consistency, are also used in this bench book. There is one notable exception: in any case where domestic and family violence and criminal jurisdictions intersect, the term ‘offender’ is used to identify a party who has been convicted of a criminal offence, for example, where a perpetrator’s domestic and family violence behaviours also constitute a criminal offence, or where the victim of domestic and family violence commits a criminal offence.

Parties - Key Literature

Australia

Special Taskforce on Domestic and Family Violence, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015).

This report commences with an acknowledgement that the term 'victim' is most commonly used in the public discourse, despite there being a contrary view that the term is disempowering for the subject individual and a preference is sometimes expressed for the use of the term 'survivor' (p4). The terms are then defined and ultimately the authors decide to use the terms interchangeably.

International

Ashcraft, Catherine, 'Naming Knowledge: A Language for Reconstructing Domestic Violence and System Gender Inequality' (2000) 23 *Women and Language* 1.

This article explores a range of communicative options available for framing domestic violence. The author examines how terminology choices have silenced certain groups of women and in some cases, left dominant representations unchallenged. Ashcraft submits that there are various problems with the use of the term 'victim' (p5) and notes research has shown that many women, even women who have suffered severe and prolonged instances of domestic and family violence resist the label. The author suggests that this is because the term suggests powerlessness and that some feel that it does not accurately describe their situations, and goes further to suggest that '[t]o require these women to accept the *victim*…label may remove the remaining vestiges of self-esteem and hope that have made possible their survival' (p5).

Dobash, Rebecca, and Russell Dobash, *Women, Violence and Social Change* (Routledge, 1992).

This book is framed as a sociological inquiry into the growth of the battered women's movements in America and Great Britain and the relationship of the movements to local and national institutions. The book opens with an overview of the nature and extent of domestic and family violence and the authors pass comment on the use of the terms 'victim' and 'survivor'. They note that '[t]he term "victim" has been used in two ways: implying a master status of individual women (i.e. she is a victim) and as a description of the experience itself

(i.e. she was the victim of a violent attack' (p30). Dobash and Dobash note that use of the term 'victim' in the first way is the one most often criticised and replaced with the term 'survivor'. They see the second use of the term as legitimate and important for describing an individual's role within the act itself.

Fernandez, Marilyn, *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing* (Lexington Books, 2010).

Fernandez acknowledges that there is much debate on the appropriate descriptors to be applied to those who have experienced domestic violence, and notes that the terms 'victim', 'survivor' or 'targets (of violence)' are some of the most commonly discussed (p24). The author focuses on the terms 'victim' and 'survivor' and makes some interesting observations with respect to these two descriptors. In relation to the former, Fernandez notes that although there are some who would argue that the term 'connotes victim blaming' there are many who prefer the term 'because it better captures their experiences, particularly when they were in the midst of the violence and even after' (p24). On the other hand, 'survivor' may be seen as the more empowering term, but the author counters this by submitting that the term 'minimises the trauma they have experienced' (p24). Ultimately Fernandez opts to use the terms interchangeably, and uses the term 'victim' when violence experiences are described and analysed and 'survivor' when help-seeking or rehabilitative behaviour is the focus.

Fine, Michelle, 'The Politics of Research and Activism: Violence Against Women' (1989) 3 *Gender and Society* 549.

The author cites her own research along with that of Susan Schechter and Lynn Phillips about self-descriptors, noting that women who have been subjected to violent behaviour often distance themselves from the label 'victim' or more precisely the term 'battered woman' (p553). It is argued that popularising such categories portray women as powerless and innocent and does not resonate with those who do not feel helpless, who defend themselves or are ambivalent about their relationship to the person inflicting the violence. The author does not, however, offer any alternative descriptors but rather suggests that it is necessary to understand the consequences for women of the political act of labelling them a 'victim' or a 'battered woman'.

Govier, Trudy and Wilhelm Verwoerd, 'How Not to Polarize "Victims" and "Perpetrators"' (2004) 16 *Peace Review* 371.

Although written in the context of naming parties in acts of political violence, some important comments are made in relation to the term 'victim' which can be applied to domestic and family violence. The authors submit that the 'victim' label is objectionable if 'it is interpreted as implying the person harmed is nothing but a passive part in an act in which he or she was hurt by another' and note that this interpretation has led many harmed persons to insist on the use of the term 'survivor' (p371). Govier and Wilhelm object to labelling parties on the basis that it encourages polarized thinking that is simplistic and counter-productive. It is for this reason that they do not endorse the use of the terms 'victim' and 'perpetrator' and submit that the distinction between the two as 'logically simplistic, ethically unfair, psychologically misleading and prudentially undermining' (p371). Unfortunately, the comments made in relation to the perpetrator label have little application in the context of domestic and family violence because the authors' focus in this respect is on the culpability of persons supporting the use of physical force during political violence.

Groves, Nicola, and Terry Thomas, *Domestic Violence and Criminal Justice* (Taylor and Francis, 2013).

This book aims to provide an up-to-date and comprehensive introduction to the subject of domestic violence and its interaction with the criminal justice system in England and Wales. The authors dedicate a chapter to naming and defining domestic violence as well as exploring its nature and extent, including the historical and political contexts of related terms. The focus of this book is the criminal justice system response to domestic and family violence and as such, individuals who are subject to the violence are referred to as 'victims' rather than 'survivors'. The authors do acknowledge that the term 'victim' has been widely critiqued but ultimately submit that it is the most accurate descriptor despite the fact that 'those who experience domestic violence are rarely passive victims' (pxi).

Meyersfeld, Bonita, *Domestic Violence and International Law* (Bloomsbury Publishing, 2010).

In the introductory chapter to this book, the author raises the important question of whether the term 'victim' or 'survivor' should be used when referring to a person who has experienced domestic and family violence. There are two important points made in relation to these terms respectively. The first is that the descriptor

'victim' can be seen as 'connot[ing] weakness and vulnerability' (pxxxiv). Secondly, the author submits that the term 'survivor' is 'problematic in its implied commentary on those women who either kill or are killed as a result of the abuse' and there is an implication that a person who fails to escape the violence is somehow weak or consented to the behaviour (pxxxiv). Although noting that neither term is ideal, Meyersfeld opts for the term 'victim' and occasionally uses the term 'survivor' when addressing issues that arise when domestic and family violence is no longer occurring.

Moncrieffe, Joy, 'Labelling, Power and Accountability: How and Why 'Our' Categories Matter' in Joy Moncrieffe and Rosaling Eyben (eds) *The Power of Labelling: How People are Categorised and Why It Matters* (Earthscan, 2007) 1.

This chapter is a good foundational resource for understanding the processes and outcomes of labelling people, and how social problems are often framed and dealt with in response to such labels. Moncrieffe explores the intense and complex politics involved in the processes of labelling, noting that the labels ascribed to individuals or sections of society can have both positive and negative effects (p2). Although the author does not address specifically the terms 'victim', 'perpetrator' or 'offender', the usefulness of this source lies in its comprehensive explanation of what is commonly referred to as 'labelling theory' through an overview of other influential sources (p6) as well as making suggestions as to how the pitfalls of labelling can be avoided. These include acknowledging the importance of and increasing awareness of the power and impact of labels and acknowledging that any one label is not going to accurately describe the experience of all individuals.

Nicholson, Paula, *Domestic Violence and Psychology: A Critical Perspective* (Taylor and Francis, 2010).

The purpose of the book is to present theoretical perspectives from the discipline of psychology and research on domestic and family violence to social science academic audience and community service providers. Similar to other authors who have addressed the issue of appropriate descriptors to name parties, Nicholson elects to use the words 'victim' and 'survivor' interchangeably and does so according to the circumstances in which the terms are being used. The author offers the following example: a woman in a violent relationship at the time is best described as a 'victim', whereas a woman who has left a violent relationship and has

physically and emotionally lived to tell the tale is to be described as a ‘survivor’ (p30). The author also notes how the use of the word ‘survivor’ has the potential to place a burden on individuals to engage in advocacy for others, thus emphasizing how language used to refer to domestic and family violence frames the context and expectations for those involved.

Dynamics of domestic and family violence

Domestic and family violence is predominantly perpetrated by men against women in the context of intimate partner relationships. Children may be exposed to the violence in a variety of ways or may be directly victimised. While the violence may take place within a range of relationships and take many different forms—physical or non-physical, sexual and non-sexual, direct or indirect, actual or threatened—it is characterised by a pattern of abusive behaviour involving a perpetrator's exercise of control over the victim, increasingly referred to as coercive control, often for an extended period. This behaviour may occur throughout a relationship, or it may be initiated or exacerbated at times of heightened risk, for example, pregnancy, attempted or actual separation, and during court proceedings dealing with children or joint property matters.

Professionals who work with victims and perpetrators have endeavoured to explain the distinctive nature of domestic and family violence. Commonly referenced is the Duluth "Power and Control Wheel". This figurative representation identifies domestic and family violence as a cycle of violence in the form of a wheel, comprising an outer ring highlighting physical and sexual violence and an inner ring including descriptions of multiple abusive behaviours with power and control consistently at their centre. Models like this one assist understanding but are not intended to be definitive. Each case of domestic and family violence involves a unique and complex series of facts that must be considered as a whole in order to understand the victim's experience of violence, and to respond appropriately to risk of future violence and perpetrator accountability. Making assumptions about parties' motivations and behaviours, or attempting to categorise violence according to severity or parties' general circumstances may result in a misunderstanding of the dynamics of violence in a particular case and inappropriate responses to the needs of the victim and perpetrator.

Victims of domestic and family violence may sustain long-term harm to their physical, mental or emotional wellbeing. While they may obtain legal protection from future harm, it may take years of treatment and counselling to recover from the effects of the violence. Children who are affected may continue to experience violence in adulthood or they may, as adults, exhibit attitudes and behaviours that reflect their childhood experiences.

Dynamics of domestic and family violence - Key Literature

Australia

Douglas, H. *Women, Intimate Partner Violence and the Law* (2021; OUP).

This text explores the results of an interview study involving interviews with 65 women who had experienced domestic and family violence over three years. See chapter 3: Most women reported that the most difficult form of abuse they dealt with were forms of non-physical abuse, especially emotional abuse. Many women identified that non-physical abuse deeply impacted on their sense of self and freedom, and that it continued to affect them for years. Other forms of non-physical abuse that were also highlighted by the women included abusive tactics targeting their role as a mother, isolation within the relationship, financial abuse. The women in the study highlighted the particular impacts of non-physical forms of abuse, including isolation, financial abuse and threats about their visas, for women from culturally and linguistically diverse backgrounds especially those women with insecure visa status.

International

National Domestic Violence Fatality Review Initiative, ABOUT NDVFRI (2016).

The National Domestic Violence Fatality Review Initiative (NDVFRI) (US resource) is a unique resource centre that is dedicated to domestic violence fatality review by the Office on Violence Against Women, a branch of the US Department of Justice. Currently, 30 States in the US have a form of domestic violence fatality review. Domestic violence fatality review requires a shift from a culture of blame to a culture of safety. The Initiative aims to provide assistance for assessing domestic violence-related deaths, with the underlying objectives of:

- Preventing domestic violence homicides and domestic violence in the future;
- Preserving battered women's safety;
- Identifying gaps in service delivery and assessing potential methods of remedying these organisational issues;
- Holding domestic violence perpetrators, as well as the agencies and organisations that come into contact with the parties, accountable;
- Providing technical assistance to States which either have implemented or have not implemented

domestic violence fatality review.

The website includes a range of resources including reports, videos and webinars.

Dynamics of domestic and family violence - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Rogers **[2020] SADC 72 (16 June 2020) – South Australian District Court**

At [273], the Court said:

> *"[The complainant's] behaviour in contacting police, making statements on some occasions and not others, withdrawing complaints, denying incidents occurred, allowing the accused back into her life and seeking variation to intervention orders, are behaviours that too commonly feature in cases involving serious domestic violence. Abusive and violent relationships give rise to behaviours that to anyone who has not had that experience, may seem simply too odd or counterintuitive to be believed."*

At [279], the Court observed that:

> *"…[V]ictims of domestic violence may not necessarily seek attention for the injuries inflicted upon them, and may go to extraordinary lengths to conceal signs of abuse…"*

R v Brown **[2015] ACTSC 65 (5 March 2015) – Australian Capital Territory Supreme Court**

Burns J at [4]-[5]: Burns J accepted the opinions and statements he quoted from clinical psychologist, Dr Michael Barry's report. Dr Barry said: 'At the time of the offence, Miss Brown had been in an emotionally and physically abusive relationship for over two years. She described a gradual deterioration in her mental health, reporting low self-worth and feeling overwhelmed, feeling that she did not "fit in anywhere" and she described a "sense of loss in the world". She reported that despite Mr Ruspandini's treatment of her, she felt that he was the only one who she could rely on.

Domestic violence and emotional abuse are behaviours used by one person in a relationship to control the other. Research into the cycle of domestic violence suggests that it is common for victims of domestic violence to blame themselves for the abuse and to experience major disruption in their self and world view.

Domestic abuse can have a serious impact on the way a person thinks and interacts with the world around them. The chronic exposure to violence, or the threat of violence, and the stress and fear resulting from this exposure, can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.

Domestic violence affects a person's thoughts, feeling and behaviours, and can significantly impact on mental stability. While the effects of physical abuse are obvious, the effects of emotional abuse are easier to hide and harder to repair. It is common for victims of emotional abuse to blame themselves and minimise their abuse, particularly when they are repeatedly told that it is their fault that their partner becomes angry or aggressive'.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J: 'An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6–7' ([77]).

R v Patsan **[2018] NSWCCA 129 (29 June 2018) – New South Wales Court of Criminal Appeal**

At [39], Adamson J notes –

> *'While every sentence imposed must have regard to all the circumstances particular to the specific case, individualised justice does not require sentencing judges to ignore patterns of behaviour which are repeated all too frequently before them.'*

Further, at [39], Adamson J notes –

> *'The experience of this Court and the statistics relied upon by the Crown indicate that domestic violence*

> *offences not infrequently conform to the following pattern, to which the applicant's conduct in the present case conformed: a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths.'*

***Xue v R* [2017] NSWCCA 137 (21 June 2017) – New South Wales Court of Criminal Appeal**

At [53], the Court notes –

> *'The applicant's circumstances at the time of the offending and his genuine belief that the victim may have been unfaithful to him can in no way justify or ameliorate the seriousness of the offending. Regrettably, it is often the case with domestic violence that the catalyst is a genuine, albeit irrational, belief on the part of the aggressor that he, or occasionally she, has been wronged in some way by the victim. A resort to violence in such circumstances is not justified, even if the aggressor's belief turns out to be correct.'*

***R v Biles (No 2)* [2017] NSWSC 525 (3 May 2017) – New South Wales Supreme Court**

Fagan J considered that these offences were the culmination of a course of domestic violence:

> 'The experience of courts in this State has shown that men who perpetrate violence against their female partners do not stop after one occurrence. Often they become accustomed to inflicting violence of escalating severity.' Per Fagan J at [52]

On the failure of the other women in the house to call the police:

> 'The apparent lack of a sense of urgency amongst the other women in the house … may have been due to resignation amongst them; a feeling that to some extent domestic violence is inevitable and must be endured and, perhaps, that it is a matter private to the couple, in which others should not interfere. None of that is so.' Per Fagan J at [55]

R v Gittany (No 5) **[2014] NSWSC 49 (11 February 2014) – New South Wales Supreme Court**

McCallum J at [40]: 'In my view, that history informs the degree of moral culpability of the offence. The arrogance and sense of entitlement with which Mr Gittany sought to control Lisa Harnum throughout their relationship deny the characterisation of his state of mind in killing her as one of complete and unexpected spontaneity. By an attritional process, he allowed possessiveness and insecurity to overwhelm the most basic respect for her right to live her life as she chose. Although I accept that the intention to kill was formed suddenly and in a state of rage, it was facilitated by a sense of ownership and a lack of any true respect for the autonomy of the woman he claimed to love'.

WJ v AT **[2016] QDC 211 (19 August 2016) – District Court of Queensland**

Smith DCJA quoting the explanatory notes to the 2011 Bill for the *Domestic and Family Violence Protection Act 2012* (Qld) at [166]: 'Lastly, the Bill aims to ensure that the person who is most in need of protection is identified. This is particularly important where cross-applications are made, which is where each party to a relationship alleges domestic violence against the other and which often result in cross-orders.

During consultation, stakeholders reported a disproportionate number of cross-applications and cross-orders and expressed the concern that in many instances domestic violence orders are made against both people involved.

This is inconsistent with the notion that domestic violence is characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them. Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time.

A cross-application may be used by a respondent to continue victimising the aggrieved person, to exact revenge or to gain a tactical advantage in other court proceedings.

Also, violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken' (His Honour's emphasis).

***R v Sykes* [2017] SASCFC 59 (31 May 2017) – Supreme Court of South Australia (Full Court)**

'Every person has a right to feel safe in their house and the appellant had violated the security and safety of the victim and also violated her personally. He had terrorised her for what must have been hours in her own home. In her view his behaviour appeared to have been deliberately designed to inflict the maximum amount of terror.' Per Parker J at [33]

***R v Ritter* [2016] SASCFC 88 (16 August 2016) – Supreme Court of South Australia (Full Court)**

Parker J at [17]-[21]: 'At the time of the offending the appellant and the victim had been in a relationship for approximately two years. His behaviour towards her was violent and controlling. About one month into the relationship the appellant began verbally abusing the victim. This progressed to physical abuse occurring about twice each week. By the last year of the relationship the frequency of assaults had escalated to the point where the appellant was assaulting the victim on a daily basis. The assaults included punching, slapping, kicking, throwing items and spitting. When the victim was threatened or attacked by the appellant she would try to leave their flat, often running into nearby streets and parks and attempting to hide. The appellant would frequently chase her or track her down in order to continue his abuse. The appellant monitored the victim's movements and rarely let her leave the house without him. He also controlled her finances, regularly forcing her to withdraw money from her account for his benefit, including so that he could buy drugs and alcohol. The appellant regularly threatened that if the victim reported any abuse to the police or left the relationship he would harm her and her children. She was too frightened to leave or to report the abuse to police, friends and family'.

***Her Majesty's Attorney-General v O* [2004] TASSC 53 (9 June 2004) – Supreme Court of Tasmania**

Quoting the Canadian decision of *R v Brown* (1992) 73 CCC (3d) 242, 249 (as cited in *Parker v R* [1994] TASSC 94): ' *When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.'*

***Lusted v MRB* [2013] TASMC 9 (19 February 2013) – Magistrates' Court of Tasmania**

Magistrate RW Pearce at [68]: 'Family violence is to be abhorred. It is a significant social problem, of concern to the community and the justice system. The parliament saw fit to enact legislation, the *Family Violence Act 2004*, expressly to "provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence". The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage of by perpetrators and further adding to the reluctance of victims to complain'.

***DPP v Barnes & Barnes* [2015] VSCA 293 (12 November 2015) – Victorian Court of Appeal**

This was a Crown appeal against sentence. Redlich JA at [68]-[69*]:* 'In sentencing, the judge said this about Trevor's offending: 'I make it plain that I consider that you are the main offender in this criminal enterprise and the whole appalling saga was dictated by your immaturity and inability to control your anger in the context of your possessive and controlling behaviour of Ms Bethune, whom you had subjected to domestic violence on earlier occasions. In sentencing you, the court must denounce your conduct, give emphasis to general deterrence, and impose just punishment. A strong message needs to be sent to males in the community who are inclined to be violent towards their female partners. You do not own them. You have no right … menacingly [to] control them. If you lay a hand on them in anger, the law will not spare you punishment. Men who are bullies towards women usually have some psychological inadequacy. They need to look long and hard at themselves to try to understand why they are inclined to behave with anger and brutality, and seek professional help to overcome such inclinations.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [53]-[54]: 'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

***Dawes v Coyne* [2000] WASCA 134 (19 May 2000) – Supreme Court of Western Australia (Court of Appeal)**

Miller J at [6]: 'The learned Magistrate decided the matter after hearing submissions. He began by stating that it was a tragedy that "domestic matters of this sort get into the criminal court" and made the observation that "both parties had been causing trouble for the police who do not want to be involved in these sort of things". The learned Magistrate's observations that the matters in question were merely "domestic" and should not get into the criminal court were entirely inappropriate. Allegations of unlawful assault and breaches of [the] restraining order were matters properly the subject of a complaint and the proper place for the resolution of those complaints was in the Court of Petty Sessions. Further, the observation that both parties had been causing trouble for the police is difficult to understand from the evidence but whether it be true or not, it was wrong for the learned Magistrate to make the statement that police did not wish to be involved in matters of breach of restraining order and assault in the circumstances of this case'.

***The State of Western Australia v Cheeseman* [2011] WASCA 15 (19 January 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [3]: 'The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status

quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C'.

***Bropho v Hall* [2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [16]: 'The fact that the aggravated assault occurred in a domestic setting is a significant aggravating factor of the offence. An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted, the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence. Recognising that common feature, it remains important for a court sentencing an offender for that kind of offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner' (which was approved by this court in Gillespie v The State of Western Australia [2016] WASCA 216 [48]).

Myths and misunderstandings

A victim of domestic and family violence is able to leave the abusive relationship

Many victims of domestic and family violence may be motivated to leave, however they may face a myriad of barriers, including: lack of financial resources; concerns for the welfare of children, family and pets; disability, lack of alternative, safe accommodation; inadequate formal support systems; disrupted social networks; religious and cultural beliefs preventing them from leaving; and fear of retaliation by the perpetrator. A perpetrator may also use a variety of coercive and manipulative tactics to actively prevent the victim from leaving. These barriers may be too great for a victim to ever overcome, or they may explain why a victim leaves and returns to an abusive relationship on multiple occasions before finally leaving.

The domestic and family violence will stop when the victim and perpetrator separate

A victim leaving an abusive relationship may be viewed by the perpetrator as a direct threat to the perpetrator's ability to maintain control over the victim. Research has shown that one of the most dangerous times for a victim is in the months after separation when the perpetrator may use a variety of tactics to reassert control over the victim.

Domestic and family violence involving physical violence is more serious than other controlling behaviours

Most Australian state, territory and federal legislation now recognises that domestic and family violence can be characterised by a range of non-physical abusive behaviours as well as physical violence. Indeed some studies have shown that domestic homicides are often preceded by coercive and controlling behaviour. In the past, courts have shown a tendency to focus judicial responses on separate incidents of physical violence, and the severity of that violence, without having regard to the history and dynamics of the abusive relationship. Legislative change has assisted a more developed understanding of the complex and intersecting nature of domestic and family violence behaviours, and how they may operate over time to exercise control over not only the victim's physical condition and environment but their emotional wellbeing, self esteem and sense of identity.

Domestic and family violence only affects particular groups of people

Research has consistently shown that domestic and family violence occurs in all sectors of society

irrespective of race, gender, age, sexual identity, socio-economic status, location, culture or religion. However, some groups of people are more vulnerable to the experience and impacts of violence than others due to their specific circumstances or needs.

Men and women are equally victims and perpetrators of domestic and family violence

While men do experience domestic and family violence, and women can be perpetrators, research demonstrates that, predominantly, women are the victims and men are the perpetrators of this form of violence. One in six Australian women and one in twenty Australian men experience violence by their cohabiting opposite-sex partner. One in four Australian women report violence by a partner they may or may not have lived with; and two-thirds of those women experience more than one episode of abuse. In 73% of female homicide cases, the current or intimate male partner is the perpetrator/offender. Women are also more likely than men to experience emotional abuse by their partner and are more likely to experience anxiety and fear as a result.

Domestic and family violence does not include sexual assault

While sexual assault in intimate relationships is recognised by the law as a form of domestic and family violence and as a criminal offence, victims may not know or understand this, and police may minimise or fail to respond adequately to the behaviour. Casework experience suggests that many sexual assaults in intimate relationships are unreported, and often undisclosed, even where other forms of violence are reported.

Women often make false or exaggerated claims of domestic and family violence to obtain a tactical advantage in parenting proceedings

A 2015 evaluation of the 2012 Family Violence Amendments to the Commonwealth *Family Law Act 1975* observes that this belief persists among some sections of the community, including some lawyers and non-legal professionals, despite the fact that false denials of true allegations are more common. Data also shows that since the amendments there has been a decrease in the percentage of mothers (who experienced domestic and family violence since separation) having a protection order.

Domestic and family violence is a relationship issue; both parties are responsible

Domestic and family violence is often minimised by perpetrators attempting to shift the blame to the victim and others. Conceptualising violence as a product of dysfunction in the intimate relationship overlooks the critical aspects of dominance and control central to the behaviours of most perpetrators towards victims.

Domestic and family violence is caused by external factors such as alcohol or drug misuse,

financial pressure or a prejudicial family law system

The view that domestic and family violence derives from factors other than a perpetrator's motivations and behaviours may have the effect of diminishing a perpetrator's sense of personal responsibility. In many situations violence occurs in the absence of these factors. Similarly, there are many situations where these factors are present and violence does not occur.

- **Victims of domestic and family violence are weak, passive and powerless**

  Referencing or relying on victim stereotypes may potentially exclude or fail to give due consideration and fair hearing to victims whose profiles and experiences do not align with those stereotypes. For example, some victims may physically resist violence or attempt to defend themselves. Victims and their circumstances are as diverse as in the broader population.

- **Mothers who experience domestic and family violence have a duty to keep the family together and to protect the children from violence**

  This view potentially pits a mother's safety against her children's safety. This may manifest as: the mother tolerating the violence in the interests of preserving the family unit; or reporting the violence and risking the accusation that she has failed to adequately protect her children.

Myths and misunderstandings - Key Literature

Short References

A victim of domestic and family violence will leave the abusive relationship.

Bruton and Tyson (2017) Yamawaki et al (2012) Douglas & Walsh (2010) Wakefield & Taylor (2015) Meyer (2012) Buel (1999)

The domestic and family violence will stop when the victim and perpetrator separate.

DeKeseredy, Dragiewicz and Schwartz (2017) Wilcox (2006) Douglas & Walsh (2010)

Domestic and family violence involving physical violence is more serious than other controlling behaviours.

Hunter (2006) Murray & Powell (2009) NSW DV Death Review (2020) Ragusa (2012) Stark (2012)

Domestic and family violence only affects particular groups of people.

ALRC/NSWLRC (2010) Ragusa (2012)

Men and women are equally victims and perpetrators of domestic and family violence.

Melville & Hunter (2001) Wakefield & Taylor (2015) Murray & Powell (2009) Cox (2016)

Domestic and family violence does not include sexual assault.

ALRC/NSWLRC (2010) Lievore (2004) Cox (2016)

Women often make false or exaggerated claims of domestic and family violence to obtain a tactical advantage in parenting proceedings.

Kaspiew et al (2015) Hunter (2006) Melville & Hunter (2001) Chisholm (2009) Francia et al (2019)

Domestic and family violence is a relationship issue; both parties are responsible.

Hunter (2006) Wakefield & Taylor (2015) Yamawaki et al (2012) Wilcox (2006) Douglas (2008)

Domestic and family violence is caused by external factors such as alcohol and drug abuse, financial pressure or bias of the family law system.

Murray & Powell (2009)

Victims of domestic and family violence are weak, passive and powerless.

Goodmark (2009) Douglas (2012)

Mothers who experience domestic and family violence have a duty to keep the family together and to protect the children from violence.

Douglas & Walsh (2010) Wilcox (2006) Croucher (2014)

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

- This report provides a comprehensive overview of Australian law and legislation concerning family violence.
- p300-04: features of family violence including its gendered nature and occurrence across all areas of society.

- p1111-14; 1220: outlines myths and misconceptions about women, children and sexual assault, including those held by juries.

Bruton, Crystal and Danielle Tyson, 'Leaving Violent Men: A Study of Women's Experiences of Separation in Victoria, Australia' (2017) 51(3) *Australian & New Zealand Journal of Criminology* 339-354.

This article explores women's experiences of leaving abusive relationships and seeks to combat assumptions about the nature of such relationships through in-depth interviews with 12 women who had separated from their male intimate partners (p 5). While separation is broadly recognised as a key time for increased risk of violence towards women and their children (p 1), studies demonstrate that most people believe women are able to leave violent relationships, and do not understand why they might stay (p 2). Such views place the responsibility for ending the violence on women, but in reality, these relationships often include complex circumstances, and the 'stay/leave binary' is rarely applicable (p 2). The results indicate that women's experiences of coercive control significantly affected their decision-making in the context of separation (p 6):

- Many women feared leaving because they were aware that separation may provoke retaliatory violence, with some experiencing an escalation of abusive behaviour when they attempted to leave (p 7);
- Many women were motivated to leave the relationship in order to protect their children, especially where violence became directed towards the children (p 8);
- Women's attempts to leave their relationships were often hindered by their partner's control over their finances (p 9); and
- Women adopted strategies to manage their safety both during and following separation (pp 9-10), and many women experienced escalating violence after separation (pp 11-12).

Chisholm, Richard, *Family Courts Violence Review* (Commonwealth Attorney General's Department, 2009).

This report discusses the issue of false allegations or statements made by parties to proceedings in relation to family violence

Cox, Peta, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS, 2016 Rev.ed.).

This report analyses the results of the 2012 Australian Bureau of Statistics' Personal Safety Survey. Key sections in particular that relate to myths and misunderstandings are sections one and three, described below.

Section one: Violence experienced by women and men (from p20)

This section begins with an analysis of the prevalence of violence experienced by women and men (including specific forms of violence) and then proceeds to analyse perpetrator demographics, basic incident characteristics and key post-incident actions and impacts.

Statistical data reveals the higher prevalence of women experiencing violence perpetrated by 'opposite sex perpetrators' (pp30-33). For example, since the age of 15, 1.5million women have experienced violence by a cohabiting partner. Since the age of 15, 0.45million men have experienced violence by a cohabiting partner (p31). Almost all women who had experienced violence by a cohabiting partner reported that this violence was perpetrated by a male: 1,470,200 reported violence by a male partner. This is one in six women in Australia (16.8%). Most men who experienced violence were victimised by female partners: 427,900 had experienced violence perpetrated by a female partner. This is one in 20 men in Australia (5.1%)(p31).

Section three: Women's experiences of partner violence (from p76)

This section provides a detailed examination of the PSS data relating to women's experiences of partner violence. It presents findings such as:

- Close to 2.2 million women have experienced at least one incident of violence by a male intimate partner: this is one in four women (25.1%) (p79).
- For women who were in a relationship with their violent cohabiting partner at the time of the survey, two thirds had experienced more than one incident of abuse (154,500, 65.1%) (p82).
- Most women did not permanently leave their violent partner the first time that they separated (p 104). The most common reasons for returning to a violent partner were that the partner promised to stop assaults, threats or abuse; commitment to the relationship; and for the sake of the children (p 120).
- 81,900 women have wanted to leave their violent current (at the time of the survey) partner, but never

have (p 120).

- Two out of five women experienced violence while temporarily separated from their violent former male cohabiting partner, and six out of ten of these women reported an increase in violence during the separation (p 121).
- 1 in 4 employed women who had experienced violence took time off work as a result of their most recent incident of physical assault by a male cohabitating partner (p 116).
- Women who live with their perpetrator reported feeling fear and anxiety after their most recent incident at a higher rate than women who experienced violence by an other known male (not cohabiting partner) or stranger (p 116).
- Two thirds of women had changes in routine due to fear or anxiety as a result of the violence of a former male cohabiting partner, including sleeping habits, social/leisure activities, and building or maintaining relationships (p 119).

Pages 105-107 contain flowcharts demonstrating the small numbers of physical and sexual assaults that result in court appearances. Section 4.4 (Psychological impacts, from p116) discusses the levels of fear and anxiety experienced by women following violence perpetrated by a current or former cohabiting partner.

Note: this article refers to an old release of the ABS' Personal Safety Survey, but the analysis remains useful. See Australian Personal Safety Survey (PSS) 2016.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System**' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).**

Explores conflicting expectations of mothers concerning parenting orders, child protection and family violence (p210-11).

Douglas, Heather, 'The Criminal Law's Response to Domestic Violence: What's Going On?**' (2008) 30 *Sydney Law Review* 439.**

'The Queensland data discussed in this article demonstrates that the process involved in prosecuting a criminal breach often involves a minimisation of the harm inflicted on women by perpetrators, police and

magistrates, a ruthless contest about the facts and numerous court appearances before resolution. Prosecutions of breaches of protection orders often result in no conviction being recorded or in trivialising fines.'

- Minimisation of harm by police and prosecution (p447-453) – decision to charge the breach in preference to the more serious criminal offences (i.e. stalking, assault or criminal damage).
- Defendants' minimisation of harm and responsibility (p459) – defendants attempting to shift the blame to another source including via claims of provocation, intoxication or child related matters (p461).
- Where magistrates recommended relationship counselling on the basis that both parties had accepted blame for the husband's violence of the husband, violence and responsibility of perpetrator are minimised (p463).

Douglas, Heather, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 (3) *Australian and New Zealand Journal of Criminology* 367.

This article reviews the underlying debates relating to the 2005 Victorian offence of 'defensive homicide' and the 2010 Queensland defence titled 'killing for preservation in an abusive domestic relationship' and examines recent case law to consider the application of these two approaches and their effectiveness in light of what they were designed to achieve.

In two of the cases, the author notes that the female killers were perhaps 'benchmark' battered women. Both were smaller than their partners, white, drug-free, monogamous and without a criminal record. They suffered fierce physical abuse over many years, actively protected their children from the abuser and the killing was, apparently, the first time they had physically fought back. Both had attempted to leave the relationship and both had sought assistance from the police in the past. In both cases the abuser had harmed animals and threatened their own children with violence. In comparison, other women's cases reviewed in this article fell short of the benchmark in some way. One was Indigenous, larger than the deceased; she had drug and alcohol issues, a criminal record and had been in a series of violent relationships; and there was evidence she had fought back before. Another was intimidated and harassed by her abuser but there was limited physical assault in the relationship.

While the cases reviewed in this article demonstrate that an individual woman's experience of abuse is now a significant and relevant consideration at trial and in sentencing, the latter cases show that it remains very

difficult for battered women to meet the threshold required to succeed in a claim of self-defence. While not all homicide cases where battered women kill should result in an acquittal on the basis of self-defence it may be that certain stereotypes about battered women continue to inform the choices made by prosecution authorities and juries and sometimes these stereotypes may continue to obscure structural and racial disadvantage (Stubbs and Tolmie, 2008).

Douglas, Heather, and Tamara Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16(5) *Violence Against Women* 489.

This paper outlines common misunderstandings alleged about child protection workers in relation to the dynamics of domestic violence, for example:

- Domestic violence is seen as a relationship issue (p492).
- Mothers are construed as having the responsibility to care for the children, and then blamed for the domestic violence and the consequent failure to protect their children (p493-494).
- Mothers are given the 'leave ultimatum' – leave the perpetrator or lose the kids. When, "in many cases, women make an assessment that it is safer for both themselves and their children to stay in a violent situation rather than leave … research has shown that one of the most dangerous times for an abused woman is in the months after separation" (p498).

Francia, L., Millear, P., & Sharman R., 'Addressing family violence post separation – mothers and fathers' experiences from Australia' (2019) *Journal of Child Custody.*

Family violence has been described as the 'core business of the Family Court', and child custody decisions continue to be made on a discretionary basis in the best interests of the child. The study focuses on family violence and separated parents' experiences in the Australian family law system. By means of an analysis of (n40) interviews of separated mothers and fathers, it found that contact with the Australian family law system caused considerable anxiety and distress. Separated parents noted gendered narratives within the system, with mothers referred to as 'alienating' or 'vindictive' and fathers referred to as 'abusers' or 'perpetrators'. The majority of parents also noted that their concerns, primarily around family violence, were rarely taken seriously. When parents reported concerns for their own or their children's safety, they were either not

believed or experienced lip service of their concerns without appropriate investigation. Further, separated parents found that professionals, such as child protection workers, judges, police and independent children's lawyers, lacked adequate knowledge or competence in relation to family violence. They also noted coercion by some professionals within the family law system. The article also highlights the 'devastating emotional and psychological aftermath' experienced not only by separated parents, but also their children. In summary, the authors suggest that the Australian family law system may not sufficiently meet the complex needs of families experiencing family violence.

Hunter, Rosemary, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733.

This paper identifies judicial knowledge and attitudes about domestic violence in the context of domestic violence protection order and family court proceedings, for example:

- Tendency to focus on incidents of physical violence, considered more compelling than other forms of abuse. The implication of this limited focus is that magistrates failed to understand why women remained fearful of the perpetrator post separation (p756-7).
- Failure to appreciate the ongoing psychological impacts of serious assault (p757).
- A belief that violence is a product of the relationship for which both are parties responsible; assumption that violence would stop post separation (p758).
- Mutual orders overlook power differentials in the abusive relationship and hence fail to ensure the applicant's safety, in turn reinforcing the respondent's power and control (p761-2).
- Tendency to minimise the violence and shift the blame (p766).
- Widespread acceptance of unsubstantiated narrative that women make false allegations of violence and apply for intervention orders to gain a tactical advantage in family law proceedings (p768).
- Widespread acceptance of cultural stereotypes of ethnic women seeking redress and protection against violence (p771).

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated

Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family law and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of the practices and perspectives of family law system professionals(*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- the Court Outcomes Project (CO Project) involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts; and
    - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Lievore, Denise, 'Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study' (Report, Australian Institute of Criminology, 2004).

- Study of the exercise of prosecutorial discretion in adult sexual assault cases across the Australian jurisdictions in which the primary charge was rape or the equivalent penetrative sexual assault offence.
- Relevant for myths concerning sexual violence as an element of family violence. Cases 'involving strangers and other known defendants were more likely than cases involving intimate or family relationships to proceed through the criminal justice process and to end in conviction'
- In those that proceeded, the victim was more likely to have been injured, and to have expressed non-consent either in words or through resistance; the assault was more severe in some way (for example, it involved a weapon); additional evidence was available; the defendant used force; the defendant was 'non-Caucasian'; and the defendant was a stranger.

Melville, Angela, and Rosemary Hunter, '"As Everybody Knows": Countering Myths of Gender Bias in Family Law' (2001) 10 *Griffith Law Review* 124.

This paper argues that empirical research does not support the claim that 'everybody knows the family law system is biased against men'. Although dated, this paper raises three common myths that remain relevant today:

- *Women fabricate allegations of violence and abuse to gain a tactical advantage in family law disputes and deny father's contact to their children*.
  - This study did not find evidence of this i.e. 54% of family law cases examined contained evidence of DV, of these cases, 38% of these involved cases where a protection order was not obtained, meaning it appeared women were more reluctant to take out a protection order (p128)
  - Timing of protection orders (contemporaneous with family orders) may reflect the fact that the need for protection escalates at the time of separation.
- *Rates of DV against women are overrated and DV against men is silenced*.
  - This claim uses the 'Conflict Tactics Scale', which records violent behaviour but does not rate or discount their relative severity or degree of injury caused.

- There is also no distinction between aggression and self-defence – focused on act of violence, not locus of power and control in overall relationship, producing a distorted view of DV.

- *The system stacked against men*
  - Contact orders made in 91% of cases; in cases where no contact made there were extenuating circumstances i.e. abuse, mental illness, drug and alcohol abuse.

Meyer, Silke, 'Why Women Stay: A Theoretical Examination of Rational Choice and Moral Reasoning in the Context of Intimate Partner Violence' (2012) 45(2) *Australian and New Zealand Journal of Criminology* 179.

'Using data from face-to-face interviews conducted with 29 women in Southeast Queensland who experienced severe forms of intimate partner violence over an extended period, this paper explores the rationale behind the (initial) decision to stay with an abusive partner.' (p179) Children and financial dependence were both salient factors in decision-making.

Murray, Suellen, and Anastacia Powell, 'What's The Problem? Australian Public Policy Constructions of Domestic and Family Violence' (2009) 15(5) *Violence Against Women* 532.

- Examines key Australian domestic violence policies as at November 2006 and how they represent particular values and beliefs about domestic violence.
- Discusses employing domestic violence within a gendered framework, thus recognising that domestic violence is experienced predominantly by women and perpetuated predominately by men (p539-541)
- Critics of the gendered analysis instead construct policy in terms of promotion of family harmony and family preservation. Many also suggest that domestic violence is caused by family breakdown and attribute some men's use of violence as a result of bias in the family law system (p541)
- Discusses definitions of family violence across different jurisdictions and community perceptions of what constitutes family violence (p543-547).

Noonan, Patrick, Annabel Taylor and Jackie Burke, *Links between alcohol consumption and domestic and sexual violence against women: Key findings and future directions* (ANROWS, 2017).

This literature review found that "there is little evidence that alcohol use is a primary cause of violence against women. The paper does, however, identify that there are clear associations, and in some cases, strong correlations between alcohol use and violence against women, including, for instance, in the severity of the violence." The relationship between alcohol and violence against women manifests in three ways:

- Alcohol use is linked with the perpetration of violence against women.
- Alcohol use is linked with women's victimisation by violence.
- Alcohol is used as a coping strategy by women who have experienced violence

NSW Domestic Violence Death Review Team, *Report 2017-2019* , 2020, NSW Government.

Includes detail on deaths referred to the Coroner, drawing on both data analysis and in-depth case analyses. Useful information about how domestic violence-related homicides and suicides are recorded in NSW.

Ragusa, Angela, 'Rural Australian Women's Legal Help Seeking for Intimate Partner Violence: Women Intimate Partner Violence Victim Survivors: Perceptions of Criminal Justice Support Services' (2012) 28(4) *Journal of Interpersonal Violence* 685.

Study examines legal support access and experiences by intimate partner violence survivors in rural communities, drawing on 36 in-depth face-to-face interviews. Contains numerous useful excerpts from interviews with rural Australian women experiencing domestic violence, for example:

'When you're in DV, you don't have … time to get up in the morning and you wouldn't be allowed to get dressed up. We wouldn't be allowed to wear makeup and he would be asking where 'ya going, what 'ya doing, so it does, it does interfere with your whole life … there is a lot of women who work and suffer DV, but there are a lot of us who don't because we are housebound, where that's, you know, DV. We're controlled, and that's where he can control you. He can't control us out in the workforce' (p700).

Wakefield, Shellee, and Annabel Taylor, 'Judicial Education on Family Violence: State of Knowledge Paper' (State of Knowledge Paper 2, Australia's National Research Organisation for Women's Safety Landscapes, June 2015).

This research paper examines the need for judicial education in domestic and family violence, based on the overall views of Victorian and Queensland judicial officers surveyed for the study which demonstrated a lack of understanding of the dynamics of domestic violence.

Findings include:

- 74% of magistrates agreed with the statement that women use domestic violence tactics as a tactic in family law matters (p17);
- Some judicial officers subscribed to the myth that a woman could leave the relationship if she made the choice to do so (p18).

Notes other complexities of domestic violence that are relevant to judicial officers' responses including:

- The importance of understanding how the demeanour of the victims/perpetrators vary in the courtroom. For instance, perpetrators may appear calm and charming, while victims present as angry and emotional (p18);
- Being aware that 'Studies have also found that males are more likely to blame the victim for domestic violence' (p20).

International

Buel, Sarah, 'Fifty Obstacles to Leaving a.k.a. Why Abuse Victims Stay' (1999) 28(10) *The Colorado Lawyer* 19.

Sets out the various pressures both external and internal on victims considering or endeavouring to escape abusive relationships

DeKerseredy, Walter, Molly Dragiewicz and Martin Schwartz, *Abusive endings: Separation and divorce violence against women* (University of California Press, 2017).

In this American publication the authors analyse sociological research to consider why and how men abuse women during and after a separation or divorce. They define separation violence broadly, as sometimes the separation is emotional distancing rather than physically leaving a shared home. They argue that separation assault is common and show how new technologies increase women's vulnerability to separation assault. They consider the role of the Family Court in keeping women connected to abusive fathers.

Goodmark, Leigh, 'Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal' (2009) 31 *Washington University Journal of Law and Policy* 39.

- Provides an in-depth analysis of the construction of a stereotypical victim of domestic violence as white, straight, middle-class, weak, passive, and powerless (pp40; 45).
- Describes Walker's model of domestic violence – the 'cycle of violence' and how it became entrenched as the benchmark against which other women's claims of DV would be tested (p42).
- Basing law and policy on theories such as Walker's is problematic as it can exclude or overlook women who do not conform to the profiles envisaged by those theories (p44).
- Critical to pay attention to the complexities of the lives of individual women rather than reductions of commonly reported domestic violence experiences with DV (p40).

Hamel, John, Perpetrator or victim? A review of the complexities of domestic violence cases, (2020) 12(2) *Journal of Aggression, Conflict and Peace Research* 55-62

This study reviews the research on the merits of public policy and law enforcement responses to IPV in the US using prevalence rates and dynamics of IPV. In particular, Hamel examines the issues associated with categorising individuals as either victims or perpetrators, and the failure to recognise the complexity of IPV. Laws against IPV are enforced more rigorously in the US compared with other parts of the word. However, many perpetrators are not "brought to justice", and mandatory arrest laws may result in arrests being made on limited evidence. Further, prosecutors often proceed with a prosecution even when the victim recants. Under these circumstances, determining a defendant's guilt is problematic, and the arrest and prosecution of potentially innocent individuals violates due process.

These findings may be explained by two key factors, namely, the 'gender paradigm' and the complex nature

of IPV. Research indicates that IPV is a complex phenomenon, involving heterogeneous populations, varying degrees of severity and a highly imperfect, politicised judicial system response. It cannot be easily framed in binary victim/perpetrator terms. According to results from general population studies, in approximately 60% of intimate relationships where IPV occurs, the physical violence is mutual and initiated by both partners. These results, however, are not well-understood among legal professionals who tend to consider IPV through a 'gender paradigm' lens.

Stark, Evan, 'Representing Battered Women: Coercive Control and the Defense of Liberty' (Paper presented at Violence Against Women: Complex Realities and New Issues in a Changing World, Les Presses de l'Université du Québec, 21 October 2012).

- Identifies the shortcomings of domestic violence laws that respond to incident-specific violence in which abuse is defined by discrete episodes of force.
- Outlines alternative model of 'coercive control' and discusses its prevalence, features, and damaging effects.
- 'Perpetrators use control tactics to compel obedience indirectly by depriving victims of vital resources and support systems, exploiting them, dictating preferred choices and micro-managing their behavior by establishing "rules" for everyday living' (p11).

Wilcox, Paula, 'Communities, Care and Domestic Violence' (2006) 26(4) *Critical Social Policy* 722.

This paper explores informal community-based work as an additional strategy to tackle domestic violence and discusses a number of common misconceptions:

- The problematic widespread perception of domestic violence as discrete incidents rather than as an ongoing process, quoting Harwin and Barron: "domestic violence is not a 'one-off event' or incident but part of an ongoing pattern of controlling behaviour. Often very subtle signals can be extremely threatening: violence does not have to be overt to achieve its ends." (p724)
- 'The internalization and acceptance of mainstream, traditional explanations – for example that male perpetrators are 'bad apples', or mentally ill, or have suffered a 'cycle of violence' or that some women deserve violence owing to their own behaviour – is not uncommon' (p729)

- Common expectation that it is the woman's role to keep the family together (p731), and individually manage the care of her children (p738). Also discusses the tension experienced by women living with domestic violence between needing to self-care and at the same time not jeopardising their ability to care for their children (p738).
- Discusses the stigmatized identity and loneliness women experience after leaving an abusive partner (p732) and also the increased risk of abuse, murder and rape after separation (p734).
- 'The misleading assumption is that domestic violence occurs between two 'equal' individuals, and is often constructed as a problem of intimacy or 'relationship rivalry' (p735).

Yamawaki, Niwako, et al, 'Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship with Her Abuser, and the Decision to Return to Her Abuser' (2012) 27(16) *Journal of Interpersonal Violence* 3195.

Analyses attitudes towards domestic violence, in particular that a woman can, if she wants, swiftly and successfully end a violent relationship by simply leaving her abuser (p3198). Although many women are motivated to leave their abusive relationships, a myriad of factors stand in their way, making the decision to return to abusers more likely, such as (pp3196-7):

- the perception that the rewards of the relationship outweigh the costs of separation;
- when she is unemployed, her combined family income is high, or when she has negative perceptions of herself;
- lack of financial resources, inadequate help from police or from other formal support systems, lack of a place to go; and
- difficulties in relocation, legal issues, sharing child custody, termination of the emotional connection with the abuser, and disrupted social networks.
- 'One of the most important factors that led women to successfully leave their abusers was the realization that they had access to resources and support from others' (p3197).

Myths and misunderstandings - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

7.1 notes that insufficient account is taken of the realities of the female experience of sexual assault and domestic violence, and discusses the statistical incidence of women as victims of domestic violence, domestic homicide and sexual assault. 7.5.2 discusses cultural and social attitudes to domestic violence.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

This Bench Book provides insight into domestic violence, in particular under the section 'Gender Equality', countering a number of myths and misunderstandings including:

- *Domestic and family violence only affects particular groups of people:* 'when approaching issues of family violence, stereotypes about the gender of abusers and victims should be avoided: all family members, regardless of gender/sex or age, may be affected. Domestic and Family Violence Protection Act 2012 (Qld) specifically acknowledges this by identifying a 'relevant relationship' as an intimate personal relationship, a family relationship or an informal care relationship' (p.29).
- *Men and women are equally victims and perpetrators of domestic and family violence:* 'There is evidence that women are the most common victims of domestic violence' (p.171). 'It is significantly more common for a woman to be the victim of physical violence at the hands of a partner or another person she knows than at the hands of a stranger. This is also consistent with the profile of victims of sexual assault reported to the police; the perpetrator is likely to be known to the victim and the most commonly reported location where sexual offences occur is in a residential setting'.
- *A victim of domestic and family violence is able to leave the abusive relationship:* 'Members of the judiciary, court staff and legal practitioners responding to cases of domestic violence should be aware of the fact that leaving a violent relationship is often extremely difficult, on emotional and practical levels. Women may stay in violent relationships for various reasons: financial dependence, the presence of children in the relationship (and manipulation by their partner concerning this), a sense of isolation and lack of external support, and the threat of further or worse violence if the relationship is ended. Extended

abuse over a period of time may cause women to enter a state of permanent fear or “learned helplessness”, which describes a developed inability to see a way out of their situation or to work out how to protect oneself in the face of random and variable violence’ (p.172).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.7 discusses myths about family violence and the potential for unconscious prejudice. Also see discussion about violence as a choice under 5.4.1 – men’s use of violence towards family members, and 5.6.3 – myth: violence against some women is an accepted part of some cultures.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This Bench Book provides the following comments, countering a number of myths and misunderstandings:

- Unequal perpetration of violence: The higher prevalence of women experiencing physical assaults by current or previous partners [10.1.7]; and the differing experiences of violence by men and women [13.2 and 13.4]; see especially [13.2.1] ‘Key statistics’ exploring the statistics around the gendered nature of domestic violence; [13.2.2] ‘Impacts on women’ detailing the impacts of violence on women; [13.2.4] ‘Risk factors for women’
- Sexual assault as a form of domestic violence: ‘Where the relationship between victim and offender was stated, most sexual assault victims had some form of relationship with the offender (78%).’ [10.1.7.2]
- Women are not passive/helpless: ‘One such theory was that women who had been repeatedly victimised suffered from “learned helplessness” as a result. This prevented them from resisting violence or leaving a violent relationship. This theory proved inadequate as further research highlighted the many social, economic and cultural reasons why women do not leave relationships; what is more, it is inconsistent with the many ways in which women in such relationships attempt to leave or often act in very conscious ways to minimise the abuse directed at them and to protect their children.’ [13.7.1]
- Abuse will stop post-separation: ‘Nearly all the women (97.5%) in one study had experienced violence or abuse after separation, and many described an increase in violence immediately post-separation,

although some said that it had later declined or, in a small number of instances, ceased as time passed' [13.7.1]; 'Statistically, the most dangerous time for a victim in a violent relationship is at separation or after leaving the relationship.' [13.9.4]

- Not easy to leave the relationship: 'It is not easy for a victim to leave a violent relationship — it takes considerable emotional and practical strength for an abused and frightened victim to do this, particularly if the victim is a parent and children are involved. Many who do leave or threaten to leave are coerced into returning or staying by threats or further violence from their partner. There are often insufficient support and protection structures to enable a victim to either leave or leave safely. This can be even more difficult for Aboriginal victims, victims from culturally and linguistically diverse backgrounds, victims with disabilities and victims in rural and remote locations. Statistically, the most dangerous time for a victim in a violent relationship is at separation or after leaving the relationship.' [13.9.4]
- Section [13.1.1] notes the under-reporting of assaults against women

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Neilson addresses numerous myths throughout the Bench Book including:

- Myths about children: e.g. domestic violence does not harm children, very young children are less affected (Sections 6.2.5 and 6.2.6);
- It is easy and safe to leave a relationship (Section 4.4 Understanding & interpreting evidence of domestic violence): there are 'multiple reasons female victims of violence do not leave violent relationships. Reasons include economic necessity, traumatic bonding, loss of self-esteem, immigration status, love and or emotional dependency, lack of alternative housing, inadequate legal protection, lack of access to economic resources, protection of children, and fear' (Section 4.4.4);
- Abuse stops once separated: '[d]omestic violence does not necessarily end with separation, sometimes it gets worse' (Section 17.6.7.6); 'Contrary to popular belief, separation can increase the risk of serious forms of DV, especially for women' (Section 8.14.2);
- False allegations: '[s]purious child-abuse claims against the custodial parent are common' in cases where the perpetrator employs litigation abuse; however, generally, malicious known-to-be-false allegations of child abuse are rare (Section 7.4.23);

- Partner provoking or equally responsible for violence: minimization techniques involve claims that acts of violence were defensive, and that the abuse and violence was mutual (Supplementary Reference 3);
- Drugs and alcohol cause domestic violence: ‘experts agree that drugs and alcohol are more a rationalization than a cause’ of domestic violence; judicial responses should avoid comments that could ‘give the impression that intoxication has been accepted as a cause of the domestic violence, thus absolving the perpetrator of personal responsibility; [or] encourage false and potentially dangerous expectations among perpetrators and family members that limiting alcohol and drugs will stop the domestic violence problem’ (Section 7.2.1);
- Abuse only affects particular groups of people: while particular groups may be more vulnerable, ‘domestic violence homicide with suicide crosses all gender, age, socioeconomic, professional and cultural boundaries’ (Section 8.14.8).

Myths and misunderstandings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Celia

Erin

Francis

Julia

Lisa

Sally

Sandra

Factors affecting risk

Overview

The following factors are commonly identified in academic literature, domestic violence death reviews [Death Reviews] and a range of risk assessment tools as key signifiers of risk for the escalation of domestic and family violence. It is not an exhaustive list and other resources may include additional factors. The distinguishing characteristic of domestic and family violence is that it can present in many forms and can occur within a variety of relationships and is most likely to involve a complex pattern of controlling behaviour and violence over a period of time, rather than a single incident. This is often referred to as coercive control. One study has described coercive control as the 'golden thread' running through risk identification and assessment for domestic violence [Myhill & Hohl 2019]. It is likely therefore that risk will heighten where a perpetrator increasingly engages in multiple forms of violence or abuse, or does so more frequently, intensely or severely. Judicial recognition of this is critical to understanding the ongoing and ever-changing risks of domestic and family violence unique to the circumstances of each case before the court, and the need to regularly reassess risk throughout the course of judicial proceedings [Bench guide for recognizing dangerousness in domestic violence cases]. It is also important to recognise, more broadly, that certain groups within the community as identified in this bench book may be at greater risk of experiencing domestic and family violence, and may be more vulnerable to its impacts. Some people may belong to multiple groups that have been identified as being particularly at risk of domestic and family violence.

It has become increasingly common for agencies, including police, to employ risk assessment tools in an attempt to identify victims at risk of escalation of domestic and family violence victimisation, and in particular, intimate partner homicide. Those tools are only effective if they accurately identify those victims who are at significant risk. Recent research has observed that risk assessment tools which fail to take account of the gendered nature of domestic and family violence may be ineffective [Toivonen et al 2018].

Victim fear

According to an evaluation of risk assessment tools carried out in NSW the victim's self-perception of risk of future intimate partner violence is one of the strongest predictors of future intimate partner violence [Leung &

Trimboli 2022]. A victim's intuitive sense of being in danger has been identified as a key lethality indicator present in 53.2 per cent of intimate partner violence related homicides recorded in Queensland between 2011 and 2018 [Qld Death Review 2022]. It is vital that victims are believed, regardless of how agencies assess their presentation. The Queensland Death Review and Advisory Board observed that agencies had assessed risk with a focus on the victims' presentation rather than victims' expressed concerns for their safety, and resulted in failures to refer victims to High-Risk teams for support. The Queensland Death Review and Advisory Board further observed that victims who do not fit agency understandings of the "ideal victim" may not have their fears taken seriously if they present as 'jovial' or 'happy', resulting in miscalculation of actual level of risk or potential future harm. Regardless of presentation, victim fear and help-seeking behaviours were the highest level lethality indicator observed across the period examined in the Queensland Death Review and Advisory Board Annual Report 2021-22 [Qld Death Review 2022].

Past domestic and family violence and escalation

The risk of life-threatening injury or death is reported to be higher where the past violence experienced by a victim occurred within the last year and included at least one incident where the perpetrator used or threatened to use a firearm or knife [Folkes et al 2012] or strangled or choked the victim [Glass et al 2008], or where the perpetrator made a death threat of any kind to the victim [Campbell et al 2003a], or where the frequency or severity of incidents of threatened or actual physical violence increased in the lead up to the life-threatening injury or death. Some victims however may never experience any form of actual or threatened physical violence and yet may still be at risk of death; in some reported cases, the homicide is the first incident. However, in many of these cases the homicide was preceded by coercive and controlling behaviour [NSW DV Death Review 2021]. In these cases, there may be other important signifiers of risk evident in the perpetrator's behaviour, such as: physical violence outside the intimate relationship; misuse of alcohol or drugs; intense jealousy towards the victim; or exercising a high level of prolonged control over the victim's daily activities and life [Block 2009]. Research demonstrates links between the experience of domestic and family violence and the development of mental health conditions in victims and this may place victims at risk of self-harm and suicide.

An escalation in victim experience of domestic and family violence was observed in 37 percent of intimate partner homicides recorded in Queensland between 2011 and 2018 [Qld Death Review 2022]. The presentation of victims to agencies on multiple occasions may be an indication that violence is escalating in frequency and severity, heightening risk of death and serious injury. Indicators of escalation may include:

- Victims taking further protective action, such as seeking to vary a protection order by strengthening conditions may indicate a change in circumstances or that current conditions are ineffective;
- Victim action to secure safety of children through legal processes may increase potential risk of violence.

Non-fatal strangulation

US research [Training Institute of Strangulation Prevention] indicates that women who had experienced non-fatal strangulation by the perpetrator in the last year were twice as likely to be killed as women who had not [Block 2009]. Women who had experienced non-fatal strangulation were also six times more likely to be a victim of attempted murder by their abusive partner [Glass et al 2008]. Strangulation is sometimes referred to as garrotting or choking. Strangulation has been identified as one of the behaviours that often forms part of a pattern of behaviours underpinning coercive control. A recent Western Australian study highlights the strong association between non-fatal strangulation and intimate partner sexual assault [Zilkins et al 2016].

Weapons and threats to kill

Limited Australian research in this area necessitates referencing Canadian and US sources. It is important to note that firearms are more prevalent and easier to obtain in the US than in Canada and Australia. A Canadian study found that where a firearm was present in the home, the risk of severe harm caused by weapons was heightened. This was the case even though the firearm was generally not used, and the harm was caused by another kind of weapon [Folkes et al 2012].

American research [Campbell et al 2003a] indicates that the severity of abuse related harm is significantly heightened when weapons are involved. Studies found that women whose abusers used or threatened use of a weapon were 20 times more likely to be killed (with or without a weapon) than women whose abusers did not use or threaten weapon use. A Chicago study of women subjected to lethal and non-lethal harm found that 23 per cent of abuse incidents involving a firearm had a lethal outcome. In the same study, 35 per cent of incidents involving a knife had a lethal outcome [Block 2009]. An analysis of the results from 17 studies that measured completed or attempted intimate partner homicide found that the perpetrator's direct access to guns increased the likelihood of intimate partner homicide compared to intimate partner violence by 11 times [Spencer & Stith 2020].

Separation

Victims, and their family and friends, may not always recognise domestic and family violence where there has been a prolonged history of controlling behaviours by the perpetrator and no acts of physical violence or harm. For some victims, leaving an intimate relationship will be the first time they identify an experience of domestic and family violence by their former partner, although research suggests that usually there are indications of controlling behaviours within the relationship prior to separation. Where violence has occurred during the relationship, it is common for perpetrators to continue or escalate the violence after separation in an attempt to gain or reassert control over the victim, or to punish the victim for leaving the relationship [Fleury et al 2000]. Where women leave an intimate relationship and first experience or continue to experience violence after separation, their former partner may experience an intense sense of loss of control and the violent response may be severe, life threatening or lethal [McFarlane et al 2002]. The Queensland Domestic and Family Violence Review and Advisory Board in its 2022 Annual Report noted a strong correlation between separation and homicide. Between 1 July 2016 and 30 June 2022, 50.6 per cent of Queensland victims of intimate partner homicide were known to have separated (40.5 per cent) or intended (10.1) to separate from the perpetrator [Qld Death Review 2022]. In the Victorian Systemic Review of Family Violence Deaths 1 January 2011 to 31 December 2015 42.1 per cent of the 38 family violence intimate partner homicide incidents in Victoria between 2011 and 2015 involved individuals who had separated, 23.7 per cent in the three months preceding their death and 15.8 per cent involved individuals with intention to separate or separation pending [Vic Systemic Review 2020].

The NSW Domestic Violence Death Review Team Annual Report 2019-2021 recorded that in 61.3 percent of all intimate partner homicides where a female was killed by a former partner, the victim and perpetrator had separated within three months of the killing and where a female was killed by a current partner in 51.1 per cent of cases one or both parties had indicated an intent to end the relationship, most often within three months of the killing, concluding that in over two thirds of intimate partner homicides involving a female victim and male offender the relationship had ended or was breaking down [NSW DV Death Review 2021]. This indicates that the period during and directly after separation may be high risk for women in relationships involving domestic and family violence. The Australian Bureau of Statistics reported that in 2019 domestic and family violence-related homicide victims accounted for over a third of the total number, and females accounted for

almost two-thirds of all victims [ABS FDV-related offences 2021].

Importantly, in the context of separating parents, there is also an increased risk of harm to children's psychological and physical wellbeing due to exposure to domestic violence, history of maltreatment, parental stress, social isolation of the family, and inadequate resources and support [Jaffe et al 2014].

Pregnancy of victim

The NSW Legislative Council Standing Committee on Social Issues found that pregnant women are 230 per cent more likely than non-pregnant women to experience domestic and family violence [NSW Social Issues Report 2012]. 47.5 per cent of the respondents in the 2016 Australian Bureau of Statistics Personal Safety Survey had experienced violence by a former partner while pregnant. For 24.1 per cent of these respondents, pregnancy was the first time they had experienced violence. Of the respondents who had experienced violence by a current partner, 18.per cent experienced the violence during pregnancy, 5.2 per cent for the first time [ABS PSS 2016]. Notably in the United States homicide is a leading cause of death during pregnancy and the postpartum period – with the majority of these homicides occurring in the home-pregnancy and the postpartum period are recognised as times of elevated risk for homicide among all females of reproductive age [Wallace et al 2021].

Misuse of alcohol or drugs by perpetrator

National death review data indicates that problematic substance abuse was a factor in over 60 per cent of homicides where a male offender killed a female victim. A quarter of male homicide offenders engaged in problematic drug and alcohol use in the lead up to or at the time of the homicide, over half engaged in problematic alcohol use at the time of the homicide (27.1 per cent used alcohol and no other drug) and one third engaged in problematic drug use in the lead up to or at the time of the homicide (8.3 per cent engaged in problematic drug use only) [ADFVDRN & ANROWS 2022]. The Victorian Systemic Review of Family Violence Deaths 1 January 2011 to 31 December 2015 found that 35.3 per cent of family violence homicide offenders misused substances at the time of the fatal incident [Vic Systemic Review 2020]. The accessibility of alcohol also has a relationship to the risk of violence. Australian research indicates that rates of violence are heightened in areas where takeaway alcohol is available for purchase [Livingston 2010].

Stalking

In assessing the relative significance of risk factors for predicting lethal or near lethal harm to victims of domestic and family violence, a large sample size study across ten US cities revealed that significantly more of the women killed or nearly killed than those who were not had histories of stalking in their abusive relationships. The same study indicated that being "followed or spied on" by the abuser in the 12 months before the lethal or near lethal incident resulted in a nearly 2.5-fold risk [McFarlane et al 2002]. A later study showed that psychological abuse and stalking contributed uniquely to the prediction of severe injuries [Mechanic et al 2008]. The New South Wales Domestic Violence Death Review Team's 2021 report identified that almost a third of the 245 female intimate partner homicide victims killed by a male predominant abuser had been stalked during the relationship. In over half of the 109 cases where the relationship had ended the male predominant abuser stalked the female predominant victim after the relationship had ended [NSW DV Death Review 2021].

Coercive and controlling, jealous, obsessive behaviours by the perpetrator

Findings from the New South Wales Domestic Violence Death Review Team's 2019-2021 Report indicate a strong correlation between accounts of coercive control in relationships prior to homicide; of male homicide perpetrators identified as the predominant abuser:

- 96.7 per cent used emotional and/or psychological abuse against the female predominant victim before the homicide, including verbal denigration, threats regarding child custody, victim-blaming, gaslighting, exploiting a victim's mental illness, unfounded allegations of infidelity and threats of self-harm or suicide to control a victim.
- 15.1 per cent had an identifiable history of sexual abuse (this figure is suspected to not reflect the true prevalence of sexual abuse in these relationships);
- 59.2 per cent used social violence against the female predominant victim, including controlling the victim's contact with family and friends, abuse, threats or rudeness to the victim's friends or family, intentional relocation away from support networks, friends and family, restricting access to transport, and controlling the victim's personal appearance;
- 31.4 per cent used economic and/or financial violence against the female predominant victim, including withholding and controlling use of and access to money, scrutinising spending and unrealistic expectations for expenditure on necessities, preventing the victim from working or controlling wages and

coerced debt.

- 30.6 per cent stalked the female predominant victim during the relationship and 51.4 per cent did so after the relationship had ended, including physical following, hiring someone to surveil the victim, loitering near or breaking into the victim's home or work, reading a victim's diary, using devices to track the victim's location, persistently messaging a victim's phone or social media, maintaining surveillance over the victim's phone, email or other accounts, covertly recording the victim's activities, and engaging with the victim on social media/dating sites under a false identity.

In addition, 72.7 per cent of male predominant abusers used physical violence against the female predominant victim before her death [NSW DV Death Review 2021].

Analysis of the National Death Review Network's National Minimum Dataset identified the following types of coercive and controlling behaviour exhibited by male primary domestic violence abusers who killed female domestic violence victims in its 2022 report:

- 81.6 per cent emotionally and/or psychologically abused their victim;
- 63.2 per cent socially abused their victim;
- 41.5 per cent stalked their victim;
- 27.4 per cent financially abused their victim;
- 16 per cent were identified as having sexually abused their victim (this is recognised as likely an undercount of the true incidence of sexual violence).

This was in addition to the 79.7 who used physical violence against their victim [ADFVDRN & ANROWS 2022].

A recent study which interviewed loved ones of female intimate partner homicide victims found that coercive control was present in all informant's narratives of the relationship between the victims and homicide perpetrators [AIC 2022]. The Victorian Systemic Review of Family Violence Deaths 1 January 2011 to 31 December 2015 found that 78.9 per cent of domestic and family violence homicide victims were identified as having a prior history of domestic and family violence victimisation at the hands of the homicide perpetrator [Vic Systemic Review 2020].

The controlling behaviours referred to in the previous paragraphs (sometimes referred to as coercive control) may involve the perpetrator spatially confining or restraining the victim; asserting exclusive possession over the victim; monopolising the victim's skills and resources; restricting the victim's access to finances and employment; or preventing the victim from keeping in touch with social networks, escaping the abusive

relationship, or seeking help and support [Bagshaw et al 2000]. The effect may be to physically and socially isolate the victim, and, over time, undermine the victim's sense of identity, independence and self worth, and place them at greater risk of further domestic and family violence.

Suicide threat by perpetrator

There is evidence to suggest a correlation between severe domestic and family violence and threat of suicide by the perpetrator [Campbell et al 2003a]. The NSW Domestic Violence Death Review Team Annual Report 2017-2019 recorded that 23 per cent of all male intimate partner perpetrators suicided after murdering their intimate partners. In the period 2000-2010 in Victoria, of the 31 homicide-suicides, 17 involved intimate partners and the Victorian Systemic Review of Family Violence Deaths 1 January 2011 to 31 December 2015 found that 14 per cent of the 85 family violence homicide perpetrators suicided at the time of the incident or subsequently. The Ombudsman Western Australia reported that, in the period 2012-2015, of the 35 domestic and family violence related deaths, 8 were homicide-suicides where in all cases the male killed the female and subsequently suicided.

Step-child in the family

A number of studies have investigated the prevalence and severity of domestic and family violence against women with children fathered by someone other than the perpetrator [Campbell et al 2003a]. A recent comparative study found that women with some or all children not fathered by the perpetrator were 30 per cent more likely to experience lethal harm and 20 per cent more likely to experience at least one life-threatening violent incident than women whose children were all fathered by the perpetrator; further, these women represented 65 per cent of the homicide victims in the study [Miner et al 2012]. An earlier study found that the presence of a step-child in the family more than doubled the risk of the mother being killed [Campbell et al 2003a]. A recent Swedish study observed that the presence of any children (not just step-children) was related to a higher risk rating for imminent intimate partner violence re-victimization and warranted recommendations of more than standard levels of risk management strategies [Petersson & Thunberg 2022].

Parenting proceedings and other court proceedings

An Australian study found that domestic and family violence is a common experience among separated parents, with mothers reporting physical or emotional abuse in greater proportions than fathers. Another study reported high rates of ongoing fear and abuse associated with post-separation parenting arrangements and decision-making. A 2015 court outcomes project found that more than one third of all parenting matters filed in the then Family Court of Australia and then Federal Circuit Court of Australia raised allegations of family violence, while a study of the experiences of separated parents found that a significant proportion of mothers who had experience family violence may have difficulty corroborating it because they had not previously disclosed it to police or other agencies [Kaspiew et al 2015]. In these circumstances, a parent may use their joint parenting role or related judicial options as a means of exercising ongoing control over their former partner and may be considered as systems abuse and part of a pattern of abusive behaviours aimed at controlling the victim, sometimes referred to as coercive control. The Australian Domestic and Family Violence Death Review Network Data Report found that protection orders were a feature in over 40 per cent of the 240 cases where a male intimate partner homicide offender killed a female intimate partner, demonstrating a history of police or court intervention due to domestic or family violence, and in 49 of those cases there was a current protection order in place at the time of the homicide, the vast majority naming the female victim as the protected person. Active family law proceedings were identified in only 3.8 per cent of the total 290 cases in the focused dataset, reflecting the fact that many disputes relating to separation, property division and child arrangements are settled informally. It notes that the Queensland Domestic and Family Violence Death Review Board has identified that there is no process whereby the family court system is notified of domestic violence deaths involving parties engaged with the court [ADFVDRN & ANROWS 2022].

Factors affecting risk - Key Literature

Links to all *Domestic and Family Violence Death Review Documents* are located at 4.2 Factors affecting risk – Death Reviews

Australia

Australian Bureau of Statistics, *4510.0 - Recorded Crime - Victims, Australia, 2021*.

Victims of Domestic and Family Violence-Related Offences

This chapter presents experimental data about victims of selected Family and Domestic Violence (FDV) – related offences. Victims of selected offences have been determined to be FDV–related where the relationship of offender to victim, as stored on police recording systems, falls within a specified family or domestic relationship or where an FDV flag has been recorded, following a police investigation.

Key findings include:

- FDV-related homicide victims accounted for over a third of total homicide victims, and females accounted for over half of all FDV-related homicide victims.
- FDV-related assault is mostly likely to occur in the age range 25-34 years; and, across all states and territories, females are more likely than males to be victims – at least three times as likely, and up to six times more likely.
- FDV-related sexual assault accounted for over a third of total sexual assaults and there are six times as many female victims as male victims.

Australian Bureau of Statistics (2023) Personal Safety Australia 2021-2022.

This release present summary prevalence statistics from the Australian Bureau of Statistics' (ABS) 2022 Personal Safety Survey (PSS).

The survey collected information from persons aged 18 years and over about the nature and extent of their experiences of physical and sexual violence, violence, emotional abuse and economic abuse by a cohabiting partner, stalking, sexual harassment and past experiences of childhood abuse and witnessing parental

violence before the age of 15.

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2017).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 16, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

The survey results demonstrate that approximately one fifth of women who experienced violence by a current partner and were pregnant at some stage during the relationship experienced violence during their pregnancy. For more than one quarter of these women, pregnancy was the first time they had experienced violence. Nearly one half of women who experienced violence by a previous partner and who were pregnant during the relationship experienced violence during their pregnancy, approximately one half for the first time.

See Tables 17-18, which highlight the link between pregnancy and experiences of violence.

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022). Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018 (2nd ed.; Research report 03/2022). ANROWS.

This report provides data findings from the Australian Domestic and Family Violence Death Review Network's National Minimum Data Set on intimate partner violence ("IPV") homicides from July 2010 to June 2018. The research demonstrates the highly gendered nature of IPV and IPV homicides, the need for service providers and first responders to recognise the pattern of abusive and controlling behaviours in domestic violence relationships and that any relationship exhibiting physical or non-physical domestic violence carries a risk of lethality.

Key data findings include:

- There were 311 IPV homicides across Australian between 1 July 2010 and 30 June 2018.
- More than three quarters of IPV homicides involved a male offender killing a current or former female partner (most killed a current female partner). The vast majority of those had been the primary perpetrator of IPV behaviours and the most common criminal justice outcome was a murder conviction.
- Less than one quarter of IPV homicides involved a female IPV offender killing a current or former male partner (most killed a current male partner). In the majority of these cases the female homicide offender was the also the primary IPV victim who killed her male abuser and the most common criminal justice outcome was a manslaughter conviction.
- The majority of IPV homicide offenders engaged in “problematic drug and/or alcohol use”. This may be a possible opportunity for intervention.
- Only approximately one third of all IPV homicide offenders and victims were engaged in paid employment at the time of the homicide.
- There was an overrepresentation of Aboriginal and Torres Strait Islander people as IPV homicide victims and offenders. The report considers the “complex range of interrelated factors associated with the disproportionate incidence and severity of family violence in Aboriginal and Torres Strait Islander communities.
- There were four cases where children were killed together with their mother, resulting in the deaths of eight children. At least 171 children under the age of 18 who survived the homicide of one or both parents.

Key findings as to discrete characteristics present within a relationship prior to an IPV homicide included:

- *Separation*: Actual or intended separation was a feature in more than half of cases where a male IPV homicide offender killed a female partner, and in just under half of cases where a female IPV homicide offender killed a male intimate partner.
- *Domestic violence orders*: In more than half of cases where a male IPV offender killed a female partner there was no evidence of a current or historical domestic violence order. Current or historical domestic violence orders were identified in 66.1% of cases where a female IPV offender killed a male partner.
- *Domestic violence abusive behaviours*: The vast majority of male IPV homicide offenders who killed a female victim were identified as the primary abuser. Only a small proportion of female IPV homicide offenders who killed a male victim were identified as the primary abuser. Half of the 6 male offenders who killed a male partner were identified as the primary abuser in the relationship.

Where a male primary abuser killed a female victim the majority used emotional and psychological abuse (81.6%) and physical abuse (79.7%). Stalking occurred in 41.5% of those cases. In a third of cases the abuser stalked the victim during the relationship and in a fifth after the relationship ended.

Australian Domestic and Family Violence Death Review Network, *Data Report 2018* (May 2018).

This report provides data on intimate partner homicides occurring between 2010 and 2014 in Australia, and aims to inform prevention initiatives. Key data findings include:

- There were 152 intimate partner homicides which followed a history of domestic violence in Australia during the study period (p 9);
- The majority of intimate-partner homicides involved a male killing his current or former female partner (p 10);
- Actual or intended separation was present in over half of cases where men killed their female partners (p 12), but only in around 40 percent of female perpetrated homicides (p 21);
- Almost one quarter of men who killed their female partners were named in Domestic Violence Orders protecting the female victims (p 13), and one quarter of women who killed their male partners were protected by a Domestic Violence Order naming the homicide victim as the respondent (p 22);
- In most cases where a female killed her male partner, she was the primary victim of violence and killed her abuser (p 19);
- The most common outcome for men who killed their partners was a murder conviction (p 16), while the most common outcome for women was a manslaughter conviction (p 24);
- Over 20 percent of men who killed their intimate partners died by suicide (p 16);
- Almost 20 percent of men who killed their female partners (p 14), and around half of women who killed their male partners, identified as Aboriginal (p 22);

In cases where men killed their female partners and were also domestic violence abusers, most had previously used physical, emotional and/or social abuse against the victim (pp 26-8).

Australian Institute of Health and Welfare (2022) *Family, domestic and sexual violence data in Australia*, AIHW, Australian Government, accessed 24 January 2023.

This release brings together a range of sources to report a core set of data in an interactive format, and summarise changes in measures of family, domestic and sexual violence over time. It complements the Australian Institute of Health and Welfare's Family, domestic and sexual violence in Australia report series. It contains new and updated data for crime rates for family and domestic violence and sexual assault, hospitalisation for family and domestic violence and family and domestic violence crisis payments.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019*.

This is primarily a data report to help inform government policies and plans and to assist in the planning and delivery of violence prevention and intervention programs. It builds on AIHW's inaugural *Family, domestic and sexual violence in Australia 2018 report*. It presents new information on vulnerable groups, such as children and young women. It examines elder abuse in the context of family, domestic and sexual violence, and includes new data on telephone and web-based support services, community attitudes, sexual harassment and stalking. It also includes the latest data on homicides, child protection, hospitals and specialist homelessness services, while noting notable data gaps on various aspects of family, domestic and sexual violence and work underway to fill the gaps and develop new data sources.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);

- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Bagshaw, Dale et al, 'Reshaping Responses to Domestic Violence' (Final Report, University of South Australia and Partnerships Against Domestic Violence, Commonwealth of Australia, April 2000).

This Australian research used a variety of methods including an anonymous 'phone-in' and focus groups. 102 women who were victims/survivors of domestic violence participated in the phone-in. 'Social abuse' was reported by 67 per cent of callers. Social abuse included 'systematic isolation of women from family and friends'. Techniques included perpetrators' ongoing rudeness to family and friends that gradually resulted in reluctance by family and friends to make contact due to concerns that contact would trigger abuse from the perpetrator. Other means by which women were socially isolated included moving to new towns or to the country where they knew nobody and were not allowed to go out and meet people. In some cases women were physically prevented from leaving the home and were kept 'prisoners' in their own homes' (p22-23).

Backhouse, Corina and Cherie Toivonen, *National Risk Assessment Principles for domestic and family violence: Companion resource* (ANROWS, 2018).

This review provides a summary of the evidence-base for the National Risk Assessment Principles for domestic and family violence developed on behalf of the Commonwealth Department of Social Services [Toivonen et al 2018]. This summary of literature highlights key aspects of the evidence-base that underpin the development and implementation of the Principles, including literature regarding: risk and safety; need and vulnerability; risk assessment and management approaches; intimate partner sexual violence and sexual assault; and multi-agency integrated service responses. It includes discussion of priority populations and the evidence that particular groups experience multiple challenges that heighten the likelihood, impact or severity of violence, as well as experiencing additional barriers to seeking and obtaining support (pp14-20).

Boxall H & Morgan A. 2021. Experiences of coercive control among Australian women. Statistical Bulletin no. 30. Canberra: Australian Institute of Criminology.

Abstract: Awareness of coercive control within the context of abusive intimate relationships is greater than ever before in Australia. However, there is limited research examining the different patterns and characteristics of abuse, particularly among large Australian samples.

This study examines the characteristics of violence and abuse reported by 1,023 Australian women who had recently experienced coercive control by their current or former partner. The most frequently reported behaviours were jealousy and suspicion of friends, constant insults, monitoring of movements and financial abuse. Over half of the respondents also reported experiencing physical forms of abuse (54%), including severe forms such as non-fatal strangulation (27%). One in three of these women also reported experiencing sexual violence during the survey period (30%). Women were much more likely to seek advice or support when they had also experienced physical or sexual forms of abuse.

Boxall H & Morgan A 2021. Who is most at risk of physical and sexual partner violence and coercive control during the COVID-19 pandemic?. *Trends & issues in crime and criminal justice* no. 618. Canberra: Australian Institute of Criminology.

Abstract: In this study, data was analysed from a survey of Australian women (n=9,284) to identify women at

the highest risk of physical and sexual violence and coercive control during the early stages of the COVID-19 pandemic.

Logistic regression modelling identified that specific groups of women were more likely than the general population to have experienced physical and sexual violence in the past three months. These were Aboriginal and Torres Strait Islander women, women aged 18–24, women with a restrictive health condition, pregnant women and women in financial stress. Similar results were identified for coercive control, and the co-occurrence of both physical/sexual violence and coercive control.

These results show that domestic violence during the early stages of the COVID-19 pandemic was not evenly distributed across the Australian community, but more likely to occur among particular groups.

Boxall, Hayley and Anthony Morgan, *Repeat Domestic and Family Violence among Young People* Research Report No 591, February 2020, Australian Institute of Criminology.

This paper adds to what is known about family violence perpetrated by adolescents. It examines short-term reoffending patterns – including timing, prevalence, the peak period for repeat violence, and cumulative rates – as well as predictors of repeat violence, particularly those relating to prior histories of family violence or breaches of orders, given that this information is readily available to frontline responders. The paper draws on incident data from Victoria Police for almost 4,000 young people aged 12-18 involved in domestic or family violence. Approximately one in four of these young people were involved in repeat violence in the six months following an incident, with the risk peaking at around 30 days following an incident in domestic violence cases and at around three to four weeks for family violence cases. Violence was largely perpetrated against intimate partners or parents. The findings show how the violence histories of young people can be helpful for identifying who will be involved in repeat violence in the short term, and who will be involved in multiple violent incidents. Frequency of prior incidents of violence is a better predictor of future short-term reoffending than prevalence of prior violence, but they are both useful indicators of future risk.

Bricknell, S. (2023) Homicide in Australia 2020-2021 (National Homicide Monitoring Program) Sydney: Australian Institute of Criminology.

Statistical Report 42 reports: Between 1 July 2020 and 30 June 2021, there were 210 homicide incidents

recorded by Australian state and territory police. In 2020–21, 36 percent (n=76) of homicide incidents were domestic homicides.

Of the 76 domestic homicides in 2020–21, half (50%, n=38) were intimate partner homicides. Intimate partner homicides comprised 18 percent of homicide incidents in Australia in 2020–21.

Another 12 homicides (6% of all homicide incidents) were filicides (where a parent killed their son or daughter), 11 (5%) were parricides (where a parent was killed by their son or daughter), four (2%) were siblicides (a brother or sister killed a sibling) and 11 (5%) were homicides of other family members or kin. (p6)

Intimate partner homicide (n=2,102) comprised 60 percent of domestic homicides and 24 percent of all homicide incidents between 1989–90 and 2020–21 (see Table A8). Threequarters (76%, n=1,589) of these were female victim intimate partner homicides and a quarter were male victim intimate partner homicides (24%, n=513).(p15) Females are significantly more likely to be killed by an intimate partner or family member (69%, n=45), mostly by their current or former intimate partner (38%, n=25). (p14)

Dearden, Jack, and Jason Payne, 'Alcohol and Homicide in Australia' (2009) 372 *Trends and Issues in Crime and Criminal Justice* 1.

The current study builds on limited Australian research on alcohol-related homicide. It examines solved homicides recorded in the National Homicide Monitoring Program over a six year period. A key finding was that alcohol is equally likely to be implicated in intimate-partner homicides as it is in all other homicides. However, homicides involving women killing male intimate partners were far more likely to involve alcohol consumption by victim or offender or both, and that the overwhelming majority of Indigenous intimate-partner homicides were alcohol related.

Douglas, Heather and Robin Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 *Sydney Law Review* 231.

This paper presents a useful literature review of recent studies about the risk of attempted strangulation to health and as a predictive factor in death or serious injury. See especially pp232-236.

Dowling C, Boxall H & Morgan A 2021. The criminal career trajectories of domestic violence offenders. *Trends & issues in crime and criminal justice* no. 624. Canberra: Australian Institute of Criminology. https://doi.org/10.52922/ti78016

Abstract: This study examines the officially recorded criminal careers of 2,076 domestic violence offenders and 9,925 non-domestic violence offenders in New South Wales in the 10 years following their first police proceeding. Group-based trajectory modelling was used to examine both domestic violence and non-domestic violence offending. Special attention is given to the degree of versatility in offending, and to the interplay of domestic violence and non-domestic violence offending trajectories. Domestic violence offending often formed part of a broader pattern of offending. While trajectories of low -frequency domestic violence and non-domestic violence offending were most common, domestic violence typically increases as non-domestic violence offences begin to decline. Importantly, there was variability in the offending profiles of domestic violence offenders. This was amplified when non-domestic violence offending was analysed, indicative of a complex array of underlying risk factors.

Dowling, Chistopher and Anthony Morgan, *Predicting Repeat Domestic Violence: Improving Police Risk Assessment* , (Research Report No 581, October 2019, Australian Institute of Criminology).

This study examines how accurately the Family Violence Risk Assessment Tool (FVRAT) predicts repeat domestic violence. The FVRAT is a 37-item tool used by police in the ACT to inform their responses to domestic violence. The study examines a sample of 350 unique cases of violence involving current or former intimate partners between March and December 2017 in which police used the FVRAT. Repeat domestic violence was measured based on whether a subsequent report of domestic violence was made to police within six months. The study found that the FVRAT is not a strong predictor of repeat domestic violence. However, an empirically refined version of the FVRAT consisting of 10 individually predictive items much more accurately predicts repeat domestic violence.

Dowling, Chistopher and Anthony Morgan, *Is methamphetamine use associated with domestic violence?* (Australian Institute of Criminology Report No. 563 December 2018).

Report abstract:

There is considerable evidence of the impact of methamphetamine use on violent behaviour. This paper presents findings from a review of existing research on the association between methamphetamine use and domestic violence.

Eleven studies met the criteria for inclusion. Domestic violence is common among methamphetamine users; however, methamphetamine users account for a small proportion of all domestic violence offenders.

There is evidence that methamphetamine users are more likely than non-users to perpetrate domestic violence. Importantly, methamphetamine use is frequently present along with other risk factors. This means methamphetamine use probably exacerbates an existing predisposition to violence, rather than causing violent behaviour.

Grech, Katrina, and Melissa Burgess, 'Trends and Patterns in Domestic Violence Assaults: 2001 To 2010' (Issue Paper 61, NSW Bureau of Crime Statistics and Research, 2011).

A NSW study. 'Forty-one per cent of all incidents of domestic assault are alcohol related. This percentage varies, however, from a low of 35 per cent in the Sydney Statistical Division to a high of 62 per cent in the Far West Statistical Division. The rate of recorded domestic assault for Indigenous women is more than six times higher than for non-Indigenous women.' This study deals with a variety of risk factors in depth, with a special focus on alcohol and related geographic issues.

Hulme, Shann, Anthony Morgan and Hayley Boxall,Domestic Violence Offenders, Prior Offending and Reoffending in Australia, Research Report No 580, September 2019, Australian Institute of Criminology.

Developing effective strategies to reduce domestic violence offending requires an understanding of perpetrator characteristics, offending patterns and recidivism. This study consolidates the Australian evidence base through a systematic review of 39 quantitative studies that examined domestic violence offending and reoffending. Despite the wide range of data sources, samples and measures of violence, findings are remarkably consistent across studies. The findings further reinforce the importance of targeting male perpetrated violence, and reducing violence in Indigenous communities. Alcohol featured in a significant proportion of domestic violence incidents. Finally, the study demonstrates the importance of reducing repeat

offending, particularly among prolific offenders, to reduce overall rates of violence.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family law and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of the practices and perspectives of family law system professionals(*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- the Court Outcomes Project (CO Project) involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts; and
    - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much

less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). ***Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers*** **(Research report, 01/2022). ANROWS.**

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, ***Domestic Violence Trends and Issues in NSW*** **(Report No 46, 2012).**

A NSW report. At paragraphs 2.25 - 2.27 (pp16-7), the Committee notes key indicators of most likely victims:

women over 18 years in a heterosexual relationship; women with children being up to three times more likely to be victims of domestic violence than women without children. From paragraph 5.25 (p101) onwards, the Committee deals with factors that exacerbate violence against women, including: “alcohol and drug use, exposure to pornography, violence in the media and exposure to violence as a child”. The Committee notes that the same factors have an impact on one’s likelihood to be a perpetrator of domestic violence. Paragraphs 9.127 - 9.147 (from p251) examine ‘unworkable apprehended domestic violence order conditions’. The committee concludes in paragraphs 9.148 - 9.156 that conditions contained in an order should be individually tailored to the situation, the protected person, and the perpetrator; thus minimising the risk of breach and further violence.

Leung, F and Trimboli, L. (2022). Improving police risk assessment of intimate partner violence. NSW Bureau of Crime Statistics and Research.

This research aimed to develop a tool with better predictive accuracy than the NSW’s Domestic Violence Safety Assessment Tool.

The sample comprised 234,454 incidents between intimate partners recorded from January 2016 to December 2018 in the Central Referral Point (CRP) database, provided by Victim Services NSW. Four predictive models of a victim’s risk of intimate partner re-victimisation were evaluated. These were a) NRAP-all: a model with all 16 risk factors identified in the National Risk Assessment Principles (NRAP) developed by Australia’s National Research Organisation for Women’s Safety (ANROWS); b) NRAP-10: a model with only the 10 high-risk factors identified by ANROWS in the NRAP; c) SAFVR: the Static Assessment of Family Violence Recidivism (SAFVR), developed by the New Zealand Police; and d) DVSAT-8: a model with the eight items from the NSW DVSAT that are most predictive of repeat victimisation. The best performing model was further simplified, keeping only the best predictors. This simplified model was then used to predict re-victimisation.

Of the four models, only the two NRAP models had acceptable predictive performance (i.e., with an Area under the Curve (AUC) above 0.7). The model with the highest AUC was the NRAP model that combined all 16 risk factors identified by ANROWS (with an average AUC of 0.732). When tested on unseen data, its out-of-sample AUC was similar, at 0.738. The simpler NRAP-10 model performed only slightly worse with an average AUC of 0.728. Further analysis found that the best performing NRAP model could be simplified, with almost no loss in predictive performance. Of the 16 risk factors in the NRAP model, a simplified model using

only the best five predictors delivered an out-of-sample AUC of 0.734.

This study demonstrates that a risk assessment instrument with a small number of variables can identify victims who are most at risk of future intimate partner violence. With an appropriately selected risk threshold to match service capacity, the simplified model could help control the volume of referrals at a desired level.

In the current study, the five variables that most strongly predicted repeat victimisation in the subsequent 12 months were: two measures of previous history of family and domestic violence; pregnancy and new birth; the victim's self-perception of risk of future violence; and misuse of drugs or excessive alcohol consumption.

Mooney, Rosemary and Deborah Byrne, *Understanding the relationship between family violence and brain injury* (The Brain Injury Association of Tasmania, 2016).

This report provides a summary of the key issues surrounding the complex relationship between injury and family violence in Australia. It notes that half of the people who perpetrate family violence have an existing brain injury (but not all people living with a brain injury perpetrate family violence). Research demonstrates that there is an association between brain injury and increased aggressive behaviour. Moreover, the types of abuse victims of family violence often report (being hit in the face, head and neck, being shaken, and being choked) are all risk factors for brain injury. Research has established that at least one third of women who have experienced family violence has sustained a brain injury. However, the needs of women who live with traumatic brain injury are not being met (p.1).

It notes that '[v]ictims of family violence are seldom screened for brain injury which means that the phenomenon of brain injury as a consequence of family violence is under reported; the same is true for perpetrators of family violence. Prevalence rates are therefore difficult to estimate due to under reporting, under diagnosis, and under researching of brain injury, making it an 'invisible' problem' (p.1).

It concludes that the relationship between brain injury and family violence shown in this report points to an 'urgent need for education and training across all intersecting areas in relation to implementing brain injury screening and the provision of targeted services that are appropriate and effective for people living with a brain injury' (p.2). This report makes fourteen recommendations.

Morgan, Anthony, Hayley Boxall and Rick Brown, *Targeting repeat domestic violence: Assessing short term risk of reoffending* (Australian Institute of Criminology Report No. 552 June 2018).

Report abstract:

Drawing on repeat victimisation studies, and analysing police data on domestic violence incidents, the current study examined the prevalence and correlates of short-term reoffending.

The results showed that a significant proportion of offenders reoffended in the weeks and months following a domestic violence incident. Individuals who reoffended more quickly were more likely to be involved in multiple incidents in a short period of time. Offenders with a history of domestic violence—particularly more frequent offending—and of breaching violence orders were more likely to reoffend. Most importantly, the risk of reoffending was cumulative, increasing with each subsequent incident.

The findings have important implications for police and other frontline agencies responding to domestic violence, demonstrating the importance of targeted, timely and graduated responses.

Morgan A & Boxall H 2020. Social isolation, time spent at home, financial stress and domestic violence during the COVID-19 pandemic. *Trends & issues in crime and criminal justice* no. 609. Canberra: Australian Institute of Criminology.

In this study data from a large online survey of Australian women is used to examine whether the increased time spent at home, social isolation and financial stress resulting from COVID-19 containment measures were associated with a higher likelihood of physical and sexual violence among women in current cohabiting relationships with and without a history of violence.

An increase in the amount of time spent at home with a partner did not in itself increase the likelihood of violence among either group. However, the probability of repeat or first-time violence was between 1.3 and 1.4 times higher for women who had less frequent contact with family and friends outside of the household during the pandemic.

While financial stress prior to the pandemic was a strong predictor of violence for both groups, the probability of first-time violence was 1.8 times higher among women who experienced an increase in financial stress. We conclude that the pandemic was associated with an increased risk of violence against women in current cohabiting relationships, most likely from a combination of economic stress and social isolation.

Myhill A, Hohl K. The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence. *Journal of Interpersonal Violence*. 2019; 34(21-22):4477-4497.

Abstract: Research on risk assessment for domestic violence has to date focused primarily on the predictive power of individual risk factors and the statistical validity of risk assessment tools in predicting future physical assault in sub-sets of cases dealt with by the police. This study uses data from risk assessment forms from a random sample of cases of domestic violence reported to the police. An innovative latent trait model is used to test whether a cluster of risk factors associated with coercive control is most representative of the type of abuse that comes to the attention of the police. Factors associated with a course of coercive and controlling conduct, including perpetrators' threats, controlling behavior and sexual coercion, and victims' isolation and fear, had highest item loadings and were thus the most representative of the overall construct. Sub-lethal physical violence—choking and use of weapons—was also consistent with a course of controlling conduct. Whether a physical injury was sustained during the current incident, however, was not associated consistently either with the typical pattern of abuse or with other context-specific risk factors such as separation from the perpetrator. Implications for police practice and the design of risk assessment tools are discussed. We conclude that coercive control is the "golden thread" running through risk identification and assessment for domestic violence and that risk assessment tools structured around coercive control can help police officers move beyond an "incident-by-incident" response and toward identifying the dangerous patterns of behavior that precede domestic homicide.

Noonan, Patrick, Annabel Taylor and Jackie Burke, *Links between alcohol consumption and domestic and sexual violence against women: Key findings and future directions* (ANROWS, 2017).

This literature review found that "there is little evidence that alcohol use is a primary cause of violence against women. The paper does, however, identify that there are clear associations, and in some cases, strong correlations between alcohol use and violence against women, including, for instance, in the severity of the violence." The relationship between alcohol and violence against women manifests in three ways:

- Alcohol use is linked with the perpetration of violence against women.
- Alcohol use is linked with women's victimisation by violence.

- Alcohol is used as a coping strategy by women who have experienced violence

Parkinson, Patrick, Judy Cashmore and Judi Single, 'Post-Separation Conflict and the Use of Family Violence Orders' (2011) 33(1) *Sydney Law Review* 1.

This article is based on interviews with 181 parents who had parenting disputes post-separation. Many of the disputes involve family violence orders (FVO). The research outlines the wide range of situations in which a FVO may be sought (from p11), including in relationships where there had been no history of violence over a long period. In these situations, it was difficult to assess risk pre-separation. In some cases, it was the act of applying for a FVO that led to the most severe instances of violence. The article also draws on the experiences of respondents to a FVO application. Other risk factors are also briefly identified including: pregnancy (p13); and coercive/controlling violence (p5).

Phillips, Janet, and Penny Vandenbroek, 'Domestic, Family and Sexual Violence in Australia - An Overview of the Issues' (Research Paper, Parliamentary Library, Parliament of Australia, 2014).

These include: perpetrators' substance dependency; victims' past exposure to violence (especially as a young person or child); and absence of social support (p 6). In particular, it draws on relevant Australian research to identify that the 'involvement of alcohol and drug use often lead[s] to higher levels of aggression by perpetrators' (p7). The authors also outline which groups of women may be identified as being at greatest risk (p8).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Notes that a suicide threat is considered a risk factor for lethal harm and constitutes a form of domestic and family violence where it is made for the purpose of "tormenting, intimidating or frightening the person to whom the behaviour is directed". (In particular, see p 68).

International

Block, Carolyn, 'Reducing Intimate Partner Homicide Rates: What are the Risk Factors for Death when a Woman is being Abused?' in Australian Institute of Criminology, *Domestic-related Homicide: Keynote Papers from the 2008 International Conference on Homicide* (Report No 104, Research and Public Policy Series, 2009) 62.

This paper summarised the most important findings of the Chicago Women's Health Risk Study (CWHRS). The CWHRS involved interviews with 705 women who screened positive for domestic violence, and was designed to inform service providers of how to identify risk factors for intimate partner homicides. CWHRS found that, while past violence is a significant risk factor (particularly where there has been a threat of use of a weapon, an attempt to strangle her, or abuse of substances (p69)), women who have not experienced a previous violent incident may still be at high-risk of death (p72). The study also found that girls as young as 11 were killed by an intimate partner (see the age breakdowns and abuse types on p81). Other important findings included: '(1) leaving as both a protective factor against but also a risk factor for death, (2) the importance of choking/attempted strangulation as a risk factor for death, (3) risk factors for an abused woman killing her abuser, and (4) the voices of women about help-seeking' (p63).

Block reports that women who had experienced a strangulation or choking attempt by the perpetrator in the last year were twice as likely to be killed as women who had not, with the CWHRS finding that:

> '12 percent of women whose partner had tried to choke or strangle them in the past year were in the homicide sample, versus six percent of abused women who had not experienced a choking incident in the past year. Clinic/hospital women who said their partner had tried to choke or strangle them in the past year were more likely (16% versus 8%) to experience a very severe or life-threatening incident on follow-up (weapon use or threat, lost consciousness, permanent injury, internal injury, head injury or attempted murder)' (p70).

Brownridge, Douglas, et al., 'The Elevated Risk for Non-Lethal Post-Separation Violence in Canada: A Comparison of Separated, Divorced, and Married Women' (2008) 23(1) *Journal of Interpersonal Violence* 117.

This Canadian study used a nationally representative sample (n=7,369), and made two contributions to the

existing literature:

- first, compared with married women, separated women reported 9 times the prevalence of violence by their ex-husbands, and divorced women reported 4 times the prevalence of violence (pp 128-9); and
- second, the risk factors for the married, divorced and separated women were different. Sexually proprietary behaviour (for example, jealousy or possessiveness) and patriarchal dominance were significant risk factors only for married women, not for separated or divorced women (pp 129-30). In contrast, important risk factors for separated women were age and Indigenous status (p 130-1).

Thus, there may be different circumstances influencing post-separation violence and intimate partner violence.

Campbell, Jacquelyn, et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003a) 93(7) *American Journal of Public Health* 1089.

This 11-city study sought to identify risk factors for femicide in abusive relationships. Proxies of 220 intimate partner femicide victims identified from police or medical examiner records were interviewed, along with 343 abused control women. Pre-incident risk factors associated with increased risk of intimate partner femicide included: perpetrator's access to a gun and previous threat with a weapon; perpetrator's stepchild in the home; and estrangement, especially from a controlling partner. Never living together and prior domestic violence arrest were associated with lowered risks. Significant incident factors included the victim having left for another partner and the perpetrator's use of a gun. Other significant bivariate-level risks included stalking, forced sex, and abuse during pregnancy.

Campbell, Jacquelyn, et al, 'Assessing Risk Factors for Intimate Partner Homicide' (2003b) 250 *National Institute of Justice Journal* 14.

This study examines the effectiveness of a particular risk assessment tool, the Danger Assessment Tool developed in 1985, in measuring women's risk in abusive relationships. It 'found that despite certain limitations, the tool can with some reliability identify women who may be at risk of being killed by an intimate partner' (p14). The Danger Assessment found that women whose abusers used or threatened use of a weapon were 20 times more likely to be killed, while the correlation between threatened or attempted suicide

required further analysis. Other risk factors identified included: partner attempting to strangle the woman; partner violently and constantly jealous; partner controls most or all of the woman's daily activities; partner's use of alcohol and illicit drugs; and the woman ever being beaten while pregnant. Limitations of the tool include that, while the Danger Assessment process correctly assessed 83% of women who were murdered as high-risk, it also assessed 40 percent of abused women who were not killed as high-risk, demonstrating that the tool can only operate as a guide for identifying a woman's risk of death.

Charlotte Barlow and Siobhan Weare, 'Women as Co-Offenders: Pathways into Crime and Offending Motivations' (2019) 58(1) *The Howard Journal of Crime and Justice* 86-103.

This article examines a qualitative study in the UK which aimed to investigate co-offending women's pathways into, and motivations for engaging in, criminal behaviour. It considers not only the impact of co-offending relationships on women's criminality, but also factors which intersect with these relationships in their lives. Interviews with eight women who accessed a women's advice and support centre were conducted. Findings showed that while co-offending relationships were a central pathway into offending, this often intersected with other circumstances in the women's lives, including drug addiction, socio-economic circumstances, and 'significant life events'. Moreover, women who co-offended with female friends were more likely to acknowledge their agency than those who co-offended with intimate male partners. Findings also demonstrated the significance of understanding the complex nature of the lives co-offending women, and the decision-making process.

Emily Brignone, Anneliese Sorrentino, Christopher Roberts and Melissa Dichter, 'Suicidal ideation and behaviors among women veterans with recent exposure to intimate partner violence' (2018) 55 *General Hospital Psychiatry* 60-64.

Female veterans are at a disproportionately high risk for suicide and intimate partner violence (IPV) compared to female non-veterans. Suicide rates increased by 32.7% among veterans between 2005 and 2015. There is evidence that female veterans differ from non-veterans in terms of IPV-related experiences. The authors examined the US Veterans Health Administration (VHA) electronic medical records for 8427 female veterans who completed screening for past-year IPV between April 2014 and 2016. Results showed a strong connection between IPV and suicidal ideation, and self-harm behaviours among VHA female veterans.

Farzan-Kashani, Julian and Christopher Murphy, 'Anger Problems Predict Long-Term Criminal Recidivism in Partner Violent Men' (2017) 32(23) *Journal of Interpersonal Violence* 3541-3555

Anger problems are not only an important correlate of IPV, but may also be an important factor underlying treatment response for IPV perpetrators. Of 132 men receiving treatment services at a community-based DV agency, those with serious anger problems had more charges for general violence offences and more ongoing problems with protection orders than did those with 'normal' anger levels. Further, low anger control and high anger expression predicted general violence recidivism. The results demonstrate that new intervention approaches are necessary for partner violent men with serious anger dysregulation, as a standard cognitive-behavioural treatment program may not suffice.

Fleury, Ruth E, Cris M Sullivan & Deborah I Bybee, 'When Ending the Relationship Does not End the Violence: Women's Experiences of Violence by Former Partners' (2000) 6(12) *Violence Against Women* 1363.

A US study of 278 women with abusive partners leaving a women's shelter were interviewed across two years. More than one third of the women were assaulted by their former partner during the time of the study. Those who were in a relationship longer before the first incident of violence were more likely to be assaulted after the end of the relationship suggesting that the violence may have started as a means by which the perpetrator could maintain control over the victim. There was also evidence that perpetrators who were highly sexually suspicious of the victim were more likely to be violent towards the victim after separation.

Folkes, Stephanie, N, Zoe Hilton and Grant T Harris, 'Weapon Use Increases the Severity of Domestic Violence but Neither Weapon Use Nor Firearm Access Increases the Risk or Severity of Recidivism' (2012) 28(6) *Journal of Interpersonal Violence* 1143.

A Canadian study. This reanalysis of 1,421 police reports of domestic violence by men found that 6% used a weapon during the assault and 8% had access to firearms. Firearm access was associated with assault severity, but this was mostly attributable to use of non-firearm weapons. Weapon use was associated with older age, lower education, and relationship history as well as to assault severity. Victims were most concerned about future assaults following threats and actual injuries. Although firearm access and weapon

use were related to actuarial risk of domestic violence recidivism, neither predicted the occurrence or severity of recidivism. The study concluded that, consistent with previous research in the United States and Canada, firearm use in domestic violence is uncommon even among offenders with known firearm access. Weapon use is characteristic of a subgroup of offenders who commit more severe domestic violence, and seizure of weapons may be an effective intervention.

Glass, Nancy, et al, 'Non-fatal Strangulation is an Important Risk Factor for Homicide of Women' (2008) 35(3) *Journal of Emergency Medicine* 329.

The study examines non-fatal strangulation by an intimate partner as a risk factor for major assault, or attempted or actual homicide of women. A case control design was used to describe non-fatal strangulation among actual and attempted homicides (n=506) and abused controls (n=427). The results demonstrate non-fatal strangulation as an important risk factor for homicide of women by intimate partners, underscoring the need to screen for non-fatal strangulation when assessing abused women in emergency department settings.

Graham, Kathryn; Sharon Bernards, Sharon C. Wilsnack and Gerhard Gmel; 'Alcohol May Not Cause Partner Violence But It Seems to Make It Worse: A Cross National Comparison of the Relationship Between Alcohol and Severity of Partner Violence' (2011) 26(8) *Journal of Interpersonal Violence* 1503.

This study assesses whether severity of physical partner aggression is associated with alcohol consumption at the time of the incident, and whether the relationship between drinking and aggression severity is the same for men and women and across different countries. National or large regional general population surveys were conducted in 13 countries as part of the GENACIS (Gender, Alcohol and Culture – an International Study) collaboration. Respondents described the most physically aggressive act done to them by a partner in the past 2 years, rated the severity of aggression on a scale of 1 to 10, and reported whether either partner had been drinking when the incident occurred. Severity ratings were significantly higher for incidents in which one or both partners had been drinking compared to incidents in which neither partner had been drinking. The relationship did not differ significantly for men and women or by country. The authors concluded that alcohol consumption may serve to potentiate violence when it occurs, and this pattern holds across a diverse set of cultures.

Jaffe, Peter, Katreena Scott, *'Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce'* (Department of Justice Canada, 2014).

This report provides a summary of the expanding literature in the field of family violence, with specific attention to factors that increase the risk of harm to children during the critical time of parental separation. The report also summarises policies and practices for intervention and prevention as identified by Canadian experts and current research reports. The review highlights the many factors that increase children's risk of harm to their psychological and physical well-being (e.g., exposure to domestic violence; history of maltreatment; parental stress; social isolation of the family; inadequate resources and support) in the context of family violence and separating parents. The authors propose a model to guide judges, lawyers and court-related professionals to consider when looking at potential harm to children based on their vulnerabilities as well as the risks that parents may present. Findings of risk can lead to court mandated interventions and safeguards in determining parental access to their children. This analysis requires consideration of barriers to required services such as language and cultural barriers as well as poverty.

Livingston, Michael, 'The Ecology of Domestic Violence: The Role of Alcohol Outlet Density' (2010) 5(1) *Geospatial Health* 139.

This study assesses whether alcohol outlet density is related to the incidence of domestic violence and whether this relationship is due to alcohol availability or to co-occurring economic disadvantage and social disorganisation. The study found that the density of hotels (or pubs), but not packaged liquor outlets or restaurants and bars, was significantly associated with rates of domestic violence, even controlling for socio-demographic factors. Socio-economic disadvantage was also found to be associated with domestic violence rates. The results present a mixed picture of the links between alcohol availability and domestic violence, and are suggestive of the need for more research. The study provides valuable insights into substance abuse as a risk factor for domestic violence.

Lyons, et al., Risk Factors for Child Death During an Intimate Partner Homicide: A Case-Control Study (2021) 26(4) Child Maltreatment 356-362 doi: 10.1177/1077559520983901

This research used the US National Violent Death Reporting System (NVDRS) data (2003–2017) to compare all IPH incidents with a child corollary victim (n = 227) to all IPH incidents where a child was present but not killed (n = 350). We examined risk factors for child fatality during an IPH. For each risk factor, we calculated the odds ratio for child death during the IPH, adjusting for multiple comparisons. Perpetrator history of suicidal behavior, rape of the intimate partner victim, a non-biological child of the perpetrator living in the home, and perpetrator job stressors increased odds while prior separation of the IPV victim from the perpetrator decreased the odds of a child death during an IPH incident.

McFarlane, Judith, Jacquelyn Campbell and Kathy Watson, 'Intimate Partner Stalking and Femicide: Urgent Implications for Women's Safety' (2002) 20(1-2) *Behavioral Sciences and the Law* 51.

Researchers conducted a case control study of 821 women in 10 U.S. cities. A sample of 437 women who were killed or nearly killed by their intimate partners was compared with a control sample of 384 abused women residing in the community. The researchers assessed the relative significance of a set of risk factors for predicting femicide (homicide of a woman by her intimate partner) or near femicide (cases that could have but did not result in death for the victim). Compared with the control group of abused women (49%), significantly more of the killed/nearly killed women had histories of stalking (79%) in their abusive relationships. Multivariate analyses indicated that being "followed or spied on" by the abuser in the 12 months before the lethal or near lethal incident resulted in a nearly 2.5-fold risk. More detailed analyses identified five threat factors (in the perpetrator's behavior towards the victim) that increased odds of femicide/attempted femicide: (a) threatened to harm children if the woman left, (b) frightened the woman with a weapon before the incident, (c) left scary notes on the woman's car before the incident, (d) threatened to kill the woman, and (e) frightened or threatened the woman's family before the incident.

McKee GB, Gill-Hopple K, Oesterle DW, Daigle LE, Gilmore AK. New Perspectives on Risk Factors for Non-fatal Strangulation and Post-assault Imaging. *Journal of Interpersonal Violence*. October 2020.

Abstract: Strangulation has long been associated with death in the context of sexual assault and intimate partner violence (IPV). Non-fatal strangulation (NFS) during sexual assault, which refers to strangulation or choking that does not result in death, is common and has been associated with IPV and with bodily injury; however, other factors associated with NFS are unknown. The current study examined demographic and

sexual assault characteristics associated with NFS among women who received a sexual assault medical forensic exam (SAMFE). A second purpose of this study was to explore factors associated with receiving follow-up imaging orders after NFS was identified during a SAMFE. Participants (*N* = 882) ranged in age from 18 to 81 (*M* = 28.85), with the majority identifying as non-Hispanic White (70.4%) or Black/African American (23.4%). A total of 75 women (8.5%) experienced NFS during the sexual assault. Of these, only 13 (17.3%) received follow-up imaging orders for relevant scans. Results from a logistic regression analysis demonstrated that NFS was positively associated with report of anal penetration, intimate partner perpetration, non-genital injury, and weapon use during the assault. Results from chi-square analysis showed that among sexual assaults involving women who experienced NFS, those whose assaults involved weapon use were over four times more likely to receive imaging orders compared to assaults without weapon use. These findings have implications for criminal justice, and if incorporated into danger assessments, could potentially reduce fatalities linked to sexual assault and/or IPV. Additional work is needed to ensure that all assaults with NFS trigger a referral for imaging regardless of other assault characteristics.

Mechanic, Mindy B, Terri L. Weaver & Patricia A. Resick, 'Risk Factors for Physical Injury Among Help-Seeking Battered Women: An Exploration of Multiple Abuse Dimensions' (2008) 14(10) *Violence Against Women* 1148.

This US study assessed the nature and extent of minor and severe injuries among a help-seeking sample of battered women. It assessed the roles of physical violence, sexual coercion, psychological abuse, and stalking in predicting minor and severe injuries in battered women. Length of relationship abuse and severity of physical aggression were the most robust predictors of minor and severe physical injuries. Consistent with other research findings, psychological abuse and stalking together contributed uniquely to the prediction of severe injuries.

Messing, JT, Thomas, KA, Ward-Lasher, AL & Brewer, NQ 2021, 'A Comparison of Intimate Partner Violence Strangulation Between Same-Sex and Different-Sex Couples', *Journal of Interpersonal Violence*, vol. 36, no. 5/6, pp. 2887–2905.

US based study. Abstract: Strangulation is a common and dangerous form of intimate partner violence (IPV). Nonfatal strangulation is a risk factor for homicide; can lead to severe, long-term physical and mental health

sequelae; and can be an effective strategy of coercion and control. To date, research has not examined strangulation within same-sex couples. The objective of this cross-sectional, observational research is to identify whether and to what extent the detection of strangulation and coercive control differs between same-sex and different-sex couples in police reports of IPV. Data (n = 2,207) were obtained from a single police department in the southwest United States (2011-2013). Bivariate analyses examined differences in victim and offender demographics, victim injury, violence, and coercive controlling behaviours between same-sex (male-male and female-female) and different-sex couples (female victim-male offender). Logistic regression was used to examine associations between strangulation, victim and offender demographics, coercive controlling behaviours, and couple configuration. Strangulation was reported significantly more often in different-sex (9.8%) than in female and male same-sex couple cases (5.2% and 5.3%, respectively; p <.05). Injury, however, was reported more frequently in same-sex than in different-sex couples (p <.05). Couple configuration (p <.05), coercive control (p <.05), and injury (p <.05) significantly predict strangulation. Findings suggest that nonfatal strangulation occurs within at least a minority of same-sex couples; it is possible that underdetection by law enforcement makes it appear less common than it actually is. Regardless of couple configuration, timely identification of strangulation and subsequent referral to medical and social service providers is essential for preventing repeated strangulation, life-threatening injury, and the long-term health effects of strangulation.

Messing, Jill Theresa, Wilson, Janet Sullivan and Jacquelyn Campbell, ' Differentiating among Attempted, Completed, and Multiple Nonfatal Strangulation in Women Experiencing Intimate Partner Violence' (2018) 28(1) *Women's Health Issues* 104-111.

The identification of intimate partner violence (IPV) in health care settings is difficult, and strangulation increases the risk of death among women experiencing IPV. Previous literature suggests that women rarely seek treatment and care after IPV strangulation, and those who do, may not disclose prior assaults or the cause of the injury, thus leading to misdiagnoses and inadequate treatment plans. The authors examined the prevalence and correlates of non-fatal strangulation among 1008 women survives of intimate partner violence. Trained researchers conducted semi-structured interviews with women survivors of IPV referred by police. Results showed that each strangulation was independently significantly associated with sexual violence when compared to non-strangulation. Multiple strangulation was associated with more IPV injury and risk factors for homicide, including loss of consciousness and miscarriage (see pages 107-108). The authors found that strangulation was a prevalent form of IPV and has significant health risks to women. Women's

health practitioners are best placed to identify the signs and symptoms of strangulation, help women to understand the consequences and potential future fatality associated with strangulation, and direct them to appropriate resources to reduce the risk of mortality and morbidity.

Miner, Emily, et al, 'Risk of Death or Life-Threatening Injury for Women with Children Not Sired by the Abuser' (2012) 23(1) *Human Nature* 89.

This US study further explores the previously identified link between the presence of children sired by a woman's previous partner (step-children) and an increased risk of abuse and femicide by her current partner. The current research secured data from samples of 111 non-abused women, 111 less severely abused women, 128 more severely abused women, and 26 victims of intimate partner femicide from the Chicago Women's Health Risk Study. The study found that women who have genetic children in the household sired by a previous partner experience an increased risk of severe forms of abuse (by their current partner) compared with women whose children were all sired by their current partner. It also identified a trend of increasing representation of women with children sired by previous partners as victims of abuse as the severity of the abuse increases.

National Institute of Justice, 'How Effective Are Lethality Assessment Programs for Addressing Intimate Partner Violence?' (Office of Justice Programs, June 11 2018).

The article analyses the effectiveness of Lethality Assessment Programs (LAP) in addressing intimate partner violence (IPV). LAP was developed by the Maryland Network Against Domestic Violence in 2003 as a means for first responders to identify high-risk victims of IPV, and provide them with the tools to make decisions of self-care. As part of the program, police officers used an 11-question Lethality Screen to evaluate a victim's risk for lethal violence, and warned high-risk victims of their dangerous circumstances and offered to connect them with a social services provider. If victims agreed, they were put in contact, by phone, to a provider to receive victim advocacy services, safety planning, and referral for additional services. The researchers collected data on 700 female victims of IPV in seven police jurisdictions in Oklahoma.

Although the program did not appear to have a significant impact on reducing the incidence of IPV, it did seem to significantly reduce the severity and frequency of the violence that survivors experienced. It also appeared to increase help seeking and safety planning. Women who participated in the program were more

likely to remove or hide their partner's weapons, to obtain formal services for domestic violence, to establish safety strategies with friends and family, and to obtain protection against their partner. The researchers also found that victims who received assistance through the LAP reported greater satisfaction with the police response. Consequently, LAP was described as a 'collaborative police-social service intervention with an emerging evidence base.'

The article was based on Police Departments' Use of the Lethality Assessment Program: A Quasi-Experimental Evaluation.

Patch, Michelle, Jocelyn Anderson and Jacquelyn Campbell, 'Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review' (2018) 44(4) *Journal of Emergency Nursing* 384.

This article reviewed the literature on women's injuries and their subsequent experiences in seeking health care after encountering non-fatal intimate partner strangulation (NF-IPS). Research shows that NF-IPS is higher in women than in men. Although injuries may be subtle or minimised, they may have severe health consequences. In recent years, there have been calls for nursing and other health care providers to improve practices related to strangulation screening, assessment and treatment. Overall, NF-IPS was associated with multiple negative physical (eg injuries to head/neck or neurological, vascular or respiratory systems) and psychological (eg anxiety, depression, suicidal ideation or post-traumatic stress) outcomes for women. Studies suggested that women are reluctant to seek health care after being strangled. Reasons for their reluctance include wanting a safe place first, not wanting to share personal experiences, an abuser being present in the room during the visit, and feelings of hopelessness.

Petersson, Joachim and Thunberg, Sara, (2022) Vulnerability Factors among Women Victimized by Intimate Partner Violence and the Presence of Children, 37 *Journal of Family Violence* 1057-1069, doi: 10.1007/s10896-021-00328-8

This study aimed to a) examine the presence of children in relation to victim vulnerability factors and assessed risk for intimate partner violence (IPV) re-victimization, and b) examine the police response, in terms of risk management, in IPV cases with and without children, respectively. Data from a sample of 1407

women who had reported IPV victimization to the Swedish police was analyzed. The material consisted of risk assessments conducted by the police using the Swedish version of the Brief Spousal Assault Form for the Evaluation of Risk (B-SAFER) checklist, as well as the recommended risk management strategies. Victim vulnerability factors that were most strongly associated with an elevated risk rating for IPV re-victimization were generally the same for both groups of victims. The presence of children was related to a higher risk rating for imminent IPV re-victimization and to recommendations of more than standard levels of risk management strategies.

Rossiter, KR. et al., 'Domestic Homicide in Immigrant and Refugee Populations: Culturally-Informed Risk and Safety Strategies' (Canadian Domestic Homicide Prevention Initiative, Domestic Homicide Brief 4, February 2018).

The purpose of this Briefing Paper is to highlight risk assessment, risk management, and safety planning for immigrant and refugee populations. The paper provides definitions of key terms, such as 'migrant', 'protected persons' and 'permanent residents'. It also identifies unique risk factors for domestic homicide, using the Immigrant Power and Control Wheel (p6). The authors highlight the importance in recognising that 'domestic violence and homicide among immigrant and refugee populations are not rooted specific in cultures, but in patriarchy' (p 5). The authors identify several factors that contribute to increased risk of domestic violence and homicide among immigrant and refugee populations (p4):

- Acculturation level
- Cultural norms and expectations
- Geographic and social isolation
- Length of residency in host country
- Loss of socioeconomic status
- Loss of culture, family structures and community leaders
- Power imbalances between partners
- Stress associated with migration
- Post-migration strain and stigma
- Strict or changing gender roles
- Traditional patriarchal beliefs

- Unresolved pre-migration trauma
- Victim/survivor immigration status

Barriers to services for immigrant and refugee women are addressed, along with the need for culturally-informed strategies for risk assessment, risk management, and safety planning. Examples of culturally-specific risk assessment tools are provided.

Spencer, Chelsea and Stith, Sandra, (2020) Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis. 21(3) Trauma, Violence & Abuse 527-540. doi: 10.1177/1524838018781101

This meta-analysis examined results from 17 studies. Primary findings from this research suggest the strongest risk factors for intimate partner homicide were the perpetrator having direct access to a gun, perpetrator's previous nonfatal strangulation, perpetrator's previous rape of the victim, perpetrator's previous threat with a weapon, the perpetrator's demonstration of controlling behaviors, and the perpetrator's previous threats to harm the victim. Implications for law enforcement personnel, medical professionals, victim advocates, mental health professionals, and other professionals who may be in contact with potential IPH perpetrators and victims are discussed.

Taylor, Gregory, *The Chief Public Health Officer's Report on the State of Public Health in Canada, 2016: A Focus on Family Violence in Canada* (Public Health Agency of Canada, 2016).

While focused on Canada, this report gives an overview of the factors that influence the risk of both experiencing and perpetrating family violence. Individual factors include: a history of child abuse or neglect, age, gender, traits, beliefs and behaviour, physical and mental health, substance use, and stress (p.20). Some of the family and social factors that increase the risk for family violence are poor parenting and parental attachment; intimate partner violence between parents; stress in relationships; mistreatment of older adults; social isolation and lacking social support (p.23). Community and societal factors that can influence family violence include cultural differences; social acceptability and normalisation of violence; and neighbourhoods (pp.23-25).

Vivienne, Elizabeth, 'Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation' (2017) 25(2) *Feminist Legal Studies* 185-201.

This study adds to the literature in relation to post-separation violence by introducing the new concept of 'custody stalking'. Custody stalking is a parents's use of custody and/or child protection proceedings to obtain care time with children far in excess of their involvement prior to separation (p 187). Elizabeth views custody stalking as a specific pattern of coercive control, derived from the unique insights former partners have about how to torment women (p 187). The study was conducted through interviews with 12 mothers who had experienced domestic violence (p 190). The study found that custody stalking causes grief, damages psychological wellbeing and has a detrimental effect on their mothering relationships. However, the losses experienced by mothers in this study are described as 'culturally invisible' (p 187-8)

Wallace, M. et al., (2021) 'Homicide during pregnancy and the post-partum period in the United States, 218-2019'. *Obstetrics & Gynecology,* 138(5): 762- 769, doi: 10.1097/AOG.0000000000004567

Objective: To estimate the national pregnancy associated homicide mortality ratio, characterize pregnancy-associated homicide victims, and compare the risk of homicide in the perinatal period (pregnancy and up to 1 year postpartum) with risk among nonpregnant, nonpostpartum females aged 10–44 years.

Methods: Data from the National Center for Health Statistics 2018 and 2019 mortality files were used to identify all female decedents aged 10–44 in the United States. These data were used to estimate 2-year pregnancy-associated homicide mortality ratios (deaths/100,000 live births) for comparison with homicide mortality among nonpregnant, nonpostpartum females (deaths/100,000 population) and to mortality ratios for direct maternal causes of death. We compared characteristics and estimated homicide mortality rate ratios and 95% CIs between pregnant or postpartum and nonpregnant, nonpostpartum victims for the total population and with stratification by race and ethnicity and age.

Results: There were 3.62 homicides per 100,000 live births among females who were pregnant or within 1 year postpartum, 16% higher than homicide prevalence among nonpregnant and nonpostpartum females of reproductive age (3.12 deaths/100,000 population, P,.05). Homicide during pregnancy or within 42 days of the end of pregnancy exceeded all the leading causes of maternal mortality by more than twofold. Pregnancy was associated with a significantly elevated homicide risk in the Black population and among girls and younger women (age 10–24 years) across racial and ethnic subgroups.

Conclusion: Homicide is a leading cause of death during pregnancy and the postpartum period in the United States. Pregnancy and the postpartum period are times of elevated risk for homicide among all females of reproductive age.

Webermann, Aliya R, and Christopher M Murphy, 'Childhood Trauma and Dissociative Intimate Partner Violence' (2018) 25(2) *Violence Against Women* 148-166.

This article considers research investigating whether childhood abuse and neglect is a predictor of dissociative intimate partner violence among perpetrators (p 4). Experiences of childhood abuse and neglect, including exposure to domestic and family violence, is a key predictor of IPV perpetration as an adult (p 2). Key findings include:

- Around one third of the male perpetrators reported dissociative IPV (p 11);
- Childhood abuse and neglect predicted dissociative IPV flashbacks (p 8), dissociative IPV-specific blackouts (p 8), dissociative IPV-specific derealisation (p 11), and IPV-specific aggressive dissociative self-states (p 11);
- Childhood sexual abuse uniquely predicted amnesia (p 9).

The results also indicated that other potential traumas did not predict dissociative IPV, which suggests that dissociative IPV occurs more predictably where perpetrators who have experienced childhood neglect and abuse disconnect from their abusive behaviours (p 12).

White, Catherine et al., 'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period' (2021) 79 Journal of Forensic and Legal Medicine. doi: 10.1016/j.jflm.2021.102128

One of the aims of this study was to identify the prevalence of NFS in patients presenting to a Sexual Assault Referral Centre (in the UK for an acute forensic medical examination after a report of rape or sexual assault. Data from case files of all patients attending in a three year period, January 1, 2017 to December 31, 2019, were analysed. The case files included 204 (9.28%) NFS cases. Conclusion: The study shows that NFS in sexual assault is a gendered crime, with most victims female and most assailants male. NFS is prevalent and this prevalence increases where the alleged perpetrator is a partner or ex-partner. Many are assaulted in their

own homes, homes frequently shared with children. Visible NFS injuries are not the norm yet fear of death is not uncommon. Over 1 in 6 (15.7%) reported loss of consciousness suggesting that they were victims of a near lethal assault. That 27% had previously been a victim of NFS by the same alleged perpetrator indicates that there are considerable numbers potentially living in fear and at risk. Awareness of the risk of NFS, and an enhanced response to it, is required by those looking after victims and all those in the criminal justice system.

Zilkins, R.R., Phillips, M.A., Kelly, M.C., Mukhtar, S.A., Semmens, J.B., & Smith, D.A., 'Non-fatal strangulation in sexual assault: A study of clinical and assault characteristics highlighting the role of intimate partner violence' (2016) 43 *Journal of Forensic and Legal Medicine* 1.

Western Australian Study. A total of 1064 women were included in the study; 79 (7.4%) alleged non-fatal strangulation during sexual assault. This study identifies and quantifies NFS risk factors in female sexual assault and highlights the strong association with intimate partner sexual assault. Notes as follows:

- 7.4% of all female sexual assault cases involved non-fatal strangulation (NFS)
- 58% of non-fatal strangulation sexual assault cases involved intimate partners
- 23% of sexual assaults by an intimate partner involved NFS
- NFS was most frequent in 30–39 year olds sexually assaulted by an intimate partner
- External physical signs of NFS were absent in 49% who gave a history of NFS.

Factors affecting risk - Death Reviews

National

Australian Domestic and Family Violence Death Review Network (2018), Australian Domestic and Family Violence Death Review Network Data Report: 2018, New South Wales Domestic Violence Death Review Team, Sydney.

Abstract: The Australian Domestic and Family Violence Death Review Network ('the Network') was established in 2011 and represents a unique collaboration between domestic and family violence death review mechanisms across Australia. Network members have specialist expertise in domestic and family violence related issues and access to extensive information pertaining to domestic and family violence deaths. This is critical to providing a more informed, holistic understanding of the circumstances and context of a domestic and family violence related death.

In recent years, the Network has undertaken extensive work to develop a National Minimum Dataset of domestic and family violence related deaths and this report presents key findings from this specialised dataset.

This report demonstrates the breadth of information and data that is held by the Network, and its unique ability to collect and report on data in relation to domestic and family violence related deaths.

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022), *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018* (2nd ed.; Research report 03/2022). ANROWS.

The data presented in this report provides a national picture of characteristics present in intimate partner violence homicides ("IPV") in Australia between 1 July 2010 and 30 June 2018, examining the 311 reported IPV homicides across Australia.

Key findings include:

- IPV homicide is highly gendered: in the majority of cases, domestic violence is used by the man against

his female partner. Less than one quarter of all cases involved a female IPV homicide offender killing a current or former male partner, and more than three quarters of all cases involved a male IPV homicide offender killing a current or former female partner (n=240, 77.2%).

- IPV homicide occurs across a broad age range (18–82) with the majority of offenders and victims born in Australia.
- IPV homicide can occur at any stage during a relationship with homicides occurring during or after short relationships, as well as after many years of protracted violence by abusers.
- There is a heightened vulnerability for women who separate or intend to separate from their partners prior to the homicide, with actual or intended separation being a feature in over half of the male-perpetrated IPV homicides. Actual (n=77, 34.4%) or intended separation (n=53, 36.1%) was a feature in more than half of cases where a male IPV offender killed a female partner (n=130, 58.0%).
- The diverse range of abusive tactics identified in this dataset, including physical, emotional, social, financial and sexual violence and stalking, suggests that any relationship that exhibits domestic violence, whether physical or non-physical, is embedded with a risk of lethality.
- Only approximately one third of all IPV homicide offenders and victims were engaged in paid employment at the time of the homicide (n=225 of 622, 36.2%).
- Aboriginal and Torres Strait Islander people are overrepresented as both IPV victims and offenders, with a complex range of interrelated factors associated with the disproportionate incidence and severity of family violence in Aboriginal and Torres Strait Islander communities.

The report identifies particular domestic violence abusive behaviours observed in the focused dataset:

- In the focused dataset (n=292), the vast majority of the 224 male IPV homicide offenders who killed a female victim were identified as the primary domestic violence abuser in the relationship (n=212, 94.6%). Of the 62 cases where a female IPV homicide offender killed a male partner, only a small proportion of women were identified as the primary abuser against the male partner they killed (n=5, 8.1%). In half of the six cases where a male IPV homicide offender killed a male partner, the homicide offender was identified as the primary abuser in the relationship (n=3, 50%).
- Of the 212 cases in which a male primary domestic violence abuser killed a female victim, the majority used emotional and psychological abuse (n=173, 81.6%) and physical abuse (n=169, 79.7%) against the female partner they killed. Over half had been socially abusive (n=134, 63.2%), just over a quarter were financially abusive (n=58, 27.4%) and far fewer were known to be sexually abusive (n=34, 16.0%).

- Stalking occurred in two fifths of the 212 cases in which a male primary domestic violence abuser killed a female victim (n=88, 41.5%). In 71 cases, the domestic violence abuser stalked the victim during the relationship (33.5%) and in 44 cases the abuser stalked the victim after the relationship ended (20.8%).

It concludes:

This research demonstrates the highly gendered nature of intimate partner violence and IPV homicides, with the male party being identified as the primary domestic violence abuser in the majority of cases where a male homicide offender killed a female victim and where a female homicide offender killed a male partner. In many cases, there had been a domestic violence order naming one or both parties as in need of protection from the other at the time of, or prior to, the homicide. The vast majority of these named the female party as needing protection from her male partner. This demonstrates that in many cases the domestic violence had been reported and there had been some level of police or court intervention prior to the homicide.

With separation being a prominent feature in over half of the male-perpetrated IPV homicides against women and almost half of the female-perpetrated IPV homicides, this research also demonstrates that the period leading up to and immediately following separation involves a heightened level of risk.

Analysis of the domestic violence behaviours used by the primary domestic violence abuser demonstrates the range of physical and non-physical violence used by abusive men to dominate and control their partner. The high prevalence of emotional and psychological abuse (such as verbally denigrating, threatening, blaming or gaslighting the victim) and social abuse (such as isolating the victim from support networks and controlling her movements) demonstrates the need for services and first responders to recognise, beyond the use of physical violence, the pattern of abusive and controlling behaviours that presents in a domestic violence relationship. Further, the diverse range of abusive tactics present in this dataset, including physical, emotional, social, financial and sexual violence, and stalking, suggests that any relationship that exhibits domestic violence, whether physical or non-physical, is embedded with a risk of lethality.

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022) *Domestic and family violence lethality: Updated facts about intimate partner homicide* (Fact sheet).

This fact sheet highlights important findings of the *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018*.

ACT

ACT data for the Australian Domestic and Family Violence Death Review Network is provided by the National Coronial Information System with the approval of the ACT Coroner's Court.

Australian Government (2021). *National Plan to Reduce Violence against Women and their Children: Family Violence Death Review: Responsible government: Australian Capital Territory* (website).

The ACT Family Violence Death Review was established through legislation in 2021.

"The intended outcome of an ACT Family Violence Death Review is to make system-wide improvements across policy, systems and services, data collection and legislation to prevent future deaths related to domestic and family violence. Risk factors identified as part of the Death Review will also inform concurrent work of the ACT Government to deliver a domestic and family violence risk assessment and management framework (see Domestic and Family Violence Risk Assessment and Management Framework)."

NSW

Coroner's Court New South Wales, *Domestic violence death review* (Government of New South Wales).

The Domestic Violence Death Review Team (DVDRT) was established in 2010 pursuant to the Coroners Act 2009 NSW to review deaths occurring in the context of domestic violence in New South Wales. This page details the role, function and membership of the DVDRT and provides links to the annual reports of the DVDRT to Parliament. It also provides a link to reports of the national Domestic and Family Violence Death Review Network.

New South Wales Domestic Violence Death Review Team (2021). *Report: 2019-2021*. New South Wales Government, Sydney.

Key findings:

All Intimate Partner Homicides

- The vast majority (86.3%) of intimate partner homicides in NSW occur following an identifiable history of domestic violence.

Intimate Partner *Violence* Homicides

Gender

- Nearly 80% of all intimate partner violence (IPV) homicide victims were women.
- The vast majority of men who killed their female intimate partner were the predominant domestic violence abuser in the relationship (98.5%).
- The vast majority of women who killed their male intimate partner were the predominant domestic violence victim in the relationship (91.3%).
- There were no cases where a woman was identified as the predominant domestic violence abuser in the relationship.

Male predominant abuser behaviours and histories of violence:

- Emotional/psychological violence was evident in almost all cases (96.7%).
- In more than a quarter of cases there was no identifiable history of physical violence prior to the fatal assault (27.3%).
- Almost 60% of male abusers were known to have perpetrated violence against at least one prior partner, as well as the victim (58.1%).
- In 22.9% of cases there was a current enforceable ADVO at the time of the homicide.
- In 46.9% of cases there was no police contact prior to the homicide.

Homicide offender and victim characteristics:

- Aboriginal and Torres Strait Islander peoples continue to be significantly overrepresented in intimate partner homicides:
  - 15.5% of female and 34.8% of male IPV homicide victims.
  - 28.3% of female and 11.2% of male IPV homicide offenders.
- Intimate partner homicide victims were most commonly living in areas with the lowest socio-economic status.
- One third of male homicide offenders engaged in alcohol (39.8%) or drug use (33%).

- More than half of male homicide offenders had a confirmed or suspected background of mental health issues (up to 51.9%).
- Over 40% of male homicide offenders had experienced significant trauma and/or adversity in their childhood (41.7%).

Relationship characteristics

- Separation was a factor in two-thirds of IPV homicides involving a male offender killing a female intimate partner (66.5%).
- From the 252 IPV homicides in the dataset there were at least 267 child survivors

NT

Northern Territory information for the Australian Domestic and Family Violence Death Review Network is provided by the Coroner's Office of the Northern Territory.

QLD

Queensland Coroners Court, *Review of deaths from domestic and family violence* (webpage, updated 1 December 2022) (Queensland Government).

The Domestic and Family Violence Death Review and Advisory Board ("the Board") was established pursuant to the Coroners Act 2003 (Qld) in response to a key recommendation of the he Special Taskforce on Domestic and Family Violence Final Report, Not Now, Not Ever: Ending domestic and family violence in Queensland (Queensland Government).

This page details the role, function and membership of the Board and provides links to the Systemic and Annual Reports of the Board to Parliament, as well as a statistical overview of Queensland domestic and family violence data, research reports and submissions.

Domestic and Family Violence Death Review and Advisory Board (2022) *Collaborative responses to risk, safety, and dangerousness: Annual Report 2021-22*, Queensland Government.

The 2021-22 Queensland report highlights 6 key lethality risk indicators in intimate partner homicides

between 2011 and 2018 (where recorded) as follows:

- In 53.2% the victim had an intuitive sense of fear of the perpetrator;
- In 26.1% the victim had experienced non-lethal strangulation by the perpetrator;
- In 37% there had been an escalation in violence prior to the homicide;
- In 35.95% the perpetrator had made threats to kill;
- In 15.2% there was a history of sexual violence.

In particular, the Board recommends a focus on understanding escalation of domestic violence, particularly where victims present to agencies on multiple occasions. The Board observed that further protective action taken by victims, for example, seeking to vary a protection order can indicate a change in circumstances or that current conditions are ineffective, should be interpreted as reflecting an escalation of violence. Service providers should be aware that some actions by the victim can heighten risk of harm, including taking steps to secure the safety of children through mediation and legal processes.

TAS

Tasmanian data for the Australian Domestic and Family Violence Death Review Network is provided by the National Coronial Information System with the approval of the Tasmanian Coroner's Court.

VIC

Coroners Court of Victoria (2020) ***Victorian Systemic Review of Family Violence Deaths: Review of Family Violence Related Homicides: 1 January 2011 to 31 December 2015*****, State of Victoria.**

Extract: The Victorian Systemic Review of Family Violence Deaths (VSRFVD) at the Coroners Court of Victoria (CCOV) is led by the State Coroner and examines the context in which family violence-related deaths occur. Through coroners' findings, comments and recommendations, the VSRFVD contributes to strengthening the response to family violence in Victoria.

To assist the work of the VSRFVD, and coroners, the CCOV captures data relating to homicides in Victoria using the Victorian Homicide Register (VHR). The VHR records every homicide reported to the CCOV and captures a range of information pertaining to the homicide victim and offender. In cases identified as family violence related homicides, further information regarding the dynamics of the relationship between the homicide victim and offender, any family violence history and risk factors are captured.

The VSRFVD 'First Report' was published in 2012 and used data relating to homicides from 1 January 2000 to 31 December 2010 to explore the factors and circumstances in which family violence homicide deaths occur. This report builds on that initial dataset, presenting data in relation to family violence homicides which occurred between 1 January 2011 and 31 December 2015.

Of the 257 homicide related deaths reported during this time period, where the coronial investigation was closed, 97 deaths were identified as family violence related deaths where coding into the VHR had been completed. Those deaths arose from 82 separate homicide incidents perpetrated by 86 homicide offenders. Data from these deaths was examined for the purposes of this report.

WA

Western Australian data for the Australian Domestic and Family Violence Death Review Network has been provided by the National Coronial Information System with the approval of the Western Australian Coroner's Court.

Ombudsman Western Australia, *Family and Domestic Violence Fatality Review* 2021 (Western Australian Government).

This is the section of the Ombudsman's 2020-21 Annual Report which relates to Family and Domestic Violence Fatality Review. It sets out the work of the Ombudsman in the area, including:

- Background;
- The role of the Ombudsman in relation to family and domestic violence fatality reviews;
- The family and domestic violence fatality review process;
- Analysis of family and domestic violence fatality reviews;
- Patterns, trends and case studies relating to family and domestic violence fatality reviews;
- Issues identified in family and domestic violence fatality reviews;
- Recommendations;
- Timely handling of notifications and reviews;
- Major own motion investigations arising from family and domestic violence fatality reviews;
- Other mechanisms to prevent or reduce family and domestic violence fatalities; and
- Stakeholder liaison.

The 2020-21 Annual Report records the following issues identified from fatality review (it is important to note that issues are not identified in every family and domestic violence fatality review; and when an issue has been identified, it does not necessarily mean that the issue is related to the death):

- Not working directly with remote Aboriginal community to facilitate local solutions to family violence that are co-designed, and led, by Aboriginal people to promote safety.
- Missed opportunities to develop culturally informed safety planning and consult with Aboriginal experts.
- Not undertaking sufficient action to confirm the cultural safety of a family and domestic violence model in use across the diverse population of Aboriginal people in Western Australia.
- Missed opportunities to address family and domestic violence perpetrator accountability.
- Missed opportunities to provide perpetrator rehabilitation support.
- Missed opportunities to address family and domestic violence victim safety.
- Missed opportunity to facilitate safe accommodation.
- Missed opportunity to assess risk of harm and develop strategies to reduce or prevent family and domestic violence in the context of mental health issues and/or drug and alcohol use.
- Not undertaking sufficient family and inter-agency communication to enable effective case management and collaborative responses.
- Not adequately meeting policy and procedures of the Family and Domestic Violence Response Team.
- Not taking action consistent with legislative responsibilities of the Children and Community Services Act 2004, and associated policy, to determine whether children were in need of protection or whether action was required to safeguard child wellbeing.
- Not adequately meeting policies and procedures relating to the Aboriginal and Torres Strait Islander child placement principle, permanency planning and cultural care planning.
- Missed opportunity to develop safety planning to reduce the risk of an escalation of family and domestic violence, when children are taken into the care of the Chief Executive Officer.
- Missed opportunity to ensure governance, monitoring and evaluation of a family and domestic violence five-year initiative were in place to achieve positive outcomes.
- Inaccurate recordkeeping.

Factors affecting risk - Other Resources

Australia

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022) *Domestic and family violence lethality: Updated facts about intimate partner homicide* (Fact sheet).

This fact sheet highlights important findings of the *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018*.

Family Court of Australia, *Family Violence Best Practice Principles, 4th edition* (2016)

The Best Practice Principles are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the *Family Law Act* 1975 (Cmth), and provide useful background information for decision makers, legal practitioners and individuals involved in these cases including an explanation of the definition of 'family violence' and 'abuse' under the Family Law Act and the different types of violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the prominence given to the issue of family violence in the Family Law Act, and
- the principles guiding the case management system for the disposition of cases involving allegations of abuse of children.

Section C deals with the interim hearing stage and introduces the 'PPP' screening tool as a useful mechanism in the assessment of risk. This screening tool analyses risk by reference to three factors: the potency (of violence), pattern (of violence and coercive control) and primary perpetrator indicators (PPP). The screening tool is not a predictive device but does give a useful framework of factors to look for when considering the risk of family violence.

Toivonen, Cherie and Corina Backhouse, *National Risk Assessment Principles for domestic and family violence* (ANROWS, 2018).

This resource identifies *lethality/high-risk factors*, including (pp 12-15):

- History of family and domestic violence;
- Separation (actual or pending);
- Intimate partner sexual violence;
- Non-lethal strangulation (or choking);
- Stalking;
- Threats to kill;
- Perpetrator's access to, or use of weapons;
- Escalation (frequency and/or severity);
- Coercive control; and
- Pregnancy and new birth.

It also identifies *other risk factors*, including (pp 15-16):

- Victim's self-perception of risk;
- Suicide threats and attempts;
- Court orders and parenting proceedings;
- Misuse of drugs or excessive alcohol consumption;
- Isolation and barriers to help-seeking; and
- Abuse of pets and other animals.

This resource outlines the 9 key principles for assessing risk (pp 5-11):

- Survivors' safety is the core priority of all risk assessment frameworks and tools;
- A perpetrator's current and past actions and behaviours bear significant weight in determining risk;
- A survivor's knowledge of their own risk is central to any risk assessment;
- Heightened risk and diverse needs of particular cohorts are taken into account in risk assessment and safety management;

- Risk assessment tools and safety management strategies for Aboriginal and Torres Strait Islander peoples are community-led, culturally safe and acknowledge the significant impact of intergenerational trauma on communities and families;
- To ensure survivors' safety, an integrated, systemic response to risk assessment and management, whereby all relevant agencies work together, is critical;
- Risk assessment and safety management work as part of a continuum of service delivery;
- Intimate partner sexual violence must be specifically considered in all risk assessment processes; and
- All risk assessment tools and frameworks are built from evidence-based risk factors.

State and Territory Risk Assessment Tools

ACT

- **The screening tool used by the Australian Federal Police (ACT Policing) is not publicly available.**
- **ACT Domestic and Family Violence Risk Assessment and Management Framework: Supporting an integrated domestic and family violence service system (July 2022) Community Services Directorate, 34-35: ACT Key Risk Factors.**

NSW

- **Department of Justice (NSW), *Safer Pathways: Domestic Violence and Child Protection Guidelines* (2014).**

New South Wales, Domestic Violence Safety Assessment Tool and Guide (2015)

For use by non-government service providers and government agencies other than NSW Police Force. The DVSAT as primarily been designed for use in intimate partner violence situations.

Tool: https://www.facs.nsw.gov.au/__data/assets/file/0010/592948/DVSAT.pdf

Guide: https://www.facs.nsw.gov.au/__data/assets/file/0009/593064/DVSAT_guide.pdf

NT

Northern Territory Police, *Family Safety Framework*.

This page contains links to the Common Risk Assessment Tool, one of a number of practice guides and tools in The Northern Territory Government Domestic and Family Violence Risk Assessment and Management Framework ("RAMF").

QLD

- **Queensland Police, 'Chapter 9: Domestic Violence' in *Operational Procedures Manual* (Issue 70, 5 June 2019), Appendix 9.1 'Domestic Violence Protective Assessment Framework'.**

Queensland Government, Department of Justice and Attorney-General, *DFV common risk and safety framework* (webpage).

This page has links to the Queensland Government's *Domestic and family violence common risk and safety framework*, and a series of risk assessment and safety planning tools for integrated service responses to domestic and family violence.

SA

Common Risk Assessment: Domestic Violence Risk Assessment (DVRA)

State Government of South Australia: Department of Health and Safety (2021) Family Safety Portal https://familysafetyportal.sa.gov.au/RiskAssessment/.

TAS

- **Safe Homes Families Communities (Tas) (January 2021), Responding to Family and Sexual Violence: A guide for service providers and practitioners in Tasmania, Tasmanian Government.**

VIC

Victorian Government (2020) *MARAM Screening and Identification Practitioner Guide: Role, Responsibilities and Supporting Resources*.

This resource forms part of the Victorian Government's Family violence multi-agency risk assessment and

management framework.

Judicial College of Victoria (2021) *Assessing Risk* (webpage).

The Judicial College of Victoria has collated a collection of resources on coercive control and family violence which includes a number of risk assessment resources, which include:

Magistrate Noreen Toohey (2021) The buck stops here, Court Talk Podcast.

- **Judicial College of Victoria (2021) Family violence risk factors: the intimate terrorism of family violence (Common risk factors checklist).**
- **Judicial College of Victoria (2021) The Victorian Family Violence Multiple-Agency Risk Assessment and Management Framework (MARAM).**

WA

Department for Communities (WA), Family and domestic violence operational responses and practice resources (webpage).

This page contains links to information on domestic violence service system responses and practice resources for workers, including:

- *The Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (Second Edition, 20152021).
- *Multi-agency Case Management* (MACM) (webpage)

International

Gentile Long, J and Wilkinson, J, Stalking: effective strategies for prosecutors, Strategies in Brief, Aequitas, Issue 11, April 2012.

This American resource briefly outlines 3 strategies for successful investigation and prosecution of stalking offences:

1. Recognise the danger stalkers pose to their victims;
2. Work with experts to understand and respond to stalking; and
3. Collaborate and coordinate with other allied criminal justice professionals.

Judicial Council of California's Domestic Violence Practice and Procedure Task Force, *Bench guide for recognizing dangerousness in domestic violence cases*.

This US-based resource is designed for use by judicial officers in proceedings involving domestic violence. The checklist is not exhaustive but lists factors most commonly present when there is a risk of serious harm or death. These factors include the perpetrator owning a gun, the perpetrator using drugs, and the physical violence increasing in severity or frequency over the past year.

National Domestic Violence Fatality Review Initiative website.

This aim of this US based organisation is ' to provide technical assistance for the reviewing of domestic violence related deaths with the underlying objectives of preventing them in the future, preserving the safety of battered women, and holding accountable both the perpetrators of domestic violence and the multiple agencies and organizations that come into contact with the parties.' The website provides access to a range of helpful resources including video lectures from some America's most well-known experts on domestic and family violence. The focus of many of these lectures is on understanding risk.

Stalking Resource Center, National Center for Victims of Crime, AEquitas, Office on Violence Against Women, Prosecutor's Guide to Stalking, October 2015.

This American resource is intended to assist prosecutors in:

- analyzing the elements of their stalking statute(s);
- recognizing stalking in cases where it has been employed by the offender in connection with some other criminal offense;
- appreciating the strategic value of charging stalking in cases where it is related to other criminal

offenses;

- determining what evidence is necessary to prove the elements of the crime and ensuring that such evidence is properly documented and preserved; and
- effectively prosecuting a stalking charge.

***Training Institute of Strangulation Prevention* website (United States).**

Includes information on signs and symptoms and impact of strangulation, and online training resources. A single-page downloadable fact sheet emphasises:

- 10% of women who experience intimate partner violence experience strangulation
- Strangulation is the obstruction of blood vessels and/or airflow in the neck resulting in asphyxia – loss of consciousness can occur with 5-10 seconds, death within 4-5 minutes
- 79% of women are strangled manually (with hands); 38% report losing consciousness; 13% are strangled along with sexual assault/abuse, 9% are also pregnant; 97% involve blunt force trauma
- There is a 7-fold increase in risk of homicide for victims who been previously strangled compared to those never strangled
- Often there is no external evidence of injury – only half of victims have visible injuries, and of these, only 15% could be photographed
- Strangulation can cause: physical, neurological and psychological injuries and delayed fatality

Factors affecting risk - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Ben

Cassy

Celina

Faith

Fiona

Francis

Gillian

Hilary

Ingrid

Jennifer

Julia

Lisa

Melissa

Mira

Rosa

Sally

Sandra

Susan

Trisha

Yvonne

Death review

Overview

The Australian Domestic and Family Violence Death Review Network (the Network) was established in 2011 to formalise and coordinate collaboration between death review mechanisms across Australia to share outcomes of reviews into deaths and homicides related to domestic violence where there is an identified history of abuse between the parties preceding the death [ADFVDRN & ANROWS 2022]. The Network has developed a National Minimum Dataset (NMDS) to identify key trends and patterns in intimate partner homicide with an identified history of domestic and family violence. Intimate partner homicides with no identifiable history of domestic and family violence are not included in the dataset. While most jurisdictions across Australia have formalised death review teams, the Australian Capital Territory is in the process of developing a formal death review process and Tasmania currently has no formal death review process. Several jurisdictions produce annual reports and case studies about domestic and family violence deaths which can be found on their websites [Death Reviews].

Key data findings from the NMDS (reproduced from the Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety's *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018* (2022)) [ADFVDRN & ANROWS 2022] include:

Complete IPV homicide dataset (n=311)

- Between 1 July 2010 and 30 June 2018, there were 311 IPV homicides across Australia.
- More than three quarters of all cases involved a male IPV homicide offender killing a current or former female partner (n=240, 77.2%). The vast majority of those male offenders had been the primary user of domestic violence behaviours against the woman they killed (n=227, 94.6%).
- Less than one quarter of all cases involved a female IPV homicide offender killing a current or former male partner (n=65, 20.9%). Even though the female partner was the homicide offender, in the majority of these cases she was also the primary domestic violence victim, who killed her male abuser (n=46, 70.8%).

- In six cases, a male IPV homicide offender killed a male partner. Of these, three homicide offenders were the primary abuser against the partner they killed; two offenders were the primary victim of abuse; and in one case both parties mutually used domestic violence against each other.
- There were no cases identified in this dataset where a female IPV homicide offender killed a female partner.
- IPV homicide occurs across a broad age range. There was an age range of 18 to 82 years for male offenders and 18 to 75 years for female homicide offenders. Homicide victims' ages ranged from 16 to 78 years for female victims and from 18 to 76 years old for male homicide victims.
- The duration of relationship between homicide offenders and victims in this dataset ranged from less than a year to 45 years. This demonstrates that IPV homicides can occur at any stage during a relationship.
- The majority of IPV homicide offenders (n=183, 60%) engaged in problematic drug and/or alcohol use. Importantly, this finding does not purport to identify problematic substance use as a causative factor for IPV homicide, but rather represents a pattern of behaviour and identifies possible sites of intervention.
- Only approximately one third of all IPV homicide offenders and victims were engaged in paid employment at the time of the homicide (n=225 of 622, 36.2%). This is significant because workplaces can offer an additional site of intervention for domestic and family violence.
- The data demonstrates an overrepresentation of Aboriginal and Torres Strait Islander people as both IPV homicide victims and offenders. While acknowledging these high rates, it is important to recognise that domestic and family violence is not a part of Aboriginal and Torres Strait Islander cultures, and there is a complex range of interrelated factors associated with the disproportionate incidence and severity of family violence in Aboriginal and Torres Strait Islander communities (discussed in the report below).

Male IPV homicide offenders who killed a female intimate partner (n=240)

- Most male IPV homicide offenders killed a current female partner (n=154, 64.2%). Fewer killed a former female partner (n=86, 35.8%).
- The majority of male IPV homicide offenders killed their current or former female partner in her home (n=151, 62.9%). In 97 of these cases (64.2%) this was a home the woman shared with the offender and in 54 cases (35.8%) this was the home the woman lived in but did not share with the offender.

- The most common criminal justice outcome for male IPV homicide offenders who killed a female victim was a murder conviction (n=121, 63.0%). Forty-four male homicide offenders suicided after the homicide (18.3%) and in the majority of these cases, they suicided within 24 hours of the homicide (n=32, 72.7% of male offenders who suicided).

Female IPV offenders who killed a male intimate partner (n=65)

- Most female IPV homicide offenders killed a current male partner (n=50, 76.9%). Fewer killed a former male partner (n=15, 23.1%).
- Over two fifths of female IPV homicide offenders killed their partner in their shared residence (n=28, 43.1%). In nine cases the homicide occurred in the male partner's home and in a further nine cases the homicide occurred in the female homicide offender's home (13.8% respectively).
- The most common criminal justice outcome for female IPV homicide offenders was a manslaughter conviction (n=40, 62.5%). One female IPV homicide offender suicided after the homicide.

IPV homicide and children

- There were four cases in which children were killed together with their mother, resulting in the deaths of eight children.
- Of the 311 IPV homicides examined in this dataset, there were at least 172 children under the age of 18 who survived the homicide involving one, or both, of their parents.

Focused IPV homicide dataset (n=292)

Domestic violence death review teams are uniquely positioned to conduct in-depth analysis and reviews so as to identify discrete characteristics present within a relationship prior to an IPV homicide. Drawing on data from those jurisdictions with a formalised death review mechanism in place, this report presents focused data findings around IPV homicide characteristics relating to separation or intention to separate, family law proceedings, domestic violence orders, and the nature of domestic violence and abusive behaviours used by the abuser prior to the homicide.

This focused subset of cases includes 224 cases where a male IPV homicide offender killed a female victim; 62 cases where a female IPV homicide offender killed a male partner; and six cases where a male IPV homicide offender killed a male partner.

Separation as a characteristic of IPV homicide

Male IPV homicide offenders who killed a female partner (n=224)

- In about a third of the cases where a male IPV homicide offender killed a female victim (n=77, 34.4%) the relationship had ended prior to the homicide. In more than half of these cases, the relationship had ended within three months of the fatal episode of violence (n=44, 57.1% of separated couples).
- Of the 147 cases where the relationship was ongoing, one or both parties had expressed an intention to separate in 53 cases (36.1%). The overwhelming majority of these cases involved the female homicide victim indicating an intention to separate from the male offender who killed her (n=50, 94.3%).
- Accordingly, actual or intended separation was a feature in more than half of the cases where a male IPV homicide offender killed a female partner (n=130, 58.0%).

Female IPV homicide offenders who killed a male partner (n=62)

- In just under a quarter of cases where a female IPV homicide offender killed a male partner the relationship had ended prior to the homicide (n=14, 22.6%). Five of these separations occurred less than three months prior to the homicide (35.7% of separated relationships).
- Of the 48 cases where the relationship was ongoing, one or both parties had indicated an intention to leave the relationship in 14 cases (29.2%). In the majority of these 14 cases, it was the female homicide offender who had indicated an intention to separate from the male partner she then killed (n=8, 57.1%).
- Accordingly, actual or intended separation was a feature in just under half of the cases where a female IPV homicide offender killed a male intimate partner (n=28, 45.2%).

Domestic violence orders

Male IPV homicide offenders who killed a female partner (n=224)

- Current or historical domestic violence orders were evident in 96 cases where a male IPV homicide offender killed a female partner (42.9%). Accordingly, in 128 cases there was no evidence of a current or historical domestic violence order (57.1%).
- In 49 cases, a current domestic violence order was in place between the male IPV offender and female victim at the time of the homicide (21.9%). The vast majority of these orders named the female homicide victim as the person in need of protection from the male homicide offender (n=44, 89.8% of cases with a current order). In two cases (4.1%) there were cross-orders in place at the time of the homicide where both the male IPV homicide offender and the female victim were named as needing protection from the other. In three cases (6.1%) the male IPV homicide offender was named as the person in need of protection from the female partner they killed.
- Historical domestic violence orders between the male homicide offender and female victim were a feature in 67 cases (29.9%). In 53 of these cases, the female homicide victim was named as the protected person from the male offender (79.1%) and in 11 cases both parties were named as needing protection from the other (16.4%).

Female IPV homicide offenders who killed a male partner (n=62)

- Current or historical domestic violence orders were evident in 41 cases where a female homicide offender killed a male partner (66.1% of female-perpetrated IPV homicides).
- In 21 cases, a current domestic violence order was in place between the female homicide offender and the male homicide victim at the time of the homicide (33.9%). Twelve of these orders named the female homicide offender as the person in need of protection from the male homicide victim (57.1% of current orders); eight named the male homicide victim as the person in need of protection from the female homicide offender (38.1%); and one was a cross-order naming both parties as needing protection from each other (4.8%).
- Historical domestic violence orders between the female homicide offender and male homicide victim were a feature in 29 cases (46.8%). In 17 of these cases, the female homicide offender was named as the protected person from the male homicide victim (58.6%) and in 11 cases both parties were named as in need of protection from each other (37.9%).

Domestic violence abusive behaviours

- In the focused dataset (n=292), the vast majority of the 224 male IPV homicide offenders who killed a female victim were identified as the primary domestic violence abuser in the relationship (n=212, 94.6%). Of the 62 cases where a female IPV homicide offender killed a male partner, only a small proportion of women were identified as the primary abuser against the male partner they killed (n=5, 8.1%). In half of the six cases where a male IPV homicide offender killed a male partner, the homicide offender was identified as the primary abuser in the relationship (n=3, 50%).
- Of the 212 cases in which a male primary domestic violence abuser killed a female victim, the majority used emotional and psychological abuse (n=173, 81.6%) and physical abuse (n=169, 79.7%) against the female partner they killed. Over half had been socially abusive (n=134, 63.2%), just over a quarter were financially abusive (n=58, 27.4%) and far fewer were known to be sexually abusive (n=34, 16.0%).
- Stalking occurred in two fifths of the 212 cases in which a male primary domestic violence abuser killed a female victim (n=88, 41.5%). In 71 cases, the domestic violence abuser stalked the victim during the relationship (33.5%) and in 44 cases the abuser stalked the victim after the relationship ended (20.8%).

Death review - Death Reviews

Domestic and Family Violence Death Review Documents

National

Australian Domestic and Family Violence Death Review Network (2018), Australian Domestic and Family Violence Death Review Network Data Report: 2018, New South Wales Domestic Violence Death Review Team, Sydney.

Abstract: The Australian Domestic and Family Violence Death Review Network ('the Network') was established in 2011 and represents a unique collaboration between domestic and family violence death review mechanisms across Australia. Network members have specialist expertise in domestic and family violence related issues and access to extensive information pertaining to domestic and family violence deaths. This is critical to providing a more informed, holistic understanding of the circumstances and context of a domestic and family violence related death.

In recent years, the Network has undertaken extensive work to develop a National Minimum Dataset of domestic and family violence related deaths and this report presents key findings from this specialised dataset.

This report demonstrates the breadth of information and data that is held by the Network, and its unique ability to collect and report on data in relation to domestic and family violence related deaths.

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022), *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018* (2nd ed.; Research report 03/2022). ANROWS.

The data presented in this report provides a national picture of characteristics present in intimate partner violence homicides ("IPV") in Australia between 1 July 2010 and 30 June 2018, examining the 311 reported IPV homicides across Australia.

Key findings include:

- IPV homicide is highly gendered: in the majority of cases, domestic violence is used by the man against his female partner. Less than one quarter of all cases involved a female IPV homicide offender killing a current or former male partner, and more than three quarters of all cases involved a male IPV homicide offender killing a current or former female partner (n=240, 77.2%).
- IPV homicide occurs across a broad age range (18–82) with the majority of offenders and victims born in Australia.
- IPV homicide can occur at any stage during a relationship with homicides occurring during or after short relationships, as well as after many years of protracted violence by abusers.
- There is a heightened vulnerability for women who separate or intend to separate from their partners prior to the homicide, with actual or intended separation being a feature in over half of the male-perpetrated IPV homicides. Actual (n=77, 34.4%) or intended separation (n=53, 36.1%) was a feature in more than half of cases where a male IPV offender killed a female partner (n=130, 58.0%).
- The diverse range of abusive tactics identified in this dataset, including physical, emotional, social, financial and sexual violence and stalking, suggests that any relationship that exhibits domestic violence, whether physical or non-physical, is embedded with a risk of lethality.
- Only approximately one third of all IPV homicide offenders and victims were engaged in paid employment at the time of the homicide (n=225 of 622, 36.2%).
- Aboriginal and Torres Strait Islander people are overrepresented as both IPV victims and offenders, with a complex range of interrelated factors associated with the disproportionate incidence and severity of family violence in Aboriginal and Torres Strait Islander communities.

The report identifies particular domestic violence abusive behaviours observed in the focused dataset:

- In the focused dataset (n=292), the vast majority of the 224 male IPV homicide offenders who killed a female victim were identified as the primary domestic violence abuser in the relationship (n=212, 94.6%). Of the 62 cases where a female IPV homicide offender killed a male partner, only a small proportion of women were identified as the primary abuser against the male partner they killed (n=5, 8.1%). In half of the six cases where a male IPV homicide offender killed a male partner, the homicide offender was identified as the primary abuser in the relationship (n=3, 50%).
- Of the 212 cases in which a male primary domestic violence abuser killed a female victim, the majority used emotional and psychological abuse (n=173, 81.6%) and physical abuse (n=169, 79.7%) against the female partner they killed. Over half had been socially abusive (n=134, 63.2%), just over a quarter were

financially abusive (n=58, 27.4%) and far fewer were known to be sexually abusive (n=34, 16.0%).

- Stalking occurred in two fifths of the 212 cases in which a male primary domestic violence abuser killed a female victim (n=88, 41.5%). In 71 cases, the domestic violence abuser stalked the victim during the relationship (33.5%) and in 44 cases the abuser stalked the victim after the relationship ended (20.8%).

It concludes:

This research demonstrates the highly gendered nature of intimate partner violence and IPV homicides, with the male party being identified as the primary domestic violence abuser in the majority of cases where a male homicide offender killed a female victim and where a female homicide offender killed a male partner. In many cases, there had been a domestic violence order naming one or both parties as in need of protection from the other at the time of, or prior to, the homicide. The vast majority of these named the female party as needing protection from her male partner. This demonstrates that in many cases the domestic violence had been reported and there had been some level of police or court intervention prior to the homicide.

With separation being a prominent feature in over half of the male-perpetrated IPV homicides against women and almost half of the female-perpetrated IPV homicides, this research also demonstrates that the period leading up to and immediately following separation involves a heightened level of risk.

Analysis of the domestic violence behaviours used by the primary domestic violence abuser demonstrates the range of physical and non-physical violence used by abusive men to dominate and control their partner. The high prevalence of emotional and psychological abuse (such as verbally denigrating, threatening, blaming or gaslighting the victim) and social abuse (such as isolating the victim from support networks and controlling her movements) demonstrates the need for services and first responders to recognise, beyond the use of physical violence, the pattern of abusive and controlling behaviours that presents in a domestic violence relationship. Further, the diverse range of abusive tactics present in this dataset, including physical, emotional, social, financial and sexual violence, and stalking, suggests that any relationship that exhibits domestic violence, whether physical or non-physical, is embedded with a risk of lethality.

Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022) *Domestic and family violence lethality: Updated facts about intimate partner homicide* (Fact sheet).

This fact sheet highlights important findings of the *Australian Domestic and Family Violence Death Review*

Network Data Report: Intimate partner violence homicides 2010–2018.

Senate Legal and Constitutional Affairs Committee, (commenced 2022) Missing and murdered First Nations women and children. Parliament of Australia (Webpage).

This inquiry is tasked to examine issues associated with missing and murdered First N ations women and children, with particular reference to:

- the number of First Nations women and children who are missing and murdered;
- the current and historical practices, including resources, to investigating the deaths and missing person reports of First Nations women and children in each jurisdiction compared to non-First Nations women and children;
- the institutional legislation, policies and practices implemented in response to all forms of violence experienced by First Nations women and children;
- the systemic causes of all forms of violence, including sexual violence, against First Nations women and children, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of First Nations women and children;
- the policies, practices and support services that have been effective in reducing violence and increasing safety of First Nations women and children, including self-determined strategies and initiatives;
- the identification of concrete and effective actions that can be taken to remove systemic causes of violence and to increase the safety of First Nations women and children;
- the ways in which missing and murdered First Nations women and children and their families can be honoured and commemorated; and
- any other related matters.

The website includes submissions, details of hearings and other documents including statistics requested by the Committee.

ACT

ACT data for the Australian Domestic and Family Violence Death Review Network is provided by the National Coronial Information System with the approval of the ACT Coroner's Court.

Australian Government (2021). *National Plan to Reduce Violence against Women and their Children: Family Violence Death Review: Responsible government: Australian Capital Territory* (website).

The ACT Family Violence Death Review was established through legislation in 2021.

“The intended outcome of an ACT Family Violence Death Review is to make system-wide improvements across policy, systems and services, data collection and legislation to prevent future deaths related to domestic and family violence. Risk factors identified as part of the Death Review will also inform concurrent work of the ACT Government to deliver a domestic and family violence risk assessment and management framework (see Domestic and Family Violence Risk Assessment and Management Framework).”

NSW

Coroner’s Court New South Wales, *Domestic violence death review* (Government of New South Wales).

The Domestic Violence Death Review Team (DVDRT) was established in 2010 pursuant to the Coroners Act 2009 NSW to review deaths occurring in the context of domestic violence in New South Wales. This page details the role, function and membership of the DVDRT and provides links to the annual reports of the DVDRT to Parliament. It also provides a link to reports of the national Domestic and Family Violence Death Review Network.

NSW Domestic Violence Death Review Team (2021). *Report: 2019-2021*. New South Wales Government, Sydney.

Key findings:

All Intimate Partner Homicides

- The vast majority (86.3%) of intimate partner homicides in NSW occur following an identifiable history of domestic violence.

Intimate Partner *Violence* Homicides

Gender

- Nearly 80% of all intimate partner violence (IPV) homicide victims were women.
- The vast majority of men who killed their female intimate partner were the predominant domestic violence abuser in the relationship (98.5%).
- The vast majority of women who killed their male intimate partner were the predominant domestic violence victim in the relationship (91.3%).
- There were no cases where a woman was identified as the predominant domestic violence abuser in the relationship.

Male predominant abuser behaviours and histories of violence:

- Emotional/psychological violence was evident in almost all cases (96.7%).
- In more than a quarter of cases there was no identifiable history of physical violence prior to the fatal assault (27.3%).
- Almost 60% of male abusers were known to have perpetrated violence against at least one prior partner, as well as the victim (58.1%).
- In 22.9% of cases there was a current enforceable ADVO at the time of the homicide.
- In 46.9% of cases there was no police contact prior to the homicide.

Homicide offender and victim characteristics:

- Aboriginal and Torres Strait Islander peoples continue to be significantly overrepresented in intimate partner homicides:
  - 15.5% of female and 34.8% of male IPV homicide victims.
  - 28.3% of female and 11.2% of male IPV homicide offenders.
- Intimate partner homicide victims were most commonly living in areas with the lowest socio-economic status.
- One third of male homicide offenders engaged in alcohol (39.8%) or drug use (33%).
- More than half of male homicide offenders had a confirmed or suspected background of mental health issues (up to 51.9%).
- Over 40% of male homicide offenders had experienced significant trauma and/or adversity in their childhood (41.7%).

Relationship characteristics

- Separation was a factor in two-thirds of IPV homicides involving a male offender killing a female intimate partner (66.5%).
- From the 252 IPV homicides in the dataset there were at least 267 child survivors

NT

Northern Territory information for the Australian Domestic and Family Violence Death Review Network is provided by the Coroner's Office of the Northern Territory.

QLD

Queensland Coroners Court, *Review of deaths from domestic and family violence* (Queensland Government).

The Domestic and Family Violence Death Review and Advisory Board ("the Board") was established pursuant to the Coroners Act 2003 (Qld) in response to a key recommendation of the he Special Taskforce on Domestic and Family Violence Final Report, Not Now, Not Ever: Ending domestic and family violence in Queensland (Queensland Government).

This page details the role, function and membership of the Board and provides links to the Systemic and Annual Reports of the Board to Parliament, as well as a statistical overview of Queensland domestic and family violence data, research reports and submissions.

Domestic and Family Violence Death Review and Advisory Board (2022) *Collaborative responses to risk, safety, and dangerousness: Annual Report 2021-22*, Queensland Government.

The 2021-22 Queensland report highlights 6 key lethality risk indicators in intimate partner homicides between 2011 and 2018 (where recorded) as follows:

- In 53.2% the victim had an intuitive sense of fear of the perpetrator;
- In 26.1% the victim had experienced non-lethal strangulation by the perpetrator;
- In 37% there had been an escalation in violence prior to the homicide;
- In 35.95% the perpetrator had made threats to kill;
- In 15.2% there was a history of sexual violence.

In particular, the Board recommends a focus on understanding escalation of domestic violence, particularly where victims present to agencies on multiple occasions. The Board observed that further protective action taken by victims, for example, seeking to vary a protection order can indicate a change in circumstances or that current conditions are ineffective, should be interpreted as reflecting an escalation of violence. Service providers should be aware that some actions by the victim can heighten risk of harm, including taking steps to secure the safety of children through mediation and legal processes.

TAS

Tasmanian data for the Australian Domestic and Family Violence Death Review Network is provided by the National Coronial Information System with the approval of the Tasmanian Coroner's Court.

VIC

Coroners Court of Victoria (2020) *Victorian Systemic Review of Family Violence Deaths: Review of Family Violence Related Homicides: 1 January 2011 to 31 December 2015*, State of Victoria.

Extract: The Victorian Systemic Review of Family Violence Deaths (VSRFVD) at the Coroners Court of Victoria (CCOV) is led by the State Coroner and examines the context in which family violence-related deaths occur. Through coroners' findings, comments and recommendations, the VSRFVD contributes to strengthening the response to family violence in Victoria.

To assist the work of the VSRFVD, and coroners, the CCOV captures data relating to homicides in Victoria using the Victorian Homicide Register (VHR). The VHR records every homicide reported to the CCOV and captures a range of information pertaining to the homicide victim and offender. In cases identified as family violence related homicides, further information regarding the dynamics of the relationship between the homicide victim and offender, any family violence history and risk factors are captured.

The VSRFVD 'First Report' was published in 2012 and used data relating to homicides from 1 January 2000 to 31 December 2010 to explore the factors and circumstances in which family violence homicide deaths occur. This report builds on that initial dataset, presenting data in relation to family violence homicides which occurred between 1 January 2011 and 31 December 2015.

Of the 257 homicide related deaths reported during this time period, where the coronial investigation was closed, 97 deaths were identified as family violence related deaths where coding into the VHR had been

completed. Those deaths arose from 82 separate homicide incidents perpetrated by 86 homicide offenders. Data from these deaths was examined for the purposes of this report.

WA

Western Australian data for the Australian Domestic and Family Violence Death Review Network has been provided by the National Coronial Information System with the approval of the Western Australian Coroner's Court.

Ombudsman Western Australia, *Family and Domestic Violence Fatality Review* (Western Australian Government).

This is the section of the Ombudsman's 2019-20-21 Annual Report which relates to Family and Domestic Violence Fatality Review. It sets out the work of the Ombudsman in the area, including:

- Background;
- The role of the Ombudsman in relation to family and domestic violence fatality reviews;
- The family and domestic violence fatality review process;
- Analysis of family and domestic violence fatality reviews;
- Patterns, trends and case studies relating to family and domestic violence fatality reviews;
- Issues identified in family and domestic violence fatality reviews;
- Recommendations;
- Timely handling of notifications and reviews;
- Major own motion investigations arising from family and domestic violence fatality reviews;
- Other mechanisms to prevent or reduce family and domestic violence fatalities; and
- Stakeholder liaison.

The 2020-21 Annual Report records the following issues identified from fatality review (it is important to note that issues are not identified in every family and domestic violence fatality review; and when an issue has been identified, it does not necessarily mean that the issue is related to the death):

- Not working directly with remote Aboriginal community to facilitate local solutions to family violence that are co-designed, and led, by Aboriginal people to promote safety.
- Missed opportunities to develop culturally informed safety planning and consult with Aboriginal experts.

- Not undertaking sufficient action to confirm the cultural safety of a family and domestic violence model in use across the diverse population of Aboriginal people in Western Australia.
- Missed opportunities to address family and domestic violence perpetrator accountability.
- Missed opportunities to provide perpetrator rehabilitation support.
- Missed opportunities to address family and domestic violence victim safety.
- Missed opportunity to facilitate safe accommodation.
- Missed opportunity to assess risk of harm and develop strategies to reduce or prevent family and domestic violence in the context of mental health issues and/or drug and alcohol use.
- Not undertaking sufficient family and inter-agency communication to enable effective case management and collaborative responses.
- Not adequately meeting policy and procedures of the Family and Domestic Violence Response Team.
- Not taking action consistent with legislative responsibilities of the Children and Community Services Act 2004, and associated policy, to determine whether children were in need of protection or whether action was required to safeguard child wellbeing.
- Not adequately meeting policies and procedures relating to the Aboriginal and Torres Strait Islander child placement principle, permanency planning and cultural care planning.
- Missed opportunity to develop safety planning to reduce the risk of an escalation of family and domestic violence, when children are taken into the care of the Chief Executive Officer.
- Missed opportunity to ensure governance, monitoring and evaluation of a family and domestic violence five-year initiative were in place to achieve positive outcomes.
- Inaccurate recordkeeping.

Typological approaches

To better understand the nature and causes of domestic and family violence, US researchers in the 1990s, concerned about the risks of accepting narrow, unitary conceptions, sought to differentiate types of violence, and groups of perpetrators and victims [Boxall et al 2015]. Early typological groupings were characterised as "situational couple violence", "intimate terrorism", "violent resistance", and "mutual violent control" [Johnson & Ferraro 2000]. In the decades since, various authors have developed and expanded on these typologies, which essentially focus on physical violence and vary according to perceptions of the presence or absence of coercive control. Michael Johnson and his colleagues have been working on understanding patterns of domestic and family violence for many years and this work has been very influential in Australia [Kelly & Johnson 2008].

Some Australian judicial officers and legal practitioners in the family law jurisdiction have shown considerable interest in the typological approach, for example in some instances typologies are referenced in best practice materials, and are relied on in decision-making. This is despite a much broader legislative approach taken in Australian jurisdictions to recognising a range of behaviours, in addition to physical violence, as constituting domestic and family violence [Wangmann 2011].

Consequently, researchers were prompted to investigate the utility of typologies in the Australian context, particularly among professionals responsible for the management of domestic and family violence matters, such as police, lawyers, service providers and treatment practitioners [Boxall et al 2015]. Respondents expressed a number of concerns about adhering to typologies in identifying abusive behaviours, including:

- Criteria are inflexible and don't satisfactorily account for anomalies or outliers;
- Criteria may be too abstract and subjective, and therefore open to challenge;
- The unique, complex and non-standard nature of specific cases, and the corresponding need for individualised responses, may be overlooked;
- It may encourage a less rigorous approach to the assessment of behaviours and associated risks;
- Static classifications are unlikely to be appropriate for behaviours and relationship dynamics that change over time;

- They felt they didn’t have the necessary skills to apply the typologies in different contexts accurately and consistently.

Instead, these professionals expressed a strong preference for basing their judgments and assessments on: experience; knowledge; best practice; information elicited using risk assessment tools and from interagency databases; observations of perpetrators’ behavioural patterns and violence histories; and direct interviews with perpetrators and victims. They did however indicate that typologies may have a complementary application in their practices, for example in: supporting existing knowledge; assisting risk assessment; better screening of families for referral to alternative dispute resolution processes and services where likely benefits are identified and safety is ensured; determining perpetrator treatment options and violence prevention strategies that address the underlying cause of violent behaviours; and continuing professional education and training [Boxall et al 2015].

Typological approaches - Key Literature

Australia

Boxall, Haley, et al, 'Domestic Violence Typologies: What Value to Practice?' 494 *Trends and Issues in Crime and Criminal Justice* 1.

Over the last few decades, understandings of the nature and causes of domestic violence have increased in sophistication. This has been influenced by, and led to, an influx of domestic violence typologies that have attempted to identify differences between groups of offenders and victims based on factors ranging from physiological reactions to specific stimuli through to historical experiences of violence and abuse. While this research has been of undeniable conceptual and theoretical value, its applicability to the day-to-day work of domestic violence practitioners is less clear. This study represents one of the first attempts to speak directly to professionals about how domestic violence typologies inform their everyday decision-making and case practice.

Wangmann, Jane, 'Different Types Of Intimate Partner Violence: An Exploration Of The Literature' (Issue Paper 22, Australian Domestic and Family Violence Clearing House, 2011).

Key points:

- The last 15 years has seen a growing body of research emphasising that not all intimate partner violence (IPV) is the same. There are key differences in terms of the presence of control, gender perpetration, severity and impact.
- Work on differentiation is diverse. It includes research exploring different types of IPV, as well as different types of male and female perpetrators of IPV.There is great interest in the potential of differentiation to assist in more appropriately targeted interventions for victims, perpetrators and any children of the relationship. In particular, in the area of family law in Australia, along with Canada and the United States, there has been some interest expressed in the potential for differentiation to provide for more nuanced responses that take account of the type of violence or perpetrator when making determinations about ongoing parenting arrangements.
- A range of important concerns and criticisms have been raised about the methodology of the various typologies, as well as concerns about their translation into practice. They suggest that there is still much

more work to be done on the articulation of typologies before a useful tool can be developed to assist delineation in practice.

International

Johnson, Michael P, and Kathleen J Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 (4) *Journal of Marriage and the Family* 948.

This US review of the family literature on domestic violence suggests to the authors two broad themes of the 1990s. The first, in their view, is the importance of distinctions among types or contexts of violence. Some distinctions are central to the theoretical and practical understanding of the nature of partner violence; others provide important contexts for developing more sensitive and comprehensive theories; and others may question the tendency to generalise from context to another. Second, the authors suggest that issues of control—although most visible in feminist literature that focuses on men using violence to control "their" women—also arise in other contexts, calling for more general analyses of the interplay of violence, power, and control in relationships. This article theorises four major patterns of partner violence:

- Common couple violence – not connected to a general pattern of control, not as likely to escalate over time or to involve severe violence, more likely to be mutual.
- Intimate terrorism- one tactic in a pattern of control, likely to escalate over time more likely to involve severe violence and less likely to be mutual.
- Violent resistance-perpetrated almost entirely by women, similar to understandings of self-defence.
- Mutual violent control- both husband and wife are controlling and violent – could be viewed as two intimate terrorists battling for control. Relatively rare.

In addition, the review covers literature on coping with violence, the effects on victims and their children, and the social effects of partner violence.

Kelly, Joan, and Michael Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 (3) *Family Court Review* 476.

In this article Kelly and Johnson further develop and discuss four patterns of domestic violence which they call: Coercive Controlling Violence, Violent Resistance, Situational Couple Violence, and Separation-

Instigated Violence.

- Coercive controlling violence- identified by the pattern of coercive and controlling behaviours embedded within it.
- Violent resistance- self-protective violence.
- Situational couple violence- most common type of physical aggression. One or both partners appear to have poor ability to manage their conflicts and/or poor control of anger. Violence tends to be less serious and fear does not tend to be present.
- Separation-instigated violence- Separation-Instigated Violence is more likely to be perpetrated by the partner who is being left and is shocked by this. Can be severe.

Pence, Ellen and Shamita Das Dasgupta, *Re-Examining 'Battering': Are All Acts of Violence Against Intimate Partners the Same?* (Praxis International, 2006).

This US study conducted interviews over a 15-year period with men and women who were arrested for domestic violence and involved in court proceedings. The authors identified 5 categories of domestic violence, which are not mutually exclusive:

- Battering: the use of intimidation, coercion and violence in order to control another person or group (pp 5-9). The vast majority (95%) of men in the study were assessed to be batterers (p 15).
- Resistive/reactive violence: the use of violence to retaliate and resist domination, often in resistance to ongoing battering (pp 9-11).
- Situational violence: the use of violence to express anger, disapproval or to reach an objective. Battering is often misdiagnosed as situational violence because police and practitioners often intervene in a specific incident of abuse and do not investigate whether there is a pattern. Victims themselves may not recognise a pattern (pp 11-12).
- Pathological violence: the use of violence by individuals that suffer from mental illness or physical disorders, or abuse alcohol and drugs. It is often difficult to determine when the pathology causes the violence (pp 12-13). Four percent of men in the study committed domestic violence exclusively due to pathological reasons (p 15).
- Anti-social violence: the use of verbal or physical abuse in social settings. This violence may stem from

antecedents such as childhood abuse and a lack of maturity (pp 13-14).

Typological approaches - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.2 discusses how some researchers have categorised different types of intimate partner violence using typologies (including the Kelly and Johnson typology) based on the role of violence in the context of the relationship, and notes that caution has been expressed by some commentators about this approach.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

See [13.7.1] 'Theories of family and domestic violence', which discusses the development of models to understand family and domestic violence. It notes the development from models understanding domestic violence as a function of mental illness or mental triggers (such as anger/stress/loss of control), to the theory of victims suffering from learned helplessness, to a family conflict model, to an understanding of the theory of Stockholm Syndrome. It notes that 'While there is no such thing as a "typical" perpetrator of domestic violence, studies reveal certain common behaviours among these men', going on to discuss the 'Power and Control Wheel' as the best tool to capture the dynamics of domestic and family violence.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

See Supplementary Reference 1: Developing research: distinguishing types of violence: '[t]his section discusses a developing body of domestic violence research that is identifying differences in forms of heterosexual male and female violence in intimate relationships'. It explores Michael Johnson's distinctions around violence, but also cautions about '[d]ifferential assessment of violence' due to the controversies around the research that has been conducted on distinctions between different types of violence. It states that '[i]t is not possible to identify scientifically, with confidence or with clarity, the boundaries between repetitive or severe 'situational violence' and coercive 'domestic violence''.

Typological approaches - Other Resources

Johnson, Michael P, 'Types of Domestic Violence: Research Evidence' (Video Lecture published online, 13 November 2012).

Johnson, Michael P,(Ph.D., University of Michigan) is Emeritus Professor of Sociology, Women's Studies, and African and African American Studies at Penn State. In this lecture he discusses his theories about typologies of violence.

Vulnerable groups

Domestic and family violence can affect any person irrespective of age, gender, socio-economic status or cultural background. It is widely acknowledged however that women are significantly more likely than men to experience domestic and family violence. However, men also experience domestic and family violence and when they do they may experience stigma and, similar to others, may face obstacles in accessing help and difficulty in having their story believed [Drijber et al 2013].

A key role of judicial responses to domestic and family violence is to assess and respond to risk and promote the safety of those at the risk of harm.

Certain groups within the community may be at greater risk of experiencing domestic and family violence, may be more vulnerable to its impacts, and may require different judicial responses to ensure that all individuals are afforded fair and equal access to justice. Some people may belong to multiple groups and, as a consequence, may experience heightened risk or vulnerability. These groups may include but are not limited to:

- Women
- People with children
- Children
- Young people
- Older people
- Pregnant people
- People with disability and impairment
- People with mental illness
- People from culturally and linguistically diverse backgrounds
- Aboriginal and Torres Strait Islander people
- People living in regional, rural and remote communities
- People affected by substance misuse
- People who are lesbian, gay, bisexual, transgender, intersex and queer +

People with poor literacy skills

Victims as (alleged) perpetrators

Vulnerable groups - Key Literature

Australia

Australian Bureau of Statistics, *4510.0 - Recorded Crime - Victims, Australia, 2021*.

Victims of Domestic and Family Violence-Related Offences

This chapter presents experimental data about victims of selected Family and Domestic Violence (FDV) – related offences. Victims of selected offences have been determined to be FDV–related where the relationship of offender to victim, as stored on police recording systems, falls within a specified family or domestic relationship or where an FDV flag has been recorded, following a police investigation.

Key findings include:

- FDV-related homicide victims accounted for over a third of total homicide victims, and females accounted for over half of all FDV-related homicide victims.
- FDV-related assault is mostly likely to occur in the age range 25-34 years; and, across all states and territories, females are more likely than males to be victims – at least three times as likely, and up to six times more likely.
- FDV-related sexual assault accounted for over a third of total sexual assaults and there are six times as many female victims as male victims.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019*.

This is primarily a data report to help inform government policies and plans and to assist in the planning and delivery of violence prevention and intervention programs. It builds on AIHW's inaugural *Family, domestic and sexual violence in Australia 2018 report*. It presents new information on vulnerable groups, such as children and young women. It examines elder abuse in the context of family, domestic and sexual violence, and includes new data on telephone and web-based support services, community attitudes, sexual harassment and stalking. It also includes the latest data on homicides, child protection, hospitals and specialist homelessness services, while noting notable data gaps on various aspects of family, domestic and sexual

violence and work underway to fill the gaps and develop new data sources.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Bagshaw, Dale, and Donna Chung, *Women, Men and Domestic Violence* (Department of Prime Minister and Cabinet (Cth) and University of South Australia, 2000).

Discusses research over the past two decades in Australia and notes it has shown that violence generally, and particularly domestic violence, is mainly carried out by men.(p1) While there is evidence that both men and women are abusive in domestic relationships, most data show that men are more likely than women to be violent towards their partners. It reviews the findings of research and notes that these differ greatly according to the way the research is done, but they clearly show that the nature and results of men's violence are different to that of women's violence in a number of significant ways. In particular: men's violence is more severe, and more likely to inflict severe injury; women are more likely to be killed by current or former male partners than by anyone else; and less than 10% of Australian male homicides are carried out by an intimate partner. When women do kill their male partners, there is a history of domestic violence in more than 70% of cases.' (p1)

Specifically in relation to female perpetrators of domestic violence, the authors note on p13 that 'Although there is some evidence that both men and women engage in abusive behaviour in heterosexual relationships, the nature and consequence of women's violence is not equivalent to men's violence [in a number of ways]', including severity, likelihood of being killed, and reasons for the violence.

Morgan, Anthony, Hayley Boxall and Rick Brown, *Targeting repeat domestic violence: Assessing short term risk of reoffending* (Australian Institute of Criminology Report No. 552 June 2018).

Report abstract:

Drawing on repeat victimisation studies, and analysing police data on domestic violence incidents, the current study examined the prevalence and correlates of short-term reoffending.

The results showed that a significant proportion of offenders reoffended in the weeks and months following a domestic violence incident. Individuals who reoffended more quickly were more likely to be involved in multiple incidents in a short period of time. Offenders with a history of domestic violence—particularly more frequent offending—and of breaching violence orders were more likely to reoffend. Most importantly, the risk of reoffending was cumulative, increasing with each subsequent incident.

The findings have important implications for police and other frontline agencies responding to domestic

violence, demonstrating the importance of targeted, timely and graduated responses.

Salter, M., et al., *A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence* (ANROWS, 2020)

Complex trauma can be explained as "multiple, repeated forms of interpersonal victimisation and the resulting traumatic health problems and psychosocial challenges". This report aimed to (1) analyse how complex trauma experienced by women is constructed in public policy and practice at national, state and territory levels; (2) examine institutional responses to women's complex trauma in the mental health, alcohol and drugs, and sexual assault/domestic violence sectors in NSW and Queensland; (3) document how complex trauma is understood by women who have experienced it, as well as their encounters with agencies while seeking help; and (4) develop models of improved and collaborative responses to improve the wellbeing and safety of victims and their children.

Key results include:

- 'References to complex trauma in public policy are typically brief and undefined', and '[t]he lack of shared terminology and understanding of complex trauma raises questions about the adequacy of current policy frameworks to address the multiple needs of people with experiences of complex trauma and the effects that varying understandings of the long-term impact of complex trauma may have on program and service delivery'.
- Women who have experienced complex trauma often have multiple needs, but many services are funded only to deal with a particular issue or concern. Consequently, women are required to navigate multiple services and agencies so that their needs can be met.
- 'Self-harm and suicidality are particularly stigmatised in service settings', and '[w]omen with experiences of complex trauma frequently encountered sexist and disparaging views about women's mental health, encapsulated in the common stereotype of the "crazy woman"'.
- 'There is currently a lack of trauma-specialised services and professionals, and women's experiences of health care are typically segmented and uncoordinated.'
- 'Successful criminal justice outcomes for women with experiences of complex trauma are rare'. None of the women interviewed for the study stated that 'the full extent of [their] victimisation had been prosecuted in the criminal justice system'.

- ‘There is widespread concern that the impact of trauma on parenting is not being addressed in the child protection system, resulting in late and punitive interventions.’
- ‘In family law matters, women are frequently not believed or supported when reporting abuse by an ex-partner and are often worse off financially and psychologically for their contact with the legal process.’
- Best practices in service provision for people with experiences of complex trauma are set out on p. 9, and recommendations are specified on pp. 10-11.

International

Drijber, Babette, Udo Reijnders and Manon Ceelen, ‘Male Victims of Domestic Violence’ (2013) 28(2) *Journal of Family Violence* 173–178.

This study conducted in the Netherlands involved 372 male victims of domestic violence. The participants completed an online questionnaire. The participants reported both physical and psychological abuse. Key findings included: Less than 32% of the victims spoke to the police about the violence and only 15% of the victims officially reported it; the reason reported for failing to talk to the police or report the domestic violence were fear of not being taken seriously (49%), shame (31%), or the belief the police cannot do anything (35%); and motives not to report the domestic violence were the belief the police would not take any action (41%), fear or aggravated violence (17%), or fear of revenge (19%) (p175).

Vulnerable groups - Other Resources

ANROWS, *Fast Facts: Impacts of Family, Domestic and Sexual Violence*.

This resource provides a one page summary of Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

Women

‘The biggest risk factor for becoming a victim of sexual assault or domestic and family violence is being a woman.’ [National Council to Reduce Violence against Women and their Children, 2009]

Prompted by growing academic, government and community attention to the range of complex issues associated with domestic and family violence, Australian researchers have considered the gendered nature of this form of violence. Claims that domestic and family violence is gender-equal or gender-neutral [Flood 2006] are consistently refuted by empirical research demonstrating that, while sometimes women are violent in their intimate relationships, overwhelmingly it is men who are more likely than women to be violent towards their partners [Bagshaw & Chung 2000].

The nature and consequences of men’s violence are significantly different from women’s violence, in particular: men’s violence is more severe, and is more likely to inflict serious injury, to involve the exercise of coercive control, and to cause fear [Bagshaw & Chung 2000]; women are more likely than men to experience actual or threatened physical or sexual violence or emotional abuse by a partner [ABS PSS 2016]; women experience much higher levels of violence and emotional abuse by former partners than by current partners [ABS PSS 2016]; and women are more likely to be killed by current or former male partners than by anyone else. The data also indicate that although more rare, when women do kill their male partners, there is a history of domestic violence by the male partner in more than 70% of cases [Bagshaw & Chung 2000]. Further research explains that the gendered framing of domestic and family violence recognises that this form of violence occurs within the wider context of social and economic disadvantage and inequality experienced by women in relation to men, which may mean that for some women multiple factors may intersect so as to heighten their vulnerability [Murray & Powell 2009].

Recent research and statistical analyses verify earlier studies. Seventeen per cent of Australian women and 5.5 per cent of Australian men experience physical violence by their cohabiting partner [ABS PSS 2016]. In 76% of cases where a woman is the victim of homicide, the current or intimate male partner is the perpetrator/offender [Bricknell 2023]. Women are also more likely than men to experience {{CS::3.1.4::emotional abuse}} [ABS PSS 2016] by their partner and are more likely to experience anxiety and fear as a result [ABS PSS 2016]. Where women are the perpetrators of violence against their partners, they are also likely to be the

victims of violence or sexual abuse by their partners and to be acting in self-defence, or to be suffering mental or physical ill health as a consequence [Hester 2013].

In Australia, legislation, judicial bench books [Other Bench Books], and government policies [DSS 2022] have drawn on available research and recognise that while men can be victims of domestic and family violence and sexual assault [ABS PSS 2016] the overwhelming majority of these behaviours are perpetrated by men against women, and that the most significant risk factor in this context is being a woman [Diemer 2015]. These resources also recognise that Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, young women and women with physical or mental disabilities are overrepresented as victims.

Women - Key Literature

Australia

Australian Bureau of Statistics, *4510.0 - Recorded Crime - Victims, Australia, 2021*.

Victims of Domestic and Family Violence-Related Offences

This chapter presents experimental data about victims of selected Family and Domestic Violence (FDV) – related offences. Victims of selected offences have been determined to be FDV–related where the relationship of offender to victim, as stored on police recording systems, falls within a specified family or domestic relationship or where an FDV flag has been recorded, following a police investigation.

Key findings include:

- FDV-related homicide victims accounted for over a third of total homicide victims, and females accounted for over half of all FDV-related homicide victims.
- FDV-related assault is mostly likely to occur in the age range 25-34 years; and, across all states and territories, females are more likely than males to be victims – at least three times as likely, and up to six times more likely.
- FDV-related sexual assault accounted for over a third of total sexual assaults and there are six times as many female victims as male victims.

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

- One in five women (18% or 1.7 million) and one in twenty men (4.7% or 428,800) experienced sexual violence (see Table 3);

- Women were nearly three times more likely to have experienced partner violence than men, with approximately one in six women (17% or 1.6 million) and one in sixteen men (6.1% or 547,600) having experienced partner violence since the age of 15 (see Table 3);
- One in six women (16% or 1.5 million) and one in seventeen men (5.9% or 528,800) experienced physical violence by a partner (see Table 3);
- Women were eight times more likely to experience sexual violence by a partner than men (5.1% or 480,200 women compared to 0.6% or 53,000 men) (see Table 3);
- One in four women (23% or 2.2 million) and one in six men (16% or 1.4 million) reported experiencing emotional abuse by a current and/or previous partner since the age of 15 (see Table 27);
- Women were more likely to experience fear or anxiety resulting from their experiences of partner violence than men (see Table 20).

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children’s experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;

- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Australia's National Research Organisation for Women's Safety. *Violence against women: Accurate use of key statistics* (ANROWS, 2018).

This 'Key Facts' sheet prevents an overview of statistics sourced primarily from research from the 2016 ABS Personal Safety Survey and Australian Institute of Criminology. It identifies for example that in Australia:

- women are significantly more likely than men to experience domestic and family violence;
- Approximately one quarter of women have experienced at least one incident of violence by an intimate partner;
- On average, one woman a week is killed by her intimate partner;
- Women are most likely to experience physical assault in their home;
- Just over 9 out of 10 women reported that their last incident of physical assault by a male was perpetrated by a man they know (most commonly a former partner);
- Just under 9 out of 10 women reported that their last incident of sexual assault was perpetrated by a man they know (most commonly a former partner); and
- Of women who have experienced violence by a current partner since the age of 15, 82% had never contacted the police.

Bagshaw, Dale, and Donna Chung, *Women, Men and Domestic Violence* (Department of Prime Minister and Cabinet (Cth) and University of South Australia, 2000).

Discusses research over the past two decades in Australia and notes it has shown that violence generally, and particularly domestic violence, is mainly carried out by men.(p1) While there is evidence that both men and women are abusive in domestic relationships, most data show that men are more likely than women to be violent towards their partners. It reviews the findings of research and notes that these differ greatly according to the way the research is done, but they clearly show that the nature and results of men's violence are different to that of women's violence in a number of significant ways. In particular: men's violence is more severe, and more likely to inflict severe injury; women are more likely to be killed by current or former male partners than by anyone else; and less than 10% of Australian male homicides are carried out by an intimate partner. When women do kill their male partners, there is a history of domestic violence in more than 70% of cases.' (p1)

Specifically in relation to female perpetrators of domestic violence, the authors note on p13 that 'Although there is some evidence that both men and women engage in abusive behaviour in heterosexual relationships, the nature and consequence of women's violence is not equivalent to men's violence [in a number of ways]', including severity, likelihood of being killed, and reasons for the violence.

Belknap, Joanne, and Heather Melton, 'Are Heterosexual Men Also Victims of Intimate Partner Abuse?' (Research Paper, Applied Research Forum: National Electronic Network on Violence Against Women, March 2005).

This paper presents and discusses the varied findings on women's roles as perpetrators of intimate partner abuse (IPA). The reasons for these varied findings are examined and the implications of the research finding of gender symmetry in the perpetration of IPA are discussed. This paper documents the importance of the approach taken by the researcher regarding whether IPA is found to be gendered. This overview of scientific research concludes that IPA is indeed gendered, that the perpetrators are more commonly men and the victims are more commonly women. This review also emphasises the importance of not simply examining types of abuse reported, but the consequences of the abuse.

Boxall H & Morgan A 2021. Experiences of coercive control among Australian women. Statistical Bulletin no. 30. Canberra: Australian Institute of Criminology.

Abstract: Awareness of coercive control within the context of abusive intimate relationships is greater than

ever before in Australia. However, there is limited research examining the different patterns and characteristics of abuse, particularly among large Australian samples.

This study examines the characteristics of violence and abuse reported by 1,023 Australian women who had recently experienced coercive control by their current or former partner. The most frequently reported behaviours were jealousy and suspicion of friends, constant insults, monitoring of movements and financial abuse. Over half of the respondents also reported experiencing physical forms of abuse (54%), including severe forms such as non-fatal strangulation (27%). One in three of these women also reported experiencing sexual violence during the survey period (30%). Women were much more likely to seek advice or support when they had also experienced physical or sexual forms of abuse.

Bricknell, S. (2023) *Homicide in Australia 2020-2021*. (National Homicide Monitoring Program) Sydney: Australian Institute of Criminology.

Statistical Report 42 reports: Between 1 July 2020 and 30 June 2021, there were 210 homicide incidents recorded by Australian state and territory police. In 2020–21, 36 percent (n=76) of homicide incidents were domestic homicides.

Of the 76 domestic homicides in 2020–21, half (50%, n=38) were intimate partner homicides. Intimate partner homicides comprised 18 percent of homicide incidents in Australia in 2020–21.

Another 12 homicides (6% of all homicide incidents) were filicides (where a parent killed their son or daughter), 11 (5%) were parricides (where a parent was killed by their son or daughter), four (2%) were siblicides (a brother or sister killed a sibling) and 11 (5%) were homicides of other family members or kin. (p6)

Intimate partner homicide (n=2,102) comprised 60 percent of domestic homicides and 24 percent of all homicide incidents between 1989–90 and 2020–21. Threequarters (76%, n=1,589) of these were female intimate partner homicides and a quarter were male intimate partner homicides (24%, n=513). (p15) Females are significantly more likely to be killed by an intimate partner or family member (69%, n=45), mostly by their current or former intimate partner (38%, n=25). (p14). (see Table A8, p38)

Bruton, Crystal and Danielle Tyson, *Leaving Violent Men: A Study of Women's Experiences of Separation in Victoria, Australia* (2017) 51(3) *Australian & New Zealand Journal of Criminology* 339-

354.

This article explores women's experiences of leaving abusive relationships and seeks to combat assumptions about the nature of such relationships through in-depth interviews with 12 women who had separated from their male intimate partners (p 5). While separation is broadly recognised as a key time for increased risk of violence towards women and their children (p 1), studies demonstrate that most people believe women are able to leave violent relationships, and do not understand why they might stay (p 2). Such views place the responsibility for ending the violence on women, but in reality, these relationships often include complex circumstances, and the 'stay/leave binary' is rarely applicable (p 2). The results indicate that women's experiences of coercive control significantly affected their decision-making in the context of separation (p 6):

- Many women feared leaving because they were aware that separation may provoke retaliatory violence, with some experiencing an escalation of abusive behaviour when they attempted to leave (p 7);
- Many women were motivated to leave the relationship in order to protect their children, especially where violence became directed towards the children (p 8);
- Women's attempts to leave their relationships were often hindered by their partner's control over their finances (p 9); and
- Women adopted strategies to manage their safety both during and following separation (pp 9-10), and many women experienced escalating violence after separation (pp 11-12).

Coumarelos, C., Weeks, N., Bernstein, S., Roberts, N., Honey, N., Minter, K., & Carlisle, E. (2023). *Attitudes matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS), Findings for Australia.* (Research report 02/2023). ANROWS. https://ncas.au/

The NCAS findings are drawn from interviews with a representative sample of 19,100 Australians aged 16 years or over. The NCAS findings show that 'generally been slow but statistically significant improvement in community understanding of violence against women and attitudinal rejection of gender inequality and violence against women since 2013, according to all NCAS scales' however:

- 47% of people surveyed agreed that violence against women is a problem in their own suburb or town.
- 91% of respondents agreed that violence against women is a problem in Australia.
- 41% of respondents believed that domestic violence is equally committed by both men and women.

- 34% of respondents believed that it is common for sexual assault accusations to be used as a way of getting back at men (contrary to evidence).

Day, Andrew, Sharon Casey, Adam Gerace, Candice Oster and Deb O'Kane, The forgotten victims: prisoner experience of victimisation and engagement with the criminal justice system – Research report (ANROWS, 2018).

The following summarises the key aspects of this research report:

Premise

Many women in prison have experienced intimate partner violence. As this form of violence is often intergenerational and entrenched, women in prison are widely considered to be at particular risk of ongoing victimisation following release from custody. And yet, their support needs often go unrecognised, and it is likely that a range of barriers exists that prevent ex-prisoners from accessing services.

Approach

This research documents data from interviews with and surveys of 22 women incarcerated in Adelaide Women's Prison, as well as interviews with 12 key South Australian agencies and service providers, to arrive at an understanding of help-seeking behaviour and how this might inform service responses. The analysis is positioned within a review of current help-seeking theories that highlight how a wide range of individual, socio-cultural and structural factors can complicate a woman's decision to seek help when concerned for her personal safety, noting that the circumstances and personal histories of women in prison increase the barriers to effective help-seeking when they face violence following release.

Key observations

- The interviews with the women prisoners revealed their:
  - lack of awareness of when they should seek external support
  - lack of knowledge of available services
  - pervasive sense of mistrust and under-confidence in existing services
  - sense that better approaches can be developed drawing on the strengths of women, their peers and families.

- Women's experience of formal and informal support-seeking (positive and negative) often determine how they define intimate partner violence and whether they decide to seek to change their circumstances.
- Agencies and service providers expressed a range of views about the services that should be made available to women leaving prison, and these views were commonly shared by the women prisoners interviewed. It was acknowledged by both groups that services are not always visible or accessible to the women. There was also no sense that any integrated pathway for identifying and managing risk currently exists.

Conclusions

- Need identified for all jurisdictions: to clearly identify women in prison as a particularly vulnerable group who are likely to be at elevated risk of ongoing victimisation and intimate partner violence and who face significant barriers preventing them from accessing the types of services that may help them to keep safe; and take a specialised and integrated approach in addressing their needs. Successful models of reintegration are discussed.
- Need identified for people with lived experience of incarceration to be part of the service framework (design, delivery and goverance) in the community sector.
- Need identified for services and programs to reflect an understanding of the role violence in the lives of people who seek help (ie trauma-informed care)

Limitations

This research did not make conclusions about different cohorts of women prisoners having specific needs, for example women from Aboriginal and Torres Strait Islander cultural backgrounds.

Diemer, Kristin, *'ABS Personal Safety Survey: additional analysis on relationship and sex of perpetrator'* (2015).

A working paper on analysis of gender and relationship between victims and perpetrators. This paper is a work in progress with ongoing updates. The purpose of this paper is to run a parallel analysis of female and male victims of family related violence reported in the ABS PSS. [Page 11] It was found that of all adult victims of violence by a current or ex de-facto partner, 76% were women who had experienced violence by a male partner, 22% were men who had experienced violence by a female partner and 2% were women and

men victimised by a same sex partner (Note: due to the way the PSS collects data, a very small number of women and men may be double-counted across same-sex and opposite sex perpetrator categories).

Flood, Michael, 'The Debate Over Men's Versus Women's Family Violence' (Paper presented at *Australian Institute of Judicial Administration Family Violence Conference*, Adelaide, 23-24 February, 2006).

Identifies differences between men's and women's typical patterns of victimisation, it notes that while men are often the victims of violence, they are most at risk from other men. This paper provides a concise, but comprehensive overview of the literature contributing to conflicting arguments around perpetration of domestic or family violence by men and women.

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Loxton, Deborah et al., Intimate Partner Violence Adversely Impacts Health over 16 years and across generations: a longitudinal cohort study (2017) PLoS ONE12(6): e0178138.

This study involved 16,761 participants in the Australian Longitudinal study on Women's Health, using six waves of survey data over 16 years. It found that women who had experienced intimate partner violence (IPV) reported poorer mental and physical health throughout their lives (p5). Compared with women who had never experienced IPV, women who have experienced IPV endure poorer physical health throughout their

lives (p6). Women who have experienced IPV consistently ranked approximately 5 points lower on the SF-36 scale (a measurement of quality of life out of 100). Women who experience IPV also have poorer mental health throughout their lives (p6). They rank between 5 and 10 points lower throughout their lives (p 8).

Mansour, Julia, *Women Defendants to AVOS: What is their experience of the justice system?* (Women's Legal Services NSW, 2014).

Women's Legal Services NSW ('WLS') undertook an exploratory study of its 2010 experience of representing women who were defendants to Apprehended Domestic Violence Order ('AVO') proceedings in order to better understand what to be a growing phenomenon. The research was limited by a number of factors and is not a random sample of all NSW cases. However the results illustrate some of the systemic issues experienced by women AVO defendants'. These results were:

- Two-thirds of women clients defending AVOs reported that they were the victims of violence in their relationships.
- 'Many of the women defending AVOs reported that when police had been called after a violent incident, they felt that their version of events had not been viewed as credible compared with the other party, due to the circumstances of their heightened stress and anxiety'.
- 'Other women reported that they believed the other party had deliberately initiated AVO proceedings as a further mechanism of controlling their behaviour, by giving them the ability to threaten them with reports to police in the future'.
- 'In the majority of cases where women were defending AVOs, the other party's complaint related to a single incident only. In several of these cases injuries to the other party could be indicative of self-defence, such as scratching or biting on the arm or hand' (page 4).

The report suggests (1) improved data collection (2) the Bureau of Crimes Statistics and Research undertake a separate project into the experience of women defendants to AVOs (3) the NSW Police strengthen policies and procedures around identifying the 'primary victim' and provide continuous training on the dynamics of family violence (4) the NSW government take into account the findings of this report in its reforms (page 4).

Murray, Suellen, and Anastasia Powell, '"What's the Problem?" Australian Public Policy Constructions of Domestic and Family Violence' (2009) 15(5) *Violence Against Women* 532.

Discusses the framing of domestic violence (from p539) and notes that: 'a gender-based framework of violence against women recognizes that domestic violence occurs within the wider context of social disadvantage and inequality experienced by women relative to men, which, for some women, means that their vulnerability is heightened. Women are more likely to be economically dependent than men, with women typically having the care of children. Furthermore, women are more likely than men to fear violence from their partner. Domestic violence reflects gender relations and also contributes to the construction of ideas and practices about gender, further enforcing gender relations (p539). References other research and notes that gender always intersects with age, sexuality, ethnicity, and the range of social categories (p540).

National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009).

- 'While both women and men can be perpetrators and/or victims of sexual assault and domestic and family violence, research shows that the overwhelming majority of violence and abuse is perpetrated by men against women' (p25).
- 'The biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman' (p26).

Salter, M., et al., *A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence* (ANROWS, 2020)

Complex trauma can be explained as "multiple, repeated forms of interpersonal victimisation and the resulting traumatic health problems and psychosocial challenges". This report aimed to (1) analyse how complex trauma experienced by women is constructed in public policy and practice at national, state and territory levels; (2) examine institutional responses to women's complex trauma in the mental health, alcohol and drugs, and sexual assault/domestic violence sectors in NSW and Queensland; (3) document how complex

trauma is understood by women who have experienced it, as well as their encounters with agencies while seeking help; and (4) develop models of improved and collaborative responses to improve the wellbeing and safety of victims and their children.

Key results include:

- ‘References to complex trauma in public policy are typically brief and undefined’, and ‘[t]he lack of shared terminology and understanding of complex trauma raises questions about the adequacy of current policy frameworks to address the multiple needs of people with experiences of complex trauma and the effects that varying understandings of the long-term impact of complex trauma may have on program and service delivery’.
- Women who have experienced complex trauma often have multiple needs, but many services are funded only to deal with a particular issue or concern. Consequently, women are required to navigate multiple services and agencies so that their needs can be met.
- ‘Self-harm and suicidality are particularly stigmatised in service settings’, and ‘[w]omen with experiences of complex trauma frequently encountered sexist and disparaging views about women’s mental health, encapsulated in the common stereotype of the "crazy woman"’.
- ‘There is currently a lack of trauma-specialised services and professionals, and women’s experiences of health care are typically segmented and uncoordinated.’
- ‘Successful criminal justice outcomes for women with experiences of complex trauma are rare’. None of the women interviewed for the study stated that ‘the full extent of [their] victimisation had been prosecuted in the criminal justice system’.
- ‘There is widespread concern that the impact of trauma on parenting is not being addressed in the child protection system, resulting in late and punitive interventions.’
- ‘In family law matters, women are frequently not believed or supported when reporting abuse by an ex-partner and are often worse off financially and psychologically for their contact with the legal process.’
- Best practices in service provision for people with experiences of complex trauma are set out on p. 9, and recommendations are specified on pp. 10-11.

International

Charlotte Barlow and Siobhan Weare, ‘Women as Co-Offenders: Pathways into Crime and Offending

Motivations' (2019) 58(1) *The Howard Journal of Crime and Justice* 86-103.

This article examines a qualitative study in the UK which aimed to investigate co-offending women's pathways into, and motivations for engaging in, criminal behaviour. It considers not only the impact of co-offending relationships on women's criminality, but also factors which intersect with these relationships in their lives. Interviews with eight women who accessed a women's advice and support centre were conducted. Findings showed that while co-offending relationships were a central pathway into offending, this often intersected with other circumstances in the women's lives, including drug addiction, socio-economic circumstances, and 'significant life events'. Moreover, women who co-offended with female friends were more likely to acknowledge their agency than those who co-offended with intimate male partners. Findings also demonstrated the significance of understanding the complex nature of the lives co-offending women, and the decision-making process.

Dobash, Russell P, and R. Emerson Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 (3) *British Journal of Criminology* 324.

Abstract: 'We present quantitative and qualitative findings from 190 interviews with 95 couples in which men and women reported separately upon their own violence and upon that of their partner. Men's and women's violence are compared. The findings suggest that intimate partner violence is primarily an asymmetrical problem of men's violence to women, and women's violence does not equate to men's in terms of frequency, severity, consequences and the victim's sense of safety and wellbeing.

This article provides an overview of the debate between family violence research, and violence against women research, in relation to the symmetry of violence by men and women.

- Findings from the study establish some general patterns, including that 'First, regardless of who is reporting, it can be seen that many more men inflict every type of injury against women than do women against men' (p337), and 'Overall, the couples agree that the *injuries inflicted by women upon men* are less frequent and less severe' (pp338). It goes on to discuss the context of women's violence against male partners, including self-defence.

Epstein, Deborah, and Lisa A Goodman, 'Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women' (2018) 167 *University of Pennsylvania Law Review* (forthcoming).

This article addresses the ways in which the credibility of female victims of intimate partner violence is discounted through their experiences of legal and social services (pp 3-4). The authors conclude that women's experiences are frequently discounted, which itself can have further traumatic impacts. Judges and other professionals often discount women's stories of abuse as implausible, particularly where the victims suffer from psychological trauma that may impact memory and comprehension (p 7). Women who suffer traumatic brain injuries (pp 9-11) or PTSD (pp 11-3) as a result of domestic violence are particularly susceptible to relaying inconsistent stories. The authors also find that cultural assumptions resulting in the prioritisation of physical over psychological violence causes judges and other authority figures to expect 'real' survivors to also prioritise physical harm, while in reality, victims may feel more significantly impacted by psychological abuse (pp 17-20).

Moreover, the results of the study indicate that gatekeepers often unjustly discount women's personal trustworthiness, based on perceptions of their demeanour (pp 21-5), their perceived motive (pp 25-32), and their social location (pp 32-7). Even women who are able to overcome initial scepticism often find that the systems intended to provide assistance dismiss the importance of their experiences (p 37). In spite of meaningful progress, 'the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors' (p 38). Ultimately, 'the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse' (p 1).

These experiences of minimisation often echo women's previous experiences of abuse (p 46). The impacts of this discrediting are multifaceted: the dismissal itself constitutes its own injury, which can compound the harm such women experience directly from the abuse (pp 47-50); additionally, this instinctive devaluing of women's testimony becomes an independent obstacle to attempts to obtain safety and justice (pp 50-2). The authors conclude that credibility discounting is widespread and pervasive, and requires genuine institutional reform (p 59). Particularly, actors must be aware of these internalised assumptions, and seek to engage more openly with victims (see pp 54-6).

European Union Agency for Fundamental Rights, Women as victims of partner violence - Justice for victims of violent crime, Part IV (April 2019).

This report, in line with the other reports from this project, highlights the importance of recognising victims' rights. It specifically examines the experiences of women who endure partner violence – a crime that targets an individual's dignity and core rights. It presents the findings from fieldwork in 7 EU Member States, including interviews with practitioners working in criminal justice systems and 35 women victims of partner violence. Victims were asked about their experiences with support organisations, the police, public prosecutors' services and courts, and any protection mechanisms available to them against repeat victimisation. Evidence shows that women victims of partner violence lack effective protection due to the inadequacy of police responses, the shortcomings in the referral of victims to support services, the incompleteness of networks of support organisations, and the insufficiency in the implementation of court protection orders. In fact, the report found that 2 in 3 women who brought their victimisation to the attention of the police were left without any protection against repeat victimisation. The police neither arrested the offender, nor issued an emergency barring order.

Felson, Richard B, and Alison C Cares, 'Gender and the Seriousness of Assaults on Intimate Partners and Other Victims' (2005) 67(5) *Journal of Marriage and Family* 1182.

This study examines assaults committed by male and female intimate partners. The authors note that analyses of the Unites States National Violence Against Women and Men Survey (N =6,480) show that, in general, gender effects do not depend on the victim's relationship to the offender. Regardless of their relationship (a) men cause more injuries; (b) women suffer more injuries although their injuries tend to be less severe; (c) victims are more fearful of male offenders but only if the offenders are unarmed; and (d) men are particularly likely to precipitate assaults by other men, not their female partners. Violent husbands do assault with particularly high frequency but so do women who assault family members.'

Hester, Marianne, 'Who Does What to Whom?' (2013) 10(5) *European Journal of Criminology* 623.

Abstract: 'The article discusses findings from the first study in Europe to track domestic violence cases over

six years through the criminal justice system and compare cases involving male and female perpetrators. Ninety-six cases involving men and women recorded by the police in England as intimate domestic violence perpetrators were tracked to provide detailed narratives and progression of cases, establishing samples with a single male or female perpetrator or where both partners were recorded as perpetrators. Domestic violence involves a pattern of abusive behaviour over time and the in-depth longitudinal approach allowed similarities and differences in violent and abusive behaviours used by men and women, as recorded by the police, to be explored. Gender differences were found relating to the nature of cases, forms of violence recorded, frequency of incidents and levels of arrest.'

- In reviewing the current literature, this paper notes that 'qualitative evidence indicates that women are rarely the initiators of violence, are more likely to be acting in self-defence, and may be using a range of behaviours to do so' (p625). It finds that 'The vast majority of men had at least two repeat incidents recorded (83% of all male perpetrators), many a lot more than that, and one man had 52 repeat incidents recorded within the six-year tracking period. In contrast, nearly two-thirds of all women recorded as perpetrators had only one incident (62%), and the highest number of repeat incidents for any woman was eight. As expected from previous literature on service samples (Johnson, 2006), these data indicate that intensity and severity of violence and abusive behaviours from the men was much more extreme. This was also reflected in the nature of the violence used.' (p628)
- The paper concludes that 'Men were the perpetrators in a much greater number of incidents; the violence used by men against female partners was much more severe than that used by women against men; violence by men was most likely to involve fear by and control of female victims; women were more likely to use weapons, often in order to protect themselves; and female perpetrators were more likely to be alcoholic, or mentally ill, although alcohol misuse by men had a greater impact on severity on outcomes' (pp634-635)

Women - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 7 deals with a range of issues specific to women. 7.1 notes that insufficient account is taken of the realities of the female experience of sexual assault and domestic violence, and discusses the statistical incidence of women as victims of domestic violence, domestic homicide and sexual assault.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Chapter 14 of the bench book considers issues relating to gender equality. In Part III, there is a discussion of the specific challenges faced by women in the legal system. These challenges include accessing legal aid, childcare considerations, alternative dispute resolution, the intersection of gender inequality and other factors, and gender specific language (p.167 onwards). Part IV of the bench book looks at the experience of domestic violence by women. It notes that there is evidence that women are the most common victims of domestic violence and notes that it is important for lawyers to be aware of the challenges faced by female victims of family violence (p.171 onwards). Further, there is a discussion of domestic violence, the court process and legal services.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.3 discusses the gendered natured of family violence. 5.2.4 discusses the statistical over-representation of women as victims of family violence, particularly those from Aboriginal and Torres Strait Islander communities and women from culturally and linguistically diverse backgrounds. 5.8 notes that women with disabilities are also particularly over-represented as victims of family violence and may have different needs from other victims. 5.2.6 discusses the impact of family violence on women. 5.3.7 discusses how the parenting ability of mothers who are victims of family violence may be affected. 5.6.3 discusses the myth that violence against women is an accepted part of some cultures. 5.4.5 notes that while men can be victims of family violence, the

majority of women who use some form of violence towards their partner have been subjected to (worse) violence by that man before, or on the same occasion.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

[13.2.1] Notes a number of facts and statistics that highlight women as vulnerable to domestic violence, including the higher prevalence of women as victims, and that men and women experience family and domestic violence differently. It also notes that Indigenous women report higher levels of violence than non-Indigenous women, and that women from culturally and linguistically diverse backgrounds report lower levels of violence but may under-report their experiences. Section [13.2.1.3] details specific characteristics of women's vulnerability to family and domestic violence, noting a number of intersecting vulnerabilities (e.g. socioeconomic status and ethnicity).

[13.2.2.2] Discusses women's particular experiences of violence, including discussion of women being more vulnerable to the health impacts of family and domestic violence.

In relation to women as perpetrators of abuse, section [13.9.4] may be relevant: 'although women's violence toward their male partners that is neither in self-defence nor in response to being abused was rare, it could still be very dangerous', and that 'Men's physical size and strength is often greater than that of their female partners, which may partly explain why men report that they do not generally live in fear of their partners'.

See also Chapter 10 Women.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 4.4.2: 'Being female is the single most common underlying factor associated with the likelihood of being targeted by domestic violence.'

Section 5.2.2: 'Far more is known about the impact of domestic violence on women than about the impact of domestic violence on men. This is because women are more often targeted and consequently more often studied.'

Women - Other Resources

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

Commonwealth of Australia (Department of Social Services) 2022, *National Plan to End Violence Against Women and Children 2022-2032*.

The National Plan to End Violence Against Women and Children 2022-2023 states:

One in 3 women has experienced physical violence since the age of 15, and one in 5 has experienced sexual violence. On average, a woman is killed by an intimate partner every 10 days. Rates of violence are even higher for certain groups, such as Aboriginal and Torres Strait Islander women. A woman is also more likely to experience violence at particular life stages, such as while pregnant or while separating from a relationship. In 2021, girls aged 10 to 17 made up 42% of female sexual assault victims. (Footnotes omitted, p14)

Intimate partner violence is the main preventable risk factor that contributes to illness and death in women aged 18 to 44. It is the leading driver of homelessness and incarceration for women. (footnotes omitted, p15)

Women - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Barbara

Bianca

Carol

Cassy

Celia

Celina

Erin

Faith

Felicity

Fiona

Francis

Gillian

Hilary

Ingrid

Jane

Jennifer

Julia

Leah

Lisa

Melissa

Mira

Rosa

Sally

Sandra

Sara

Susan

Trisha

Yvonne

Women - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Laa v The Queen **[2020] VSCA 136 (28 May 2020) – Victorian Court of Appeal**

> [52] *'The courts have made it clear that acts of violence in a domestic setting, and in particular by men towards women, are utterly abhorrent and unacceptable. In this case, the infliction by the applicant of the assaults on Ms M, in the presence of their frightened young children, was a serious aggravating factor to the offending. It was a serious breach of his duty as a parent towards his own children. In assaulting their mother before their eyes, he set an appalling example to each of them, and in particular to his son.'*

Director of Public Prosecutions v Foster **[2019] TASCCA 15 (12 September 2019) – Tasmanian Court of Criminal Appeal**

At [29], Estcourt J held:

> *'Violent behaviour by men towards women in relationships must be condemned and discouraged. Vulnerable women, such as the complainant, are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the courts.'*

Vragovic v The Queen **[2007] NSWCCA 46 (27 February 2007) – New South Wales Court of Criminal Appeal**

Adams J at [33]:

> *'It was once thought in some circles that domestic violence was somehow less serious than criminal violence inflicted in other circumstances. I do not agree. In many cases of domestic violence a distinguishing characteristic is the notion of the offender that he (and it is almost invariably a male) is entitled to act as he did pursuant to some perverted view of the rights of a male over a female with whom*

he is or was intimately connected. It is this characteristic of self-justification which requires particular emphasis to be given, in cases of this kind, to the elements of general and personal deterrence'.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J at [77]:

'These judicial statements are complemented by criminological research concerning domestic violence. An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pages 6-7'.

R v AKB **[2018] NSWSC 1628 (2 November 2018) – New South Wales Supreme Court**

At [28], Davies J stated –

'It needs to be made quite clear that marriage or a similar relationship gives no right to one party to control the other…As the cases which come before this Court so often demonstrate, those murders and other acts of violence occur because the woman will not bend her will to the man. That is what happened here. The Court must by the sentences imposed in these cases denounce such behaviour, because women should be able to feel safe and free from that control.'

R v Ellis **[2018] QCA 70 (17 April 2018) – Queensland Court of Appeal**

Justice Philippides said at [26]:

Although the offending concerned a single episode, it involved the protracted perpetration of violence of a callous and brutal nature calculated to inflict physical and mental torture. The violence was inflicted in

> the complainant's house where she was entitled to be safe and protected and in the context of the applicant's irrational jealousy after the complainant ended their relationship. In addition the conviction for domestic violence offences was required to be treated by the Court as an aggravating factor.

B, JL v Police **[2017] SASC 9 (10 February 2017) – Supreme Court of South Australia**

Stanley J emphasised that the appellant had a history of domestic violence and highlighted the need for general deterrence at [19]:

> Offences of violence by men against women are all too prevalent. All too often they result in harm but the deterrence of those offences will not be adequately achieved unless all offences of violence, whether they cause harm or not, are properly addressed.

R v Wilkinson **[2008] SASC 172 (4 July 2008) – Supreme Court of South Australia**

Gray J at [29]: 'Domestic violence is predominantly directed by men toward women. The community expects the law to protect women, to protect the weak from the strong, and to protect the vulnerable from the oppressor. These are factors that have led the courts to treat crimes involving domestic violence as grave crimes. Parliament has enacted laws designed to provide protection to those subjected to domestic violence. Parliament has recognised that crimes involving violence and assault may be aggravated by a domestic situation'.

R v Lennon **[2003] SASC 337 (2 October 2003) – Supreme Court of South Australia**

Doyle CJ at [12]: 'The court has said consistently that it must do what it can to protect women from violence by men. This applies just as much to violence within a domestic relationship as it does to violence in other situations. In cases like this the community expects, and protection of women requires, that the court should impose a sentence that is likely to deter the individual offender and to deter other potential offenders. The fact that the violence occurs on the spur of the moment is a relevant factor, but this is often true in the case of domestic violence. The impulsive nature of such offences is often offset by the fact that, as here, there is a pattern of violence within the particular relationship, or on the part of the particular offender. Mr Lennon's

record makes it clear that he has not yet learned that violence towards women cannot be accepted'.

Gregson v Tasmania **[2018] TASCCA 14 (31 August 2018) – Tasmanian Court of Criminal Appeal Appeal**

At [37], the Court held –

> *'Women in domestic circumstances are particularly vulnerable to the abuse of power and breach of trust by violence male partners* (*Director of Public Prosecutions v Karklins [2018] TASCCA 6 per Geason J, at [54]–[60]). Women who become victims in these circumstances, and other potential victims in the community, are entitled to such protection as the law is able to provide through the imposition of sentences that will act as both a personal and general deterrent.'*

Her Majesty's Attorney-General v O **[2004] TASSC 53 (9 June 2004) – Supreme Court of Tasmania**

Slicer J at [18] cited: '*R v Brown* (1992) 73 CCC (3d) 242 at 249: 'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape'.

Saxton v R **[2017] VSCA 357 (5 December 2017) – Victorian Court of Appeal**

The applicant was sentenced to 7 months' imprisonment for 5 assault charges committed against his wife. Justices Santamaria and Coghlan JJA stated that the offending was 'serious' and stemmed from an 'abusive relationship between the applicant and the victim, who was vulnerable and frightened of the applicant' ([29]). The Court quotes *Kalala v The Queen* [2017] VSCA 223 discussing the scourge of domestic violence:

> The trial courts of this State are imposing sentences for family violence offences with increasing frequency. This Court has repeatedly emphasised the need to condemn family violence, in line with community expectations. In *Filiz v The Queen* [2014] VSCA 212 [23], the Court acknowledged the

> ‘shameful truth’ that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44.

***Portelli v The Queen* [2015] VSCA 159 (22 June 2015) – Victorian Court of Appeal**

The Court at [29]-[30]: ‘The sentencing judge described the attack on C as ‘extremely vicious and intolerably abhorrent’. It was clear, his Honour said, that C was terrified: ‘You made her believe she was going to die. To ask you, her attacker, to comfort her after your attack because she thought she was going to die reveals how frightening the experience must have been for her. Yet she was in her home in the presence of an intimate partner and entitled to feel safe and secure. She was doing no more than going about her ordinary life. I do not think that she trusted you; rather, she was in fear of your confrontations when denied what you wanted. Undoubtedly, your vicious attack will be an ongoing nightmare for her. It is clear that the community is intolerant of violent behaviour in such circumstances and expects the courts to send a strong message that behaviour of this kind is totally unacceptable. *Women in domestic situations are entitled to feel safe from the violently abusive behaviour of their ex-partners. This circumstance is a significant aggravating feature’* [emphasis added by the Court].

‘We respectfully agree. What his Honour said accords with recent statements of this Court on the subject of violent attacks by men on their current or former domestic partners’ (see Filiz v The Queen; Pasinis v The Queen; Director of Public Prosecutions v Meyers).

***Filiz v The Queen* [2014] VSCA 212 (11 September 2014) – Victorian Court of Appeal**

Redlich JA at [21]-[23]: ‘It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners. In such circumstances, the submission that the complainant’s level of fear when being attacked by her ex-partner was less than it might have been if she had been attacked by a stranger should be rejected’.

***Director of Public Prosecutions v Paulino* (Sentence) [2017] VSC 794 (21 December 2017) – Supreme Court of Victoria**

Justice Bell explained that formal equality has been reached for men and women as victims of crimes. However, substantive equality requires recognition of the 'specificity and subjectivity of women's experience of family violence, which is much greater and different to men's, and the violation of their particular rights as women ([22]). His Honour further stated at [21]:

> It is now increasingly recognised by police and the courts that family violence as a crime has a gender dimension because women are vastly overrepresented as victims and profoundly affected in particular ways that are not typical of men. Ensuring respect for their human rights not just as persons but as women is at stake. This is a more informed way of understanding the causes and consequences, as well as the fundamental nature, of the criminal wrong as it is perpetrated upon women by men (citing *Kalala v The Queen* [2017] VSCA 223 (30 August 2017) [3(iii)])

***Bropho v Hall* [2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [16]: 'The fact that the aggravated assault occurred in a domestic setting is a significant aggravating factor of the offence. An offence of this nature generally involves an abuse of the trust which one partner places in another, often where the victim is in a vulnerable position by reason of greater physical strength of the offender. The vulnerability of the victim is generally increased by the difficulty which she (it is usually a she) may have in extricating herself from the situation. As McLure P has noted [in *The State of Western Australia v Cheeseman*], the readiness of many victims to return to, or remain in, a relationship with the perpetrator is a hallmark of domestic violence. Recognising that common feature, it remains important for a court sentencing an offender for that kind of offence to take account of the need to protect persons in that vulnerable position, so far as the courts can do so by the imposition of a sentence, bearing a proper relationship to the overall criminality of the offence, which has a deterrent effect and, in an appropriate case, removes the offender to a place where there is no opportunity to violently attack their partner' (which was approved by the court in *Gillespie v The State of Western Australia* [48]).

***R v Rappel* [2017] ACTSC 38 (24 February 2017) – Australian Capital Territory Supreme Court**

'For many years now, the courts of this country have spoken of the need to protect members of the community, and particularly women, from domestic violence, and the need for courts to take seriously offences of domestic violence. If these statements are to have meaning, if the protection offered by the

[Domestic Violence and Protection Orders Act 2008 (ACT)] is to have significance, it is incumbent on courts to recognise the heinousness of offences of violence committed in retribution for a member of the community invoking the protection provided by the Act.' Per Burns J at [131]

Director of Public Prosecutions (Victoria) v Turner **[2017] VSC 358 (23 June 2017) – Victorian Supreme Court**

Bell J at [13]: "Such is the great contemporary ugliness of domestic violence as revealed by the facts of this case. By reason of these and so many other dreadful consequences, this court treats crimes of domestic violence, especially those involving homicide, very seriously. As King J has said in several cases and specifically so in R v Mulhall, 'the law will do all it can to protect women from violent domestic partners'. Therefore, the court condemns domestic violence in the strongest possible terms and stresses in this case, as it has in many others, that specific and general deterrence are the most important sentencing considerations."

People with children

Where domestic and family violence occurs in families with children, the victim is most likely to be the perpetrator's female intimate partner and the mother of the children. A perpetrator in these circumstances is also highly likely to directly abuse the children or otherwise expose them to violence. These children are also victims of domestic and family violence.

There are particular vulnerabilities a perpetrator may seek to exploit in exercising control over the victim and children. They may relate to the victim's sense of their parenting role, their relationship with the children, and their responsibility to promote the children's wellbeing and protect them from harm, while also trying to cope with the dangerous and debilitating effects of the violence. These factors, together with poor mental health and social conditions that may be related to the domestic and family violence, may impact on a victim's capacity to parent effectively [Hooker et al 2016].

Where the victim is the mother of the child, a perpetrator's use of the victim's mothering role as a means of committing domestic and family violence may begin prior to pregnancy, or may continue or escalate during and after the pregnancy. A perpetrator may, for example, control or prevent contraception leading to unwanted pregnancy, or coerce the victim into pregnancy so as to prevent her from working or studying or to otherwise exercise control over her; or the perpetrator may perceive that the pregnancy occurred sooner than intended, or suspect that he is not the father.

A perpetrator may use a range of tactics to undermine or destroy the relationship between mother and child [Hooker et al 2016]. Depending on the child's age, the perpetrator may deliberately abuse the victim in front of the child so as to induce fear in the child or a sense that their mother is weak and unable to protect herself. The perpetrator may discredit the victim's mothering skills by accusing her of being a bad mother, or he may coach and recruit the child in the perpetration of the violence, or isolate the victim and children from family, friends and other sources of support and care. Over time these corrosive and manipulative behaviours may increasingly restrict and control all aspects of the everyday lives of victims and their children, including their sense of reality and their capacity to act competently and assertively; and may ultimately impair their physical, emotional and mental health and wellbeing.

A victim responsible for the care of children may delay leaving the abusive relationship, or may leave and

return on multiple occasions before finally leaving, for fear that the act of leaving may prompt an escalation of the domestic and family violence. [Moe 2009] A victim's sense of duty to protect children from further harm may directly influence these decisions [Meyer 2010].

Research demonstrates that separation coincides with an increased risk of threatened and actual violence as a perpetrator may respond to a perceived loss of control over the victim with amplified efforts to reassert control [Jaffe & Crooks 2005]. Importantly, in the context of separating parents, there is also an increased risk of harm to children's psychological and physical wellbeing due to exposure to domestic and family violence, history of maltreatment, parental stress, social isolation, and inadequate resources and support [Jaffe et al 2014].

Other factors that may influence a victim's decision to remain in the abusive relationship include lack of independent financial resources; lack of child care options, other than the perpetrator; overcrowded or inadequate shelter accommodation ill equipped for the needs of her children or animals; fear that parenting orders may put the children at further risk of harm by the perpetrator; fear that the perpetrator will avoid child support obligations; or fear of isolation, poverty and homelessness [Chung et al 2000]. These factors may in turn serve to increase the level of control the perpetrator exerts over the victim and children [Moe 2009].

A mother, for example, who is a victim of domestic and family violence must constantly reassess the risk of harm to herself and her children and the associated need to protect from further harm. If she does not leave the abusive relationship, she may fear having her children removed from her care by the child protection agency for failing to protect them from violence [Humphreys 2007]. If she does leave, and endeavour to remove herself and her children from ongoing violence, she may fear being penalised by the court for not demonstrating a willingness to facilitate a relationship between the children and their abusive father [Bagshaw et al 2011]. A victim in these circumstances is unlikely to resolve this tension in the best interests of her children without a high level of support that ensures the safety and wellbeing of herself and her children, her capacity to keep mothering, and the proper exercise of her legal rights. And yet research shows that victims who have experienced prolonged and severe domestic and family violence may, in seeking help, also experience stigmatising and victim-blaming social attitudes from formal and informal sources of support that convey a message that the victim is responsible for their own suffering, for example, by remaining in the abusive relationship [Meyer 2015]. This experience may be aggravated by an approach taken by the child protection agency that focuses on the victim's failure to protect rather than the perpetrator's culpability for the violence [Humphreys 2007].

Where a victim feels she has no other choice but to remove herself and her children from the abusive relationship, she may have to contend with the financial, housing, employment, social and parenting challenges already mentioned while also experiencing ongoing domestic and family violence from the perpetrator. For example, the perpetrator may engage in more insidious forms of emotional or psychological abuse using digital technologies or social media; or the perpetrator may follow, harass or monitor the victim at work or in the local community, or seek to coerce the victim into arrangements for the care and parenting of the children, or withdraw child support, or use contact handover occasions to humiliate and degrade the victim in front of the children [Kaye et al 2003]. Prior to separation the victim may act as a buffer to prevent or deflect abuse away from the children; however, on separation, the children may spend time alone with the perpetrator placing them at greater risk of harm. Victims report that these behaviours can be as dangerous and debilitating as those experienced during the abusive relationship.

A 2015 evaluation [Kaspiew et al Synthesis 2015] of the 2012 Family Violence Amendments to the Commonwealth *Family Law Act 1975* found that issues giving rise to safety concerns were relevant for up to one in five of the separated parents surveyed. The safety concerns associated with ongoing contact with the other parent mostly involved violent or dangerous behaviour, emotional abuse, substance misuse or mental health issues. An earlier analysis [Bagshaw et al 2011] of the effect of family violence on post-separation parenting arrangements for groups of parents and children who separated after the 1995 and after the 2006 amendments to the Act recorded that nearly half of the children reported feeling "not at all safe" with one of their parents, and nearly three times more of these children reported this feeling when with their fathers than with their mothers. It also observed that women and children were far more likely than men to be victims of severe abuse, intimidation and threats, giving rise to fear and intimidation.

People with children - Key Literature

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Approximately 50% of women 'who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence'. Further, almost 70% of women who had children in their care when they 'experienced violence by a previous partner reported that the children had seen or heard the violence'. Further, approximately 60% of men 'who had children in their care when they experienced violence by a previous partner reported that the children had seen or heard the violence'. See Tables 17-18 for further detail.

Around one quarter of male and female victims who experienced emotional abuse had the abuser threaten to take their child/children away from them, and around one quarter of female victims and 40% of male victims had the abuser lie to their children with the intent of turning their children against them (see Table 28).

Bagshaw, Dale, et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49.

This article reports on the findings from the analysis of data from two national online surveys (one for adults and one for children), which collected quantitative data and also allowed for qualitative comments about family violence and its impact on parenting and parenting arrangements. The study included adults and children who had separated after 1995 and after the introduction of the *Family Law (Shared Parental Responsibility) Amendment Act* (Cth) in 2006. The researchers gained the views of a total of 1,153 adults (90%) and children (10%). Some key findings:

- For most adult respondents, family violence posed problems in relation to decisions about their parenting

arrangements that had to be dealt with after separation and within the family law socio-legal service system.

- In the adult sample, there were clear gender differences in the reported motives for, experiences of and responses to violence.
- Women and children were far more likely than men to be victims of severe abuse, intimidation and threats, giving rise to fear and intimidation.
- The most frequent complaint that men and women had about all of the services that they accessed post-2006, with the exception of domestic violence services, was the disbelief or disregard perceived by victims when they reported family violence, and a consequent lack of assistance that ranged from the violence and associated problems being ignored, to their being labelled as "alienating" parents, to being offered unsuitable parenting proposals (with a sense of coercion about them), to actual further harm. There were many reports, in particular from mothers, of inappropriate parenting arrangements that seriously compromised their children's safety, including arrangements that exposed children to serious psychological, emotional, sexual and physical abuse - mainly from a parent, but also from a step-parent or relative.
- Nearly half of the children reported feeling "not at all safe" with one of their parents; nearly three times more of these children reported feeling "not at all safe" when with their fathers than when with their mothers.
- Many respondents who accessed services post-2006 said they did not disclose violence to the court for fear that if their allegations were unproven they would be viewed as an "unfriendly parent" and the children they were trying to protect would be exposed to the perpetrator for longer periods.

Chung, Donna, Rosemary Kennedy and Bev O'Brien, *Home Safe Home: The Link between Domestic and Family Violence and Women's Homelessness* (Partnerships Against Domestic Violence, 2000).

The research drew on consultations with 161 stakeholders (in domestic violence and homelessness services, police, courts and other relevant services) and interviews with 52 women. The study examines the trauma experienced by families in Australia when they are forced to leave their homes due to violence. The study found that many women leave their homes with their children to escape violence and when they do, they face significant social disadvantage (p46).

Douglas, H. *Women, Intimate Partner Violence and the Law* (2021; OUP).

This text explores the results of an interview study involving interviews with 65 women who had experienced domestic and family violence over three years. See chapter 3: Most women reported that the most difficult form of abuse they dealt with were forms of non-physical abuse, especially emotional abuse. Many women identified that non-physical abuse deeply impacted on their sense of self and freedom, and that it continued to affect them for years. Other forms of non-physical abuse that were also highlighted by the women included abusive tactics targeting their role as a mother, isolation within the relationship, financial abuse. The women in the study highlighted the particular impacts of non-physical forms of abuse, including isolation, financial abuse and threats about their visas, for women from culturally and linguistically diverse backgrounds especially those women with insecure visa status.

Hooker, Leesa, Rae Kaspiew, and Angela Taft, *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper* (ANROWS, 2016).

This comprehensive state of knowledge paper is the first of a three part mixed-methods research project addressing parenting and abuse tactics. This paper presents the current state of knowledge on parenting in the context of DFV by examining the following four research questions:

- What is the prevalence of DFV among parents?
- How does DFV impact on parenting capacity?
- What are the methods and behaviours that perpetrators use to disrupt the mother---child relationship?
- What interventions exist to strengthen and support a positive and healthy mother--child relationship?

This review identifies that DFV may impact negatively on women and children and the parenting capacity of both perpetrators and victims is affected. Altered mother--child relationships may occur due to deliberate undermining of the mother's parenting, and children are often used by perpetrators as tools to abuse mothers and exert control and coercion (p 2).

The report points out that violence does not end when couples separate. It specifically identifies the legal system as a tool of abuse used by perpetrators, and that poor understanding by legal professionals can heighten the risks for women and children (p 2).

Although there is limited information on the parenting style of abusive fathers, abusive men as fathers have been characterised by researchers and victims as authoritarian, under-involved, self-centred and manipulative. These men also engage in high levels of substance abuse. Children exposed to partner violence in the home by their father/stepfather are at heightened risk of child maltreatment including child sexual abuse (p 2).

The report suggests that supportive care includes improved understanding and collaboration between child protection, family law, and domestic violence advocacy services (p 2).

The report also identified issues with forced contact through court:

- Shared parenting can leave mothers and children exposed to continuing abuse (p 26).
- Post-separation matters, including negotiation of property, parenting and child support can be used by abusive ex-partners to maintain power and control (p 27).
- Women feel pressured by lawyers to agree to co-parenting arrangements even though children's safety may be at risk, or make decisions in an environment of fear, pragmatic concern, and family ideology (e.g. perpetrators playing on guilt about "breaking up" the family) (p 28).
- Awareness amongst court staff in screening for family violence and safety concerns still remains problematic, despite legal and policy reform (p 28).

Humphreys, Catherine, 'Domestic Violence and Child Protection: Challenging Directions for Practice' (Issues Paper 13, Australian Domestic and Family Violence Clearinghouse, 2007).

This review of literature explains that issues specific to domestic violence need to be addressed if there is to be effective intervention for children affected by domestic violence. It identifies that women often fear having their children removed from their care because of domestic violence (p6). It considers how the protection of abused mothers may be linked to the protection of children (p7). It considers the child protection focus on women as mothers and their 'failure to protect' their children from abuse rather than on addressing the perpetrator's violence (p8). It notes that sometimes the abusive father is missing from child protection assessments (p8). This paper notes that domestic violence is now one of the most common reasons for a notification to statutory child protection services. It identifies inconsistencies between family law and child protection approaches (p9).

Humphreys, Cathy and Monica Campo, *Fathers who use violence: Options for safe practice where there is ongoing contact with children* (CFCA Paper No. 43 – June 2017, Australian Institute of Family Studies).

The following summarises the key aspects of this paper:

Background

This paper responds to a challenge that has continued to frustrate workers attempting to intervene to support women and children living with domestic and family violence (DFV) – that the DFV intervention system (in the specialist women's DFV sector and statutory child protection) is structured around women and their children separating from men who use violence. However, many women and children may not be in a position to separate from their abusive and violent partners, and some women and children's wellbeing and safety may not be enhanced by separation.

Inquiry

The paper explored these questions by conducting a review of existing literature:

- What is the practice or evidence base for working with families where the perpetrator remains in the home?
- Are there safe ways to work with women and children living with a perpetrator of DFV, or for women and children who still have significant contact with a perpetrator post-separation?
- In particular, whether there are strategies for working with fathers who use violence, that engage and address the issues for children, women and men who are continuing to live with DFV.

Observations

This review demonstrates that there is a paucity of evidence for effective approaches for responding to DFV in families where the perpetrator remains in the home or in regular contact with women and children. There are, however, a number of practices developing in these areas: nurse home visits; restorative justice approaches; couple counselling; statutory child protection investigations; and interventions with vulnerable families/whole of family approaches. All urge caution and all recommend a priority on training workers, and only ever bringing men and women together under certain circumstances and with strict caveats. This is

necessary if work is to be effective and not inadvertently escalate danger and/or collude with the power and controlling tactics of the perpetrator of violence.

Conclusions

There is some experimentation with interventions in these complex family situations, and some early signs of success. The challenges of working with the diverse nature of fathers who use violence are significant. Nevertheless, this may prove to be an important practice development for future DFV intervention.

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cmth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are 'not uncommon' for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family law and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of the practices and perspectives of family law system professionals(*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- the Court Outcomes Project (CO Project) involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts; and
    - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns

for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaye, Miranda, Julie Stubbs and Julia Tolmie, 'Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence' (Research Report, Families, Law and Social Policy Research Unit, University of Sydney, 2003).

This report details findings based on interviews with 40 women negotiating contact arrangements with an ex-partner who had abused them and a further 22 interviews with professionals such as lawyers, counsellors, refuge workers and court assistance scheme workers, who had involvement with the development or implementation of contact arrangements. A majority of women (97.5%) had experienced significant levels of violence and abuse since separating from their partner. For many, this abuse occurred in the context of contact handovers. Women also cited occasions when it seemed that contact was used as a further opportunity to harass or annoy them. They expressed concern about children witnessing incidents of violence against them and circumstances where children themselves had been roughly handled during handover. 70.9% of women found it very difficult to disclose domestic violence to professionals they came in contact with, at least initially. Other women, especially Indigenous women, were reluctant to report the abuse for fear that statutory child protection authorities could take their children away from them.

McCorriston, Priscilla, 'Safety Planning with Women and Children: Challenges for Practitioners in a Pro-Contact Climate' (2012) 47 *Australian Domestic and Family Violence Clearinghouse Newsletter* 3.

Excellent overview in Australian context of factors that heighten women with children's vulnerability following

separation including: continued violence during contact and handover, inhibiting protection (i.e. women who act to protect themselves and their children may be subject to punitive orders being made against them), reduced capacity to escape, increased risk of poverty and homelessness, and legal bullying (using court processes to harass a party through process or in court examination).

Meyer, Silke,'Responding to Intimate Partner Violence and Victimisation: Effective Options for Help-seeking' (2010) 389 *Trends and Issues in Crime and Criminal Justice* 1.

The current analysis is based on data drawn from the International Violence Against Women Survey (IVAWS) conducted by the Australian Institute of Criminology (AIC) in 2002–03. The IVAWS was a national survey, based on a random community sample of over 6,600 women living in Australia at the time of data collection. Women between the ages of 18 and 69 years were interviewed by telephone and a sub-sample of formal and/or informal help-seekers (N=1,562) was identified (p2). The presence of children was also identified as a predictor of formal help-seeking (eg. law enforcement and specialised victim services). Children's observations of violent incidents significantly increased victims' likelihood of seeking formal support (p4).

Meyer, Silke, 'Still Blaming the Victim of Intimate Partner Violence? Women's Narratives of Victim Desistance and Redemption when Seeking Support' (2015) *Theoretical Criminology* 1.

This article presents a theoretical examination of victims' (*N* = 28) experiences when trying to rebuild a victimization-free identity after having experienced multiple years of severe intimate partner violence (IPV). Narratives reveal experiences of victim-blaming attitudes when seeking help from informal and general formal support sources, which suggest that victims of IPV do not meet the criteria of the 'ideal', innocent victim worthy of ongoing formal and informal support. Drawing on various criminological theories and theories relating to social stigma and construction of the 'ideal victim', the study finds that victims often feel they have to redeem themselves as worthy of empathy in order to access ongoing support.

Meyer, S, Reeves, E, Fitz-Gibbon, K. The intergenerational transmission of family violence: Mothers' perceptions of children's experiences and use of violence in the home. *Child & Family Social Work*. 2021; 1– 9.

Abstract: Intimate partner violence (IPV) on average affects one in four women, with the majority of victim survivors identifying as mothers in national survey data. Children experiencing parental IPV are now equally understood as victims. Extensive research documents the short- and long-term impacts of children's experiences of IPV on their safety and wellbeing. More recently, research has started to examine adolescent children's use of violence in the home as adolescent family violence (AFV). Contributing to this emerging body of research, we draw on narrative interview data from mothers who participated in a larger study on IPV, help-seeking and the perceived impact on children to better understand how mothers make sense of children's use of violence in the home. Mothers identified an emergence of AFV in male children with childhood experiences of adult IPV. Although mothers' experiences of adult and adolescent violence highlight their dual victimisation, mothers frame their abusive children as victims rather than perpetrators. Implications for future research, policy and trauma-informed practice are discussed.

Meyer S, Stambe R-M. Mothering in the Context of Violence: Indigenous and Non-Indigenous Mothers' Experiences in Regional Settings in Australia. *Journal of Interpersonal Violence*. November 2020.

Abstract: Domestic and family violence (DFV) disproportionately affects women and children in Australia and globally. On average, one in three women experiences DFV during adulthood and the majority of these women identify as mothers. The prevalence of DFV is higher for Indigenous women and their experiences disproportionately range at the more severe end of physical abuse. For women affected by DFV, mothering during and post this type of victimization is complicated by strategic entrapment, undermining of the mother–child relationship, and threats of harm directed at children and mothers. While a substantial body of literature has examined the experiences of mothers affected by DFV more broadly, research on the experiences of Indigenous mothers affected by DFV remains scarce. Research evidence is further limited when trying to understand the specific constraints experienced by mothers affected by DFV in regional settings. This article examines the experiences of Indigenous and non-Indigenous mothers affected by DFV in regional Queensland, Australia. Data derived from 17 qualitative face-to-face interviews are used to explore the lived experiences of these mothers. Findings identify the immediate and long-term effects of DFV on mothers and children, including similarities and differences in women's experiences of mothering in the context of DFV, experiences of entrapment in an abusive relationship, experiences of post-separation abuse, strategies used to mitigate its impact on children, and surviving as a female-headed single-parent household in regional settings. While mothers in this study shared a number of similar experiences, regionality, the risk of cultural disconnectedness, and socio-structural marginalization disproportionately affected Indigenous mothers in this

study. Findings raise key implications for supporting mothers and children's safety and recovery, access to safe and sustainable housing in regional towns, and the empowerment of Indigenous women to overcome the lasting effects of colonization and disproportionate experiences of disadvantage.

Moe, Angela, 'Battered Women, Children, and the End of Abusive Relationships' (2009) 24(3) *Journal of Women and Social Work* 244.

This article, written by a US based researcher, focuses on the role of children in women's decisions to leave abusive partners. It discusses arriving at the decision, the logistics involved in leaving and planning for the future, and it presents policy and advocacy-based recommendations that are aimed at addressing the social welfare of women and children. Especially at pp245-6 this article summarises numerous factors related to children, particularly that 'concern for their children causes women to delay leaving their abusers', and finding temporary housing and poverty/homelessness can impact on women with children's particular vulnerabilities (i.e. 'a woman's risk of homelessness increases with the number of dependent children under her care').

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent

parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous ‘no contact’ conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims’ safety and wellbeing.

International

Clements, K., et al., (2022) The Use of Children as a Tactic of Intimate Partner Violence and its Relationship to Survivors’ Mental Health. Journal of Family Violence, 37: 1049-1055.

Abstract: Although prior research has established that intimate partner violence (IPV) often leads to increased depression, anxiety and post-traumatic stress disorder (PTSD), little is known about how often abusive partners and ex-partners use survivors’ children as an abuse tactic, nor whether this form of IPV also is detrimental to survivors’ mental health. The current study interviewed 299 unstably housed survivors of intimate partner violence shortly after they sought services from a domestic violence agency. All participants were parents of minor children. In-person interviews asked about abuse experienced in the prior six months, including the ways children were used as a form of IPV. Participants were also asked about their current depression, anxiety, and symptoms of PTSD. As hypothesized, the majority of parents reported their abusive partners and ex-partners had used their children as a form of IPV to control and hurt them. Further, after controlling for other forms of IPV, use of the children significantly predicted both increased anxiety and greater number of PTSD symptoms. Results show the importance of focusing on the use of children as a common and injurious form of abuse used against survivors of intimate partner violence (IPV).

Holt, Amanda, ‘Adolescent-to-Parent Abuse as a Form of “Domestic Violence”: A Conceptual Review’ (2016) 17(5) *Trauma, Violence, & Abuse* 490-499.

This article discusses adolescent-to-parent abuse (APA), varied forms of abusive behaviour perpetrated by a child toward a parent (p 490). Mothers are more likely to be victims of APA than fathers (p 490), and

correlations have been identified between APA and abusive behaviours within a young person's dating relationships (p 491). As a distinct form of abuse, it is not necessarily appropriate to approach APA within a traditional domestic violence framework (p 496). Responding to APA raises issues separate from youth crime and domestic and family violence more broadly:

- Parental responsibility orders are inappropriate in cases where the burdened parent is a victim of the perpetrator's APA, as such orders may cause revictimisation (p 492).
- Attitudes that place responsibility or blame on the victim parent must be avoided, as they may lead to victim blaming in cases of APA (p 493).
- The gendered focus on these issues should be reduced in APA cases, in order to properly engage with the child-parent abuse dynamic (p 495).

Jaffe, Peter, Katreena Scott, *'Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce'* (Department of Justice Canada, 2014).

This report provides a summary of the expanding literature in the field of family violence, with specific attention to factors that increase the risk of harm to children during the critical time of parental separation. The report also summarises policies and practices for intervention and prevention as identified by Canadian experts and current research reports. The review highlights the many factors that increase children's risk of harm to their psychological and physical well-being (e.g., exposure to domestic violence; history of maltreatment; parental stress; social isolation of the family; inadequate resources and support) in the context of family violence and separating parents. The authors propose a model to guide judges, lawyers and court-related professionals to consider when looking at potential harm to children based on their vulnerabilities as well as the risks that parents may present. Findings of risk can lead to court mandated interventions and safeguards in determining parental access to their children. This analysis requires consideration of barriers to required services such as language and cultural barriers as well as poverty.

Jaffe, Peter, and Claire Crooks, *Understanding Women's Experiences Parenting in the Context of Domestic Violence* (Violence Against Women Online Resources, 2005).

This Canadian paper is easily navigated by internal links. It reviews the literature and identifies and discusses

seven central themes that highlight the intersection between domestic violence and parenting. These issues are:

- Women's parenting may be affected by the experience of violence.
- Professionals struggle to differentiate conflict from violence.
- Abused women often face continuing risks from their partner after separation.
- Many children are negatively affected by exposure to domestic violence.
- [Why] Domestic violence is highly relevant to the determination of child custody.
- Family courts, lawyers and court-related services often overlook the significance of domestic violence.
- Abused women often experience difficulty accessing appropriate legal and mental health service for themselves and their children.

Simon Lapierre et al., 'Difficult but Close Relationships: Children's Perspectives on Relationships With Their Mothers in the Context of Domestic Violence' (2018) 24(9) *Violence Against Women* 1023-1038.

Despite a recent focus in the literature on mother-child relationships, there is a limited understanding of children's perspectives on their relationships with their mothers. This article reports the findings from a participative and qualitative study involving Canadian children who experienced domestic violence, and focuses on their perspectives on their relationships with their mothers under those circumstances. 46 individual interviews were conducted with children to gather their experiences. Results showed that women's and children's victimisations are inextricably linked. Notwithstanding the negative effects of domestic violence on mother-child relationships, the participants' mothers played a significant role in their children's lives and had close relationships with them. Communication was also found to be an important element in mother-child relationships. However, several participants stated that the communication with their mothers was limited whilst they lived with the domestic violence perpetrator. As the participants experienced domestic violence alongside their mothers, the results also revealed a dynamic of mutual protectiveness. Overall, the findings emphasised the need for policies and practices that support mother-child relationships in the context of domestic violence, as well as programs that support mother-child relationships or facilitate mother-child communication.

People with children - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

7.7 discusses practical considerations relevant to women's experience of court processes, including the fact that many women are the main carers of children and other relatives, and the lack of child care facilities in courts may need to be taken into account when considering hearing dates and times.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

It is noted that access to justice for women and men with children may be hindered by the lack of availability of appropriate childcare facilities (p.167).

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Identifies the potential for gender bias in court proceedings if the child care role is not taken into account [10.4.4.7]. In relation to child care commitments and court proceedings:

- Given the lack of childcare facilities in courts and respite care generally, you may need to take these factors into account when considering the start and finish times on any particular day, the dates of hearings, adjournment dates, and the need for adjournments or breaks — for example, to allow a witness or juror to check that any necessary care arrangements are in place.
- Note that a woman may need adjournments to breastfeed her child or to express milk.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 13.5: Social context: when parents flee from domestic violence explores the particular issues parents

may face, such as decisions whether to take children with them, and implications for legal proceedings around custody as a consequence. Also see Section 13.10.1: Assessing child safety and best interests in domestic violence context, and footnote 179, which states that ‘[i]n a family context, concerned targeted parents may remain or return to abusive homes in order to serve as a buffer between the abuser and the children, particularly in jurisdictions where abusers are regularly awarded unsupervised access or even custody of children’.

People with children - Other Resources

Domestic Abuse Intervention Programs, *Using Children Post-Separation Power and Control Wheel* (Factsheet, 2013).

This resource highlights the ways in which perpetrators may use children in post-separation situations to further abusive behaviours.

Federal Circuit and Family Court of Australia, *The impact of family violence on children* (Fact sheet).

This fact sheet provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

People with children - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Leah

Lisa

Melissa

Mira

Sally

Sandra

Sara

Susan

Trisha

People with children - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Pasa v Bell **[2014] ACTSC 303 (30 October 2014) – Australian Capital Territory Supreme Court**

Murrell CJ at [16]: ‘When considering the sentencing purposes set out in s 7 of the Sentencing Act, including general and personal deterrence, a sentencing court is entitled to consider the fact that an offence involved domestic violence, and that the violence has occurred at the victim’s home. An offence involving domestic violence is one that involves abuse of a partner, former partner or other family member (using the term “family” in the broadest sense). Frequently, such offences occur in the home, where the inhibitions of an offender may be lowered, the impact on the victim may be heightened (as she or he is made to feel that a formerly safe place has been violated) and the occurrence of the offence is more readily concealed. Further, where a domestic violence offence occurs in the victim’s home, it is often associated with secondary abuse to other family members’.

R v In **[2001] ACTSC 102 (2 November 2001) – Australian Capital Territory Supreme Court**

Crispin J at [24]-[25]: ‘In my view the offences which the prisoner committed were too serious to be dealt with in that manner. His wife was confined for an extended period and, whether he now remembers it or not, he behaved in a manner which was clearly calculated to terrify her. He plainly made no attempt to conceal his identity, yet put tape over her eyes. It is difficult to imagine any explanation for that conduct other than that it was calculated to cause fear. Even if he did not intended to carry them out, it is obvious that his threats to kill the children were also made for that purpose. Furthermore, his conduct in turning on the tap in the kitchen, going to his daughter's bedroom and saying in a voice loud enough for his wife to hear "Now take this darling, I know tastes awful, doesn't it" amounted, in my view, to an exercise in sadistic cruelty. A tape recording of his wife's telephone call to obtain an ambulance was admitted in evidence. It records what one might have expected, a mother almost incoherent with fear that her children may have been poisoned’.

Connelly v Tasmania **[2015] TASCCA (29 June 2015) – Court of Criminal Appeal of Tasmania**

The appellant attempted to kill his two children to spite his wife. Wood J at [23]: ‘The "nature of the crimes" encompasses a number of considerations: the appellant's moral culpability, the gravity of his criminal conduct, and the consequences of his crimes. The comments of the learned sentencing judge, set out in the reasons of Estcourt J, provide details of these matters and it is not necessary that I set them out here. However, I mention the following to demonstrate all that the expression captures in this instance. The appellant's moral culpability involved deliberative acts to kill his two young children, his determined efforts to carry out his decision, and extended to his vindictive motive to inflict maximum anguish and emotional trauma upon his wife. The gravity of the conduct captures that he almost succeeded in carrying out his purpose, that it was the "worst possible kind of abuse of trust", and the vulnerability of his victims. The severe, life-threatening injuries he caused to his sons fall within the nature of the crimes, as do as the victims' permanent scarring, prolonged hospitalisation and extensive surgical intervention. So, too, their "extraordinarily traumatic experience", the degree of emotional suffering and physical pain they have endured and difficulties they will continue to experience for the duration of their lives, as well as the risks to their psychological wellbeing. The nature of the crimes includes the emotional torment and harm the appellant in fact caused his wife, not just his intention to do so. It also includes the risk of grave harm to which others were exposed in endeavouring to save the lives of the victims. The nature of the crimes also captures the broader harm that is inevitably caused to the community when crimes such as these are committed’.

Children

When domestic and family violence occurs between adults in families with children, those children are exposed to that violence. A significant number of Australian children are exposed to violence perpetrated most often against their mother by their father or their mother's current or former male partner [Richards 2011]; much higher rates of exposure occur among Aboriginal and Torres Strait Islander communities [Flood & Fergus 2008]. According to the 2016 Australian Bureau of Statistics' Personal Safety Survey, approximately 50% of women 'who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence'. Further, almost 70% of women who had children in their care when they 'experienced violence by a previous partner reported that the children had seen or heard the violence' [ABS PSS 2016]. Children do not however need to see or hear the domestic and family violence to be exposed to it.

Childhood exposure to domestic and family violence may be direct or indirect, with either form having the potential to cause significant harm.

Examples include [Richards 2011]:

- Assault prior to birth
- Attempting to stop the violence or defend a parent
- Being threatened, harmed or abused by the perpetrator, for example: being used as a weapon or hostage; being blamed for the violence
- Being forced to watch or participate in the violence, or spy on a parent.
- Witnessing the violence
- Witnessing a parent's physical injuries
- Being neglected as a consequence of a parent's injuries
- Sleeping during the violence, or overhearing the violence from another room and taking measures to avoid being affected, for example: turning up the volume; sleeping with pillows over the ears; leaving the house and walking the streets
- Witnessing damage and destruction to furniture, toys and other family belongings

- Witnessing harm to family pets, or becoming aware that a pet has been given away, harmed or killed
- Experiencing the aftermath of the violence, for example: having to seek emergency assistance; witnessing a parent being interviewed or arrested by police; attending to a parent's injuries; having to interact with the perpetrator; knowing a parent may be stalked; coping with their own trauma, distress and injuries; assuming the care of family members; missing school; being removed home and community because they are not safe; being isolated from family and friends.
- Being forced into poverty or homelessness as a consequence of the perpetrator's economic abuse
- Growing up in an environment of stress without stability or security, and without appropriate adult role models.

A perpetrator may also use a range of tactics to undermine or destroy the relationship between mother and child [Hooker et al 2016]. Depending on the child's age, the perpetrator may deliberately abuse the victim in front of the child so as to induce fear in the child or a sense that their mother is weak and unable to protect herself. The perpetrator may discredit the victim's mothering skills by accusing her of being a bad mother, or he may coach and recruit the child in the perpetration of the violence, or isolate the victim and children from family, friends and other sources of support and care. Over time these corrosive and manipulative behaviours may increasingly restrict and control all aspects of the everyday lives of victims and their children, including their sense of reality and their capacity to act competently and assertively; and may ultimately impair their physical, emotional and mental health and wellbeing.

Different children in the same family may give dramatically different statements and testimony as a consequence of different experiences, for example one child may be the targeted child, another may be the protected child [Hooker et al 2016].

It should be noted too that notwithstanding the extent of exposure to domestic and family violence a child may be reluctant to disclose their experiences or feelings for fear of not being believed or making the situation worse, or because they have been groomed or coerced not to disclose [Hart 2004]. The prevalence of exposure may also cause the child to perceive violence as normal and disclosure as unnecessary.

Parents and caregivers who perpetrate domestic and family violence are far more likely than other parents and caregivers to also perpetrate direct forms of child abuse and engage in negative parenting practices. The affected children in their care are also more likely to experience multiple additional adversities such as exposure to other forms of physical, sexual and emotional violence and abuse in the home, at school, and in

the community [Finkelhor et al 2009]. A child's exposure to domestic and family violence at any age may result in a range of poor psychological, behavioural and physical outcomes including depression, anxiety, trauma symptoms, increased aggression, antisocial behaviour, temperament and mood problems, impaired cognitive functioning, learning and schooling difficulties, low self-esteem, pervasive fear, peer conflict, loneliness, increased likelihood of alcohol or substance misuse, and vulnerability to unemployment and homelessness. It is also possible that domestic and family violence-exposed children may as adults exhibit attitudes and behaviours that reflect their childhood experiences [Sety 2011].

Children - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Approximately 50% of women 'who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence'. Further, almost 70% of women who had children in their care when they 'experienced violence by a previous partner reported that the children had seen or heard the violence'. Further, approximately 60% of men 'who had children in their care when they experienced violence by a previous partner reported that the children had seen or heard the violence'. See Tables 17-18 for further detail.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and

- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This literature review cites statistics from a US study, the statistics were collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Brown, Thea, Samantha Bricknell, Willow Bryant, Samantha Lyneham, Danielle Tyson and Paula Fernandez Arias, *Filicide offenders* (Australian Institute of Criminology Report No. 568 February 2019).

Report abstract:

Filicide is the killing of a child by a parent or parent equivalent. Between 2000–01 and 2011–12, there were 238 incidents of filicide in Australia involving the death of 284 children. This paper examines the characteristics of custodial parents, non-custodial parents and step-parents charged with the murder or manslaughter of their children.

Offender circumstances and characteristics differed according to the offender's gender and custodial relationship with the victim. As filicide is difficult to predict, intervention strategies should focus on families with multiple risk factors and address the needs of parents as well as those of children at risk.

Commissioner for Children and Young People, *Children and Young People's Unique Experiences of Family Violence* (Commissioner for Children and Young People, Tasmania, 2016).

This report provides a number of findings on children and young people's unique experience of family violence. It notes that effects of family violence on children and young people can have a detrimental effect on their development, as well as their physical and mental wellbeing. Their experience is a form of 'complex trauma' – 'which describes both children's exposure to multiple, chronic and prolonged developmentally adverse traumatic events, and the substantial long-term impact of this exposure'. Further, '[m]any children and young people who have experienced FV display high levels of self-efficacy and resilience; it should not be assumed that their potential to succeed is lessened compared to those who haven't experienced FV or that they will grow up to be perpetrators themselves'. There is a need to improve the ways information is gathered on children's experiences (p.4) and to understand their specific needs (p.5).

eSafety 2020, Children and technology-facilitated abuse in domestic and family violence situations: Full report.

Abstract: This world-first research explores the role technology plays in children's exposure to family and domestic violence. It shows the impacts of technology-facilitated abuse and highlights the range of strategies used for protection and intervention.

The research is based on a survey of over 500 professionals who work with domestic and family violence cases, as well as focus groups with domestic violence specialist staff and interviews with young people, mothers and perpetrators.

Key findings include:

- Over one quarter (27%) of domestic violence cases involve technology-facilitated abuse of children.
- Of cases involving children, the most common forms of technology-facilitated abuse they experienced are:
  - monitoring and stalking – 45%
  - threats and intimidation – 38%
  - blocking communication – 33%.
- This abuse typically involves everyday technologies such as mobile phones (79% of cases), texting (75%) and Facebook (59%).
- It causes real harm, negatively impacting children's mental health (67% of cases), their relationship with the non-abusive parent (59%) and their everyday activities (59%).

The research highlights options for future action such as education, hands-on technology support, screening tools for professionals and extending phone replacement programs to older children.

Flood, Michael, and Lara Fergus, *An Assault on Our Future: The Impact of Violence on Young People and Their Relationships* (Report, The White Ribbon Foundation, 2008).

Reporting statistics drawn from the National Crime Prevention Survey (2001) this paper reports that Aboriginal and Torres Strait Islander young people were significantly more likely to have witnessed physical domestic violence against their mother or step-mother than other young people (42%, compared to 23% for all respondents) (p11).

Hart, Amanda, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *Australian Journal of Family Law* 170.

This article points out that children may find it difficult to disclose violence because of a fear of not being believed and the possibility of making the situation worse. The article notes that children need to be included in determinations of what is in their best interests (p174).

Hooker, Leesa, Rae Kaspiew, and Angela Taft, *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper* (ANROWS, 2016).

This comprehensive state of knowledge paper is the first of a three part mixed-methods research project addressing parenting and abuse tactics. This paper presents the current state of knowledge on parenting in the context of DFV by examining the following four research questions:

- What is the prevalence of DFV among parents?
- How does DFV impact on parenting capacity?
- What are the methods and behaviours that perpetrators use to disrupt the mother---child relationship?
- What interventions exist to strengthen and support a positive and healthy mother--child relationship?

This review identifies that DFV may impact negatively on women and children and the parenting capacity of both perpetrators and victims is affected. Altered mother--child relationships may occur due to deliberate undermining of the mother's parenting, and children are often used by perpetrators as tools to abuse mothers and exert control and coercion (p 2).

The report points out that violence does not end when couples separate. It specifically identifies the legal system as a tool of abuse used by perpetrators, and that poor understanding by legal professionals can heighten the risks for women and children (p 2).

Although there is limited information on the parenting style of abusive fathers, abusive men as fathers have been characterised by researchers and victims as authoritarian, under-involved, self-centred and manipulative. These men also engage in high levels of substance abuse. Children exposed to partner violence in the home by their father/stepfather are at heightened risk of child maltreatment including child sexual abuse (p 2).

The report suggests that supportive care includes improved understanding and collaboration between child protection, family law, and domestic violence advocacy services (p 2).

The report also identified issues with forced contact through court:

- Shared parenting can leave mothers and children exposed to continuing abuse (p 26).
- Post-separation matters, including negotiation of property, parenting and child support can be used by abusive ex-partners to maintain power and control (p 27).
- Women feel pressured by lawyers to agree to co-parenting arrangements even though children's safety may be at risk, or make decisions in an environment of fear, pragmatic concern, and family ideology (e.g. perpetrators playing on guilt about "breaking up" the family) (p 28).
- Awareness amongst court staff in screening for family violence and safety concerns still remains problematic, despite legal and policy reform (p 28).

Humphreys, Catherine, 'Domestic Violence and Child Protection: Challenging Directions for Practice' (Issues Paper 13, Australian Domestic and Family Violence Clearinghouse, 2007).

This paper presents a discussion about the relationship between domestic and family violence and the child protection response. It identifies that children from culturally and linguistically diverse (CALD) and Indigenous backgrounds are at particular risk of experiencing domestic violence.

Meyer, S, Reeves, E, Fitz-Gibbon, K. The intergenerational transmission of family violence: Mothers' perceptions of children's experiences and use of violence in the home. *Child & Family Social Work*. 2021; 1– 9.

Abstract: Intimate partner violence (IPV) on average affects one in four women, with the majority of victim survivors identifying as mothers in national survey data. Children experiencing parental IPV are now equally understood as victims. Extensive research documents the short- and long-term impacts of children's experiences of IPV on their safety and wellbeing. More recently, research has started to examine adolescent children's use of violence in the home as adolescent family violence (AFV). Contributing to this emerging body of research, we draw on narrative interview data from mothers who participated in a larger study on IPV, help-seeking and the perceived impact on children to better understand how mothers make sense of

children's use of violence in the home. Mothers identified an emergence of AFV in male children with childhood experiences of adult IPV. Although mothers' experiences of adult and adolescent violence highlight their dual victimisation, mothers frame their abusive children as victims rather than perpetrators. Implications for future research, policy and trauma-informed practice are discussed.

Meyer S, Stambe R-M. Mothering in the Context of Violence: Indigenous and Non-Indigenous Mothers' Experiences in Regional Settings in Australia. *Journal of Interpersonal Violence*. November 2020.

Abstract: Domestic and family violence (DFV) disproportionately affects women and children in Australia and globally. On average, one in three women experiences DFV during adulthood and the majority of these women identify as mothers. The prevalence of DFV is higher for Indigenous women and their experiences disproportionately range at the more severe end of physical abuse. For women affected by DFV, mothering during and post this type of victimization is complicated by strategic entrapment, undermining of the mother–child relationship, and threats of harm directed at children and mothers. While a substantial body of literature has examined the experiences of mothers affected by DFV more broadly, research on the experiences of Indigenous mothers affected by DFV remains scarce. Research evidence is further limited when trying to understand the specific constraints experienced by mothers affected by DFV in regional settings. This article examines the experiences of Indigenous and non-Indigenous mothers affected by DFV in regional Queensland, Australia. Data derived from 17 qualitative face-to-face interviews are used to explore the lived experiences of these mothers. Findings identify the immediate and long-term effects of DFV on mothers and children, including similarities and differences in women's experiences of mothering in the context of DFV, experiences of entrapment in an abusive relationship, experiences of post-separation abuse, strategies used to mitigate its impact on children, and surviving as a female-headed single-parent household in regional settings. While mothers in this study shared a number of similar experiences, regionality, the risk of cultural disconnectedness, and socio-structural marginalization disproportionately affected Indigenous mothers in this study. Findings raise key implications for supporting mothers and children's safety and recovery, access to safe and sustainable housing in regional towns, and the empowerment of Indigenous women to overcome the lasting effects of colonization and disproportionate experiences of disadvantage.

Powell, Anastasia and Suellen Murray, 'Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand' (2008) 17(4) *Social and Legal Studies* 453.

This article discusses the relationship between domestic violence responses, child protection responses and family law responses, where a child witnesses or experiences domestic violence. It identifies that (p467):

'Where domestic violence responses, child protection responses and family law responses collide, a mother may simultaneously be constructed as being responsible for protecting her children from the influence of an ex-partner's violence, in need of support and protection herself, and responsible for facilitating the other parent's contact with children.'

'Similarly, children may be simultaneously constructed as primary 'victims' in need of protection from exposure to parental violence, as secondary victims who can be protected from exposure to a father's violence by supporting/protecting the mother, or as 'witnesses' of parental conflict who will benefit most from equal contact with both parents. Domestic violence itself is understood differently throughout these contested discourses…'

Richards, Kelly 'Children's Exposure to Domestic Violence in Australia' (2011) 419 *Trends and Issues in Crime and Criminal Justice* 1.

This paper presents a helpful overview of relevant literature. It identifies that children who live in homes characterised by violence between parents, or directed at one parent by another, have been called the 'silent', 'forgotten', 'unintended', 'invisible' and/or 'secondary' victims of domestic violence.

It summarises the research that demonstrates that witnessing domestic and family violence can involve a broad range of incidents, including the child:

- hearing the violence;
- being used as a physical weapon;
- being forced to watch or participate in assaults;
- being forced to spy on a parent;
- being informed that they are to blame for the violence because of their behaviour;
- being used as a hostage;

- defending a parent against the violence; and/or
- intervening to stop the violence.

It summarises research on the impact of domestic and family violence on children in the aftermath of violence including:

- having to telephone for emergency assistance;
- seeing a parent's injuries after the violence and having to assist in 'patching up' a parent;
- having their own injuries and/or trauma to cope with;
- dealing with a parent who alternates between violence and a caring role;
- seeing the parents being arrested; and
- having to leave home with a parent and/or dislocation from family, friends and school.

Sety, Megan, 'The Impact of Domestic Violence on Children: A Literature Review' (Report, Australian Domestic and Family Violence Clearinghouse, 1 August 2011).

This review identifies that:

- Children experience serious emotional, psychological, social, behavioural and developmental consequences as a result of experiencing violence.
- Infants and young children are especially at risk.
- Perpetrators often attack or undermine the mother-child relationship and use children in committing violence, such as threats to harm the children.
- Children continue to be at risk from the effects of violence during and after parents' separation.
- Children experience significant risks in shared parenting arrangements when the arrangement involves substantial shared time with the violent parent.
- The evidence shows that false allegations of domestic violence and child abuse are rare. There is, however, evidence to suggest that perpetrators often deny or minimise their use of violence.

International

Edleson, Jeffrey L, 'Children's Witnessing of Adult Domestic Violence' (1999) 14(8) *Journal of Interpersonal Violence* 839.

In this foundational article, the author reviews 31 research articles published since 1989. As a result of the review, the author attempts to 'expand common definitions of how children witness adult domestic violence by showing how children not only see violence but also hear it occurring, are used as part of it, and experience the its aftermath' (p16). A variety of behavioural, emotional, and cognitive-functioning problems among children found to be associated with exposure to domestic violence. The author identifies factors that appear to moderate the impact of witnessing violence (eg whether the child was also abused, child gender and age and time since last exposure to violence).

Finkelhor, David, et al, 'Children's Exposure to Violence: A Comprehensive National Survey' (2009) (Oct) *Juvenile Justice Bulletin* 1.

This Bulletin discusses the National Survey of Children's Exposure to Violence, the first comprehensive nationwide US survey of the incidence and prevalence of children's exposure to violence Conducted between January and May 2008, it measured the past-year and lifetime exposure to violence for children age 17 and younger across several major categories: conventional crime, child maltreatment, victimization by peers and siblings, sexual victimization, witnessing and indirect victimization (including exposure to community violence and family violence), school violence and threats, and Internet victimization.

The study found (inter alia) that children who were exposed to one type of violence, both within the past year and over their lifetimes, were at far greater risk of experiencing other types of violence. For example, a child who was physically assaulted in the past year would be five times as likely to also have been sexually victimized and more than four times as likely also to have been maltreated during that period. Similarly, a child who was physically assaulted during his or her lifetime would be more than six times as likely to have been sexually victimized and more than five times as likely to have been maltreated during his or her lifetime.

Jane E M Callaghan et al, 'Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse' (2015) *Journal of Interpersonal Violence* (online).

This article investigates children's experiences with domestic and family violence (DFV), through interviews

with 21 children who have been victims of DFV (p 7). The results indicate that children are aware of patterns of coercive control, and the impacts of such abuse (pp 10-3). Such experiences result in an increased sense of constraint, which children may develop specific strategies to cope with (pp 14-6).

Significantly, the article raises children's direct agency in coping with, and responding to, DFV, highlighting the inaccuracy of treating children as merely passive witnesses (pp 17-20). Accordingly, the authors recommend that professional responses to DFV better recognise children's agency, moving beyond perceptions of them as passive witnesses, and tailor strategies for children as direct victims (pp 22, 23-4).

Jofre-Bonet, Mireia, Melcior Rossello-Roig, Victoria Serra-Sastre, *The Blow of Domestic Violence on Children's Health Outcomes* (City University London, London School of Economics, 2016).

This study examines the effect of domestic violence on children's health outcomes. Drawing results from the UK Millennium Cohort Study, the authors found that 'there was a strong negative externality of household violence on children's health outcomes'. Children living in a household where there was domestic violence appeared to be between 55% and 61% less likely to have their health rated as Excellent'. This paper 'not only sheds light on the negative impact of domestic violence on children's health but provides a robust quantification of this effect'.

Katz, E (2016) Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control, Child Abuse Review Vol. 25, 46-59.

Abstract: This article begins to build knowledge of how non-violent coercive controlling behaviours can be central to children's experiences of domestic violence. It considers how children can be harmed by, and resist, coercive controlling tactics perpetrated by their father/father-figure against their mother. Already, we know much about how women/mothers experience non-physical forms of domestic violence, including psychological/emotional/verbal and financial abuse, isolation, and monitoring of their activities. However, this knowledge has not yet reached most children and domestic violence research, which tends to focus on children's exposure to physical violence. In this qualitative study, 30 participants from the UK, 15 mothers and 15 of their children (most aged 10-14) who had separated from domestic violence perpetrators, participated in semi-structured interviews. All participants were living in the community. Using the 'Framework' approach to thematically analyse the data, findings indicated that perpetrators'/fathers' coercive control often prevented

children from spending time with mothers and grandparents, visiting other children's houses, and engaging in extra-curricular activities. These non-violent behaviours from perpetrators/fathers placed children in isolated, disempowering and constrained worlds which could hamper children's resilience and development and contribute to emotional/behavioural problems. Implications for practice and the need to empower children in these circumstances are discussed.

Katz, E, Nikupeteri, A & Laitinen, M 2020, 'When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence', *CHILD ABUSE REVIEW*, vol. 29, no. 4.

Abstract: This article highlights how domestic violence perpetrators can use coercive control against their children after their ex-partner has separated from them. It provides insights into how children experience coercive control post-separation by drawing from two data sets: one from the UK and one from Finland. The data comprised narratives of 29 children and young people aged from 4 to 21 years old. Three overarching themes arose from the data: 1) dangerous fathering that made children frightened and unsafe; 2) 'admirable' fathering, where fathers/father figures appeared as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victims'; and 3) omnipresent fathering that continually constrained children's lives. Dangerous fathering made children's lives frightening, constrained and unpredictable. Admirable fathering was found to be a powerful tool of control when combined with dangerous fathering, because admirable fathering increased father-child emotional bonds and could make children want to see/live with their fathers, whilst dangerous fathering simultaneously made them fearful of him. Admirable fathering was typically aimed at professionals and wider communities, and could occur alongside fathers/father figures stalking, harassing and/or attacking ex-partners and children when they were not in the public eye. Perpetrators aimed to portray themselves as 'caring', 'concerned', 'indulgent' and/or 'vulnerable-victim' fathers, and to make their ex-partners seem like perpetrators or deficient mothers. Perpetrators disguised their use of coercive control tactics as 'admirable' behaviour. With respect to omnipresent fathering, children were fearful that their father/father figure could appear at any time to attack, harass, manipulate, upset or kidnap them or their mothers. This behaviour led to some children continuously monitoring their surroundings as a protective strategy. Fathers/father figures were able to maintain some degree of control, domination and emotional power over children even when they were not physically present. The article suggests that robust measures are necessary to prevent coercive control perpetrating fathers/father figures from using father-child relationships to continue exerting coercive control on children and ex-partners.

Lux, G & S Gll, Identifying Coercive Control in Canadian Family Law: A Required Analysis in Determining the Best Interests of the Child. (2021)59 (4) Family Court Review 810-827 doi: 10.1111/fcre.12540

Amendments to the Canadian Divorce Act have required that family violence, specifically coercive controlling behaviour, be considered when making best interest determinations for children. This paper (1) outlines how this concealed, patterned, and harmful behaviour presents in family law disputes and (2) sets out considerations for parenting arrangements. It identifies the perils of subjective impressions as well as where the legal system and its interventions may be vulnerable to misuse. Children in families where coercive control is occurring are at risk of harm. The article concludes that the lack of intentional analysis of coercive control does not serve the best interests of the child.

Lyons, et al., Risk Factors for Child Death During an Intimate Partner Homicide: A Case-Control Study (2021) 26(4) Child Maltreatment 356-362 doi: 10.1177/1077559520983901

This research used the US National Violent Death Reporting System (NVDRS) data (2003–2017) to compare all IPH incidents with a child corollary victim (n = 227) to all IPH incidents where a child was present but not killed (n = 350). We examined risk factors for child fatality during an IPH. For each risk factor, we calculated the odds ratio for child death during the IPH, adjusting for multiple comparisons. Perpetrator history of suicidal behavior, rape of the intimate partner victim, a non-biological child of the perpetrator living in the home, and perpetrator job stressors increased odds while prior separation of the IPV victim from the perpetrator decreased the odds of a child death during an IPH incident.

Children - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 6 discusses a range of issues affecting children and young people and their experience of court processes.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Chapter 13 of the bench book highlights the specific vulnerabilities of and challenges faced by children in the legal system. It first discusses matters of child development, highlighting that children are to be treated less harshly because of their youth. The bench book then turns to consider the various ways in which children interact with court processes and briefly canvasses the ways in which these issues have been dealt with by legislative measures.

At pp.151-153, the bench book looks at the issue of child development and immaturity noting that: ‘It is well recognised today that childhood and adolescence are key developmental phases, and that early experiences can affect that development. Parenting, including parental absence, plays a fundamental role in how children come to perceive themselves, as well as the world around them and how they interact with it. This includes matters such as the understanding of right and wrong, impulse control, and the taking of responsibility for one’s actions’. The bench book provides a discussion of the science regarding children’s development before stating, ‘where children are neglected or abused (particularly if severely or for prolonged periods), they are likely to progress into in a chronic state of fear and to respond accordingly. Such hyper arousal is to the detriment of other functions and also tends to mean these children struggle to comprehend any later attempts at nurturing and kindness’.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

1.1 notes that causing a child to hear, witness or be exposed to family violence amounts to family violence.

5.3 discusses in detail the impact of family violence on children. 2.5.1 discusses specific procedural protections in court proceedings relevant to children.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 5 provides detailed information about children giving evidence and their compellability in various proceedings including Family Law proceedings and restraining order proceedings. It includes information about communication issues including level and style of language.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 6: Children: Impact of Domestic violence & Evidence of children details the issues associated with children's experiences of domestic violence. Most relevant are the sections relating to myths about children, and Section 6.3: Listening for evidence of child harm by age which looks at the variety of harms children are vulnerable to. It goes on to discuss '[d]esigning agreements and orders to limit child harm' in Section 6.4, and also analyses issues with evidence, and court procedures in relation to children testifying.

Also see Supplementary Reference 2: Children and Domestic Violence' which further discusses the varying levels of exposure of children witnessing domestic violence, and understanding the impact of domestic violence on children.

Children - Other Resources

Australian legal definitions: when is a child in need of protection? **(CFCA Resource Sheet – July 2019, Australian Institute of Family Studies).**

This CFCA resource sheet is a single reference guide for practitioners and researchers on legal definitions of 'a child is in need of protection', as set out in civil child protection legislation in each Australian jurisdiction.

Echo Parenting & Education, ***The Impact of Trauma*** **(2017).**

This fact sheet explains the lasting impacts of childhood trauma on victims. Examples of impacts include loss of safety, loss of trust and re-enactment of the trauma.

Federal Circuit and Family Court of Australia, ***The impact of family violence on children*** **(Fact sheet).**

This fact sheet provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

Children - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Bianca

Erin

Felicity

Francis

Gillian

Hilary

Jane

Julia

Leyla

Lisa

Sandra

Susan

Children - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

In the Marriage of JG and BG **(1994) 122 FLR 209; (1994) FLC 92-515; (1994) 18 Fam LR 255 (30 September 1994) – Family Court of Australia**

Chisholm J at [260]-[262]: 'The authorities, then, require the court to make a judgment about the relevance of family violence to the welfare of the children. In what circumstances is family violence relevant to children's welfare? Its relevance may be more obvious in some situations than in others. Where the violence is directed at the children themselves, it is obviously and directly relevant to their welfare. Section 64(1)(va), quoted above, expressly requires the court have regard to the need to protect the child from abuse and ill treatment. Similarly, when the violence is committed in the presence of children, it will obviously have the potential to frighten and distress them.

I do not think it can be said as a matter of law that other forms of family violence are incapable of being relevant to the welfare of the children. Violence occurring between household members, even though occurring away from the children, may have the potential to cause them distress and harm, for example where it affects the parenting of the custodial parent. Similarly, threats of violence may have an impact on the welfare of children. The nature and extent of such harm must of course be assessed in the light of the evidence and findings in each case. In some cases, the court may be assisted by expert evidence on the impact of violence on the children. Violence may take many forms and have a quite different significance in different cases. It might be, for example, a single outburst, out of character, caused by a stressful situation, for which the violent persons feels immediately regretful and apologetic. It might be the result of mental instability or disease. It might stem from a person's inability to control his or her temper. It might represent a deliberate pattern of conduct through which the violent person exercises a position of dominance and power over the other. It might be associated with a particular situation, and be unlikely to be repeated in different situations, or it might be a recurrent pattern of behaviour occurring in many situations. The violent person may deny the violence, or seek to justify it, or alternatively might accept responsibility for it and be willing to take appropriate measures to prevent it happening again.

These and many other aspects of violence may be highly relevant to the court in its task of attempting to determine the relevance of the violence to the children's welfare. The court's ability to make this determination will of course depend on the evidence available to it. Violence associated with a pattern of dominance, for example, may be particularly serious. For children to grow up in a climate of a potentially violent and dominating relationship between their parents seems to me to be an unacceptable model of family relationships, and would be very likely to create a situation of stress and fear that may well be damaging over a period. It is quite wrong, in my opinion, to assume that violence can be relevant only if it is directed at the children or takes place in their presence. It is equally wrong to assume that violent behaviour will necessarily be repeated, or to assume too readily that it will harm children, or to give it excessive importance; it is of course only one factor relevant to the assessment of what the child's welfare requires, and it will be more important in some cases than in others'.

R v Rogers **[2014] ACTSC 124 (1 April 2014) – Australian Capital Territory Supreme Court**

Penfold J at [7]: 'The offences were all serious examples of the relevant offences. Both assaults were at the higher end of the spectrum of assaults appropriate for a charge of assault occasioning actual bodily harm, especially given the extended period over which the assaults took place and the fear of more serious assaults that seems to have been present throughout. The presence of KN's son, and his fear and distress at the events he witnessed, seriously aggravated the second assault occasioning actual bodily harm. The unlawful confinement offence must have been especially terrifying to the victim. All the offences were further aggravated by the breach of trust that is in my view inherent in most if not all domestic violence offences, especially those that occur in the privacy of a home shared by the victim and the perpetrator, a circumstance which of itself – that is the sharing of the home – seems to me to establish a mutual relationship of trust'.

Elson v Ayton **[2010] ACTSC 70 (15 July 2010) – Australian Capital Territory Supreme Court**

Refshauge J at [70]: 'It is clear that the courts have a duty to express the community's particular interest in denouncing family violence especially by appropriately severe sentences where it is aggravated by being committed in the presence of children. Where this occurs, it not only increases the humiliation and sense of powerlessness of the victim, but it is also likely to cause real psychological damage to the children and risks creating offenders of the children themselves. The courts must show that this is unacceptable and to be

condemned as such'.

R v AKB **[2018] NSWSC 1628 (2 November 2018) – New South Wales Supreme Court**

At [25], Davies J stated –

> *The murder was seriously aggravated by having been carried out in the presence of the two children of the offender and the deceased, and in circumstances where the offender actively prevented WB from trying to save his mother. It was aggravated by having been committed at the deceased's home where she was entitled to feel safe. It involved gratuitous cruelty inasmuch as the deceased was burnt to death whilst being prevented from escaping from the fire.*

Allen v Kerr **[2009] TASSC 10 (25 February 2009) – Supreme Court of Tasmania**

Porter J at [13]: 'There were two young children present at the time of the attack. It is not clear, but presumably they were in the vehicle with the complainant. In any event, it was not disputed that they were present throughout the incident. One was about 8 years old, the other about 1 year old. The *Family Violence Act*, s13, reflects the common law, but it is of some significance that Parliament has seen fit to expressly recognise the presence of children as an aggravating factor in the case of family violence offences. The reasons that the presence of children is an aggravating factor of some significance are largely self-evident. Violence witnessed by children in the domestic environment not only is distressing (usually the victim is a parent or someone in the place of a parent), but it also serves to desensitise impressionable minds to violence, and to encourage the notion that resort to violence is acceptable'.

El Tahir v The Queen **[2011] VSCA 46 (4 March 2011) – Victorian Court of Appeal**

Mandie JA at [23]: 'In my opinion the sentence was not manifestly excessive and, indeed, properly reflected the gravity of the offence after taking into account all mitigatory factors including the plea of guilty. The Court rightly treated with the utmost seriousness the appellant's knife attack on his defenceless wife in the presence of their children and in circumstances which included the invasion of her home in breach of a court order. Further, the relative brevity of the non-parole period might be thought to properly and adequately take into account the personal circumstances of the appellant'.

***Bropho v Hall* [2015] WASC 50 (9 February 2015) – Supreme Court of Western Australia**

Mitchell J at [18]: The second circumstance of aggravation was that children were present when the offence was committed. ‘The facts of this case illustrate a tragic cycle of violence with which the courts are depressingly familiar. A person exposed to domestic violence in his early life goes on as an adult to perpetrate the violence to which he was exposed as a child, damaging members of his community in the same way he was damaged as a child. For that reason, the fact that the appellant's offence was committed in the presence of children was a significant aggravating factor’.

Young people

Young people's dating or intimate relationships may involve domestic and family violence in the form of physical violence by both male and female partners. However, young women [ABS PSS 2016] are more likely than young men in these circumstances to be physically injured or frightened by the violence, and the physical, mental and emotional harm experienced by young women is likely to be more serious and damaging [Flood & Fergus 2008]. Compared with the overall prevalence of violence against women, young women are the most likely to have experienced violence (around one in ten), and sexual harassment (around three in five) in the last 12 months [ABS PSS 2016]. Australian women aged 18 to 24 years experience higher rates of physical and sexual violence by their partners or former partners than older women; and, within that group, those aged 20 to 24 years experience the highest rate of homicide victimisation [Mouzos & Makkai 2004]. US research [Peters et al 2002] supports the observation that young women are at greatest risk of victimisation, indicating that the age bracket begins at 15 years. It also observes that young men (aged 16 – 24 years) are at greatest risk for perpetration, however men's age is not the sole determinant as the young women victims at highest risk are those in relationships with perpetrators who are somewhat older.

Young people's vulnerability to physical violence in dating or intimate relationships may be heightened by strong peer norms that encourage traditional gender roles and relations; inexperience; age difference in relationships; and a lack of access to specialised services for young people experiencing abuse. An American study [Peacock & Rothman 2001] of adolescent male perpetrators reveals a profile of individuals who have been victims of child abuse or exposed to domestic and family violence, who have experienced substance misuse, or have been influenced by negative attitudes towards women and the pressure to comply with peer norms.

Research also suggests that young people may be less likely to understand the complex aspects of violence and abuse in relationships, or the range or seriousness of the behaviours that it may involve. While reported intergenerational influences are not consistent or definitive, they draw attention to vulnerabilities to perpetration and victimisation in young people who grow up in homes where they are exposed to domestic and family violence [Indermaur 2001].

It is acknowledged by researchers in this context that technology in young people's lives may facilitate or increase their exposure to sexual abuse and other forms of domestic and family violence. For example,

devices such as computers and smart phones may be used by the perpetrator in conjunction with platforms such as social networking sites and text messages to record sexual assaults, to make threats to distribute images or videos of the victim, or to distribute images or videos without the victim's consent [Bluett-Boyd et al 2013].

Young people - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

Women aged 18-24 were the most likely to have experienced violence, with approximately 12% of these women experiencing violence in the 12 months prior to the survey (see Table 6).

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019* (Report, 2019).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of

these forms of violence;

- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Bluett-Boyd, Nicole, Bianca Fileborn, Antonia Quadara and Sharnee Moore, 'The Role of Emerging Technologies in Experiences of Sexual Violence. A New Legal Frontier?' (Research Report No 23, Australian Institute of Family Studies, February 2013).

This research study investigates how communication technologies facilitate sexual violence against young people and what challenges this presents for the Victorian criminal justice system. Based on interviews with young people and professionals working with young people, it examines the effects of technology on the lives of young people, the interface between emerging communication technologies and experiences of sexual violence, and the factors that enable or hinder appropriate legal responses. Communication technologies such as online social networking sites and mobile phones are considered, and their use in identifying and grooming potential victims, blackmail and intimation, sexting, harassment, and pornography.

Boxall, Hayley and Anthony Morgan, *Repeat Domestic and Family Violence among Young People* Research Report No 591, February 2020, Australian Institute of Criminology.

This paper adds to what is known about family violence perpetrated by adolescents. It examines short-term reoffending patterns – including timing, prevalence, the peak period for repeat violence, and cumulative rates – as well as predictors of repeat violence, particularly those relating to prior histories of family violence or breaches of orders, given that this information is readily available to frontline responders. The paper draws on incident data from Victoria Police for almost 4,000 young people aged 12-18 involved in domestic or family

violence. Approximately one in four of these young people were involved in repeat violence in the six months following an incident, with the risk peaking at around 30 days following an incident in domestic violence cases and at around three to four weeks for family violence cases. Violence was largely perpetrated against intimate partners or parents. The findings show how the violence histories of young people can be helpful for identifying who will be involved in repeat violence in the short term, and who will be involved in multiple violent incidents. Frequency of prior incidents of violence is a better predictor of future short-term reoffending than prevalence of prior violence, but they are both useful indicators of future risk.

Boxall H & Morgan A 2021. Who is most at risk of physical and sexual partner violence and coercive control during the COVID-19 pandemic?. *Trends & issues in crime and criminal justice* no. 618. Canberra: Australian Institute of Criminology.

Abstract: In this study, data was analysed from a survey of Australian women (n=9,284) to identify women at the highest risk of physical and sexual violence and coercive control during the early stages of the COVID-19 pandemic.

Logistic regression modelling identified that specific groups of women were more likely than the general population to have experienced physical and sexual violence in the past three months. These were Aboriginal and Torres Strait Islander women, women aged 18–24, women with a restrictive health condition, pregnant women and women in financial stress. Similar results were identified for coercive control, and the co-occurrence of both physical/sexual violence and coercive control.

These results show that domestic violence during the early stages of the COVID-19 pandemic was not evenly distributed across the Australian community, but more likely to occur among particular groups.

Boxall H *et al.* 2020. Responding to adolescent family violence: Findings from an impact evaluation. *Trends & issues in crime and criminal justice* no. 601. Canberra: Australian Institute of Criminology.

Abstract: Despite growing recognition of the prevalence of and harms associated with adolescent family violence, our knowledge of how best to respond remains underdeveloped.

This paper describes the findings from the outcome evaluation of the Adolescent Family Violence Program. The results show that the program had a positive impact on young people and their families, leading to

improved parenting capacity and parent–adolescent attachment. However, there was mixed evidence of its impact on the prevalence, frequency and severity of violent behaviours.

The evaluation reaffirms the importance of dedicated responses for young people who use family violence, and the potential benefits, and limits, of community-based programs.

Campbell, Elena, Jessica Richter, Jo Howard and Helen Cockburn, *The PIPA Project: Positive Interventions for Perpetrators of Adolescent Violence in the Home (AVITH)* Research Report No 4, March 2020, ANROWS.

The 2016 Victorian Royal Commission into Family Violence found that adolescent family violence was poorly identified and had no considered systemic response. To help address this gap in knowledge, this report investigates the initial legal responses that adolescents and their families receive when they first come to the attention of the legal system. It compares legal and service sector interventions across three jurisdictions at very different stages of legislative, policy and definitional development – Victoria, Western Australia and Tasmania – focusing on awareness of adolescent family violence amongst practitioners and whether and how a legal response was provided. It also examines the characteristics of this form of violence and the impact of responses on families, using data from Victoria Legal Aid regarding 905 adolescents involved in either civil protection order matters or protection order breach matters. The study found that, across all three jurisdictions, current legal responses may not be addressing the objective of reducing risk to families and indeed may be deterring families from reporting.

Cox, Peta, 'Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012' (Australia's National Research Organisation for Women's Safety Horizons, 2016 Rev.ed.).

Section three: Women's experiences of partner violence (from p76)

- 'Section three of this report provides a detailed examination of the PSS data relating to women's experiences of partner violence. One in six women reported violence by a partner they had lived with (cohabiting partner) and one in four reported violence by a partner they may or may not have lived with (i.e. a combined total for cohabiting partner and boyfriend/girlfriend/date)'.

- Young women (most of whom did not co-habit with their partner) were at a statistically significant increased risk of male intimate partner violence (33,500, 3.1%).

Note: this article refers to an old release of the ABS' Personal Safety Survey, but the analysis remains useful. See Australian Personal Safety Survey (PSS) 2016.

Flood, Michael, and Lara Fergus, *An Assault on Our Future: The Impact of Violence on Young People and Their Relationships* (Report, The White Ribbon Foundation, 2008).

This report examines how violence against women specifically affects children and young people. It looks at the nature of violence they experience in their homes and their own relationships. Part 2 of this report focuses on 'Dating and relationship violence among young people'. At pp17-18 the authors draw on ABS statistics, the Australian Longitudinal Study on Women's Health and the National Crime Prevention Survey (2001) and reports:

- 12 per cent of women aged 18–24 years experienced at least one incident of violence in the last 12 months, compared to 6.5 per cent of women aged 35–44 years and 1.7 per cent of women aged 55 years and over.
- Among young women aged 18–23, 12 percent report that they have been in a violent relationship with a partner or spouse.
- 14 per cent of young women said a boyfriend had tried to force them to have sex, and 6 per cent said a boyfriend had physically forced them to have sex.

The authors note that inexperience, age differences in relationships and lack of access to services compound the problem of young women's vulnerability to violence in relationships (p24-28).

Relevant to the risk of perpetration of violence, the authors note that 'Young people's vulnerability to violence in relationships is heightened by strong peer norms, inexperience, age differences in relationships, and lack of access to services. Among young people, attitudes towards intimate partner violence are worst among younger males.' (p3). Also see 'Part Three: The causes of violence against girls and young women' (from p24), noting study findings such as 'In the survey of 12-20 year-olds above, boys aged 12 to 14 showed higher support for violence-supportive attitudes than older males (National Crime Prevention 2001: 75-95). Other Australian studies report similar results. In a Melbourne study for example, secondary school students had poorer attitudes towards rape victims and towards women than university students (Xenos and Smith

2001).' (p24). It goes on to discuss reasons for these findings, such as peer cultures and developmental shifts in attitudes in young men.

Grech, Katrina, and Melissa Burgess, 'Trends and Patterns in Domestic Violence Assaults: 2001 To 2010' (Issue Paper 61, NSW Bureau of Crime Statistics and Research, 2011).

Abstract: 'Descriptive analyses were conducted on all incidents of domestic assault recorded by NSW Police between 2001 and 2010. Factors associated with reporting of offences to police were examined using the Australian Bureau of Statistics, Crime Victimisation Survey 2008-2009.

Findings include that: males are more likely than females to be the offenders in both domestic (82.1% vs. 17.9%) and non-domestic assault (75.6% vs. 24.4%); and over 50 per cent of offenders were males between the ages of 18 and 39. (p7)

Indermaur, David, 'Young Australians and Domestic Violence' (2001) 196 *Trends and Issues in Crime and Criminal Justice* 1.

This is a foundational article in Australia; many subsequent reports refer to this research. This paper draws on survey data collected from 5,000 Australians aged 12-20 years from all states and territories in Australia. 55.5 per cent of respondents report having been aware of male to female domestic violence occurring at some time. Almost 70 per cent of the young people surveyed had had a boyfriend or girlfriend at some stage and about one in three of these young people (both males and females) reported incidents in their personal relationships that could be defined as "physical violence"' (p4). The research found that young people growing up in homes where there has been couple violence (both male and female carers perpetrating and being victimised by domestic violence) were more likely to be victims of relationship violence and perpetrators of violence in their intimate relationships. For example they were twice as likely to have been forced to have sex and four times as likely to have admitted forcing their partner to have sex (p4).

Morgan, Anthony, and Hannah Chadwick, 'Key Issues in Domestic Violence' (Summary Paper No 7, Australian Institute of Criminology, December 2009).

This paper reviews relevant literature. It notes that young people's vulnerability to intimate partner violence is increased by sexist and traditional gender role attitudes, peer culture, inexperience and attitudes supportive of violence that can be shaped by the media, pornography and early exposure to aggressive behaviour by parents or role models (p6).

Specific to perpetration by young people, the paper notes that 'Negative attitudes towards women are different across cultural groups and are influenced by culturally-specific norms and social relationships. However they are more commonly expressed among adolescent males than older males' (p6).

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and sexual violence including childhood violence. Quoting from ABS statistics the authors note that: 'in terms of sexual assault specifically most victims of sexual assault are women aged 18 to 24 years (46%) and unmarried (80%)' (p28). The paper notes that age has been found to be the strongest predictor of risk, and prior research shows that younger women are victimised disproportionately to older women (p28). Also, the authors report that younger women experienced higher rates of violence by their current partners (between 3 and 7% for the 18-24 years age group), compared to older women (between 2 and 3% for women aged between 45 and 54 years) – see Table 10 (p57).

In relation to perpetration of violence, the paper also reports that 'Research suggests that violence in intimate relationships is related more to the characteristics of the male than the characteristics of the woman (Piispa 2000). Levels of violence according to the age of the male partners follow a similar pattern, with a higher proportion of males in the younger age group being violent towards their intimate partners' (p56).

International

Dardis, Christina M et al, 'An Examination of the Factors Related to Dating Violence Perpetration Among Young Men and Women and Associated Theoretical Explanations: A Review of the Literature'

(2015) 16(2) *Trauma Violence and Abuse* 136.

Although focused on sex differences in the perpetration of dating violence, this paper discusses risk factors for dating violence in the context that while 'Previous research suggests that although there are some similarities between young adult DV and marital IPV, there are also important differences' (p139). It gives a thorough overview of the findings of literature in this area, and discusses numerous variables that may contribute to dating violence perpetration among young people such as historical, personal, interpersonal, and contextual variables.

Peacock, Dean and Emily Rothman, 'Working with Young Men Who Batter: Current Strategies and New Directions' (Violence Against Women National Online Resource Center, 2001).

This paper provides an overview of teen dating violence and juvenile batterer intervention programmes. The authors note that the profile of the adolescent male perpetrator of dating violence is similar to that of other juvenile offenders in the criminal justice system, with experiences of child abuse and having witnessed domestic violence, substance use, sexist attitudes and peer compliance. The intervention programmes are implemented as alternatives or complements to incarceration, and intend to rehabilitate and re-educate the young person.

Peters, Jay, Todd K Shackleford and David M Buss, 'Understanding Domestic Violence against Women: Using Evolutionary Psychology to Extend the Feminist Functional Analysis' (2002) 17(2) *Violence and Victims* 255.

This research tests the hypothesis posed by Wilson & Daly (1993) that one goal of male-perpetrated domestic violence is control over female sexuality, including the deterrence of infidelity. According to this hypothesis, domestic violence varies with women's reproductive value or expected future reproduction, declining steeply as women age. The study sample comprised 3,969 cases of male-perpetrated partner abuse reported to a single police precinct in a large urban area over a 14-year period. Results showed that (1) rates of domestic violence against women decrease as they age; (2) younger men are at greatest risk for perpetrating domestic violence; (3) younger, reproductive age women incur nearly 10 times the risk of domestic violence as do older, post-reproductive age women; & (4) the greater risk of domestic violence incurred by reproductive age women is not attributable solely to mateship to younger, more violent men.

In its findings, this paper notes that, ‘An alternative explanation for the steady decrease in violence against women as they age is that young women tend to be mated to young men and young men are the most violent age-sex subset of the population. Men aged 16 to 24 years, for example, commit the majority of violent acts, including homicide (Wilson & Daly, 1985). The decrease in violence toward women as women age therefore may be attributable to the aging of men and not attributable to the aging of women.’ (p258) However, the authors also note that this hypothesis is not entirely supported by the data: while the youngest men are at greatest risk for perpetrating domestic violence, ‘[t]he victimization rate for the youngest women (15-24 years) —women at greatest risk for domestic violence—is highest for women mated to men two age categories older. Thus, the elevated risk of domestic violence for the youngest women cannot be attributed solely to mateship to younger, more violent men’ (p259).

Young people - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 6 discusses a range of issues affecting children and young people and their experience of court processes.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

This bench books cites ABS statistics stating that 'Women aged 25–34 years had the highest rate of partner violence (2.8%), compared with women aged 55 years and over (0.5%) who experienced the lowest rate' at [10.1.7]. Section [13.3.4] 'Impact on children' provides information on impacts on young children through to young adulthood, including the typical short- and long-term responses children and young people may have.

Specifically in relation to young people, section [13.3.3] 'Risk factors for children' notes: 'Young people growing up in homes where there has been couple violence (both male and female carers perpetrating and being victimised by domestic violence) were more likely to be victims of violence and perpetrators of violence in their own relationships. For example, they were twice as likely to have been forced to have sex and four times as likely to have admitted forcing their partner to have sex. Overall, the best predictor of perpetration (and victimisation) of violence in young people's relationships was found to be witnessing certain types of male to female violence in the home'.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 6.3.7: Youth responses: adolescents highlights the range of responses adolescents may have to being exposed to domestic violence, and the bench book also touches on inter-generational transmission of domestic violence in Section 6.3.9.

In a different context, young age of the targeted adult is also identified as a lethality risk factor in Section

8.8.3.

Young people - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Hilary

Young people - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Bell **[2005] ACTSC 123 (1 December 2005) – Australian Capital Territory Supreme Court**

Higgins CJ at [30]: Domestic violence, 'is a pernicious and evil phenomenon not only because of the immediate trauma to the victim. Its evil influence spreads to children as well. It is no coincidence that, in my experience, young offenders, more often than not, present with a family history of domestic violence. It used to be regarded as a family matter, to be kept private. Victims would be made to feel humiliated, and ashamed to complain; in truth it is entirely the criminal conduct of the perpetrator which is at fault. It is entirely in the public interest that such conduct be exposed and deterred'.

R v Wilkinson **[2008] SASC 172 (4 July 2008) – Supreme Court of South Australia**

The accused was 27 and the complainant was 17. Gray J at [27]: 'The causes of domestic violence are multiple. It has been recognised that relevant contributing factors include immaturity, mental illness, abnormal personality disorders, inhibition through drug abuse, poor anger management and lack of counselling and support.'

Older people

The most commonly used definition of elder abuse is the one recognised by the World Health Organisation (WHO): 'A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm of distress to an older person' [World Health Organisation, 2020]. Australian research suggests that elder abuse is best used as an umbrella term. There are different types of abuse and mistreatment of older people, with different types of abuse sometimes happening simultaneously or changing over time. Abuse may be financial, physical, psychological, social and/or sexual, as well as neglect [Joosten et al 2017].

Evidence about prevalence in Australia is lacking, though based on international indications, it is likely that between 2% and 10% of older Australians experience elder abuse in any given year, with the prevalence of neglect possibly higher. The available evidence suggests that most elder abuse is intra-familial and intergenerational. Financial abuse appears to be the most common form of abuse experienced by elderly people. Psychological abuse appears to frequently co-occur with financial abuse, sometimes involving patterns of behaviour analogous to grooming in the sexual abuse abuse context [Kaspiew et al AIFS Family Matters 2016].

Abuse of older people includes [Bagshaw et al 2009]:

- Financial abuse such as misuse of property or money; undue influence over decisions about wills, powers of attorney, property or money; theft; forced or refused entry into a nursing home; financial dependence and exploitation; threats to not see grandchildren unless financial arrangements are agreed to.
- Psychological abuse may include humiliation, insults, intimidation, excessive control, or being treated like a child
- Neglect may include 'passive neglect' where older people are left alone, isolated, or forgotten; or 'active neglect' where older people are denied the support and care necessary for daily living
- Social abuse may include a failure to provide support and care, or social isolation, for example denying access to the telephone, not permitting visitors or making visitors feel unwelcome or fearful
- Physical abuse may include being hit, sexually assaulted, burned or physically restrained, or having aids

and equipment removed such as walking sticks or spectacles

- Medical abuse may include the inappropriate use of constraints, the mal-administration of medications and prescriptions [SA Dept of Health 2014], or the denial of medical consultation.

While elder abuse is often intergenerational, it can be perpetrated by any family member of the older person or other relationships of trust [Joosten et al 2017]. Intimate partner violence that occurs in later life is sometimes a continuation of abuse from a partner or spouse in a long-term relationship, or may occur within a new relationship [Roberto 2016]. As partners age, changing roles within the relationship and changing forms of dependency within the relationship can be a factor in abuse [Joosten et al 2017]. US research [Roberto et al 2013] indicates that, as people age and stressors such as ill health increase, gendered approaches to caregiving may become more entrenched, resulting in men being more likely to control or coerce their female partners, for example forcing her to shower or restraining her while he mows the lawn. Elder abuse is an acknowledged form of family violence, but research notes both similarities and differences to intimate partner violence [Joosten et al 2017]. See table below:

Similarities	Differences
Largely occurs within families	More often intergenerational than spousal
Power imbalance	Not only family, can include other persons in positions of trust
Reluctance to report Fear of consequences to self and perpetrator Fear of loss of relationship Lack of options	More dynamic power imbalance across the lifecourse
Sense of responsibility of person being abused	Not always driven by need to control
Many of the same risk factors	Financial most common
Negative stereotypes and discrimination against group involved	Often includes neglect

Research suggests that the existence of conflict within a family, including complex long-term problems and poor communication, can increase the likelihood of abuse of older people. Mistreatment of older people can take place as families negotiate wider family conflict, changing roles, changing care needs and financial pressures.

Like family violence, women are over-represented as victims of elder abuse, but older men also experience mistreatment and abuse [Joosten et al 2017]. Further risk factors include: ageism; dependency; family dynamics and living arrangements; an adult child in difficulty (such as marital breakdown, business failure, mental heath issues or addictions); a strong sense of entitlement felt by adult children in relation to the older person's assets; gender; financial or economic hardship; low financial literacy; carer stress; dementia, or cognitive or communication impairments; social isolation; substance misuse; Aboriginality; and mental or psychological ill health [SA Dept of Health 2014].

Submissions and case studies presented to the Australian Law Reform Commission's inquiry into elder abuse described a range of situations where family conflict, family breakdown and domestic and family violence can be a factor in abuse of the older person. These include:

- Disputes concerning family agreements, where an older person transfers property to a trusted person in exchange for ongoing care, support and housing. Agreements are often oral in nature. Lack of documentation means there can be serious consequences for the older person, including homelessness and loss of all proceeds, if the promise of ongoing care and housing is withdrawn due to family conflict and relationship breakdown.
- Instances where adult children experiencing domestic violence (either the victim or perpetrator) move in with their parents, where ongoing behaviours and stresses related to domestic violence, impact on the safety of the older person [ALRC Report 2017].

Older people from culturally and linguistically diverse backgrounds appear particularly vulnerable to financial abuse and exploitation due to their likely dependency on others—often children and other family members—for help with translation and interpretation and management of financial matters [Zannettino et al 2014]. There may also be cultural expectations about how an older person is cared for in a family that increase their vulnerability, for example the eldest son may be bound by cultural practices to house or care for an aged mother, and yet he may also be abusive.

Older people may also face a range of barriers to reporting domestic and family violence, thus compounding their vulnerability. Some of these barriers include: diminished cognitive capacity; mental, physical or sensory disability; restricted mobility; lack of awareness of what constitutes abuse; lack of knowledge of their rights or resources; social isolation or fear of alienation; the need to preserve a relationship; dependency; stigma and shame; poor literacy and language skills; religious, cultural or generational beliefs and practices; fear of reprisal; and perceived or actual lack of options or access to services [Bagshaw et al 2009]; and not wishing to tell

authorities about abuse as they subscribe to generational beliefs about family violence as a private matter [Vic Royal Commission into FV, 2016].

Older people - Key Literature

Australia

Australian Law Reform Commission, Elder Abuse – A National Legal Response, Report No 131 (2017).

This report provides a comprehensive analysis of elder abuse in Australia. It defines elder abuse broadly as an act or omission occurring within a relationship 'where there is an expectation of trust, which causes harm or distress to an older person' (p 19). Elder abuse may include physical abuse, psychological abuse, financial abuse, sexual abuse, and neglect (p 19).

Those who have 'significant disability; poor physical health; mental disorders, such as depression; low income or socioeconomic status; cognitive impairment; and social isolation' and those who live alone with the perpetrator and are older than 74 years, are particularly vulnerable, and women are more at risk than men (p 20). Risk factors for perpetrators of elder abuse include depression, substance abuse, and financial and emotional dependence (p 20). While elder abuse may be inflicted by paid carer and other people known to the victim, it is often perpetrated by a family member, and therefore often also constitutes family or domestic violence (p 20).

The current criminal justice response is discussed in Chapter 13 (from p 363). The report concludes that current provisions adequately address elder abuse, without the addition of new offences. However, the report does consider other ways in which the criminal justice response may be improved, through improved police responses (p 370), and assisting 'vulnerable witnesses' (p 373)

Bagshaw, Dale, Sarah Wendt and Lana Zannettino, 'Preventing the Abuse of Older People by their Family Members' (Stakeholder Paper 7, Australian Domestic and Family Violence Clearinghouse, 2009).

This paper provides a thorough overview of literature and issues in this area. For example it identifies that older people face barriers reporting abuse including: diminished cognitive capacity; mental or physical disability; restricted mobility; lack of awareness of what constitutes abuse; lack of knowledge of their rights or resources; social isolation or fear of alienation; the need to preserve a relationship; dependency; stigma and shame; literacy and language barriers; religious, generational and cultural barriers; fear of reprisal; and

perceived or actual lack of options or access to services.

The authors note that definitions of elder abuse are diverse (p 3). Physical abuse can include being hit, sexually assaulted, burned or physically restrained; psychological abuse can include humiliation, insults, fear, or being treated like a child; neglect can include 'passive neglect', which refers to older people being left alone, isolated, or forgotten, and 'active neglect', which is the withholding of items that are necessary for daily living; medical abuse can include the inappropriate use of constraints and withholding or careless administration of drugs; social abuse can involve a failure to provide human services and involuntary social isolation; financial abuse can include misuse of property or money, theft, forced entry into a nursing home, financial dependence and exploitation. Australian researchers have found that the most common form of abuse in this context is financial abuse.

Australian research has found the most common perpetrators are the older person's adult daughter or son (p 3).

This report discusses the gendered nature of the abuse of older people (pp 5-6): women tend to live longer, are less likely to have access to superannuation, they may fall in the gap between the domestic violence sector and the ageing sector. Domestic violence against older people is often 'spouse abuse grown old', following the typical pattern in which perpetrators were overwhelmingly male.

Dean, Adam, *Elder abuse: Key issues and emerging evidence* (CFCA Paper No. 51 – June 2019, Australian Institute of Family Studies).

Elder abuse is a multifaceted and often hidden form of abuse. There is currently no national data on the prevalence of elder abuse in Australia. Based on international studies, it is estimated that between 2% and 14% of older people in high- or middle-income countries experience elder abuse every year. The term 'elder abuse' covers a range of harmful behaviours, including physical, emotional, sexual and financial abuse and neglect.

This paper provides an overview of elder abuse in Australia. It discusses key issues involved in how elder abuse is defined and examines its prevalence, impact and associated risk factors, with a focus on implications of recent research for policy and practice. The Appendix contains a useful table setting out risk factors associated with different forms of abuse.

Department of Health (SA), *Strategy to Safeguard the Rights of Older South Australians 2014–2021* (2014).

Identifies various forms of elder abuse but also adds 'Substance (or chemical) abuse' which is any misuse of drugs, alcohol, medications and prescriptions, including the withholding of medication and over-medication. Notes that between 2007 and 2012, the most common reported forms of elder abuse were psychological and financial, often occurring at the same time, and carried out by people who are most trusted by the victim (p 15). Identifies a series of risk factors that can make older people more vulnerable to experiencing abuse (pp 18-20), including: ageism; dependency; family dynamics and living arrangements; gender; financial/economic hardship; carer stress; dementia or cognitive impairments; social isolation; substance abuse; older people from culturally and linguistically diverse communities; Aboriginal Elders; those with mental health or psychological conditions.

Fileborn, Bianca, 'Sexual assault and justice for older women' [2016] *Trauma, violence and abuse* 1.

This article provides a review of literature on the sexual assault of older women—including an exploration of the specific features and emotional and physical impacts of older women's experiences. The literature review indicates there is evidence to suggest that existing research underestimates the extent of this issue. Older women face particular barriers to disclosure and accessing the justice system, resulting in their experiences remaining hidden. Many of these barriers also contribute toward older women's experiences being ignored, dismissed, or downplayed by potential bystanders. These barriers are explored in depth in this article and include cultural context, ageism, cognitive and health impairments, and living in a residential care setting.

Kaspiew, Rae, Rachel Carson and Helen Rhoades, 'Elder abuse: Understanding issues, frameworks and responses' (Report, Australian Institute of Family Studies, 2016).

- 'This report provides a broad analysis of the issues raised by elder abuse in the Australian context. Elder abuse—which involves the physical, emotional, sexual or financial abuse or neglect of an older person by another person in a position of trust—presents a range of complex challenges for the Australian community … Fundamentally a human rights issue, responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of

government, and various justice system frameworks within the private sector and across non-government organisations'. The report notes that in this way the management of elder abuse has similar features to family and domestic violence, sexual assault and child protection, and that calls have been for the introduction of a comprehensive, national approach to elder abuse.

- 'The report first considers definitional issues in relation to elder abuse and what is known about prevalence and incidence, risk and protective factors and the dynamics surrounding disclosure and reporting. It then sets out some evidence on the demographic and socio-economic features of the Australian community that are relevant to understanding social dynamics that may influence elder abuse. Section 6 outlines some of the features of the systemic structures that intersect with elder abuse and section 7 considers prevention. Section 8 discusses international approaches'.
- Definition of elder abuse from Australian Network for the Prevention of Elder Abuse in 1999: 'any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect' (p.2). Risk factors include cognitive impairment or other disability, social isolation and traumatic life events (pp.7-9). The report also examines in detail available research relating to particular types of elder abuse namely financial abuse, and sexual abuse (pp.10-11).

Kaspiew, Rae, Rachel Carson and Helen Rhoades, 'Elder abuse in Australia' [2016] (98) *Family Matters* 64.

'This article provides an overview of the prevalence and nature of elder abuse in Australia. Topics include: What is elder abuse?; The prevalence and dynamics of elder abuse; Risk factors and consequences; Particular types of elder abuse; and Disclosure and reporting. Prevention opportunities and frameworks are also considered'.

Lacey, Wendy, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99.

This article reports on available data that indicates between two and five per cent of Australians over the age of 65 have experienced abuse, that up to 80 per cent of perpetrators are family members of the victims (the large majority being their children), that financial and psychological abuse are the most common forms of

abuse, and that women are twice as likely to be victims of abuse' (p 100). This article presents and discusses three case studies. The article also identifies that the most vulnerable age for abuse is between the ages of 75 and 85 and women are twice as likely to be abused as men.

Melanie Joosten, Freda Vrantsidis and Briony Dow, 'Understanding Elder Abuse: A Scoping Study' (University of Melbourne and National Ageing Research Institute, June 2017).

This report conducts a detailed discussion of elder abuse, focussing on abuse that occurs within families. The large range of definitions of elder abuse may have a significant impact on prevalence estimates (p 11). Victims of elder abuse suffer significant negative consequences, including 'decreased quality of life, morbidity and mortality … depression, anxiety, fear, feelings of unworthiness and other psychological stress, substance addiction and suicide' (p 11). Within families, elder abuse often occurs across generations, with the victim often a parent, and the perpetrator often an adult child, and like other forms of family violence, women are over-represented as victims (p 11). Elder abuse is likely to go unreported (p 11-12).

While conceptualisations of elder abuse have traditionally focussed on older people as dependent (p 13), the report argues that responses to elder abuse must consider 'the behaviour and motivations of the perpetrator, the complexities of the relationship between the older person and the perpetrator, and the influence of the society and systems within which they operate' (p 13). This discussion must include the intersections between elder abuse and other issues (p 14), such as family violence and conflict (pp 14-6), caring for the elderly (pp 16-7), gender and sexuality (pp 17-8), and cultural diversity (pp 18-9). It is argued that the best approach to engage with this multifaceted issue is an applied ecological approach, which 'considers the risk factors of the individual, the perpetrator, their mutual relationship, and their respective positions within community and society' (from p 19). The report also provides a summary of risk factors for perpetrators (p 23), and reviews useful interventions, including approaches that focus on the older person, on the perpetrator, and on family relationships (from p 26).

Victorian Royal Commission into Family Violence (Volume 5, 2016).

The Report discusses family violence in the context of older people in Volume 5, Chapter 27. The report states that, in some ways, "family violence experienced by older people is no different to that experienced by younger people". However, there are unique characteristics that warrant a tailored response. For example,

"while women are over-represented as victims in prevalence data, the proportion of older men who experience family violence is higher than for younger men. Older people can also be at particular risk of economic or financial abuse. The perpetrator is often the victim's son or daughter." (p 67). See pp 68-70 for detailed data in relation to the prevalence of elder abuse. See pp 71-73 for submissions on the impact of violence on older people. The report also discusses the response of the justice system (p 76), barriers for older persons to report abuse (pp 80-81) and the benefits of restorative justice in this context (p 81).

Zannettino, Lana, Dale Bagshaw and Sarah Wendt 'The Role of Emotional Vulnerability and Abuse in the Financial Exploitation of older People From Culturally and Linguistically Diverse Communities in Australia' (2014) 27(1) *Journal of Elder Abuse and Neglect* 74.

This article considers the particular vulnerability of older people from culturally and linguistically diverse (CALD) communities to domestic violence. In particular the authors note that the literature suggests that older people from CALD communities are particularly vulnerable to financial abuse and exploitation due to their dependency on others for translation, financial transactions, and services' (p 75). As CALD groups tend to rely on their children to help them manage money (p 78) this also increases their vulnerability to abuse (p 78).

International

Bows, Hannah and Nicole Westmarland, 'Rape of Older People in the United Kingdom: Challenging the 'Real-Rape' Stereotype' (2017) 57 *British Journal of Criminology* 1-17.

While advances have been made in understanding sexual violence broadly, this article addresses the gap in knowledge regarding older victims of rape and sexual violence (p 5). In order to do so, the researchers used freedom of information requests to obtain data from 45 police forces relating to 655 cases (p 6). The findings challenge dominant real-rape stereotypes, which involve a 'white, young victim who is attacked at night by a stranger who is motivated by sexual gratification' (p 3), and can lead to older victims of sexual violence being ignored or disbelieved (pp 3-4). Key findings include:

- The 'overall number of reported offences involving an older victim was low when compared with younger age groups' (p 6);
- Consistent with existing knowledge on younger groups, most victims were female, and most perpetrators

were male (pp 7-8);

- Perpetrators of sexual violence against older people were likely to be younger than their victims, with the majority under 60 years of age (p 8);
- Most perpetrators were known to the victim, with around 20% being a partner or husband (p 9); and
- Most of the assaults occurred in the victim's home (p 9).

Byard RW, Casper's sign in the elderly. (2021) 61 (4) Medicine, Science and the Law 3099-312 doi: 10.1177/00258024211015096

Casper's sign refers to the absence of external signs of trauma despite severe and often lethal internal injuries. It occurs because the elasticity and resilience of the skin results in it moving rather than sustaining injuries. Given the known increase in skin and soft-tissue fragility in the elderly, the author performed a review of autopsy reports that showed that Casper's sign can be present in elders who had died of trauma such as car crashes. Thus, in the scenario of possible elder abuse, the absence of external injury in the elderly may be no reflection of the force of the impact or the degree of resultant skeletal and/or internal organ disruption.

Fraga Dominguez S, Storey JE, Glorney E. Help-Seeking Behavior in Victims of Elder Abuse: A Systematic Review. (2021) 22 (3) Trauma Violence Abuse 466-480 doi: 10.1177/1524838019860616

Elder abuse victims face multiple barriers when seeking help. Barriers include fear of consequences for self and the perpetrator, individual feelings and external circumstances, knowledge about services, family barriers, the characteristics of their social networks, the perception of the abuse, and cultural, generational, or religious barriers. Some elder abuse victims only seek help when the abuse is perceived as unbearable or they fear for their safety. When elder abuse victims seek help, they do so from a variety of formal and informal sources.

Laura Mosqueda, Theresa Sivers-Teixeira and Stacey Hirst, 'Recognizing Elder Mistreatment: A Guide for Courts' (2017) 53(2) Court Review: The Journal of the American Judges Association 54-61.

This article considers the elements of elder abuse, and how increased knowledge can enhance legal responses (p 54).

- Older people may be prone to bruising and other injuries, which can mask abusive behaviours (pp 55-6), and frailty, which can make them more vulnerable to abuse, and less able to recover from illness and trauma (p 58).
- Many older people require medications, which may be used as a tool of control, through overuse, underuse, and misuse (p 58).
- Older people are often viewed as asexual, which has resulted in sexual abuse among older people being 'one of the least acknowledged, detected, and reported forms of elder abuse' (p 60).
- Older people often experience decreased 'visual and auditory acuity', which can contribute to their vulnerability (p 57). Special measures should be taken in the courtroom to help older people engage with proceedings, such as providing additional light and magnification, reading things aloud, and speaking loudly and clearly (p 57).
- It can be difficult to assess an older person's cognitive ability and decision-making capacity while respecting their autonomy, and judges should therefore be aware of how cognition and capacity may impact an older person's decisions (pp 59-60).
- Judges should be aware of the complexity and multi-faceted nature of elder abuse, and draw on a range of experts with particular knowledge of the aging process, to fully understand the circumstances (p 61)

Roberto, Karen, 'The complexities of elder abuse' (2016) 71(4) *American Psychologist* 302-311.

This article summarises current understandings of elder abuse, 'including what constitutes elder abuse, risk factors for elder abuse, perpetrators of elder abuse, and outcomes of elder abuse' (p 302). Research indicates that at least 10% of older adults in the United States experience elder abuse, and researchers 'consistently assert that a dramatic discrepancy exists between the actual prevalence of elder abuse and the number of elder abuse cases' known to authorities and service providers (p 302). While there 'is no consensus on the definition of elder abuse', most definitions recognise five types of abuse: physical abuse, sexual abuse, psychological and emotional abuse, financial abuse, and neglect (p 303). A range of interacting factors may contribute to a person's vulnerability to elder abuse, including 'age, gender, race, ethnicity, living arrangements, cultural beliefs and values, as well as physical and cognitive impairments, social isolation, and loneliness' (p 303). The article considers these risk factors in detail. Victims of elder abuse 'typically know their perpetrators, who are usually family members' (p 305). 'Elder abuse, in all its forms, has a profound

impact on the health and psychological well-being of late-life victims. Although some markers of elder abuse are instantly obvious, such as injuries ranging from bruises and sprains, to broken bones and lost teeth, to severe brain trauma, older victims often experience numerous adverse health effects that may not be immediately evident and persist long after the abuse has stopped' (p 306).

Roberto, Karen A, Brandy Renea McCann and Nancy Brossoie, 'Intimate Partner Violence in Late Life: An Analysis of National News Reports' (2013) 25(3) *Journal of Elder Abuse and Neglect* 230.

The authors identified the types of intimate partner violence (IPV) among elders reported most frequently in national newspapers and examined how the abuse was conceptualized by reporters. They found that most reported cases involved murder, with men as perpetrators and women as victims. Caregiving stress and health problems were frequently cited as contributing factors in the cases.

In relation to older perpetrators of intimate partner violence, see especially:

- p233 discusses older men and women's gendered approaches to caregiving in later life, noting that older men 'tended to prioritize the job of caregiving over their wives' feelings'
- '[M]en sometimes "enforced compliance" (p522), such as using force or coercion to get their wives to take a shower, or "active restraint" (p522), such as one man buckling his wife into their car to prevent her from wandering while he mowed the lawn' (p233)
- findings suggest that as stressors increase for older people (eg multiple health problems), gendered behaviours may amplify, particularly in older men who may seek to take control of problematic situations, resulting in instances of IPV (p233).

Swanson Ernst, Joy and Tina Maschi, 'Trauma-informed care and elder abuse: a synergistic alliance' (2018) 30(5) *Journal of Elder Abuse & Neglect* 354-367.

This article provides a comprehensive analysis of elder abuse - a problem in which one or more traumatic or stressful life experience directly affect older adults, their families and communities. The article demonstrates how knowledge about the causes, consequences and responses to elder abuse can be integrated with the principles of trauma-informed care to improve agency and community responses to preventing or intervening with elder abuse and neglect. To address the ongoing problems with detection and treatment of elder abuse,

the authors believe that integrating trauma and elder abuse informed care in organisational services and policies would address many of these concerns. The authors briefly review current knowledge about the causes and consequences of life course trauma and elder abuse (pages 2-4). They then detail the principles and practices of trauma-informed care and how it can form a synergistic alliance with the prevention and intervention efforts across the life course.

World Health Organisation, *Elder Abuse* (WHO, 2020).

This website contains links to fact-sheets, relevant publications and data published by the World Health Organisation (WHO) in relation to elder abuse. The information on the front page of the site states: ‘Elder abuse can be defined as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person". Elder abuse can take various forms such as financial, physical, psychological and sexual. It can also be the result of intentional or unintentional neglect.’

‘Based on available evidence, WHO estimates that 15.7% of people 60 years and older are subjected to abuse. These prevalence rates are likely to be underestimates as many cases of elder abuse are not reported. Globally the numbers of people affected are predicted to increase as many countries are experiencing rapidly ageing populations.’

Older people - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 11 discusses a range of issues affecting older people and their experience of court processes.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.10 discusses in detail older people's experiences of family violence, and some of the barriers they face when reporting abuse.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 6 focusses on 'Older people'. In particular 6.2.3 considers elder abuse. It identifies the prevalence of elder abuse as between 3%-10%. It identifies financial abuse as the most common form of abuse with women being 2.5 times more likely than men to experience elder abuse. The main perpetrators of elder abuse were adult children, a spouse or partner or other relatives. In around 75% of reported incidents of elder abuse older men and women were estimated to have a decision-making disability and nearly half of them had a significant physical disability. Physical and intellectual disabilities that become more common as people age are discussed.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Although Neilson's bench book refers to elder abuse frequently throughout footnotes in this bench book, there is little substantive discussion on it.

Older people - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Barbara

Brenda

Jennifer

Older people - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***Kiril (A Pseudonym) v The Queen* [2019] VSCA 133 (14 June 2019) – Victorian Court of Appeal**

[48] The victim of the applicant's offending was elderly and frail and – at least at some point once she had returned from the nursing home to live with him – incapable of adequately caring for herself. Her pitiable condition at the time of death – weighing a mere 34 kilograms and covered in sores – is distressing, and the source of a deal of pathos. She was in that condition because of the applicant's callous disregard for her welfare, suffering her to live in squalor without any semblance of proper care. The respondent's description of the applicant's treatment of his mother as cruel, heatless and inhumane is entirely apt. It was, I consider, very serious and protracted offending.

[53] By his plea, the applicant admitted that, by his conduct, he recklessly endangered his 83 year old mother's life. That means that the applicant admitted he foresaw that his conduct placed her at an appreciable risk of death, and yet he continued to neglect her. For my part, I consider that conduct to be truly reprehensible.

***R v Eimerl* [2015] ACTSC 72 (12 March 2015) – Australian Capital Territory Supreme Court**

The 23 year old offender forcibly confined his mother, verbally abused her and damaged property. Burns J at [17]: 'I take into account that this is a family violence matter. That is relevant because the only reason that you were able to commit this offence was because of the relationship of trust that existed between you and the victim. If you had not been a family member who was loved and trusted by your victim you would not have had the opportunity to commit this offence. I also note that the offence occurred in the victim's own home, where she should have been entitled to feel safe'.

***Saddler v Pavicic* [2011] ACTSC 199 (9 December 2011) – Australian Capital Territory Supreme Court**

Burns J at [12]: 'It is clear that this was a domestic violence offence. The complainant in the matter was the respondent's mother. Documents from the Canberra Hospital which were tendered in the proceedings before the learned Magistrate suggest that she was born on 21 June 1949, meaning that she was 60 years old at the time of this offence. The respondent was apparently 31 years old. It is now well settled that offences of domestic violence must be treated seriously, and frequently display aggravating features not present in offences occurring outside a domestic relationship. The only reason the respondent was in a position to commit the offence on his mother was because of that relationship. As such, the offence involved a serious breach of the trust reposed in the respondent as a son by his mother. Additionally, the age of the complainant was an aggravating circumstance attending the commission of the offence'.

Pregnant people

Pregnancy has been shown to increase and escalate a person's risk and experience of domestic and family violence by their intimate partner [Walsh 2008]. The Australian Bureau of Statistics 2016 Personal Safety Survey [ABS PSS 2016] estimated that approximately one fifth of women who experienced violence from a current partner, and who were pregnant at some point in the relationship, experienced violence during their pregnancy. Further, approximately one half of women who experienced violence by a previous partner, and who were pregnant during the relationship, experienced violence during their pregnancy [ABS PSS 2016]. Homicide by an intimate partner is the principal cause of injury-induced death among pregnant women [Burch & Gallop 2004].

Escalation of physical violence or other forms of controlling behaviours during pregnancy may arise from the perpetrator's jealousy of the pregnancy or child, or the extra attention their partner may experience from family, friends and health care and support service providers. The perpetrator may also perceive the pregnancy as symbolic of their partner's independence and may use violence to reassert their control.

Research shows that unplanned or unwanted pregnancy is more common among women experiencing domestic and family violence [Williams et al 2008]. The perpetrator may have forced or coerced the woman into pregnancy through, for example, emotional manipulation, contraception sabotage or forced unprotected sex [Moore et al 2010]. The perpetrator may have intended the pregnancy to prevent the woman from working or studying, or to otherwise exercise control over her. Alternatively the perpetrator may refuse to accept the pregnancy, and accuse his partner of infidelity. Women who are concerned that the violence may continue during and after pregnancy and believe that having a child may make leaving the relationship more difficult, may seek to terminate their pregnancy [Chibber et al 2014].

Pregnancy and infancy also create greater dependence for women on their partners physically, emotionally and financially, increasing their vulnerability to domestic and family violence. Some women in abusive relationships may also believe that the pregnancy will make their partner more sympathetic and less likely to abuse [Burch & Gallop 2004], even though research does not support this.

People who are at particular risk of domestic and family violence during pregnancy are those who are: young;

single, separated, divorced or in a defacto relationship; of low income and socioeconomic status; unemployed and; with lower levels of education.

Experiences of domestic and family violence during pregnancy may seriously and adversely affect the health of the pregnant person and foetus. Physiological responses caused by stress, as well as physical injury from violence, may include urinary tract and kidney infections, high blood pressure, mental health disorders, premature birth or miscarriage, low birth weight, and foetal injury or death [WHO 2021]. Long-term poor health and ongoing vulnerability due to the perpetrator's domestic and family violence may present serious risks to the safety, health and wellbeing of children of the relationship [Taft 2002].

Pregnant people - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS). The survey collected detailed information from men and women about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety. The survey estimated that approximately one fifth of women who experienced violence from a current partner, and who were pregnant at some point in the relationship, experienced violence during their pregnancy. Further, approximately one half of women who experienced violence by a previous partner, and who were pregnant during the relationship, experienced violence during their pregnancy. See Tables 17-18, which highlight the link between pregnancy and experiences of violence.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Boxall H & Morgan A 2021. Who is most at risk of physical and sexual partner violence and coercive control during the COVID-19 pandemic?. *Trends & issues in crime and criminal justice* no. 618. Canberra: Australian Institute of Criminology.

Abstract: In this study, data was analysed from a survey of Australian women (n=9,284) to identify women at the highest risk of physical and sexual violence and coercive control during the early stages of the COVID-19 pandemic.

Logistic regression modelling identified that specific groups of women were more likely than the general population to have experienced physical and sexual violence in the past three months. These were Aboriginal and Torres Strait Islander women, women aged 18–24, women with a restrictive health condition, pregnant women and women in financial stress. Similar results were identified for coercive control, and the co-occurrence of both physical/sexual violence and coercive control.

These results show that domestic violence during the early stages of the COVID-19 pandemic was not evenly distributed across the Australian community, but more likely to occur among particular groups.

Campo, Monica, *Domestic and family violence in pregnancy and early parenthood: Overview and emerging interventions* (CFCA Practitioner Resources, Australian Institute of Family Studies, 2015).

This practitioner resource contains information on risk factors for domestic and family violence for young women and women in pregnancy and early parenthood. It contains the following key points:

- Women are at an increased risk of experiencing violence from an intimate partner during pregnancy.
- If domestic and family violence already exists, it is likely to increase in severity during pregnancy.
- Young women, aged 18–24 years, are more likely to experience domestic and family violence during pregnancy.
- Unintended pregnancy is often an outcome of an existing abusive relationship.
- Poor birth outcomes (such as low birth weight, premature birth) and post-natal depression are associated with domestic and family violence during pregnancy.

The long-term effects of exposure to domestic and family violence in utero are emerging.

Meuleners, Lynn B, et al, 'Maternal and Foetal Outcomes among Pregnant Women Hospitalised due to Interpersonal Violence: A Population Based Study in Western Australia, 2002-2008' (2011) 11 *BMC Pregnancy and Childbirth* 70.

A total of 468 pregnant women were hospitalised in Western Australia for an incident of interpersonal violence during the study period, and 3,744 randomly selected pregnant women were included as the comparison group. The majority of violent events were perpetrated by the pregnant women's partner or spouse. Pregnant Indigenous women were over-represented accounting for 67% of all hospitalisations due to violence and their risk of experiencing adverse maternal outcomes was significantly increased compared to non-Indigenous women. Pregnant women hospitalised for an incident of interpersonal violence sustained almost double the risk for adverse maternal complications than the non-exposed group. The overall risk for adverse foetal complications for pregnant women exposed to violence was increased two-fold.

Ogbo, Felix Akpojene, John Eastwood, Alexandra Hendry, Bin Jalaludin, Kingsley E Agho, Bryanne Barnett and Andrew Page, 'Determinants of Antenatal Depression and Postnatal Depression in Australia' (2018) 18(49) *BMC Psychiatry* (online).

This article considers the causes of antenatal and postnatal depression in Australia. The results of the study indicate that a history of intimate partner violence, both physical and psychological, is associated with

depressive symptoms (p 3). Further, IPV was one of the 'strongest risk factors for antenatal depressive symptoms' (p 5).

Taft, Angela, 'Violence in Pregnancy and After Childbirth' (Issues Paper No 6, Australian Domestic and Family Violence Clearing House, 2002).

While this Australian issues paper is directed to health practitioners it provides a helpful literature review of violence against women during pregnancy. It focusses primarily on Australian publications. This overview of the literature notes that severe violence may be inflicted during pregnancy and that patterns of violence may change in pregnancy. Some studies report escalation or commencement of violence during pregnancy, others point to decreased violence during pregnancy.

Walsh, Deborah, 'The Hidden Experience of Violence During Pregnancy: A Study of 400 Pregnant Australian Women' (2008) 14(1) *Australian Journal of Primary Health*.

This study recruited and interviewed 400 women from the Royal Women's Hospital Antenatal clinic in Melbourne, measuring indicators of physical and psychological abuse. It found that 20% of participants reported experiencing violence during their pregnancy (p101), and 6% reported violence increasing during their pregnancy, although most women reported violence and abuse remained the same throughout the pregnancy.

International

Burch, Rebecca, and Gordon Gallup, 'Pregnancy as a Stimulus for Domestic Violence' (2004) 19(4) *Journal of Family Violence* 243.

In this study 258 men who were attending a domestic violence prevention and treatment program were interviewed about the history of domestic abuse. For those men in the study who admitted abusing their current partner when she became pregnant, the frequency and severity of abuse increased. Eight men admitted they abused a previous partner while she was pregnant and, similarly, frequency and severity of abuse increased towards a pregnant previous partner (p245). Sixty-eight men in this study refused to answer questions in relation to abuse during pregnancy. The data were analysed to determine the relationship

between female reproductive status and violent incidents. Both the frequency and severity of male initiated violence against women were twice as high when they were pregnant.

Carrie Purcell et al., 'Women's experiences of more than one termination of pregnancy within two years: a mixed-methods study' (2017) 124 *BJOG* 1983-1992.

The fact that some women undergo more than one termination of pregnancy (TOP) is often perceived as a concern for TOP provision, policy and research in the UK and internationally. Using a mixed-method design, this study examined the characteristics and experiences of women in Scotland who sought more than one TOP within two years. Results identified key differences between women seeking more than one TOP within two years and those reporting no previous TOP, or previous TOP beyond the preceding two years. Women seeking more than one TOP within two years experienced issues relating to contraception, intimate partner violence (IPV), life aspirations and socio-economic disadvantage. These challenges and vulnerabilities were underpinned by gender and socio-economic inequalities.

Chibber, Karuna et al, 'The Role of Intimate Partners in Women's Reasons for Seeking Abortion' (2014) 24(1) *Women's Health Issues* e131.

Using baseline data from the Turnaway Study, a longitudinal study among women (n = 954) seeking abortion at 30 U.S. facilities between 2008 and 2010, this study reports findings that 8 per cent of women reported abusive partners as the reason for seeking an abortion, due to concerns the abuse would continue after childbirth (thus effecting the child) and that having a child would inhibit the women leaving the relationship (p e134). Some women also referred to being pressured to get an abortion, and others, being forced to become pregnant. The article goes on to note on p e136 however, that only a small percentage of women 'identified having abusive partners as a reason for seeking abortion. Importantly, those identifying abusive partners as a reason for seeking abortion did not describe their partner as threatening or physically hurting them as a way of forcing them to have an abortion. Instead, their descriptions suggest that the women independently decided to seek abortions, perceiving this as their best option to end abusive relationships'.

Cliffe, Charlotte, Maddalena Miele and Steven Reid, 'Homicide in pregnant and postpartum women worldwide: a review of the literature' (2019) 40(2) Journal of Public Health Policy 80-216

This study reviewed the international literature on maternal homicide, and found that pregnancy-associated homicide is an important contributor to maternal mortality, with rates comparable to suicide. Women murdered during the perinatal period constitute a highly vulnerable group as they are younger, unmarried and more likely to be from minority ethnic groups. Reported worldwide rates of maternal homicide range from 0.97 to 10.6 per 100,000 live births. Rates are highest in the US in comparison to other jurisdictions. Evidence suggests that women who are pregnant may have an increased risk of being a victim of homicide, compared to non-pregnant women. Studies reporting homicide in other jurisdictions do not report as consistently high numbers in the perinatal period, which may be because a lack of data and reliance on national reporting systems which differ significantly by country in method and accuracy.

Moore, Ann M, Lori Frohwirth and Elizabeth Miller, 'Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States' (2010) 70 *Social Science and Medicine* 1737.

This article provides a concise overview of the literature, establishing a variety of reproductively coercive behaviours men may engage in, pre-, during, and post-pregnancy. The article goes on to discuss findings from interviews with 71 women aged 18-49, who reported a history of IPV. Findings include that 53 respondents (74%) experienced male reproductive control, including 'pregnancy-promoting behaviours' (e.g. sabotaging contraception, forced sex), abuse during the pregnancy, and attempts to influence the pregnancy outcome.

Nesari M., Olson J.K., Vandermeer B., Slater L., Olson D.M., 'Does a maternal history of abuse before pregnancy affect pregnancy outcomes? A systematic review with meta-analysis' (2018) 18(1) *BMC Pregnancy and Childbirth* 404.

The study aims to examine the connection between maternal histories of abuse before pregnancy and the risk of pre-term delivery and low birth weight. An analysis of 16 articles demonstrated that women who were abused prior to pregnancy have an increased risk of pre-term birth and low birth weight, with the highest level of risk associated with victims of childhood abuse. The authors suggest that possible explanations for these findings include: 1) cumulative life stress; 2) associated high risk behaviors including smoking, drug or alcohol abuse; 3) decreased family support; and 4) decreased prenatal care. The authors suggest that greater care

should be taken to identify maternal history of abuse before pregnancy, and to use this information to inform risk assessment for adverse pregnancy outcomes.

Roberts, Sarah CM, et al, 'Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion' (2014) 12 *BMC Medicine* 144.

Using data from the Turnaway Study, a longitudinal study among women seeking abortion at 30 U.S. facilities between 2008 and 2010, this study explored whether the risk of intimate partner violence decreased after having an abortion. It found that: 'Among women seeking abortion, having an abortion was associated with a reduction over time in physical violence from the MIP [man involved in the pregnancy], while carrying the pregnancy to term was not. Terminating an unwanted pregnancy may allow women to avoid physical violence from the MIP, while having a baby from an unwanted pregnancy appears to result in sustained physical violence over time' (p148).

Vivienne, Elizabeth, 'Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation' (2017) 25(2) *Feminist Legal Studies* 185-201.

This study adds to the literature in relation to post-separation violence by introducing the new concept of 'custody stalking'. Custody stalking is a parents's use of custody and/or child protection proceedings to obtain care time with children far in excess of their involvement prior to separation (p 187). Elizabeth views custody stalking as a specific pattern of coercive control, derived from the unique insights former partners have about how to torment women (p 187). The study was conducted through interviews with 12 mothers who had experienced domestic violence (p 190). The study found that custody stalking causes grief, damages psychological wellbeing and has a detrimental effect on their mothering relationships. However, the losses experienced by mothers in this study are described as 'culturally invisible' (p 187-8)

Wallace, M. et al., (2021) 'Homicide during pregnancy and the post-partum period in the United States, 218-2019'. *Obstetrics & Gynecology,* 138(5): 762- 769, doi: 10.1097/AOG.0000000000004567

Objective: To estimate the national pregnancy associated homicide mortality ratio, characterize pregnancy-associated homicide victims, and compare the risk of homicide in the perinatal period (pregnancy and up to 1

year postpartum) with risk among nonpregnant, nonpostpartum females aged 10–44 years.

Methods: Data from the National Center for Health Statistics 2018 and 2019 mortality files were used to identify all female decedents aged 10–44 in the United States. These data were used to estimate 2-year pregnancy-associated homicide mortality ratios (deaths/100,000 live births) for comparison with homicide mortality among nonpregnant, nonpostpartum females (deaths/100,000 population) and to mortality ratios for direct maternal causes of death. We compared characteristics and estimated homicide mortality rate ratios and 95% CIs between pregnant or postpartum and nonpregnant, nonpostpartum victims for the total population and with stratification by race and ethnicity and age.

Results: There were 3.62 homicides per 100,000 live births among females who were pregnant or within 1 year postpartum, 16% higher than homicide prevalence among nonpregnant and nonpostpartum females of reproductive age (3.12 deaths/100,000 population, P,.05). Homicide during pregnancy or within 42 days of the end of pregnancy exceeded all the leading causes of maternal mortality by more than twofold. Pregnancy was associated with a significantly elevated homicide risk in the Black population and among girls and younger women (age 10–24 years) across racial and ethnic subgroups.

Conclusion: Homicide is a leading cause of death during pregnancy and the postpartum period in the United States. Pregnancy and the postpartum period are times of elevated risk for homicide among all females of reproductive age.

Williams, Corrine M, Ulla Larsen and Laura A McCloskey, 'Intimate Partner Violence and Women's Contraceptive Use' (2008) 14(12) *Violence Against Women* 1382.

This article provides a very relevant review of the literature in this area, including studies establishing an association between intimate partner violence, unintended pregnancies, and abortions (pp1382-1385). In doing so, the article provides an overview of some of the behaviours women's abusive partners engage in, such as forcing or preventing women from having children, refusing to use contraception, and women not having control over the timing of sexual intercourse (p1384). It goes on to explore contraceptive use by 225 abused and nonabused women, finding that 'Women experiencing physical and emotional abuse were more likely to report not using their preferred method of contraception in the past 12 months compared with nonabused women (OR = 1.9; 95% CI = 1.0 to 3.7)' [abstract].

World Health Organisation (WHO), Fact sheet: Violence against women, 9 March 2021.

This fact sheet, based on data collected by the WHO, states that intimate partner violence and sexual violence can lead to unintended pregnancies, induced abortions, gynaecological problems, and sexually transmitted infections. WHO studies confirm that women who have experienced partner violence are twice as likely to have an abortion as compared to women who have not experienced partner violence. This fact sheet notes that intimate partner violence in pregnancy also increases the likelihood of miscarriage, stillbirth, pre-term delivery and low birth weight babies.

Pregnant people - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book has material on what the protection orders require in terms of, e.g. protecting the unborn child if the woman is pregnant when the order is made (Chapter 9.8), but does not discuss any social context.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Violence during pregnancy is identified as heightening victims' risks of experiencing domestic violence, and as increasingly the likelihood of a lethal outcome (Section 8.14.2). Further, Section 6.3.3 discusses potential impacts of domestic violence on pregnancy/birth, though this is focused on the harm caused to the foetus.

Also see Supplementary Chapter 2's section 'Domestic Violence and the Fetus', which notes '[p]hysical abuse during pregnancy has sometimes been identified as a risk factor for femicide'. It goes on to discuss the vulnerability of *children* due to having been exposed to domestic violence during pregnancy: 'As Cunningham and Baker point out … research documenting long-term psychological damage to children connected to domestic violence during pregnancy been rather limited, although low birth weight and associated problems were reported regularly. However a considerably larger body of research examining the impact of witnessing violence on children from birth onwards, together with emerging neurological research on brain development, strongly suggests the potential for such harm. Indeed it is now reasonably well accepted that pre- and perinatal stress reactions of the mother to abuse and violence in the home can affect the development of the child. Certainly there is consensus among all domestic violence, early child-care, child-protection, medical, and mental-health experts that safety measures and economic resources ought to be directed to protecting pregnant women from domestic violence with its collateral adversities.'

Pregnant people - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Pregnant people - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Ahmu v The Queen; DPP v Ahmu **[2014] NSWCCA 312 (15 December 2014) – New South Wales Court of Criminal Appeal**

Adams J at [62]: 'The judge noted that, at the time of the offences, the complainant was eight weeks pregnant, which added to the objective seriousness of the offences, committed in the context of an ongoing, relatively violent domestic relationship'.

Hiron v The Queen **[2007] NSWCCA 336 (7 December 2007) – New South Wales Court of Criminal Appeal**

Price J at [35]: 'The applicant's offending was compendiously summarised by the Judge as follows. *'The offences, or some of them, involved the actual use of a weapon, namely a tyre lever. The offences involved gratuitous cruelty, punching and kicking his domestic partner 23 weeks pregnant, and threatening her. The offences were committed while the prisoner was on conditional liberty, that is on parole. He abused a position of trust as a partner of the victim and father of their child and expected child. The victim was vulnerable in the sense that she was a pregnant female of much smaller build totally under the domination of the prisoner'.*

Police v Dolan **[2010] SASC 341 (9 December 2010) – Supreme Court of South Australia**

Gray J at [18]: 'I consider that the Magistrate failed to have sufficient regard to the fact that this was an act of domestic violence to a young pregnant woman. The fact that the defendant was angry did not justify or excuse in any way the violence perpetrated. He struck his young female partner in circumstances which put her health, and that of the child that she was carrying, in jeopardy. His victim was entitled to be treated with patience and respect, not the physical abuse that she received. I consider that the Magistrate was in error in failing to have proper regard to this factor. Although the defendant was not charged with an aggravated

assault on the basis of his domestic relationship, this was still a relevant factor to be considered'.

***Byrnes v The Queen* [2015] VSCA 341 (10 December 2015) – Victorian Court of Appeal**

Kaye JA at [22]-[23]: 'The applicant's offending had a number of very serious characteristics. As the respondent has pointed out, it was premeditated, and the applicant had clearly prepared for it. The victim was vulnerable. She was carrying the applicant's baby. The applicant took advantage of his greater strength, and the fact that he had a weapon, to overwhelm her. The threat to abort the baby was, as the judge correctly said, a 'most ugly' aspect of the false imprisonment. The whole experience, to which the applicant subjected her, must have been extraordinarily terrifying. She was justifiably in grave fear for her own life and that of her baby. While the imprisonment did not extend for hours or days, it lasted for over one hour, during the whole of which the applicant terrorised his victim.

'In those circumstances, the offending by the applicant, comprising charge 1, called for a stern sentence. In such a case, involving wanton domestic violence, general deterrence, specific deterrence, and denunciation were important considerations. While the judge accepted that the applicant's psychological condition moderated the weight to be given to those considerations, nevertheless, they rightly remained important factors in the determination of the applicant's sentence'.

***Morgan v Kazandzis* [2010] WASC 377 (10 December 2010) – Supreme Court of Western Australia**

EM Heenan J at [69]: 'The victim of the assaults was particularly vulnerable, being in a prior relationship with the appellant and being pregnant at the time of both assaults'.

People with disability and impairment

Predominantly women with disability and impairment are significantly more likely than other women to experience domestic and family violence; and the violence is more likely to be serious, experienced differently, and extend for longer periods of time [Frawlet et al 2015]. Australian research identifies a range of factors that contribute to this vulnerability and a victim's capacity to seek the assistance they need. These factors relate to the nature of the victim's disability or impairment, the extent to which the victim is dependent on the perpetrator, and general community attitudes and approaches to people with disability and impairment.

A person may experience disability or impairment as physical, sensory, or cognitive impairment [NSWLRC 2012], or a complex intersection of some or all of these conditions. When also a victim of domestic and family violence, they may not be aware of or understand their legal rights and protections, or they may be prevented from accessing support services where the physical environment does not accommodate their needs. Support workers may not have the skills to assist the victim to communicate effectively, or support service information may not be offered in a format that the victim can use or at a location the victim can access. People with disability or impairment may also have a low level of literacy or may be illiterate.

Victims with disability or impairment who require support from, or depend on, their partner, the perpetrator, for their daily needs and care may be especially vulnerable to domestic and family violence. [George & Harris 2014] For example, the perpetrator may deny or restrict the victim's access to their transport or mobility aid, medication or other means of disability support; or fail to help the victim on or off the toilet, or to adequately wash or nourish the victim. The perpetrator may injure, threaten to injure or immobilise an assistance animal that the victim is reliant on for independence; or interfere with the victim's reproductive health and choices by imposing measures to control menstruation, force infertility or terminate pregnancy. The perpetrator may also, through physically and emotionally isolating behaviours and threats, act as a gatekeeper to the victim's attempts to disclose the violence and seek assistance from support services. People with disability or impairment may be more likely to delay seeking help or reporting violence for fear of losing the perpetrator's support [Harpur & Douglas 2015].

While the research is limited, there is evidence indicating that where, in a previously non-violent relationship, one partner develops a disability through, for example, brain injury or Multiple Sclerosis, there is a risk that

the other partner may begin to demonstrate domestic and family violence behaviours towards them [Bagshaw et al 2000].

General community attitudes and approaches to people with disability and impairment may impact on how a victim experiences domestic and family violence. Stereotypical notions of, for example, a woman with disability or impairment as either not having sexual feelings or being hypersexual, incapable of sustaining relationships, or unable to control herself may result in the woman's actual circumstances and needs being overlooked, or the woman being blamed for the violence. Reportedly, when disclosing their experiences of violence, women with disability or impairment are less likely to be believed, and when giving evidence in court, their competency, reliability and credibility are more likely to be questioned or given less weight [Dimopoulos & Fenge 2013]. Their fear of prejudicial assessment or discrimination may cause women with disability or impairment to be less likely to access support services or engage with police or judicial processes.

Perpetrators of domestic and family violence may also experience disability or impairment, which may affect the nature and severity of the violence, how it is experienced by the victim, and the appropriate judicial responses. A US study revealed a high level of learning disabilities and mental ill health among perpetrators compared with other offenders [Stewart & Power 2014].

People with disability and impairment - Key Literature

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women aged 18 years and over about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

'Women with a disability or long-term health condition were more likely to have experienced violence than women without a disability or long-term health condition. In 2016, an estimated 5.9% (172,800) of women with a disability or long-term health condition experienced violence in the 12 months prior to the survey, compared to 4.3% (274,400) of those with no disability or long-term health condition.

The proportion of men who experienced violence in the 12 months prior to the survey was similar for men with a disability or long-term health condition (5.6% or 158,100) and men without a disability or long-term health condition (6.2% or 383,200)' (see Tables 6-7).

Australian Bureau of Statistics 2021. *Disability and Violence - In Focus: Crime and Justice Statistics*. April 2021. Canberra: Australian Bureau of Statistics.

Extract: The 2016 PSS found that living with disability or a long-term health condition raised the likelihood of experiencing various types of violence for women but not for men. These include physical violence by any perpetrator, violence by a cohabiting partner (physical and/or sexual), emotional abuse by a cohabiting partner, sexual harassment by any perpetrator, and stalking by any perpetrator.

The difference was greatest for violence by a cohabiting partner (physical and/or sexual), where women with disability were twice as likely to experience violence by a cohabiting partner as women without disability.

The rate of sexual violence was similar for women with and without disability or a long-term health condition.

For men, disability or a long-term health condition raised the risk of experiencing stalking only (2.5% compared with 1.4%).

The type and severity of disability were also found to impact on the likelihood of victimisation. Both women and men with intellectual/psychological disability were more likely than those with physical disability to experience violence (physical and/or sexual) and emotional abuse by a cohabiting partner, however the difference was more pronounced for women.

The PSS also found that women living with intellectual/psychological disability were more likely to experience cohabiting partner violence (physical and/or sexual) compared with women living with physical disability.

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children's experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;

- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Bagshaw, Dale et al, *Reshaping Responses to Domestic Violence* (Final Report, University of South Australia, April 2000).

Researchers reviewed Australian and overseas domestic violence literature, and then conducted a phone-in and focus groups to assess the needs of women, men and young people who have been involved in domestic violence situations. This required analysis of the primary data collected and consideration of prevention strategies used in Australia and overseas (p8).

- In relation to perpetrators of domestic violence: 'Two participants had been in relationships that became violent after their partners had experienced medical traumas – in one case a head injury and another, heart surgery. For both participants their relationships had been positive until that point and their commitment to the relationship was sustained by the hope that things would improve or 'get back to normal'. The positive aspects of their relationships were never restored.
- The authors suggest that when partners have a disability or medical condition, women may be under greater pressure to remain in the abusive relationship. [1.20] They recommend that further research be undertaken to identify the special needs of victims and/or perpetrators with a disability. (p44)
- P29 also identifies perpetrators' disabilities, such as multiple sclerosis and brain injuries being used as explanations for perpetrators' behaviours by callers in the study.

Boxall H & Morgan A 2021. Who is most at risk of physical and sexual partner violence and coercive control during the COVID-19 pandemic?. *Trends & issues in crime and criminal justice* no. 618. Canberra: Australian Institute of Criminology.

Abstract: In this study, data was analysed from a survey of Australian women (n=9,284) to identify women at the highest risk of physical and sexual violence and coercive control during the early stages of the COVID-19 pandemic.

Logistic regression modelling identified that specific groups of women were more likely than the general population to have experienced physical and sexual violence in the past three months. These were Aboriginal and Torres Strait Islander women, women aged 18–24, women with a restrictive health condition, pregnant women and women in financial stress. Similar results were identified for coercive control, and the co-occurrence of both physical/sexual violence and coercive control.

These results show that domestic violence during the early stages of the COVID-19 pandemic was not evenly distributed across the Australian community, but more likely to occur among particular groups.

Boxall H, Morgan A & Brown R 2021. Experiences of domestic violence among women with restrictive long-term health conditions: Report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Statistical Report no. 32. Canberra: Australian Institute of Criminology.

This report was prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. It describes the domestic violence experiences of women with restrictive long-term health conditions during the initial stages of the COVID-19 pandemic, using survey data collected in May 2020 from over 8,000 Australian women who were in a current relationship.

After controlling for a number of other factors associated with domestic violence such as age, Indigenous status and education level, women with a restrictive long-term health condition were more likely than women without such health conditions to have experienced physical or sexual partner violence and/or coercive control in the three months prior to the survey. Women with restrictive long-term health conditions were also more likely to report experiencing the onset or escalation of domestic violence in the past three months. The risk of domestic violence was even higher among women with intersecting risk factors for domestic violence: Indigenous women, women from non-English-speaking backgrounds, and women under financial stress.

Brain Injury Australia, 'The Prevalence of Acquired Brain Injury among Victims and Perpetrators of Family Violence' (April 2018).

This resource provides detailed analysis of the prevalence of acquired brain injuries among both victims and perpetrators of family violence. For both victims and perpetrators, brain injury impacts capacity to recover, change and safeguard future wellbeing. This study utilises data obtained from Victorian hospitals between 2006 and 2016 (p 25). Family violence is a significant cause of brain injury, with around 40 percent of victims having sustained a brain injury (pp 29). Moreover, brain injury was associated with 14 of the 17 family violence-related deaths in the study period (p 29). There is also evidence to suggest that rates of brain injury among perpetrators of family violence are disproportionately high, indicating that having suffered a brain injury is a risk factor for future perpetration of family violence (p 19). Finally, the study highlights that the available data is likely to represent the 'tip of the iceberg', with many injuries going unreported or undiagnosed, emphasising the need for additional research in this area (pp 34-5).

Darshini Ayton, Elizabeth Pritchard and Tess Tsindos, 'Acquired Brain Injury in the Context of Family Violence: A Systematic Scoping Review of Incidence, Prevalence, and Contributing Factors' (2019) *Trauma, Violence & Abuse* 1-15.

Acquired brain injury (ABI) is regarded as the forerunner to, or result of, family violence. ABI is an umbrella term for conditions such as traumatic brain injury (TBI), stroke, aneurysm, brain tumour or vestibular dysfunction. In particular, TBIs are associated with reduced cognitive and physical functioning, negative psychological responses (such as depression and post-traumatic stress disorder), and even death. Family violence may be perpetrated by someone who has previously suffered a TBI and/or the victim may sustain a TBI from violence. Although studies have considered TBIs and family violence separately, there is limited evidence assessing the nexus between these two phenomena. This article presents a systematic review of current literature regarding incidence, prevalence and contributing factors of brain injury within a family violence context. Results showed that the factors contributing to brain injury within the family violence context had multifactorial causation and varied significantly across the studied populations. A number of biological, behavioural, structural, social and environmental factors were identified as negatively affecting the incidence and prevalence of brain injury and family violence. Biological factors that contributed to being a victim of family violence included age and gender of parent/baby. The social factor of previous child abuse was

correlated with ongoing abuse later in life, but is yet to be fully explored. Environmental factors, such as hostile living environments and exposure to natural disasters, also have not been thoroughly investigated in relation to IPV or TBI, but are linked to an increase in parental stress and contributed to greater levels of child maltreatment. One limitation of the review was that the underreporting of family violence may have affected the accuracy and generalisability of incidence and prevalence statistics.

Dimopoulos, Georgina, and Elanor Fenge, *Voices Against Violence: Paper 3, A Review of the Legislative Protections Available to Women with Disabilities who have Experienced Violence in Victoria* (Women With Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria, 2013).

This paper identifies that women with disabilities are at a significantly greater risk of sexual assault than women without disabilities and identifies a number of barriers to justice (p 14):

- Inadequate education and barriers to access of information resulting in a woman's lack of knowledge or awareness that a sexual offence has been committed against her.
- Communication difficulties that impede the woman's ability to disclose sexual assault and articulate particulars.
- A greater dependence on others for her basic needs, care and support.
- A woman's care provider or family member acting as a 'gatekeeper' to disclosure, information and assistance.
- Power imbalances in the relationship between the woman and the perpetrator, who may be an intimate partner, family member or care provider.
- Physical and social isolation, which prevent a woman from accessing support services.

This paper considers evidentiary issues for women with disabilities in family violence and sexual offence proceedings (pp. 119-130).

Dowse, Leanne, Karen Soldatic, Jo Spangaro, and Georgia van Toorn, 'Mind the gap: the extent of violence against women with disabilities in Australia' (2016) 51(3) *Australian Journal of Social Issues* 341.

Identifies that further analysis of the 2012 Personal Safety Survey data indicates that among women with disabilities aged under 50, 62 per cent have experienced violence since the age of 15, and women with disabilities had experienced three times the rate of sexual violence in the past 12 months compared to those without disabilities. These ?ndings still do not represent the full extent of violence against women with disabilities, since the Personal Safety Survey samples only women who reside in private dwellings and excludes those living in disability care settings. (p.341).

Dyson, Sue, Patsie Frawley and Sally Robinson, *"Whatever it takes": Access for women with disabilities to domestic and family violence services: Final report* (ANROWS, 2017).

The report highlights that accessibility includes how services think about disability (attitudinal factors) and how information about services is made available (p 3). The report states that "[e]nsuring physical access is important, but service accessibility needs to be understood and promoted, so that women with disabilities know services exist that can help them, and that they will be received, acknowledged, and heard by tertiary response services. Good practice principles for accessibility suggest that services must be approachable, acceptable, affordable, available, and appropriate" (p 43).

Frawley, Patsie, Sue Dyson, Sally Robinson and Jen Dixon, *What Does It Take? Developing Informed and Effective Tertiary Responses to Violence and Abuse of Women and Girls with Disabilities in Australia: State of Knowledge paper* (ANROWS, 2015).

This literature review examines the scope, nature and incidence of violence and abuse experienced by women and young women with disabilities. It includes relevant statistics. It identifies that 'women and young women with disabilities experience all forms of violence and abuse as other women experience. However, women with disabilities experience violence and abuse, including sexual abuse, at significantly higher rates than women who do not have disabilities' (p 5).

George, Amanda, and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Centre for Rural and Regional Law and Justice, Deakin University, 2014).

This research reports that women with disabilities who experience family violence face additional barriers

including dependency on those who provide support, limited private finances, limited access to suitable transport, social isolation and limited support services that are responsive to their needs and these barriers are compounded in a rural setting. This paper also reports on fears held by women with disability that their children will be removed from their care (pp 139-140).

Harpur, Paul, and Heather Douglas, 'Disability and Domestic Violence: Protecting Survivors' Human Rights' (2015) 23 (3) *Griffith Law Review* 405.

This paper reviews the literature in relation to domestic violence, the legal system and disability. It considers how disability domestic violence may be manifested eg pp 408-411 identifies that those victims who require support from their partners for daily tasks can be especially vulnerable to abuse (e.g. leaving a person who requires assistance off the toilet on the toilet for hours). Victims who rely on mobility aids, medication or medical technologies are especially vulnerable to partners who restrict access. It notes that people with disabilities have significantly different relationships with their pets when pets are service animals (e.g. guide dogs for blind and deaf people) – perpetrators who threaten or harm pets can have an extremely disabling impact upon a survivor with a disability; threatening to injure or immobilise a service animal is particularly distressing for a person who relies on that animal for their independence.

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Maher, JaneMaree, et al., *Women, disability and violence: Barriers to accessing justice—Final Report* (ANROWS, 2018).

Women with disability face additional barriers related to acknowledging and disclosing violence that must be addressed before fundamental steps, including escaping or planning to escape a violent situation, can be considered (p 33).

The report identified current critical barriers to justice (pp 29-32), including:

- Normalisation of violence within service systems and society more generally (this was identified in interviews as the most difficult barrier to overcome, see p 37);
- Victim-blaming and disbelieving reports (police responses as questioning credibility; or an unwillingness to investigate);
- Lack of awareness of disability in the criminal justice system (that is, a failure to recognise disability, provide reasonable adjustments, adequately investigate, or recognise the abuse as violence);
- Limited resources in the community legal sector (including lack of accessible services);
- Limited access to, and knowledge of, legal rights; and
- Fear of reprisal.

Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, *Invisible women, invisible violence: Understanding and improving data on the experiences of domestic and family violence and sexual assault for diverse groups of women: State of knowledge paper* (ANROWS, 2016).

This paper establishes the state of knowledge about the experiences of domestic and family violence and sexual assault against women from diverse groups, including women with disabilities. It explains that women with disabilities are more likely, across their lifetime, to experience violence from multiple perpetrators compared to women without disabilities, and when violence does occur, it is likely to be more frequent, severe, and to continue for a longer duration (p 26). Research shows that women with disabilities experience specific forms of violence, such as a perpetrator in a carer role taking advantage of their dependency; restriction or withholding of aids or medication; withholding of essential assistance; financial abuse; and involuntary sterilisation and/or termination of pregnancy (p 26). Access to support services and justice

responses can be limited by social and physical environmental barriers, as well as lack of appropriate educational resources on rights and seeking assistance (pp 26-27). Being disbelieved is a further and fundamental barrier for women with disabilities. Access to justice can be hindered by, for example, women being assessed as legally incapable to give evidence, being unable to access communication aids or interpreters, and having perpetrators of serious crimes against them going unprosecuted (p 27).

New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012).

Although focused on criminal justice this report provides a useful definition of cognitive impairment (pp 135-137). It defines cognitive impairment as an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay or deterioration of the brain or mind. It may arise from but is not limited to intellectual disability, borderline intellectual functioning, dementias, acquired brain injury, drug or alcohol related brain damage and autism spectrum disorders.

Office of Public Advocate (Queensland) Systems Advocacy, Submission to the Australian Human Rights Commission, *The Investigation into Access to Justice in the Criminal Justice System for People with Disability*, August 2013.

While not specific to DV, this submission canvasses the Queensland-specific legal processes around people with disabilities in the criminal justice system, and the considerations that need to be taken into account.

See especially:

- '2.1 Defendants' (from pp2-3) drawing on statistics of intellectual disability and literacy levels in Queensland prisoners;
- '4.3 The Court Process' (pp8-12) discussing evidence-in-chief and cross-examination considerations that need to be made for defendants with disabilities. This section also discusses identifying and communicating with people with intellectual disability or impaired decision-making (p10);
- '4.4 Court Diversions' (pp12-14) discussing specialist mental health and diversion programs for judicial officers to consider.

People with Disability Australia (PWDA) and Domestic Violence NSW (DVNSW), *Women with Disability and Domestic and Family Violence: A Guide for Policy and Practice* (Toolkit, 8 March 2015).

This guide reports that 19% of Australian women have a disability. Drawing on available research the authors identify that Australian women with disability are 37.3% more at risk of domestic and family violence. In NSW, over 43% of women experiencing personal violence have disability or long-term illness, meaning that they experience violence at twice the rate of other women (p1).

The report defines disability: 'Disability is now usually understood using the social model of disability, which emphasises that disability results from disabling environmental and social barriers (p1). Physical, attitudinal and communication barriers reduce the opportunities afforded to people with impairments, resulting in unequal access, exclusion and/or discrimination. The social model of disability highlights that it is a shared responsibility to ensure equality of access for all by addressing barriers to inclusion and full participation for people with disability'.

Barriers to seeking assistance include (pp4-5):

- Unawareness of services available to them; Information not being available in correct formats (Easy English, Auslan, braille etc).
- Inappropriate or inadequate education of their rights, or of the criminal nature of domestic and family violence.
- Women with disability are frequently not believed upon disclosing their experiences of violence and abuse.
- Inappropriate responses to disclosure resulting from social myths about people with disability (e.g. people with disability are innocent, do not have sexual feelings, are incapable of sustaining relationships; or are 'hypersexual', lack the ability to control themselves) – these myths shift blame from perpetrator to the person being abused.
- Discriminatory stereotypes.
- Fear of losing custody of children to abusive partner or family member (women with disability do disproportionately have children removed from their care).
- Crisis accommodation may be inaccessible or unable to provide women with disability with enough

personal support.

- Women with disability may be reliant on their abuser for daily, personal care.
- Fear of being institutionalised.
- Women with disability may be physically segregated in residential institutions due to discrimination and prejudice, removing support networks and isolating them physically or socially.

The report discusses the major access issues to Family Violence Services (and these have relevance to courts) (pp 6-10):

- Inaccessible information and communication (information not available in alternative formats, not distributed in locations frequented by women with disability, may not acknowledge complex difficulties faced by women with disability).
- Physical inaccessibility (not just wheelchair users - women with physical, visual, hearing impairments and/or mental illness face various barriers in environments that do not accommodate their presence)
- Organisational attitudes and experience (attitudes of service staff, managers and governance bodies; stereotypes and myths)
- Perceived discrimination (belief that family violence services and refuges are unsafe, unapproachable and inaccessible; fear of discrimination).

Women With Disabilities Australia, *Stop The Violence: Facts & Figures* (2013).

This factsheet on women and girls in Australia with disability includes statistics from a number of national studies including ABS. For example:

- Women with disabilities make up 20% of the population of women in Australia (nearly 2 million women).
- Only 16% of all women with disabilities are likely to have any secondary education compared to 28% of men with disabilities.
- 51% of women with disabilities earn less than $200 per week compared to 36% of men with a disability.
- Men with disabilities are twice as likely to be in paid employment as women with disabilities.
- Women with disability were 37.3% more likely than women without disability to report experiencing some form of intimate partner violence.
- 19.7% of women with disability reported a history of unwanted sex compared to 8.2% of women without

disability.

International

Amanda St Ivany, Susan Kools, Phyllis Sharps and Linda Bullock, 'Extreme Control and Instability: Insight Into Head Injury From Intimate Partner Violence' (2018) 14(4) *Journal of Forensic Nursing* 198-205.

Head injuries and intimate partner violence (IPV) are underreported due to the unwillingness of victims to seek medical care after suffering a head injury, or to report an incident of IPV to authorities. Other barriers to understanding the prevalence of IPV-induced head injury include a lack of specific screening tools, as well as difficulties with classification and diagnosis of mild traumatic brain injury (TBI) when women do seek medical assistance. This study reports on 21 interviews from nine (US) women who self-reported passing out from a blow to the head. None of the women received medical care for their head trauma. A main reason for why the women did not receive medical care for their head injury was because the abusers made unwanted sexual advances immediately after the head injury in order to assert dominance and instil fear. Abusers exhibited characteristics of extreme control and manipulation. Further, the women in the study reported living with instability from not having control over basic needs (such as housing), cycles of incarceration, drug and alcohol use and fear of being separated from their children. A further element of instability was the varied police response they received when they did report incidents of IPV. This also often placed them at a higher risk for violence and retaliation from their abusers.

Kastello, Jennifer et. al., 'Predictors of Depression Symptoms Among Low-Income Women Exposed to Perinatal Intimate Partner Violence' (2016) 52(6) Community Mental Health Journal 683-90.

This US study assessed 239 low-income pregnant women for their risk of depression. It found that women experiencing severe psychological intimate partner violence (IPV) were 3.16 times more likely to have a high risk for depression compared to women experiencing severe physical or sexual IPV (p 686).

McCarthy, M., Bates, C., Triantafyllopoulou, P., et. al., '"Put bluntly, they are targeted by the worst creeps society has to offer": Police and professionals' views and actions relating to domestic

violence and women with intellectual disabilities' (2019) 32(1) *Journal of Applied Research in Intellectual Disabilities* 71-81.

An online survey of police, and health and social care professionals (total n717) across the UK was conducted to investigate their attitudes, experiences and responses towards the domestic violence experienced by women with intellectual disabilities. Results showed that half of the respondents had direct experience of working with an intellectually disabled woman who had also suffered from domestic violence. Professionals were more likely than police to view women with intellectual disabilities as being particularly vulnerable. The majority of professionals and police believed that women with intellectual disabilities were deliberately targeted by abusive men. The authors conclude that further training of police, and health and social care professionals is required in this area.

Michelle S Ballan et al, 'Intimate Partner Violence Among Help-Seeking Deaf Women: An Empirical Study' (2017) 23(13) *Violence Against Women* 1585-1600.

Deaf women experience heightened rates of intimate partner violence compared to hearing women, but there is limited research on the experiences of this community (pp 1586-7). In service provision, the particular communication needs of deaf survivors must be accommodated, through providing consistent access to ASL interpreters, and facilitating access to the victim's preferred interpreter wherever possible (p 1596).

Nemeth, Julianna et al., Provider Perceptions and Domestic Violence (DV) Survivor Experiences of Traumatic and Anoxic-Hypoxic Brain Injury: Implications for DV Advocacy Service Provision, (2019) 28(6) *Journal of Aggression, Maltreatment & Trauma* 744-63

This study sought to 1) characterise provider knowledge, experience and perception of the impact of brain injury (BI) on the experiences of DV survivors within services, and 2) document DV survivors' experiences with abuse exposures that can lead to traumatic or anoxic-hypoxic brain injury along with their perception of how programs address brain injury (p 747). The authors examined data on BI and strangulation collected from five domestic violence advocacy organisations: 11 focus groups were conducted with service providers and interview administered surveys were completed with survivors. Results show a discrepancy between providers' perception of the potential impact of BI on survivors' ability to access services, and the pervasive exposure to incidents of head trauma and strangulation that could cause brain injury among the population.

Over 81% of survivors reported having been hit in the head or been made to have their head hit another object at least once, and over 83% of survivors reported being strangled.

Shah, Sonali, Lito Tsitsou and Sarah Woodin, 'Hidden Voices: Disabled Women's Experiences of Violence and Support Over the Life Course' (2016) 22(10) *Violence Against Women* 1189-1210.

Fifteen disabled women were interviewed about their life stories. The UK based study notes that "disabled women are significantly more likely to experience violence compared with their nondisabled contemporaries, at the hands of different perpetrators, including paid and unpaid carers, and in various ways, including those specific to their impairment" (p 1206).

Barriers to support for disabled women include, but are not limited to (p 1193):

- an inability to physically access services;
- an inability to access public materials;
- the lack of accessible alternative accommodation such as refuges;
- social stereotypes that assume that disabled people are asexual, tragic or burdens to society;
- legal professionals' poor understanding of disability and impairment-specific abuse;
- fear of children being taken away by authorities if violence is disclosed; and
- fear of disbelief if violence is disclosed.

Stewart, Lynn A and Jenelle Power, 'Profile and Programming Needs of Federal Offenders with Histories of Intimate Partner Violence' (2014) 29(15) *Journal of Interpersonal Violence* 2723.

This study presents data on male perpetrators of domestic violence (DV) in the Correctional Service of Canada (CSC) using two samples: (a) a snapshot of all male offenders who had been assessed for DV (*n* = 15,166) and (b) a cumulative sample of male offenders from 2002-2010 who had been assessed as moderate or high risk for further DV (*n* = 4,261). DV offenders were compared to a cohort sample of non-DV offenders (*n* = 4,261). Findings included that DV offenders had higher risk and criminogenic need ratings, and 50% more learning disabilities (18.4%) and mental health problems (15%), and more extensive criminal histories than those without DV histories. Aboriginal DV offenders had high levels of alcohol dependence, suggesting a

need for substance abuse treatment as part of DV programming.

The Disabilities Trust, Making the Link: Female Offending and Brain Injury (2018).

This study focuses on brain injury in female offenders – one of the most vulnerable individuals in the criminal justice system. Female prisoners are twice as likely as male prisoners to experience anxiety and depression, incidences of self-harm, and domestic violence and abuse. In addition, a number of female prisoners may suffer undiagnosed brain injuries, which cause cognitive, behavioural and emotional problems, such as loss of memory, concentration, confusion and increased aggression. From 2016-2018, the Disabilities Trust introduced a Brain Injury Linkworker (BIL) service at HMP/YOI Drake Hall (a female prison in the UK) which provided specialist support to women with a history of brain injury. During the delivery of the BIL service, the study also found that there were 196 reports of brain injuries from severe blows to the head. 96% of female offenders reported experiencing domestic abuse, 62% reported to sustaining a traumatic brain injury (TBI) due to domestic violence, and 33% reported to sustaining their first brain injury prior to committing their first offence.

People with disability and impairment - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 5 discusses a range of issues affecting people with disabilities and their experience of court processes.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

In relation to perpetrators, see Chapters 5.1.1 ‘What if a respondent has impaired capacity?’ and 11.1 ‘Explanation of proposed order to the respondent’.

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Chapter 11 focuses on people with disabilities. It overviews the issues that may be faced by people with disability, and identifies the different types of disabilities and practical considerations. Although the bench book does not provide a specific discussion of the intersection of domestic violence and people with disabilities, it does relevantly suggest a number of key elements a judge may need to consider when a person with a disability goes to court. For example: (p.122).

- such persons may need more time than is common with persons without disability;
- the stress of coming to court may exacerbate their symptoms;
- making any special arrangements in advance will save time and embarrassment at the trial;
- the person with a disability may not be able to hear, read or be understood whilst in court, or to fully comprehend what is taking place; and
- some ailments may make it impossible to attend court at all.

Vic

Judicial College of Victoria, *Family Violence Bench Book* (2014).

Section 5.8 - People with disabilities (cognitive, physical or mental health), provides detailed information on disability and domestic violence, including prevalence of family violence against people with disabilities, disability as a risk factor, particular forms of family violence and barriers to reporting it. It also discusses 'court craft' in relation to people with disabilities and contact information for services.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 4 focuses on people with disabilities. It overviews the issues that may be faced by people with a disability, and identifies the different types of disabilities and practical considerations.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 21: Mental and Physical Disability comprehensively discusses mental disability, including information on enhanced risks for persons with a disability; prevalence and reporting of domestic violence in disability contexts; forms of domestic violence and court options to enhance assessment of domestic violence in disability cases. It also provides a very detailed section on process issues around domestic violence in a disability context.

People with disability and impairment - Other Resources

Australia

- **ANROWS, *Personal Safety Survey 2016 Fact Sheet* (2017).**

International

VAWnet, Understanding the Intersection: TBI and DV (United States) (2019).

VAWnet is an online network, operated by the National Resource Center on Domestic Violence, which focuses on violence against women and other forms of gender-based violence. It is a comprehensive and readily-accessible source of information for anti-violence advocates, human service professionals, educators, and others who wish to eliminate domestic and sexual violence. In particular, various resources (including fact sheets and reports) on the intersection between traumatic brain injury (TBI) and domestic violence are available for download. For example, some resources provide information about brain injury and its possible implications for domestic violence survivors, while others focus on the early detection of TBI among domestic violence survivors. A screening tool for TBI adapted by domestic violence service providers, as well as training materials, are also included. The website also directs readers to resources which highlight the need to consider the possibility of a TBI in safety planning. Fact sheets and handouts aim to provide advice on how to identify existing injuries, where victims of domestic violence who have sustained brain injuries can find appropriate help, and how to prevent future injury.

People with disability and impairment - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Barbara

Francis

Julia

Lisa

Sally

Sandra

People with disability and impairment - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Gray v Burt **[2005] ACTSC 93 (23 September 2005) – Australian Capital Territory Supreme Court**

Bennett J at [9]-[10]: 'Ms Keys also raises as a matter that the Magistrate should have taken into account and in Ms Keys' view did not; the rights of the respondent. In particular she refers to the *Disability Services Act 1991*(ACT), which provides for the fact that persons with disabilities have the same basic rights as other members of Australian society and gives particulars of those rights. I would have thought that such a concept did not need an Act to support it and should have been taken into consideration in any event.

'I note that the Magistrate specifically referred to the expressed wishes of the respondent to continue the relationship with the appellant. His Honour specifically referred to her right to have a physical relationship if she so desired. However, his Honour concluded that the risk to the respondent resulting from such a relationship was such that he was unable to be satisfied that the order preventing such a relationship was no longer necessary for her protection. I repeat that there was unchallenged evidence before the Magistrate that it was the physical relationship between the parties that caused the respondent to suffer three separate fractures of her legs'.

R v Grech **[1999] NSWCCA 268 (6 September 1999) – New South Wales Court of Criminal Appeal**

Carruthers AJ at [33]-[34]: 'The relationship between a person in authority and an intellectually disabled person can be a sensitive one and involves, to use a well-known phrase of George Bernard Shaw, *"fatal propinquity"*. It is a situation in which strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.

'Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into

one of a continuing and prolonged violation of the provisions of s 66F(2). The applicant knew not only that he was in breach of his position of trust, but that he was in breach of the criminal law, and he was also aware that the complainant had previously been the victim of sexual exploitation and as a consequence a prior carer was serving a lengthy custodial sentence. The fact that the relationship may have developed, as the applicant contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor'.

At [37]: 'For sentencing purposes the deterrent element necessarily looms very large with regard to s 66F(2) offences. It is the mark of a civilised society that those who are incapable fully of protecting their own interests, should be protected from exploitation by those in whom society vests the responsibility of caring for them. Carers who breach this trust must expect condign punishment. The instant case was one of a gross and prolonged breach of trust deserving of condign punishment'.

***DPP v Maxfield* [2015] VSCA 95 (12 May 2015) – Victorian Court of Appeal**

The defendant had stabbed her partner. The Court at [36]-[37]: 'Ms Maxfield's intellectual disability was of particular relevance to the sentencing exercise. As the High Court pointed out in Muldrock, a person who suffers from a mild intellectual disability is unlikely to be a proper vehicle for general deterrence. Moreover, *'the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community'* (*Muldrock v The Queen*)'.

***Earl v The Queen* [2008] VSCA 162 (25 August 2008) – Victorian Court of Appeal**

Nettle JA at [23]: 'Despite the limited nature and extent of the attack, and the injuries which it was shown to have caused, it was serious for the reasons given by the judge. The victim was a person with limited cognitive impairment and to that extent she was vulnerable and in need of care and support. As the applicant's wife, she was entitled to his love and protection and, instead of affording her that, he assaulted her in their home. As such, the offence involved a gross breach of trust in the place where the victim was most entitled to feel

safe. General deterrence is of real importance in cases of domestic violence, especially in cases where victims are particularly vulnerable. And because of the applicant's prior convictions, aged as they were, it was apparent that there was a need for some measure of specific deterrence'.

People with mental illness

Research demonstrates clear causal links between the experience of domestic and family violence and the development of mental health conditions in victims [Holden et al 2013].

Understanding [Braaf & Meyering 2013] the potential difficulties, barriers and disadvantages victims suffering from mental illness may face in proceedings in domestic and family violence-related matters may assist judicial officers in assessing and responding to the safety needs of the victim and any children or other people at risk; the treatment and support needs of the victim; and the victim's capacity and willingness to participate in the proceedings and to otherwise assert their legal rights and protections.

For example, there is a reported hesitancy to diagnose women victims as mentally ill due to concerns that the stigma of "being crazy" may be used to rationalise the domestic and family violence they experience, resulting in possible victim blaming and revictimisation [May et al 2003]. Further, a woman medicated or receiving treatment for a mental condition caused or aggravated by violence may be reluctant to exercise her rights to protect herself and her children from further violence for fear that the perpetrator may use her mental illness to seek to deny her child residence or contact [Humphreys & Thiara 2003].

Domestic and family violence may directly affect a victim's mental disposition and cognition, and confer a vulnerability to psychiatric consequences,by engendering feelings of fear, hopelessness and low self-esteem. The most common psychiatric disorders diagnosed in women victims are: depression, dysthymia (a chronic form of depression), post-traumatic stress disorder, bipolar disorder, personality disorder, psychoses, phobias, suicidal ideation, psychoactive drug dependence, anxiety, sleep and eating disorders. The incidence, severity and co-morbidity of these conditions tend to correlate with the type, extent and duration of the violence [VicHealth 2004]. It has been shown, for example, that harassing behaviours and emotional and verbal abuse are significant individual predictors of post-traumatic stress symptoms among women victims [Mechanic et al 2008].

Victims who have experienced abuse as children are particularly vulnerable to the impacts of cumulative trauma and re-victimisation in adulthood and thus are at higher risk of subsequent psychiatric morbidity [Hegarty et al 2004]. This may be particularly prevalent for Aboriginal and Torres Strait Islander people where, across

several generations, family members may have recurring experiences of various forms of violence and related trauma that remain unacknowledged or unresolved [Purdie et al 2010]. Pre-existing mental ill health can also influence a victim's vulnerability to abuse as it renders the victim more susceptible to unsafe environments and abusive relationships [Holden et al 2013].

Victims who have been exposed to multiple, recurrent and prolonged forms of abuse may also experience chronic stress, distress and impairment, both psychological and physical, and a diminished capacity to cope with day to day living putting them at risk of secondary stressors such as unemployment, lack of material resources, social isolation, and poverty.

Perpetrators of domestic and family violence may also experience mental illness, which may affect the nature and severity of the violence, how it is experienced by the victim, and the appropriate judicial responses [Cerulli et al 2004]. US research indicates a need for further investigation of the relationship between childhood trauma, emotional regulation impairment and domestic and family violence [Siegel 2013], and the already demonstrated association between general anxiety disorder, panic disorder, social phobia and alcohol and drug misuse and the perpetration of domestic and family violence [Shorey et al 2012].

Aboriginal and Torres Strait Islander people [JCCD, The Path to Justice (ATSI) 2016] may have the experience of seeing spirits or hearing ancestral voices, and may therefore be at risk of being misdiagnosed or mislabelled as mentally ill when they are not in fact ill. Fear of misdiagnosis or mislabelling may be a strong barrier to help-seeking for victims and perpetrators in this context [MHFAA, ATSI Mental Health First Aid Guidelines 2008].

People with mental illness - Key Literature

Australia

Australia's National Research Organisation for Women's Safety. Violence against women and mental health- Research Synthesis (ANROWS Insights, 04/2020). Sydney: ANROWS.

This paper provides a synthesis of evidence on violence against women and mental health, examining the way that mental health intersects with trauma, complex trauma, disability, coercive control, access to justice and parenting. This paper is not intended to be a comprehensive literature review—it focuses on ANROWS research and other research, while also drawing on recent grey literature for further supporting evidence. Some of the key issues identified include:

- For women experiencing violence, mental health problems can overlap with trauma, complex trauma and disability, making simple diagnoses and treatment difficult.
- Mental ill health can be a compounding factor, a barrier, an outcome and a tool used by perpetrators of violence against women.
- Access to justice can be impacted at the intersection of mental health and violence against women, because the criminal justice system is not designed to accommodate trauma.
- The co-occurrence of violence against women and mental health concerns can have parenting impacts, damaging the mother–child relationship and impacting the child's mental health.

Braaf, Rochelle, and Isobelle Barrett Meyering, 'Domestic Violence and Mental Health' (Fast Facts 10, Australian Domestic & Family Violence Clearinghouse, 2013).

This two-page overview reviews literature on the relationship between mental health, domestic violence and sexual abuse. Referencing relevant studies and reports it identifies key issues including higher rates of: depression, post-traumatic stress disorder, anxiety, alcohol abuse, non- prescription drug use and a tendency towards suicide for those who have experienced domestic violence and sexual assault.

Douglas, Heather, 'Domestic and Family Violence, Mental Health and Well-Being, and Legal Engagement' (2017) *Psychiatry, Psychology and Law* (online).

This article draws from interviews with a group of diverse women who have engaged with the legal system after experiencing domestic and family violence (DFV). The study sought to investigate how women's experiences of legal processes 'affected their mental health and well-being' (p 1). Almost all the women experienced some type of mental health issue directly attributable to DFV (p 5). Many women engaged preventative measures prior to attending court, including pre-court counselling, contacting mental health practitioners, and taking prescribed medication (p 2). Other women self-medicated and avoided seeking help fearing that proof of mental health concerns may lead to negative court outcomes (p 2). Many women highlighted attending court (pp 5-6), having to face the perpetrator in court (pp 6-8), and giving evidence (pp 8-9) as negatively affecting their mental health (p 10). A number of suggestions are made for improving women's experiences in court, including:

- minimising the frequency with which victims are required to attend court (p 10);
- allowing women to give evidence remotely (p 10);
- minimising contact between the victim and abuser, through ensuring there are safe waiting spaces (p 10), and staggering attendance and departure times of the parties (p 11);
- providing effective training to court personnel regarding the dynamics of DFV (p 11); and
- ensuring cross-examination, and legal proceedings in general, are not misused by the abuser (p 11).

Hegarty, Kelsey, et al, 'Association between Depression and Abuse by Partners of Women Attending General Practice: Descriptive, Cross Sectional Survey' (2004) 328(7440) *The BMJ* 621.

This article reports on a survey of female patients within a general practice setting in Australia, which sought to investigate the connection between depression and physical, emotional, and sexual abuse of women by partners or former partners. The researchers surveyed1257 female patients of 30 general practitioners in Victoria between August and December 2000. The authors found that 18.0% of women were scored as currently probably depressed and 24% as having experienced some type of abuse in the past 12 months, while 37% had ever experienced some form of abuse while in an adult intimate relationship. Of women who were probably depressed, more were likely to have experienced some form of abuse as a child and also were

more likely to have experienced partner abuse.

Holden, Libby, et al, 'Mental Health: Findings from the Australian Longitudinal Study on Women's Health' (Final Report, Women's Health Australia, May 2013).

This report draws on data from The Australian Longitudinal Study on Women's Health (examining data on about 5,766 Australian women). See pp76-83. Key finding from this examination include:

- 'Women in their 20s and 30s who report Intimate Partner Violence (IPV) experience a subsequent decrease in mental health.
- Women in their 20s and 30s who report IPV experience poorer mental health prior to IPV, suggesting an inter-connected relationship; that is, IPV affects mental health status and likewise mental health affects IPV.
- An analysis of data from women in the mid-aged cohort (born 1946-51) found that after the cessation of IPV, women experience an improvement in mental health. However, even after 12 years, their mental health is significantly poorer than that of women who have never lived with IPV' (at 83).

Loxton, Deborah, Margot Schofield and Rafat Hussain, 'Psychological Health in Midlife Among Women Who Have Ever Lived With a Violent Partner or Spouse' (2006) 21(8) *Journal of Interpersonal Violence* 1092.

This study examines the psychological health correlates of domestic violence in a large random sample of mid-aged Australian women (N = 11,310, age 47 to 52 years). The research investigated the associations between domestic violence and depression, anxiety, and psychological wellbeing, and adjusted for demographic variables (marital status, income management, area). Results indicate increased odds of having experienced domestic violence for those who had: ever experienced a diagnosis of depression, anxiety, or an 'other' psychiatric disorder; recent symptoms of depression and anxiety; used psychoactive medication for depression or anxiety in the 4 weeks prior to the survey; and who reported current depression. Current psychological well-being had an inverse association with a history of domestic violence, that is, as psychological well-being decreased, the odds of having ever experienced domestic violence increased. The results indicate that a history of domestic violence is associated with decreased psychological well-being in

mid-aged Australian women.

Ogbo, Felix Akpojene, John Eastwood, Alexandra Hendry, Bin Jalaludin, Kingsley E Agho, Bryanne Barnett and Andrew Page, 'Determinants of Antenatal Depression and Postnatal Depression in Australia' (2018) 18(49) *BMC Psychiatry* (online).

This article considers the causes of antenatal and postnatal depression in Australia. The results of the study indicate that a history of intimate partner violence, both physical and psychological, is associated with depressive symptoms (p 3). Further, IPV was one of the 'strongest risk factors for antenatal depressive symptoms' (p 5).

Purdie Nola, Pat Dudgeon and Roz Walker, eds. *Working together: Aboriginal and Torres Strait islander mental health and Well-being Principles and Practice*, 2nd edition (2014, Telethon Kids).

This book includes chapters on a wide range of issues associated with Aboriginal and Torres Strait Islander mental health. The editors identify that the purpose of the book is to provide an appropriate resource for a range of health professionals who work with Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander health workers, counsellors, and other staff of Indigenous health services. Chapter 1 'Australian Aboriginal and Torres Strait Islander Mental Health: An Overview' by Robert Parker provides a good summary of relevant issues, see especially from p5-7. See also chapter 10 'Trauma, Transgenerational Transfer and Effects on Community Well-being' by Judy Atkinson et al.

Roberts, Gwenneth, et al, 'How Does Domestic Violence Affect Women's Mental Health?' (1998) 28(1) *Women and Health* 117.

This study compares the mental health of women who reported domestic violence and those who reported no domestic violence in their lifetime. Women between the ages 16 and 74 years (n = 358), who attended the emergency department of a major public hospital in Australia, were the subjects of this study. The results of the study showed that women who had experienced domestic violence had experienced more ill-effects to their mental health than women who had never experienced violence (including PTSD, phobias, depression, dysthymia, anxiety, somatisation, harmful alcohol consumption and drug dependence.)

VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004).

This report is focussed on health outcomes associated with intimate partner violence. This paper presents a helpful review of relevant literature about the relationship between poor mental health and the experience of violence. It notes that previous literature has found that (at 20):

- 'Shock, fear and feeling numb are common psychological responses to intimate partner violence. However, the mental health effects persist long after a violent episode.
- Middle-aged women are significantly more likely to experience anxiety and depression.
- The effects of violence can persist for many years. Women who have experienced violence in the past have lower rates of mental health problems than women reporting current intimate partner violence, but significantly higher rates than those who have *never* experienced this type of violence.
- Women reporting intimate partner violence are more likely to use medication for depression and anxiety.
- Some other psychiatric disorders (namely phobias, somatisation and dissociative disorders) are more common in women reporting intimate partner violence than those not affected.' (references omitted).

Drawing on existing studies this report identifies mental health outcomes associated with intimate partner violence: attempted suicide, self-harming behaviours, depression, anxiety, eating disorders, traumatic and post-traumatic stress symptoms and other psychiatric disorders such as phobias and dissociative and somatisation disorder (involving the physical expression of psychological symptoms) (p21).

International

Agenda Alliance and the VISION Consortium (2023) *Underexamined and Underreported: Suicidality and intimate partner violence: Connecting two major public Health Concerns*.

Drawing on existing data (2014 Adult Psychiatric Morbidity Survey- based on large household sample of 7,000 adults 16+) This UK based report identifies:

- Suicide and intimate partner violence (IPV) are each recognised as major public health concerns; however, the links between them have been critically under-examined.
- This briefing establishes the relationship between IPV and suicidality (suicidal thoughts and suicide

attempts) and self harm, setting out the ways in which women are disproportionately impacted and at greater risk of IP related suicidality.

- Women who have experienced IPV are three times more likely than women who have not experienced IPV to have made a suicide attempt in the past year.
- Women who have experienced sexual IPV are seven times more likely than those who had not experienced sexual IPV to have attempted suicide in the past year.
- Furthermore, intersecting identities and experiences associated with systemic disadvantages, including poverty, disability, and ethnicity, exacerbate risks of both suicidality and IPV

Cerulli, Catherine, Kenneth R Conner and Robert Weisman, 'Bridging Healthcare, Police, and Court Responses to Intimate Partner Violence Perpetrated by Individuals with Severe and Persistent Mental Illness' (2004) 75(2) *Psychiatric Quarterly* 139.

This US study explores the appropriateness of criminal justice responses to dealing with perpetrators of intimate partner violence (IPV) who suffer from severe and persistent mental illness. It is suggested that a singular legal response may miss the opportunity for detection and assertive treatment of the illness so as to promote safety and reduce the likelihood of violence. It is also suggested that perpetrators in this group may have difficulty comprehending court procedures. This article discusses the potential for a more flexible approach to IPV through interdisciplinary coordination and training of police, judges, attorneys, legal advocates, mental health professionals and substance abuse providers.

Although New York-specific, the section 'Court response to IPV' (from p145) is very relevant, discussing the need to for judges to consider mental health in the context of issuing protection orders, as 'the effectiveness of a protection order may be reduced with mentally ill offenders, particularly those receiving inadequate treatment (due to gaps in the system or noncompliance). Alternative responses to violations of protection orders, including an assessment of comprehension of the order, referrals for psychiatric care for those not in treatment (or enriched care for those that are), and innovations that serve to coordinate and formalize the efforts of psychiatric/social and legal systems should also be considered' (p145).

Cimino, A., Yi, G., Patch, M., et. al., 'The Effect of Intimate Partner Violence and Probable Traumatic Brain Injury on Mental Health Outcomes for Black Women' (2019) *Journal of Aggression, Maltreatment*

& Trauma **(online first).**

Severe intimate partner violence (IPV) can result in traumatic brain injury (TBI), cognitive impairment, and mental health disorders, such as depression and PTSD. The purpose of this study is to examine the relationship between IPV, injuries associated with TBI (a loss of consciousness from a blow to the head and/or strangulation), and their effect on mental health disorders among Black women, who experience higher rates of IPV and greater mental health burden than White and Latina women. The study examined data on 95 Black women with a history of abuse, such as IPV, forced sex, and childhood maltreatment. Results showed that approximately one-third of women had probable TBI. 38% were hit on the head, 38% were strangled to unconsciousness, and 25% were strangled and hit on the head. A significant percentage of abused Black women who sustained probable TBI injuries were found to have a greater chance of experiencing comorbid PTSD and depression. These results highlight a need for healthcare professionals to assess women who lost unconsciousness due to IPV for TBI, and allow referrals to IPV interventions and mental health treatment.

Emily Brignone, Anneliese Sorrentino, Christopher Roberts and Melissa Dichter, 'Suicidal ideation and behaviors among women veterans with recent exposure to intimate partner violence' (2018) 55 ***General Hospital Psychiatry*** **60-64.**

Female veterans are at a disproportionately high risk for suicide and intimate partner violence (IPV) compared to female non-veterans. Suicide rates increased by 32.7% among veterans between 2005 and 2015. There is evidence that female veterans differ from non-veterans in terms of IPV-related experiences. The authors examined the US Veterans Health Administration (VHA) electronic medical records for 8427 female veterans who completed screening for past-year IPV between April 2014 and 2016. Results showed a strong connection between IPV and suicidal ideation, and self-harm behaviours among VHA female veterans.

Farzan-Kashani, Julian and Christopher Murphy, 'Anger Problems Predict Long-Term Criminal Recidivism in Partner Violent Men' (2017) 32(23) ***Journal of Interpersonal Violence*** **3541-3555**

Anger problems are not only an important correlate of IPV, but may also be an important factor underlying treatment response for IPV perpetrators. Of 132 men receiving treatment services at a community-based DV agency, those with serious anger problems had more charges for general violence offences and more

ongoing problems with protection orders than did those with 'normal' anger levels. Further, low anger control and high anger expression predicted general violence recidivism. The results demonstrate that new intervention approaches are necessary for partner violent men with serious anger dysregulation, as a standard cognitive-behavioural treatment program may not suffice.

Humphreys, Cathy, and Ravi Thiara, 'Mental Health and Domestic Violence: "I Call It Symptoms of Abuse"' (2003) 33 *British Journal of Social Work* 209-226.

A UK research project based in Women's Aid outreach services shows a direct link between women's experiences of domestic violence and heightened rates of depression, trauma symptoms, and self-harm. The study also shows that women's experiences of mental health services were often negative due to some unhelpful practices within the medical model of mental health, including: lack of recognition of trauma or provision of trauma services; a focus on the woman's mental health rather than the actions of the abuser and her experiences of abuse; victim blaming; offering medication rather than counselling support; labelling the woman with mental health problems, and thereby enabling adverse consequences in child contact and child protection.

Laura A Szalacha et al, 'Mental Health, Sexual Identity, and Interpersonal Violence: Findings from the Australian Longitudinal Women's Health Study' (2017) 17(94) BMC Women's Health (online).

This study investigates the linkages between interpersonal violence, mental health, and sexual identity (pp 2-3). The results indicate that:

- Compared to exclusively heterosexual women, mainly heterosexual and bisexual women were significantly more likely to report physical, sexual, and emotional abuse (p 4);
- Mainly heterosexual and lesbian women were more likely to report severe physical abuse (p 4);
- Mainly heterosexual women were more than three times as likely to have been in a violent relationship in the past three years (p 4);
- All sexual minorities were two to three times as likely to have experienced harassment (p 4);
- Bisexual women reported significantly higher levels of depression and scored lower on mental health than did exclusively heterosexual women (pp 6, 7);

- Interpersonal violence strongly predicted poorer mental health for lesbian and bisexual women (p 6);
- Mental health indicators were similar for exclusively heterosexual and sexual minority women who did not report interpersonal violence (pp 6, 7);
- Experiencing multiple types of interpersonal violence was the strongest predictor of stress, anxiety and depression (p 6).

Interpersonal violence is a significant contributor to mental health disparities for women, particularly for those belonging to sexual minorities (pp 7-8).

May, Barbara A, et al, 'Are Abused Women Mentally Ill?'(2003) 41(2) *Journal of Psychosocial Nursing & Mental Health Services* 21-29.

This study attempted to profile the psychological distress symptoms of community-based abused women who were participating in a larger intervention study and compare them to normative samples using the same measure (Derogatis Brief Symptom Inventory (BSI)) to better understand the effects of intimate partner violence on their mental health. The study sample (N = 50) experienced complex trauma and various psychological manifestations consistent with [cited] literature on victims/survivors of intimate partner violence; contrary to the researchers' implicit assumption, they profiled more like the psychiatric adult female outpatients than the adult female nonpatients.

The authors note that studies have shown a hesitancy to diagnose abused women as mentally ill because the stigma of "being crazy" tends to be used to rationalize their situations, resulting in victim blaming and revictimization. They observe also that these studies may have minimized the likelihood of self-disclosure or help-seeking, and explained health care providers' reluctance to consider this diagnosis.

'In the community of health care providers for abused women, there is a strong need to refrain from "pathologizing" or labeling victims/survivors of abuse as mentally ill. However, the BSI findings in this study do indicate symptomatology in this nonclinical, community-based sample of abused women is very high in all dimensions and in the global indexes, which suggests serious mental distress.

Abused women are fearful of being labeled as "sick" and further stigmatized by the situations for which they actively seek answers…However, mental illness, regardless of origin, must be diagnosed so it can be treated properly…Health care providers then must educate the abused women about possible benefits of diagnosis

using a "social contextual advocacy-based model" … However, it is important to remember that for many women in abusive situations a diagnosis of mental illness can work against them in a court case. In particular, when children are involved, this diagnosis may be detrimental, and the women may lose custody of their children because of it.' (pp 25-27)

Mechanic, Mindy, Terri L Weaver and Patricia A Resick, 'Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse' (2008) 14(6) *Violence Against Women* 634.

This article explores the independent contributions of physical violence, sexual coercion, psychological abuse, and stalking on symptoms of posttraumatic stress disorder (PTSD) and depression among a sample of 413 severely battered, help-seeking women. The authors test the unique effects of psychological abuse and stalking on mental health outcomes, after controlling for physical violence, injuries, and sexual coercion. The research finds, among other things, that 'harassing behaviours and emotional and verbal abuse both emerged as significant individual predictors in the full model, suggesting their unique contribution to post-traumatic stress symptoms among battered women.'(p649)

Siegel, Judith P, 'An Expanded Approach to Batterer Intervention Programs Incorporating Neuroscience Research' (2013) 14(4) *Trauma, Violence and Abuse* 295.

This article reviews findings of neurobiological research that have informed the treatment of disorders that are strongly represented among perpetrators of intimate violence, such as addiction, posttraumatic stress disorder, mood, anxiety, and personality disorders. The author argues for an expanded perspective and approach that recognize the relationships among childhood trauma, emotional regulation impairment, and intimate partner violence.

Shorey, Ryan C et al, 'The Prevalence of Mental Health Problems in Men Arrested for Domestic Violence' (2012) 27(8) *Journal of Family Violence* 741.

This US study examines self-reported psychopathology among men arrested for domestic violence (N = 308). Results replicated past research showing high rates of PTSD and depression. In addition, the prevalence of

generalized anxiety disorder, panic disorder, social phobia, and alcohol and drug disorders were very high. All types of mental health problems were positively associated with aggression perpetration. The authors acknowledge the need for further research investigating the mechanisms responsible for this association. (p746)

People with mental illness - Other Bench Books

NSW

Judicial Commission of NSW, *Equality before the Law: Bench Book* (2022).

[5.2.2.6] outlines some psychiatric disabilities (although they are not specifically considered in the context of domestic and family abuse).

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

- Although this bench book does not discuss the relationship between domestic violence and psychiatric disabilities, the section on witnesses with psychiatric disabilities may be relevant where a person appears as a witness (eg. an alleged victim/or perpetrator of domestic violence) before the court.
- Specifically the bench book notes (pp125-126): 'Witnesses with psychiatric disabilities may find the court environment especially stressful. At hearings, it must be recognised that a witness with a psychiatric disability may find it difficult to concentrate and remember. There may also be communication barriers, for example, if the person is easily distracted, distressed, anxious, frightened, manic, delusional or aggressive. Certain adjustments may be necessary for witnesses with psychiatric disabilities. For example:'
    - there may be a need to repeat information;
    - it may be necessary to rephrase questions;
    - there may be a need to provide regular breaks because of short concentration spans;
    - the witness should be afforded adequate familiarisation with the court room;
    - practitioners should provide appropriate amounts of time in their estimates for trial to accommodate necessary adjustments; and
    - particularly vulnerable witnesses may benefit from the application of s 21A of the Evidence Act 1977 (Qld).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2.6 notes the mental health effects of family violence. 4.1.4 notes that whether a family violence offender suffers from a mental impairment is relevant to determining whether to refuse bail.

WA

Western Australia Department of Justice, Equal Justice Bench Book, Family and Domestic Violence (updated September 2022).

Mental illness is not specifically considered in the context of domestic and family abuse; see especially 'Impacts on women' (13.2.2), which references the VicHealth Study referenced above and lists some of the wide-ranging effects of intimate partner violence on women's mental health.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 21: Mental and Physical Disability comprehensively discusses mental disability, including information on enhanced risks for persons with a disability; prevalence and reporting of domestic violence in disability contexts; forms of domestic violence and court options to enhance assessment of domestic violence in disability cases. It also provides a very detailed section on process issues around domestic violence in a disability context.

Reference is also made throughout the bench book to mental health, including:

- 'Domestic violence can produce scientifically verifiable mental health reactions, including post-traumatic stress, depression, anxiety and panic disorder, hypervigilance as well as a host of short- and long-term physical medical conditions' (Section 5.2.2);
- In relation to perpetrators and mental illness, Section 7.2.4: Mental illness rationalization discusses mental illness as a risk factor for both the victim's and children's safety. However, it emphasises that mental illness should not be considered a cause of domestic violence, but rather an aggravating factor. It also cautions against the use of neuroscience research in court to explain domestic violence perpetration.

People with mental illness - Other Resources

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of useful resources and links.

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Aboriginal and Torres Strait Islander women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Law Society Northern Territory, *Indigenous Protocols for Lawyers* (second edition, 2015).

This handbook is written for lawyers and identifies and discusses six protocols to assist lawyers in communicating with their clients. See p5 which sets out the six protocols. The remaining part of the document discusses these protocols in depth.

Protocol 1:	Assess whether an interpreter is needed before proceeding to take instructions.
Protocol 2:	Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.
Protocol 3:	Explain your role to the client.
Protocol 4:	Explain the relevant legal or court process to the client prior to taking instructions.
Protocol 5:	Use 'plain English' to the greatest extent possible.
Protocol 6:	Assess whether your client has a hearing or other impairment that may affect their ability to understand

Mental Health First Aid Australia, *Cultural Considerations & Communication Techniques: Guidelines for providing Mental Health First Aid to an Aboriginal or Torres Strait Islander Person.* Melbourne: Mental Health First Aid Australia and beyondblue, the national depression initiative (2008).

These guidelines describe how members of the public should provide first aid to an Aboriginal or Torres Strait Islander person who may be developing a mental illness or experiencing a mental health crisis. The role of the first aider is to assist the person until appropriate professional help is received or the crisis resolves. These guidelines are designed to accompany the series Guidelines for Providing Mental Health First Aid to an Aboriginal or Torres Strait Islander Person. The guidelines are based on the expert opinions of Aboriginal clinicians from across Australia, who have extensive knowledge of, and experience in, mental health.

People with mental illness - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Brenda

Carol

Gillian

Ingrid

Leyla

Susan

People with mental illness - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Bell **[2005] ACTSC 123 (1 December 2005) – Australian Capital Territory Supreme Court**

Higgins CJ at [31]: 'I appreciate that personality disorders may often underlie the criminal behaviour of men who beat women. Alcohol or other substance abuse may sometimes be a triggering factor. Nevertheless, they must take responsibility for their actions and be seen to have done so. The offence is often hidden, so general deterrence is a factor that is quite prominent. So also is specific deterrence. No offender engaging in this kind of behaviour, nor their victims, should feel that it is to be treated lightly. Rather, it must be made the subject of condign punishment. That is not to say, of course, that any mitigatory factors or prospects for rehabilitation will be disregarded'.

R v In **[2001] ACTSC 102 (2 November 2001) – Australian Capital Territory Supreme Court**

Crispin J at [19]: 'The extent of his psychological condition is relevant to the issue of general deterrence but, in my view, the need to protect former spouses or partners from conduct of this nature cannot be so easily dismissed. Many people no doubt experience great stress upon the break-up of their marriages or other close relationships and in some cases they may suffer from symptoms of an underlying psychological illness or even become psychologically ill for the first time. One may and should respond with sympathy. However, when a person commits serious criminal acts against a former spouse or partner the court must take into account the need to deter other people from similar conduct. The risk of serious injury and, as in this case, grave emotional trauma may be at least as serious when the offender is psychologically ill. Accordingly, the need for deterrence should be given due recognition, though the weight which should be given to that factor will vary according to the circumstances of the case, and the actual sentences must be determined by reference to all relevant factors referred to in s 429A of the *Crimes Act 1900*'.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou JA at [54]: 'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and long-lasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

***R v Margolis* [2021] VSC 341 (15 June 2021) – Victorian Supreme Court**

As to aggravating factors, Beale J observed:

> [16] The prosecution submitted that there were a number of aggravating circumstances to your offending. First, you kept pursuing Ms Vang, who was much smaller than you, from room to room in your house, even though you realised you were losing control and posed a danger to her. Second, the killing was an instance of domestic violence: you and Ms Vang were living together in an intimate relationship, albeit one of short duration. Third, you killed her, intending to kill her. Fourth, you sent false messages to Ms Vang's sisters and left her body on the floor for an extended time.
>
> [17] The fact that this killing was an instance of domestic violence is certainly a circumstance of aggravation, as is the fact, established by your suicide note, that you actually intended to kill. As for the other matters, I consider that your thought processes were so clouded by your mental health problems (which I discuss below) that it would be inappropriate to treat them as circumstances of aggravation.

As to *Verdins* principles, Beale J stated:

> [54] Dr Zimmerman found that you have a borderline personality disorder and long-term PTSD. Associate Professor Carroll found that you have a severe personality disorder and long-term PTSD, both conditions commencing in your teens and likely to be permanent.
>
> [55] I accept the findings of Associate Professor Carroll that you have a severe personality disorder and

long-term PTSD. Neither diagnosis was disputed by the prosecution. I find that your mental health problems enliven principles 1, 3, 4, 5 and 6 of the well-known case of *R v Verdins*. In other words, your moral culpability is somewhat reduced by your mental health issues, which I find contributed causally to the commission of the offence. Because of your entrenched mental health issues, you are not an appropriate medium for giving full effect to general and specific deterrence. Although it seems you are currently feeling well supported by the prison mental health services, it is also likely that the substantial prison term which I must impose on you will exacerbate your mental health issues and make jail harder for you than for prisoners who do not have such issues.

People from culturally and linguistically diverse backgrounds

The Australian Bureau of Statistics conducted a study of the prevalence of violence in 2016. It shows that women are predominantly the victims of physical and sexual violence and emotional abuse perpetrated by a current or former male partner, however this study did not collect data regarding the ethnicity or origin of the survey participants [ABS PSS 2016].

Women from culturally and linguistically diverse ("CALD") backgrounds may be particularly vulnerable to domestic and family violence. They may have their origins in a range of countries and ethnicities. They may primarily speak a language or multiple languages other than English. They may hold religious or cultural beliefs about gender roles and behaviours, particularly within marriage, that are inconsistent with speaking out about violence perpetrated against them and their children or with seeking legal redress. They may have come from circumstances of war or civil unrest where they have personally experienced violence, rape or sexual assault without redress or any expectation of redress [Zannettino 2013]. These factors, and the range of other cultural, linguistic, economic, and social factors associated with resettlement in a new country, heighten the challenges and barriers for CALD women who experience domestic and family violence, especially when they engage with the legal system to secure the protection of themselves and their children, and to seek legal redress [Allimantet & Ostapiej 2011].

Australian research in recent years reveals the depth and severity of the problems CALD women face. There is no single factor that puts CALD women at a greater risk of both experiencing abuse and being less able to seek redress for it. Rather, a raft of factors may intersect, each compounding the other. Overall, CALD women report similar forms of domestic and family violence to other women. However, the impact of violence is exacerbated by the stressors of the migration experience generally, and the constraints of visa status, which may increase women's dependency on perpetrators for economic security and residency rights. Perpetrators in these circumstances are able to use misinformation about women's visa status and threats of deportation and the removal of children as further means of control. For these reasons, CALD women tend to endure domestic and family violence for prolonged periods before seeking help and, as a consequence, risk negative physical and mental health effects. CALD women are also highly motivated to resolve domestic and family violence without ending relationships and breaking up families, for a range of reasons including

immigration concerns and family and community pressures [Vaughan et al 2015].

For example, a woman with only temporary immigration status may not be eligible to work, may have no access to income support, health care or other public benefits, and may be legally, economically and socially dependent on her abusive partner. This forced dependency is likely to intensify if the woman has poor English literacy, is caring for children, is isolated from family and social support networks, or faces threats from her abusive partner that she and her children will be deported if they leave the abusive relationship [Allimant & Anne 2008]. These vulnerabilities are aggravated if the woman also experiences discrimination, disability, physical or mental illness, lack of education and other barriers to her wellbeing.

Whilst the Commonwealth *Migration Regulations 1994*, in the case of certain visas, exempt a woman from having to stay in an abusive relationship for two years before being eligible to apply for permanent residency, there are complex processes and evidentiary requirements that must be satisfied [Gray et al 2014]. A CALD woman who fears deportation or visa cancellation [JCCD, Path to Justice (CALD) 2016] may also fear engaging with the police or other authorities, and may remain in the abusive relationship rather than suffer the stress and anxiety of seeking legal redress [Taylor & Putt 2007].

In addition to the issues specific to immigration status, CALD women may for cultural or religious reasons [JCCD, Path to Justice (CALD) 2016] be reluctant to seek help for the domestic and family violence. They may feel shame in speaking openly about the violence. They may be unaware of their legal rights and unable to access linguistically appropriate information. They may be unwilling to disclose their circumstances to interpreters and counsellors who may sometimes be inadequately trained. Interpreters for particular dialects may not be available, and in small communities, the woman may know the interpreter and she may fear a lack of privacy and confidentiality. If counselled to leave the abusive relationship, CALD women may feel unable to face the cultural repercussions, which may include being ostracised from their family and community [George & Harris 2014].

The range of compounding factors may substantially delay a CALD woman from seeking help from legal or health services or the police, which may over time increase the risk of serious harm or death to the woman and her children. In the event that a CALD woman does report domestic and family violence, these factors may present as significant obstacles in her engagement with service providers and with police, legal and judicial processes. For example, as a result of experiences in her country of origin she may be mistrustful of authority and may need additional support in engaging openly and constructively with these processes [JCCD, Path to Justice (CALD) 2016]. Furthermore, access to appropriate interpreters at a cost the woman can afford is likely

to be critical to her fair treatment and hearing [Cavallaro 2010].

Research indicates that whilst cultural origin is not a predictor of a capacity for violence [Mederos 2004], the perpetration of domestic and family violence in the CALD context should be considered having regard to surrounding circumstances and factors, including: the impact of protracted stays in refugee camps and related experiences of high levels of tension and violence [Pittaway & Eckert 2013]; the effects of isolation, unemployment, trauma, alienation and cultural change; and cultural communities' expectations of conformity with cultural norms and traditional gender roles [Rees & Pease 2006].

People from culturally and linguistically diverse backgrounds - Key Literature

Australia

Allimant, Annabelle, and Stephanie Anne, 'No Room… Homelessness and the Experiences of Women of Non-English Speaking Backgrounds' (Paper presented at 5th National Homelessness Conference, Adelaide, 21st-23rd May 2008).

This paper examines service responses to women from non-English speaking backgrounds (NESB) who have experienced domestic and family violence. NESB women are likely to be accompanied by children and abusers may misinform them that they will be deported without their children if they leave the relationship (see pp5, 8, 9).

Allimant, Annabelle, and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds Who are Victim/Survivors of Sexual Violence: Challenges and Opportunities for Practitioners' (Australian Centre for the Study of Sexual Assault Wrap No 9, Australian Institute of Family Studies, 2011).

This publication identifies specific personal barriers for women from CALD backgrounds: failure to recognise sexual violence; physical and emotional isolation; cultural barriers such as spiritual beliefs, rituals, traditions and world-views; fears about breaches of confidentiality; residency status; and access to income support. Additionally, it notes systematic barriers for women from CALD backgrounds: language barriers; lack of informed understanding; racism and discrimination. The paper identifies particular issues for those from countries where the laws or culture do not recognise a woman's right of control over her body.

AMES Australia and Department of Social Services (Cth), *Violence against women in CALD communities: Understandings and actions to prevent violence against women in CALD communities* (AMES Australia and Department of Social Services (Cth), 2016).

This report focuses on preventing violence against women in CALD communities. It summarises the outcomes of a project focusing on the primary prevention of violence against women in CALD communities.

Factors contributing to violence in CALD communities include: unequal and disrespectful relationships between men and women, and rigidly stereotyped gender roles and identities; factors that support the learning of violent behaviour and permit violence to occur with impunity; and factors that intersect or interact with gender inequality to shape particular patterns of violence or increase the risk of violence occurring (e.g. poverty) (p.8). Specific factors relevant to understanding violence against women in CALD communities are summarised in Table 1 (pp.9-10).

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

The most recent large-scale prevalence study in Australia is the 2016 Personal Safety Survey showing that since the age of 15, one in six Australian women reported experiencing physical or sexual violence from a current or former partner, and one in four Australian women reported experiencing emotional abuse by a current or former partner. While age, gender and frequency of experiences were taken into account in this data, no information is sourced on the ethnic identities of participants and no information is provided around the number of participants who were born overseas.

Cavallaro, Lisa, *'I Lived in Fear because I Knew Nothing': Barriers to the Justice System Faced by CALD Women Experiencing Family Violence* (InTouch Multicultural Centre Against Family Violence, Victoria Law Foundation, 2010).

This qualitative research identifies that CALD women face barriers in accessing the justice system and in going through the justice and support systems. It suggests that CALD women are less likely to report violence in the first place, and, in cases when they do report, they are often quickly discouraged from progressing further with their complaints and may disengage prematurely from support. Discusses obstacles faced throughout the legal process, including language difficulties, intimidating court processes, prejudicial attitudes and inadequate support from services.

Department of Social Services, Hearing her voice: report from the kitchen table conversations with culturally and linguistically diverse women on violence against women and their children 2015, Commonwealth of Australia (Department of Social Services).

Drawing on 29 ‘kitchen conversations’ with women from 4 different ethnic groups, this report focuses on 11 interrelated issues and themes which were identified as specific to CALD women and communities:

1. Understanding Australia’s laws, rights and cultural norms and new arrivals.
2. Gaining familiarity with and knowledge of support services.
3. Enhancing the availability and accessibility of support services.
4. Resolving immigration status and eligibility for support services and payments.
5. Reducing women’s isolation and promoting community participation.
6. Recognising cultural beliefs and norms about gender and marriage.
7. Building the capacity of community and religious leaders.
8. Raising professional standards in interpreting and translation.
9. Improving police interventions.
10. Engaging and educating CALD men to inspire behaviour change.
11. Recognising the intersectionality of issues for CALD women.

Dimopoulos, Maria, ‘Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities’ (Issues Paper 20, Australian Domestic & Family Violence Clearinghouse, 2010).

This paper identifies issues faced by new migrants, including language issues, economic difficulties, housing barriers, unemployment and cultural difficulties (p5). It emphasises lack of fluency and literacy in English as barriers to accessing justice for recent migrants and notes limited awareness of family and domestic violence laws. With respect to perpetration of domestic violence, see ‘Role of culture/application to Australian law’ (p14-16), which disputes the applicability of a ‘cultural defence’ - and ‘Challenging stereotypes about violence in communities’, specifically in the context of Muslim communities.

Douglas, H. *Women, Intimate Partner Violence and the Law* (2021; OUP).

This text explores the results of an interview study involving interviews with 65 women who had experienced domestic and family violence over three years. See chapter 3: Most women reported that the most difficult form of abuse they dealt with were forms of non-physical abuse, especially emotional abuse. Many women identified that non-physical abuse deeply impacted on their sense of self and freedom, and that it continued to affect them for years. Other forms of non-physical abuse that were also highlighted by the women included abusive tactics targeting their role as a mother, isolation within the relationship, financial abuse. The women in the study highlighted the particular impacts of non-physical forms of abuse, including isolation, financial abuse and threats about their visas, for women from culturally and linguistically diverse backgrounds especially those women with insecure visa status.

El-Murr, Alissar, *Intimate partner violence in Australian refugee communities* (CFCA Paper No. 50 – December 2018, Australian Institute of Family Studies).

This paper looks at what is currently known about intimate partner violence in Australian refugee communities, including the forms of IPV most commonly experienced; contributing factors, such as traumatic pre-arrival experience and acculturation stress; and the barriers women from refugee backgounds face in reporting IPV and seeking help.

The paper also looks at what service providers can do to ensure appropriate support is available to this client group. The three services (organisations of importance to refugee communities in Queensland, Western Australia and Victoria) consulted for this paper had developed response strategies to engage and support women from refugee backgrounds, and these provided real-life case studies of promising service practice. The range of responses is underpinned by principles of trauma-informed care.

Fisher, C. et al. (2020). *Best practice principles for interventions with domestic and family violence perpetrators from refugee backgrounds* (2020). Sydney: ANROWS.

This Western Australian project involved: literature review; in-depth interviews with 20 men and 20 women from refugee backgrounds, including men who had perpetrated and women who had experienced domestic

and family violence (countries of birth were Burma, Afghanistan, Sudan, Iraq and Iran); and two focus groups with service providers working in men's behaviour change programs, women's services, women's health, refugee services and domestic and family violence services.

It developed a set of best practice principles for interventions with men from refugee backgrounds who use domestic and family violence.

Flood, Michael, 'Engaging Men From Diverse Backgrounds In Preventing Men's Violence Against Women' (Paper presented at Stand Up! National Conference on Eliminating All Forms of Violence Against CALD Women, Canberra, ACT, 29-30 April 2013).

In this paper, the author explores intersections of gender, difference, and violence against women, focusing on men from diverse backgrounds. Relevantly, the author discusses the ways in which men from different social locations do not benefit from patriarchy equally, and that 'Particular groups of men may be both oppressed and oppressing, e.g. in oppressive relations with women' (p3). He goes on to discusses how 'Experiences of immigration and resettlement shape men's experiences of violence' (p7), and how to engage CaLD men in the prevention of violence (from p8).

George, Amanda, and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Centre for Rural and Regional Law and Justice, Deakin University, 2014).

This report considers domestic and family violence faced by women and children in Victoria living in regional and remote areas, with a specific focus on CALD women. It notes that CALD women face additional barriers and have diverse needs, but often have more limited access to appropriate services, particularly in regional and rural areas' (p 39). The report discusses the various barriers facing CALD women, including limited knowledge of the available services and supports, fear of experiencing cultural insensitivity and racism, fear or insecurity in the presence of police, or lack of awareness of social, legal and financial rights and their immigration status (pp 51-55).

Gray, Lauren, Patricial Easteal and Lorana Bartels 'Immigrant Women and Family Violence: Will the New Exceptions Help or Hinder Victims?' (2014) 39(3) *Alternative Law Journal* 167.

This article reviews the relationship between domestic violence and immigration law.

Henry, N, Vasil, S, Flynn, A, Kellard, K & Mortreux, C 2021, 'Technology-Facilitated Domestic Violence Against Immigrant and Refugee Women: A Qualitative Study', *Journal of interpersonal violence*, p. 8862605211001465.

Abstract: Digital technologies are increasingly being used as tools for the perpetration of domestic violence. Little empirical research to date has explored the nature and impacts of technology-facilitated domestic violence (TFDV), and even less attention has been paid to the experiences of immigrant and refugee women. This article examines the nature and impacts of TFDV as experienced by immigrant and refugee women. Drawing on interviews with 29 victim-survivors and 20 stakeholders, we argue that although immigrant and refugee women may experience TFDV in similar ways to non-immigrant and refugee women, they face unique challenges, such as language barriers, cultural bias from support services, lack of financial resources, lack of trust in state institutions, and additional challenges with justice and migration systems. Immigrant and refugee women also face multiple structural layers of oppression and social inequality. Accordingly, we argue that a multifaceted approach is required to address TFDV that includes culturally sensitive and specific law reform, education, and training.

Ibrahim, N. (2022) Experiences of abused Muslim women with the Australian criminal justice system. 37 (3-4) *Journal of Interpersonal Violence* NP2360-NP2386. doi: 10.1177/0886260520935487

The article provides a literature review of Muslim women's experiences with the Australian justice system (ACJS). It then reports on 10 in-depth interviews conducted by the author with Muslim women who had experienced IPV to identify the barriers for women in contacting the police for help for the violence experienced. The findings of the study indicate that barriers faced by the interviewees are clustered into victim/survivor related, family, community, and systemic related barriers (pNP2376). At an individual level, the reasons why abused Muslim women did not access the CJS were related to fear, lacking self-confidence, language barriers, financial dependence, and lack of knowledge about the CJS which is consistent with previous research (pNP2377). Often abused Muslim women who were isolated as migrants especially if they did not have any extended family in Australia, found it difficult to access the ACJS (pNP2377). At the community level findings indicated that culturally prescribed roles, community pressure, social stigma, fear of

negative stereotyping of the community, and uncertainty of faith understandings of IPV deters abused Muslim women from seeking the ACJS for assistance (pNP2378). At the system level issues of distrust, cultural and religious sensitivity and lack of knowledge of rights were relevant (pNP2379).

Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, *Invisible women, invisible violence: Understanding and improving data on the experiences of domestic and family violence and sexual assault for diverse groups of women: State of knowledge paper* (ANROWS, 2016).

This paper establishes the state of knowledge about the experiences of domestic and family violence and sexual assault against women from diverse groups, including women with disabilities. It highlights the way that, for women with disability, access to support services and justice responses can be limited by social and physical environmental barriers, as well as a lack of appropriate educational resources on rights and seeking assistance (pp 26-27). Being disbelieved is a further and fundamental barrier for women with disabilities. Access to justice can be hindered by, for example, women being assessed as legally incapable to give evidence, being unable to access communication aids or interpreters, and having perpetrators of serious crimes against them going unprosecuted (p 27).

Pittaway, Eileen, and Rebecca Eckert, 'Domestic Violence, Refugees and Prior Experiences of Sexual Violence: Factors Affecting Therapeutic and Support Service Provision' in Zannettino, Lana, et al (eds), *Improving Responses to Refugees with Backgrounds of Multiple Trauma: Pointers for Practitioners in Domestic and Family Violence, Sexual Assault and Settlement Services* (Practice Monograph 1, Australian Domestic & Family Violence Clearinghouse, 2013).

Discusses the need for support service providers to understand the pre-arrival experiences of refugees, which is characterised by high levels of violence. Notes a need for cultural sensitivity, and knowledge about increased vulnerability of refugee women as a result of past trauma, anxiety, guilt and shame about family and friends left behind (esp. p 11). In relation to perpetration of domestic violence, pp11-12 may be of relevance, noting that while the gendered nature of domestic violence transcends culture, 'For many refugees who come to Australia from protracted refugee situations, their cultural heritage is also complicated by an overlay of 'refugee culture', built up over years in refugee sites in countries of asylum' which protects traditional norms of family and community.

Rees, Susan and Bob Pease, Refugee Settlement, Safety and Wellbeing: Exploring Domestic and Family Violence in Refugee Communities (VicHealth, 2006).

This paper, part of the Violence Against Women Community Attitudes Project, explores a variety of aspects of domestic and family violence in refugee communities. It explores the application of intersectionality to both understanding and responding to men's violence against women from p18, emphasizing that 'Intervention strategies against domestic and family violence in refugee communities need to both ensure that they don't reinforce cultural values that tolerate violence against women and simultaneously be mindful of not undermining cultural differences that can promote wellbeing and enhance settlement' (p3). Pp4-5 summarise the key findings of the report on the interrelation between men and women refugees' settlement experiences and patriarchy, including the effects of isolation, unemployment, trauma and alienation, gender roles and cultural change on domestic and family violence experiences and perpetration.

Segrave, Marie 'Temporary Migration and Family Violence: An analysis of victimisation, vulnerability and support' (Monash University, 2017)

The paper discusses the importance of temporary migration status in the context of family violence. Uncertainty of migration status creates leverage for violence and control, and also impacts victims' access to support and services. The project aimed to comprehensively review family violence cases, managed by InTouch Multicultural Centre Against Family Violence, that involve women victims-survivors of family violence whose migration status was temporary at the time of their initial contact with the organisation. This report draws on the analysis of 300 client case files from InTouch that were closed over 2015-16. The findings provide the foundation for various interventions and improved responses for this group of women, and points to other critical issues that extend beyond temporary migration, such as the overlap of family violence and forms of coercion and abuse that are akin to Commonwealth slavery and trafficking offences. Further, the report proposes recommendations on how to ensure that migration status does not affect responses to family violence and how to support victims of family violence who seek assistance.

Segrave, M and Pfitzner, N (2020) *Family violence and temporary visa holders during COVID-19*, Monash University.

Abstract: This study captures the immediate needs, contexts and circumstances of 100 women who held temporary visas and sought the support of in Touch Multicultural Centre Against Family Violence due to their experience of family or domestic violence during the first lockdown phase (from the declaration of a State of Emergency across Victoria on 16 March to 31 May 2020).

The report found that the impact of COVID 19 intensified the impact of the exclusion of temporary visa holders experiencing family violence from safety and support mechanisms. The report makes a number of recommendations for reform of migration and protection order legislation and service and support (see pp8-9).

There is also a technical report of the findings of this study: Segrave, Marie; Wickes, Rebecca; Keel, Chloe (2021): Migrant and Refugee Women in Australia: The safety and security study, Technical Report. Monash University. Report. The Technical Report offers a detailed account of the design and survey approach utilised for the 2020 Migrant and Refugee Women's Safety and Security Study, undertaken in partnership by Monash University and Harmony Alliance. This report is designed to sit alongside the findings in the major report, but provided technical details about the survey for future research use.

Taylor, Natalie, and Judy Putt, 'Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia' (2007) 345 *Trends and Issues in Crime and Criminal Justice* 1.

This paper reports on findings from a study investigating sexual violence and people from CALD backgrounds. The paper reports on a focus group of 268 CALD women (pp 2-3): many of the women stated that they believed rape could not occur within marriage since the marriage contract implied consent; sexual violence is not discussed among members of such communities, especially when occurring within marriage; and there were varying levels of awareness about sexual violence being a crime in Australia. Interviewed support workers identified a number of factors which seemed to increase the risks of sexual violence towards CALD women: lack of family ties in Australia, pregnancy and social isolation; lack of permanent residency and fear of deportation if she does not cooperate with her partner; poor police and legal responses to requests for assistance; lack of awareness of rights; sense of obligation to stay; cultural traditions of male dominance; little community knowledge of the rights of victims/survivors of sexual violence; socioeconomic disadvantage due to unemployment, poverty etc. and cultural stereotypes

Tayton, Sarah, et al, 'Groups and Communities at Risk of Domestic and Family Violence: A Review and Evaluation of Domestic and Family Violence Prevention and Early Intervention Services Focusing on At-Risk Groups and Communities' (Report, Australian Institute of Family Studies, 2014).

This report sets out the findings of research into domestic and family violence (DFV) prevention initiatives focused on groups and communities identified as being at greater risk of experiencing DFV and/or having difficulty accessing support services. It finds that CALD women are particularly likely to lack information or be financially marginalised compared to other women (p 24). It notes that the CALD community is significantly diverse, including 'refugees and asylum seekers, newly arrived migrants on temporary or permanent visas, people from well-established communities and international students' (p 26). It identifies that cultural issues and immigration intensify complexities associated with Domestic and Family Violence in the form of compounding factors including: isolation from established family and social support networks; language barriers; a lack of knowledge about legal rights and financial support services; fear of deportation or visa cancellation; high dependence on partners; lack of employment or occupational skills; "traditional" ideas about the role of women; cultural stigma; fear and/or distrust of the police; limited availability of culturally appropriate services (p 27).

Of some relevance to responding to perpetration of domestic and family violence in CALD communities, section 6.3 'CALD Women' (from p50) discusses effective prevention practices in CALD communities generally. While aimed at community-level initiatives, it notes some relevant considerations that may need to be made, such as the need to educate men and communities 'as a whole' (p51), and briefly highlights 'The complexity of dealing with the impact of trauma for both victims and offenders, particularly in relation to refugees: "Perpetrators have also been victims."(Roundtable participant, NSW).' (p52)

Ussher, J. et al. *Crossing the line: Lived experience of sexual violence among trans women from Culturally and Linguistically Diverse backgrounds in Australia* (2020) Sydney: ANROWS

The key findings of this study are that:

- There are positive implications for trans women's overall health and wellbeing when trans women feel included and accepted;
- Trans women of colour from CALD backgrounds, as well as women who identify as lesbian, bisexual or

queer, may experience additional prejudice and discrimination due to the intersection of gender, sexuality, social class, race and religion;

- Support in gender transitioning, through facilitation of access to hormone therapy, reduces the risk of transphobic violence; and
- CALD trans women's experiences of gender-based sexual violence are comparable with those of non-CALD trans women and cisgender women, however trans women also experience transphobic violence.

The study's recommendations are to:

- Conduct further awareness-raising and education for healthcare providers, legislators, police and policymakers, as well as the general public, in relation to transgender experience and gender transitioning;
- Challenge societal attitudes which support, condone or trivialise sexual violence against women, including violence against trans women; and
- Ensure policy and practice documents and clinical guidelines use language that is inclusive of gender and sexuality diversity when discussing sexual violence against women.

Vaughan, Cathy, et al, 'Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia: The Aspire Project' (State of Knowledge Paper 7, Australia's National Research Organisation for Women's Safety Landscapes, October 2015).

This state of knowledge paper examines a broad range of national and international research to present the current knowledge about family violence against immigrant and refugee women. While the paper identifies critical evidence on the topic, it acknowledges that much of the available literature has methodological issues, including incomplete and inconclusive prevalence data; small sample sizes; and conceptualising family violence in ways that are not recognised by immigrant and refugee communities.

The paper finds:

- Overall immigrant and refugee women report similar forms of family violence as women from non-immigrant backgrounds, however there are some differences in the types of violence experienced and the structural contexts where it takes place.

- The constraints produced by immigration policies are of significant concern, where women depend on perpetrators for economic security and residency rights.
- Many immigrant and refugee women are motivated to resolve family violence without ending relationships and breaking up families, for reasons including immigration concerns and family and community pressures.
- There is scant evidence that the increase in criminal justice responses to family violence, such as "mandatory arrest" and "pro-prosecution" approaches, are helpful for immigrant women, and may deter them from seeking assistance in crisis situations.
- In relation to perpetration of domestic violence by men from CALD backgrounds, 'Engaging men and boys (p41) is of most relevance, exploring effective prevention strategies and engagement.

Vaughan, Cathy, et al., *Promoting community-led responses to violence against immigrant and refugee women in metropolitan and regional Australia. The ASPIRE Project—Research report* (ANROWS, 2016).

This research reports on interviews (n46, n33 in Victoria and n13 in Tasmania) conducted with immigrant and refugee women who had experienced family violence, 46 interviews with a total of 57 key informants (three small group interviews took place) from a range of services, and workshops.

Key findings included:

- Experience of immigration (in particular, visa class), shaped women's experiences of violence (pp 25-32): this included reinforcing dependency on the abuser, or visa restrictions limiting access to employment, social security, housing, health care, child care, and eduction. It also included experiences pre-arrival to Australia, including trauma and violence.
- There were a range of social, religious, and personal values that contributed to normalising violence (for example, the dominance of men), however, participants did not attribute violence to the cultural context, and in some circumstances, family and community members were important avenues of support (pp 32-37).
- Service providers described under-resourcing as limiting capacity to meet the intensive support needs of immigrant and refugee women; this was particularly exacerbated in regional areas (pp 39-40).

- Women reported violence perpetrated by their male partners but also in some cases by extended family. This included physical, sexual, emotional, psychological, and financial abuse, as well as religious abuse, reproductive control, social isolation, and immigration-related violence (pp 46-52).
- Problems with communication with services and in court were commonly reported, including unprofessional and dangerous interpreter behaviour. This was worsened with limited availability of interpreters in regional areas. Interpreters also reported challenges such as vocabulary limitations and taboos, feeling a sense of responsibility for the client's safety, and vicarious trauma (pp 66-70; see also pp 64-71).
- Assistance was most commonly sought at a point of crisis, although many women made multiple attempts to address the perpetrator's behaviour before this point, including disclosures that had led to inadequate responses (pp 55-62).
- While women reported mostly positive experiences with services, there was still reported difficulties in accessing the services, and some women felt pressured to make important life-changing decisions quickly, while negotiating communication barriers, and while holding limited information about their rights and options (pp 72-74).
- Some women had positive experiences with police, but many reported feeling dismissed, disbelieved, blamed, and discriminated against (pp 74-77).

Specifically in relation to court processes, the report found that:

- The most commonly reported positive experience in court was the support provided by a court support worker. Women without court support described feeling isolated and unsafe, not understanding court processes or procedures, and not receiving information about family violence or legal services (p 77).
- Women reported being abused by perpetrators through the family law system, and through cross-applications for protective orders (pp 77-78).

Vidal, Laura, Opportunities to Respond to Forced Marriage within Australia's Domestic and Family Violence Framework, Issues Paper, 2019, Good Shepherd.

Currently in Australia, responses to the practice of forced marriage are heavily embedded within a criminal justice framework. This paper considers whether there are opportunities to prevent and respond to forced marriage within existing and more holistic domestic and family violence laws and policies instead. It discusses

the relationship between forced marriage and family violence, the drivers and impacts of forced marriage, the gendered nature of family violence and forced marriage, policy and legislative responses, general trends in legislative responses, existing intervention orders, and the proposed forced marriage protection order scheme. A table noting where forced marriage is recognised within current Commonwealth and state and territory legislation is included as an appendix.

Zannettino, Lana, 'Refugees, Sexual and Domestic Violence and Prior Experiences of Trauma: Introduction and Context' in Zannettino, Lana, et al (eds), *Improving Responses to Refugees with Backgrounds of Multiple Trauma: Pointers for Practitioners in Domestic and Family Violence, Sexual Assault and Settlement Services* (Practice Monograph 1, Australian Domestic & Family Violence Clearinghouse, 2013).

This research identifies that within the refugee context, several compounding issues are identified as being relevant in the domestic abuse context, including heightened gender inequality resulting from external pressures that lead to more extreme cultural practices concerning women and girls than in the traditional society; and men's traditional identities and roles being threatened by their experience of trauma and persecution, and time they spend in refugee camps, which they suggest results in an increase in violent behaviour. This can also be exacerbated by symptoms of post-traumatic stress disorder and other psychological problems (esp. p 7). Furthermore, in understanding the perpetration and experience of violence by refugees, the authors emphasise the need to understand the intersectionality of gender oppression with other factors such as race, ethnicity, sexuality and class, and that 'This means that strategies for violence prevention need to acknowledge culturally-specific factors in particular communities rather than attributing blame to a particular culture for violence' (p8).

International

Alsinai A, Reygers M, DiMascolo L, Kafka J, Rowhani-Rahbar A, Adhia A, Bowen D, Shanahan S, Dalve K, Ellyson AM. *Use of immigration status for coercive control in domestic violence protection orders*. Front Sociol. 2023 Apr 28;8:1146102. doi: 10.3389/fsoc.2023.1146102. PMID: 37188152; PMCID: PMC10175620.

Abstract: In the context of domestic violence (DV), immigration-related circumstances can be exploited by an

abuser to coerce and manipulate their partner. Using an intersectional structural framework, we examine how social structures overlaid with immigration-specific experiences operate to further enhance opportunities for abuse against immigrant women. We conducted a textual analysis to identify how socially constructed systems interact with a victim-survivor's immigration status to introduce more tools for abusers to engage in coercive control and/or acts of violence in a random sample of petitioners (i.e., victim-survivors) who were granted a Domestic Violence Protection Order (DVPO) in King County, WA (n = 3,579) from 2014-2016 and 2018-2020. We hand-reviewed textual petitioner narratives and identified n = 39 cases that discussed immigration-related circumstances and related acts of violence and coercion. These narratives included threats to contact authorities to interfere with an ongoing immigration process, deportation threats, and threats that would separate families. In many cases, petitioners indicated that immigration-related threats prevented them from leaving the violent partner, seeking help, or reporting the abuse. We also found mention of barriers for victims to receive protection and gain autonomy from further abuse including a lack of familiarity with US protections and laws, and restrictions on authorizations to work. These findings demonstrate that structurally created immigration-specific circumstances provide opportunities for threats and retaliation against victim-survivors by abusers and create barriers to seeking help initially. Policy should respond to anticipate these threats in the immigrant community and engage early responders (e.g., healthcare providers, law enforcement) to support victim-survivors from immigrant communities.

Cimino, A., Yi, G., Patch, M., et. al., 'The Effect of Intimate Partner Violence and Probable Traumatic Brain Injury on Mental Health Outcomes for Black Women' (2019) *Journal of Aggression, Maltreatment & Trauma* (online first).

Severe intimate partner violence (IPV) can result in traumatic brain injury (TBI), cognitive impairment, and mental health disorders, such as depression and PTSD. The purpose of this study is to examine the relationship between IPV, injuries associated with TBI (a loss of consciousness from a blow to the head and/or strangulation), and their effect on mental health disorders among Black women, who experience higher rates of IPV and greater mental health burden than White and Latina women. The study examined data on 95 Black women with a history of abuse, such as IPV, forced sex, and childhood maltreatment. Results showed that approximately one-third of women had probable TBI. 38% were hit on the head, 38% were strangled to unconsciousness, and 25% were strangled and hit on the head. A significant percentage of abused Black women who sustained probable TBI injuries were found to have a greater chance of experiencing comorbid PTSD and depression. These results highlight a need for healthcare professionals to

assess women who lost unconsciousness due to IPV for TBI, and allow referrals to IPV interventions and mental health treatment.

Mederos, Fernando, *Accountability and Connection with Abusive Men: A New Child Protection Response to Increasing Family Safety* (Family Violence Prevention Fund (US), 2004).

Although directed at child protection workers, 'Chapter 2 highlights some of the racial, cultural and socio-economic factors that will be relevant to working with perpetrators of violence and attempts to deconstruct some of the myths surrounding the nature of violence in non-Caucasian communities.' The chapter notes that, 'In each culture, there are values, traditions and practices that facilitate abusive and coercive relationships, and there are also values, traditions and practices that support and promote functional and respectful relationships' (p11). It also highlights that 'Culturally-based explanations or excuses for violent behavior should not be used as primary indicators of dangerousness or of capacity to change, since cultural origin is not a predictor of capacity for violence' (p11).

Rossiter, KR. et al., 'Domestic Homicide in Immigrant and Refugee Populations: Culturally-Informed Risk and Safety Strategies' (Canadian Domestic Homicide Prevention Initiative, Domestic Homicide Brief 4, February 2018).

The purpose of this Briefing Paper is to highlight risk assessment, risk management, and safety planning for immigrant and refugee populations. The paper provides definitions of key terms, such as 'migrant', 'protected persons' and 'permanent residents'. It also identifies unique risk factors for domestic homicide, using the Immigrant Power and Control Wheel (p6). The authors highlight the importance in recognising that 'domestic violence and homicide among immigrant and refugee populations are not rooted specific in cultures, but in patriarchy' (p 5). The authors identify several factors that contribute to increased risk of domestic violence and homicide among immigrant and refugee populations (p4):

- Acculturation level
- Cultural norms and expectations
- Geographic and social isolation
- Length of residency in host country

- Loss of socioeconomic status
- Loss of culture, family structures and community leaders
- Power imbalances between partners
- Stress associated with migration
- Post-migration strain and stigma
- Strict or changing gender roles
- Traditional patriarchal beliefs
- Unresolved pre-migration trauma
- Victim/survivor immigration status

Barriers to services for immigrant and refugee women are addressed, along with the need for culturally-informed strategies for risk assessment, risk management, and safety planning. Examples of culturally-specific risk assessment tools are provided.

Tabibi, J., Ahmad, S., Baker, L., and Lalonde, D., 'Intimate Partner Violence Against Immigrant and Refugee Women' (Learning Network, Issue 26, Ontario: Centre for Research & Education on Violence Against Women & Children, 2018).

This paper provides a summary of the particular issues associated with intimate partner violence (IPV) against immigrant and refugee women. It examines the types of IPV, considers the risk factors and vulnerabilities concerning IPV, highlights the barriers victims face when seeking safety and accessing services and support, and shares recommendations for successful violence prevention initiatives. Immigrant and refugee women who experience IPV encounter many obstacles to disclosing and reporting abuse, and accessing support services and legal processes. Obstacles include economic exclusion, fear of deportation, discrimination and racism within the service delivery system, lack of coordinated services, geographic, social and cultural isolation, and a lack of culturally and linguistically appropriate services. Recommendations for the support of victims and for implementing meaningful prevention initiatives for immigrant and refugee communities may be found on pages 9-11.

People from culturally and linguistically diverse backgrounds - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 3 discusses a range of issues affecting people from CALD backgrounds and their experience of court processes.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Although this bench book does not discuss the relationship between having a culturally and linguistically diverse (CALD) background and domestic violence, Chapter 2 on 'Ethnic, Religious, Spiritual and Linguistic Diversity' and Chapter 3 'Religions in Queensland' include Queensland population statistics in relation to birth country, language and religion. Additionally, Chapter 6 provides a discussion of effective communication in court proceedings and, most relevantly, Parts II and III provide information about working with interpreters. The bench book notes: 'Ensuring people from culturally and linguistically diverse backgrounds are able to comprehend and be understood in court proceedings is fundamental in achieving justice according to law' (p.41).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.6 discusses how people from CALD backgrounds may experience family violence and issues that may affect their experience of applying for an intervention order.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

The section on 'Culturally and linguistically diverse people' (ch7) includes Western Australian population

statistics in relation to birth country, language and religion. It briefly considers cultural norms and differences and considers the use of interpreters in court. See also ‘Points to consider in relation to particular groups of women’ (ch 10.4.4): Some issues particular to women from culturally and linguistically diverse backgrounds may include:

- more limitations on access to independent income;
- unfamiliarity with English and limited access to interpreters, which may reduce access to information and support services; and
- increased levels of social isolation.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 22: Minority/Immigration Status in domestic violence cases specifically discusses domestic violence in these contexts. See especially Section 22.2.4: Forms of Domestic Violence: Minority & Immigration Status, which provides a comprehensive overview of different types of behaviour that may specifically affect women from these groups. Also see Section 22.2.5: Potential responses to forms of domestic violence associated with minority and immigration status. Issues around language and translation are also raised in this chapter, but this discussion is more directed towards Canadian processes and access to these services. The bench book goes on to provide detailed discussion on immigration status and family law, and issues with residence status.

People from culturally and linguistically diverse backgrounds - Other Resources

Family Court of Australia, *Family Violence Best Practice Principles, 4th edition* (2016).

The Best Practice Principles are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the *Family Law Act* 1975 (Cmth), and provide useful background information for decision makers, legal practitioners and individuals involved in these cases.

[Extract]

In particular, the Principles note that the dynamics of family violence and abuse are informed by the diverse cultural context in which it occurs and by the experience of people from different ethnicities, backgrounds and language groups. It is important to recognise that the concept of 'culture' is not fixed and immutable. Attempting to ascribe certain characteristics to particular cultural groups may lead to erroneous generalisations based on racial or ethnic identification. Making assumptions or generalisations about racial, ethnic or religious groups ignores the intersection between, for example, culture and socio-economic status, age, disability, sexual orientation, place of residence, immigration status and homelessness. Nevertheless, insofar as broad statements can be made about violence and culturally and linguistically diverse communities, research has tended to suggest that cultural values and immigration status increases the complexities normally associated with family violence and abuse.

Women from culturally and linguistically diverse backgrounds are generally less likely to report cases of family violence. The factors that may influence this can include:

- being excluded from their community
- the limited availability of appropriate translator/interpreter services and access to support services
- limited support networks
- reluctance to confide in others
- lack of awareness about the law
- continued abuse from immediate family
- cultural and/or religious shame, and

- religious beliefs about divorce.

Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context:* Existing Court Resources (2016).

This paper consolidates the outcomes and findings of a scoping study conducted by Maria Dimopoulos, managing director of MariaD Consultants. The study was commissioned by the Migration Council Australia on behalf of the Judicial Council on Cultural Diversity.

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2016).

See the Executive Summary (p6-9) which makes a number of recommendations. It also identifies and discusses key pre-court barriers:

- Lack of knowledge of legal rights;
- Lack of financial independence;
- The importance of integrated support services;
- Poor police responses;
- The impact of pre-arrival experiences and traumatic backgrounds;
- Community pressure on women seeking to protect themselves and their children;
- Uncertainty about immigration status and fear of deportation; and
- The cost of engagement with the legal system.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and

- Unethical and poor professional conduct by interpreters.

Identifies barriers to full participation in attending court:

- The intimidating process of arriving at court;
- Safety while waiting at court;
- Lack of understanding of court processes;
- Difficulty understanding forms, charges, orders or judgments;
- Courtroom dynamics;
- The impact of attitudes and actions of judicial officers;
- The need for judicial officers to receive cultural competency training;
- Lack of availability of men's behaviour change programs; and
- Abuse of court processes by perpetrators.

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of useful resources and links.

Non-inquest findings into the death of Rinabel Tiglao Blackmore, Coroners Court of Queensland (Cairns), 4 April 2019.

The following is a summary of the key facts relating to the domestic violence related death of Ms Blackmore and the key findings of Northern Coroner, Nerida Wilson. There are other matters raised in the Coroner's findings relating to police responses that are not covered in this summary.

Key facts:

Ms Blackmore migrated to Australia from the Philippines in 1991; English was not her first language. After separating from her husband (with whom she had three sons) in 2014, she moved from Brisbane to

Middlemount in central Queensland to continue a relationship with Mr Dickson that had commenced prior to the separation from her husband. Ms Blackmore was concerned that her family would not approve of her living with a man she was not married to, so she was secretive about her relationship with Mr Dickson, her living arrangements and whereabouts. Ms Blackmore's reluctance to tell her family about the new relationship was a source of consternation for Mr Dickson and was allegedly the trigger for two separate (although causally connected) episodes of domestic violence in the 48 hours prior to her death.

Ms Blackmore spent the 2014 Christmas period in Brisbane whilst Mr Dickson visited friends in Bundaberg. During their time apart, Mr Dickson exhibited controlling and jealous behaviours. He demanded that Ms Blackmore take photos of the people she was with so that he could satisfy himself that she wasn't cheating on him. Mr Dickson sent messages to Ms Blackmore's male friends from her mobile phone, impersonating her, and asking when they were free to have sex again, in an attempt to 'catch her out' for alleged infidelity.

On 28 December 2014, Ms Blackmore travelled from Brisbane to Bundaberg to meet and stay overnight with Mr Dickson at a local motel. An argument ensued in the motel room, with Mr Dickson asking Ms Blackmore why he was her "dirty little secret", and then pushing and grabbing her on the shoulders. They then both went to the motel's front office where the manager witnessed Mr Dickson and Ms Blackmore in a tug of war over a handbag, Ms Blackmore saying she wanted to break up, and Mr Dickson becoming more agitated as he tried to convince Ms Blackmore to get into the car with him. Ms Blackmore whispered to the manager to call the police. When Mr Dickson went outside to sit in his car, Ms Blackmore told the manager that he (Mr Dickson) had earlier put his hands around her neck, that she was frightened for her life, and that if the manager didn't get the police he (Mr Dickson) would kill her.

The police attended the motel, took statements from the parties, and told Mr Dickson that they would be applying for a protection order on Ms Blackmore's behalf. The police supervised the return of personal effects to Ms Blackmore and the exchange of their respective mobile phones. Ms Blackmore told the police she intended to catch a train to Rockhampton. Mr Dickson then left the motel, as did the police. Not long after however, Mr Dickson returned to the motel and Ms Blackmore told the manager that Mr Dickson had taken $400 from her bag. The manager became concerned for Ms Blackmore's safety and assisted her to be collected by a friend.

The Application for a Protection Order prepared by the police included grounds that it was necessary and desirable to protect the aggrieved due to the respondent's violent nature and history and the aggrieved's level of fear towards the respondent.

Ms Blackmore asked a friend to drive her to Middlemount so she could collect her property and passport from Mr Dickson's unit. They arrived in the early hours of 30 December 2014. Before the friend left Ms Blackmore, they agreed on a code in case Ms Blackmore was in trouble and the police should be called.

Mr Dickson told police that when he arrived at his unit around lunchtime on 30 December 2014, Ms Blackmore was waiting for him so she could retrieve her possessions. He said he and Ms Blackmore had sex on two occasions, they fell asleep, and then argued. He admitted to grabbing Ms Blackmore around the collar bone or shoulder, shaking and squeezing her, resulting in red marks on her shoulders and around her neck. He also admitted to making contact with her lip causing it to bleed. Mr Blackmore claimed that Ms Blackmore was screaming at him to stop, while also crying and saying that she loved him and didn't want to leave him.

Mr Dickson told police that late in the evening of 30 December 2014 he and Ms Blackmore decided to drive to Brisbane in his vehicle. He said initially Ms Blackmore sat in the rear while Mr Dickson drove as she appeared to be searching for something in one of her bags. A later examination of the vehicle revealed that Mr Dickson had taken possession of Ms Blackmore's mobile phone and had put it in the driver's door well. Mr Dickson said Ms Blackmore subsequently climbed over to the front passenger seat, complaining of motion sickness; then another argument ensued involving Mr Dickson screaming verbal abuse at Ms Blackmore. Mr Dickson denied using any physical violence against Ms Blackmore while they were in the vehicle. Mr Dickson told police he was driving the vehicle at around 100km per hour when Ms Blackmore suddenly opened the door and exited the vehicle. Mr Dickson told police he then took steps to locate Ms Blackmore, keep her alive, contact emergency services and assist in her transfer to hospital.

Ms Blackmore's head injuries resulted in her death on 2 January 2015. There were no alcohol or drugs detected in her system.

Mr Dickson pleaded guilty to (the alternative charge of) manslaughter of Ms Blackmore, and served time. See para 135 on pages 15-16 for the Judge's sentencing remarks.

Key findings by the Coroner:

- Ms Blackmore's death occurred at separation and during a period of prolonged violence perpetrated by her intimate partner. She died within 40 hours of her first and only report of domestic violence to police. In the 40 hours preceding her exit from the vehicle, Ms Blackmore had been subjected to several causally connected episodes of verbal abuse and significant physical violence by Mr Dickson.

- Ms Blackmore's actions were a desperate act of self-preservation. The Coroner found that it is more probable than not that Ms Blackmore exited the vehicle to escape the terror of the events unfolding inside whilst in fear for her life.
- Ms Blackmore was all the more vulnerable by virtue of the fact she was a Filipino woman, English was not her first language, and she resided in Middlemount (a remote and isolated location). Her physical isolation was compounded by her isolation from family, including her children. Her support network and resources were extremely limited.

The Australian Muslim Women's Centre for Human Rights, Muslim Women and Family Violence: A guide for changing the way we work with Muslim women experiencing family violence. (2011) The Australian Muslim Women's Centre for Human Rights.

This guide was developed primarily for Muslim and non-Muslim professionals and community leaders in the community welfare, government and legal sectors. The guide is structured into three sections. The first section (from p11) looks at Muslim women, their communities and what we know about family violence and Muslim women in Australia. The second section (from p22) explores multiculturalism and issues of practice. The third and final section (from p36) looks at how Islamic texts have been interpreted in relation to the treatment of women, as well as Muslim women's interpretation of Islamic texts. This includes an examination of religious literature that has proven important to Muslim women's work on preventing violence.

People from culturally and linguistically diverse backgrounds - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Celina

Ingrid

Leah

Leyla

Mira

Rosa

Sara

Trisha

Yvonne

People from culturally and linguistically diverse backgrounds - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Ramzi & Moussa **[2022] FedCFamC2F 1473 (4 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

Backhouse J observed at [202]:

…There are some specific individual characteristics in this matter that lead me to place less weight on inconsistent versions of events given by the mother. English was not the mother's first language. She was poorly educated. She spoke through an interpreter. I cannot be satisfied she would have understood how domestic and family violence is defined in Australia.

Hossen v Hughes **[2014] ACTSC 101 (21 May 2014) – Australian Capital Territory Supreme Court**

The appellant was from Bangladesh and slapped his wife in the presence of their daughter. Penfold J at [30]: '[I]t seems clear that [Mr Hossen] was inexperienced in the ways of Australian courts. Furthermore, English was not his first language, and an interpreter had been provided for him. In fact, Mr Hossen seemed to have a reasonably adequate command of English; this is suggested by the transcript, which identifies what Mr Hossen said in English and what he said through the interpreter (although it is not clear whether, before replying in English to his Honour's questions, Mr Hossen had the questions translated by the interpreter). On the other hand, even people who are fluent in English can have difficulties dealing with legal English and its jargon'.

Penfold J quoted from the sentencing magistrate's remarks at [33]: 'Now, I note that the cultural differences may be in play here, but I don't accept them on the base that you've been here for two years, you've acknowledged in your own statement to me today that you understand what you did was wrong, and the – what you did attracts certainly from – as you've heard from the prosecution in this matter, from the Supreme Court of the ACT in the authority referred to me of *Elson v Ayton*, is that the courts have no tolerance, or very limited tolerance, for people who engage in domestic violence, and certainly in the presence of children'.

R v Saedam **[2015] ACTSC 85 (1 April 2015) – Australian Capital Territory Supreme Court**

Refshauge J at [10]: ‘The note [from workers at a women’s refuge where the complainant stayed] showed that considerable care and assistance was readily provided to the complainant by the workers at the refuge, a vital part of the community's response to the serious problem of domestic violence, especially to vulnerable women, such as the complainant, with difficulties in her immigration status, language and cultural challenges’.

At [58]-[60]: ‘Submissions were made that matters relating to immigration may be used to put further pressure on the complainant. Those are relevant and important matters. What those pressures are designed to do was not identified. I can speculate about what they could be, but that is not appropriate for me to do. They need to be specified clearly so that the risks suggested to flow from such intimidation or interference are clear.’

‘The matters to which my attention was drawn were the sponsorship of the complainant, enabling her to remain in Australia, and the current proposal that Mr Saedam sponsor her family to come to Australia. While I cannot discount that, indirectly, Mr Saedam may refuse to continue with his sponsorship of the complainant, she has, as I understand it, some protection with the immigration system as a result of the allegations of domestic violence by her.’

Messiha v Plaucs **[2012] WASC 63 (24 February 2012) – Western Australia Supreme Court**

Hall J at [33]-[35]: ‘The appellant has sought to rely upon an affidavit of the victim filed on the appeal, which was admitted without objection from the respondent. In that affidavit the appellant's wife states that the imprisonment of the appellant has caused her and her children extreme hardship. In particular, she says that the mortgage on the family home is in arrears and that there is some prospect that the mortgagee bank will sell it. She says that if the appellant is released and obtains work, she hopes that the arrears could be paid. There is, of course, no certainty that he would get work. It must also be noted that the appellant had lost his job before being imprisoned and debts had already accrued at that time. The appellant's wife also says that she has visited the appellant and that he has apologised to her and expressed remorse. She also says that she has health issues and finds it difficult to cope with the children without the appellant's assistance. It should be noted that the appellant and his wife are migrants and that she has no wider family of her own in Australia.

'The weight to be given to the impact of sentences on family members of an offender is usually not great. The consequences of imprisonment are the responsibility of the offender. Offenders cannot expect leniency because their just punishment impacts on others. Furthermore, the wishes of victims of domestic violence for reconciliation has to be seen in context. As McLure P said in *State of Western Australia v Cheeseman* [2011] WASCA 15: '*The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence'.*

'Thus, whilst I accept that impact on the family may be taken into account in some cases, it is not a matter that should have been given great weight in this case. There is certainly nothing unusual about the impact that would have justified the magistrate lowering the sentence below that which would otherwise be appropriate'.

***NAS v QPS* [2017] QDC 173 (21 June 2017) – Queensland District Court**

In relation to the appellant's cultural background, Reid DCJ stated (at [6]):

> 'The duty lawyer submitted that the appellant's cultural upbringing perceived acts of domestic violence to be the norm in Papua New Guinea and not something that is unacceptable, as it is in Australia. Indeed, he said that when he was growing up the appellant was often exposed to violence against women as a means to end arguments. He was also often struck by his father. It was submitted that the disagreement between himself and the complainant which ended in him striking her, was not an uncommon response where he was from.

However, Reid DCJ did not place any weight on this submission in sentencing.

Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander women are at greater risk of all forms of violence and related death than other Australian women. In 2014-15: the hospitalisation rates for Aboriginal and Torres Strait Islander women who experienced non-fatal domestic and family violence-related assaults were 32 times the rate for non-Aboriginal and Torres Strait Islander females [JCCD, Path to Justice (ATSI) 2016]. In that year, the hospitalisation rates for Aboriginal and Torres Strait Islander men who experienced non-fatal domestic and family violence-related assaults were 23 times the rate for non-Aboriginal and Torres Strait Islander males. These hospitalisation rates increased considerably with remoteness [Productivity Commission 2016]. For example, for Aboriginal and Torres Strait Islander women in some remote areas, the rate was 53 times higher than for other women [DPM&C Closing the Gap 2018].

Due to social and cultural influences unique to the lives of Aboriginal and Torres Strait Islander people including gender-specific cultural roles and protocols, and experiences of colonisation, dispossession, assimilation, racism and the Stolen Generations [JCCD, Path to Justice (ATSI) 2016], the broader understanding of domestic and family violence applied in other Australian contexts may not fully reflect the experience of Aboriginal and Torres Strait Islander people [Blagg et al 2015]. An understanding of kinship structures and community histories, particularly in remote communities, may be important where the victim and perpetrator are from different groups and there is a risk of conflict between families or retaliation by the perpetrator's family. Some communities continue to practise traditional Aboriginal and Torres Strait Islander laws and these may have strict cultural protocols.

The Wiyi Yani U Thangani First Nations Women's Safety Policy Forum identifies that: 'Research highlights the impacts of colonisation and trauma in an historical sense, as an ongoing intergenerational process, and as perpetuating and causing contemporary issues and cycles of harm. Dispossession of land, separation of families and communities, ongoing marginalisation from racism and discrimination and in particular the forcible removal of children, are historic traumas and continue through current structures. They are deeply linked with the experiences of family violence, serving both as a cause and effect of intergenerational trauma and violent behaviours' [Wiyi Yani U Thangani 2022].

The extended notion of family and kin in Aboriginal and Torres Strait Islander culture may broaden the scope

of relationships affected by or vulnerable to domestic and family violence, which may in turn mean that the abusive behaviours manifest differently in some respects from those in non-Aboriginal and Torres Strait Islander relationships. For example, the abuse may take the form of bullying, shaming, social exclusion, "demand sharing" or "humbugging" (demanding money or food) or "jealousing up" (a person jealous of their partner's associations with others may deliberately provoke a violent response from their partner [Blagg et al 2015]). Particularly in this context, both men and women may engage in aggressive behaviours, and be both perpetrators and victims of domestic and family violence. Perpetration rates for men are seven times that of non-Aboriginal and Torres Strait Islander men; and for women, the rate is ten times that of non-Aboriginal and Torres Strait Islander women [Grech & Burgess 2011]. For Aboriginal and Torres Strait Islander women, there is a strong correlation between exposure to violence and their own offending: most who perpetrate domestic and family violence are also victims of physical or sexual violence within their family and kin relationships, as adults, or previously as children [Bartels 2012].

Aboriginal and Torres Strait Islander women may not report or seek help for the domestic and family violence they experience so as to avoid damaging consequences for themselves, their children and family members [Langton et al 2020]. They may fear retribution from the perpetrator or the perpetrator's family; they may fear the child protection agency will remove their children [JCCD, Path to Justice (ATSI) 2016]; they may distrust or fear the police, criminal justice system and mainstream services where they themselves have a record of violence or offending; they may fear the perpetrator will be jailed or that he will die in custody; or they may fear gossiping and shaming by members of the local community [Willis 2011]. Some Aboriginal and Torres Strait Islander women with children, feeling a duty to keep the family together, may prefer that the violence stops to leaving the perpetrator whom they may continue to feel empathy for and committed to.

A number of other factors may compound the vulnerability of Aboriginal and Torres Strait Islander women to the experiences and impacts of domestic and family violence. They include: geographical remoteness and isolation, overcrowded housing, low incomes, limited access to transport, lack of shelters that cater specifically for Aboriginal and Torres Strait Islander women and children, lack of English literacy and limited availability of interpreters in particular Aboriginal and Torres Strait Islander languages [JCCD, Path to Justice (ATSI) 2016], lack of other support services and related delays in response, more ready access to firearms, higher rates of gambling and alcohol consumption, the practical difficulties in compliance with protection orders in small communities, and the intergenerational continuance of violence [Blagg et al 2015]. Recent reports have identified extremely high levels of unmet legal need amongst Aboriginal and Torres Strait Islander

women [JCCD, Path to Justice (ATSI) 2016]. These factors may intersect with the systemic disadvantage, inequality and discrimination, and feelings of shame and hopelessness experienced by some Aboriginal and Torres Strait Islander women resulting in significant challenges and barriers to those women when seeking support and legal redress for domestic and family violence.

Aboriginal and Torres Strait Islander people - Key Literature

Australia

Australian Institute of Health and Welfare, *Indigenous Community Safety*, 2021.

This report states that 'factors that lead to unsafe situations include long-term social disadvantage and the ongoing impact of past dispossession and forced child-removal policies, which result in intergenerational trauma and breakdowns of traditional parenting, culture and kinship practices.'

Over the period of 2006–07 to 2018–19, there was a 63% increase in the rate of family violence-related assaults for Indigenous Australians (based on age-standardised rates), or an increase from 1,902 to 3,319 hospitalisations (see Figure 2).

Between July 2018 and June 2019, there were 30 homicide victims who were Indigenous. The offender was an intimate partner or other family member for 15 of these victims (54% of the 28 victims whose offender had been identified).

Bartels, Lorana, 'Violent offending by and against indigenous women', (2012) 8(1) *Indigenous Law Bulletin* 119-122.

This paper considers the issue of Indigenous women and violence—both the violence they perpetrate and the violence they experience. Indigenous women experience violent and sexual victimisation at much higher rates, and more seriously, than non-Indigenous women, and much of this is likely to be in a domestic context. Most Indigenous women who also offend are themselves victims, and the nexus between offending and victimisation must therefore be considered. For example, the authors quote the Australian Institute of Criminology's national homicide monitoring program, which indicates that: Indigenous women are 14 times more likely than non-Indigenous women to commit homicide; Indigenous women accounted for 28 per cent of Indigenous homicide offenders, and in 93% of cases the offender and victim were in a domestic or family relationship; and it is likely in many of these cases the women were responding to violence against themselves.

Blagg, H et al., *Understanding the role of law and culture in Aboriginal and/or Torres Strait Islander communities in responding to and preventing family violence* (2020) Sydney: ANROWS

The project explored the roles Aboriginal and Torres Strait Islander Law and Culture play in prevention, intervention and healing in family violence and how they can be supported using a strengths-based approach. It was grounded in an understanding shaped by the impact of colonisation and took place in six communities which retain strong connections to Law and Culture.

It found that Aboriginal and Torres Strait Islander Law and Culture are features of everyday life in many Aboriginal and Torres Strait Islander communities, although the mainstream legal system and forms of governance undermine their practice. Responses to family violence in Aboriginal and Torres Strait Islander communities should move away from the mainstream legal system and be grounded in Law and Culture, including Aboriginal and Torres Strait Islander dispute resolution processes. Healing (including addressing trauma and restoring wellbeing) is fundamental to addressing family violence. Participants recommended interventions that worked at the family, rather than individual, level.

Recommendations include: a greater focus on prevention, healing and diversion from the criminal legal system; involvement of men and women in the design and implementation of local family violence strategies; acknowledging the link between violence and issues that stem from colonisation such as alcohol misuse and intergenerational trauma, rather than focusing solely on gender inequality and male power increases the effectiveness of policy and service responses; and an improved understanding within mainstream systems and services of the nature of Aboriginal and Torres Strait Islander family obligations and interconnections.

Blagg, Harry, Emma Williams, Eileen Cummings, Vickie Hovane, Michael Torres and Jaren Nangala Woodley, *Innovative Models in Addressing Violence Against Indigenous Women: Final Report* (ANROWS, 2018).

This comprehensive report responds to the deficiency in knowledge relating to Indigenous women's experiences of violence, and highlights the importance of Indigenous women's voices in informing innovative responses to violence against Indigenous women (p 9). It is recognised that Indigenous culture and knowledge necessitate specially tailored responses to family violence (pp 9, 19). Further, the report highlights the complex context of oppression within which violence against Indigenous women occurs, and the

importance of investing in Indigenous women's organisations (pp 53, 56-8).

The report also confronts problematic elements in mainstream approaches to family violence in the context of Indigenous culture (see p 59). Key findings include:

- Many Indigenous victims view mainstream systems as alien and estranging (p 26);
- The law does not distinguish between coercive control and other forms of aggression, particularly fights, which are a prominent form of conflict in Indigenous communities (pp 24, 26);
- The approach to domestic violence as an exceptional form of harm prevents understanding from other sites of Indigenous crisis response, such as suicide, mental health, substance abuse, and intergenerational trauma (pp 26, 34, 58);
- Criminal justice interventions do not adequately reflect layers of violence within Indigenous communities (p 58);
- Indigenous communities seek a greater focus on prevention of the whole spectrum of aggressive behaviours (p 58); and
- Poor housing conditions exacerbate violence and increase vulnerability (p 58).

Finally, the report highlights a number of considerations and strategies for future practice in this area:

- Intervention and prevention in cases of family violence should be underpinned by a focus on social and emotional wellbeing (pp 61-2);
- Courts should adopt innovative practices, such as 'one family/one judge' initiatives, consideration of intergenerational trauma, and appropriately adapted triage processes focussing on comprehensive screening (p 62);
- Locally, there should be a focus on communication between relevant parties, including magistrates, court user groups, and Indigenous community leaders (p 63); and
- To the greatest possible extent, Indigenous leaders should be at the centre of intervention processes (p 63).

Blagg, Harry, Nicole Bluett-Boyd and Emma Williams, *Innovative Models in Addressing Violence Against Indigenous Women: State of Knowledge Paper* (ANROWS, 2015).

This review outlines current knowledge on responses to violence against Indigenous women in Australia. The review points out that Indigenous women must continually balance reporting violence to the police with the potential consequences for themselves and other family members that may result from approaching the police (p 13).

Further barriers to disclosure for Indigenous women can stem from geographical remoteness, and include for example (p 8):

- Communication difficulties, including telephone access and access to transport;
- lack of Indigenous specific shelters;
- heightened concerns of confidentiality due to the small community size (and limited service providers);
- lack of services;
- the dominance of patriarchal ideologies and colonial mentalities amongst police in rural and remote locations;
- the relative conservatism of rural towns, where family violence may be seen as a “private matter”; and
- the risk of experiencing racism when engaging with services.

The review identified further common themes, such as:

- a reluctance to report because of fear of the police, the perpetrator, or the perpetrator’s kin;
- fear of “payback: by the offender’s family if he is jailed;
- concerns the offender may become “a death in custody”;
- reluctance to become involved with non-Indigenous justice systems, which are seen by many as an instrument of dispossession; and
- fears that children may be removed.

Cunneen, Chris, ‘Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities’ (Research Report, Department of Communities (QLD), 2010).

The aims of the research were to: determine what data are available about the use of domestic violence orders by Indigenous clients; determine whether domestic violence orders are an adequate and effective legal mechanism to respond to violence against Indigenous clients, particularly in rural and remote areas; and

make recommendations. The evaluation utilised a combination of legal research, qualitative interviews and quantitative analysis. This report provides a comprehensive overview of specific issues facing Indigenous women in the context of domestic violence, and identifies a variety of barriers for Indigenous women to reporting violence and accessing protection including family and kinship issues, removal of children, and lack of community support and services (p97-110). Particular issues with access to services include lack of cultural sensitivity, failure to provide appropriate and accurate advice, lack of access to ATSI legal services, and lack of appropriate services for remote communities (p25-26). The author concludes that it is possible to identify and summarise the major issues (arising from the literature) as knowledge and decision making; cultural issues; community issues; police, legal system and associated services; geographic isolation; concerns about consequences and outcomes, and broader contextual issues of colonisation, dispossession and Indigenous law' (see p26-32).

In relation to perpetration of domestic and family violence, section 3.2.1 'Protection orders and Indigenous respondents' (from p60) is relevant. Table 3.7 on p70 shows that 'Differences in police responses to Indigenous offenders are statistically significant, with Indigenous offenders more likely to be processed by way of arrest than non-Indigenous offenders. Conversely, Indigenous offenders are less likely to be given a notice to appear in court or not proceeded against'. Chapter Five 'Court Responses' (from p83) is also especially relevant for Indigenous offenders.

Day, Andrew, Robin Jones, Martin Nakata and Dennis McDermott, 'Indigenous Family Violence: An Attempt to Understand the Problems and Inform Appropriate and Effective Responses to Criminal Justice System Intervention' (2012) 19(1) *Psychiatry, Psychology and Law* 104-117.

Abstract: 'Whilst high levels of concern about the prevalence of family violence within Indigenous communities have long been expressed, progress in the development of evidence-based intervention programs for known perpetrators has been slow. This review of the literature aims to provide a resource for practitioners who work in this area, and a framework from within which culturally specific violence prevention programs can be developed and delivered. It is suggested that effective responses to Indigenous family violence need to be informed by culturally informed models of violence, and that significant work is needed to develop interventions that successfully manage the risk of perpetrators of family violence committing further offences.'

- This article provides an overview/summary of the main issues, including discussion of 'Patterns and

Trends in Indigenous Violence', 'Frameworks for Understanding Indigenous Violence' and 'Connections between Intergenerational Trauma, Anger, and Indigenous Men's Violence' (e.g. inherited grief and trauma, dispossession, economic exclusion, loss of traditional Aboriginal roles and statuses etc), before analysing 'Implications for practice'.

Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2018*.

In Chapter 7, the report looks at building safety in Aboriginal and Torres Strait Islander communities. It notes that, 'Aboriginal and Torres Strait Islander people are significantly more likely than the wider community to be hospitalised as a consequence of family violence. In 2014-15, the hospitalisation rate for family violence-related assaults for Aboriginal and Torres Strait Islander females was 32 times the rate for non-Indigenous females, and for Indigenous males the rate was 23 times the rate for non-Indigenous males (Steering Committee for the Review of Government Service Provision 2016b, p. 4.98)' (p 120).

Grech, Katrina and Melissa Burgess, 'Trends and Patterns in Domestic Violence Assaults: 2001 to 2010' (2011) 61 *Crimes and Justice Statistics* 1.

Descriptive analyses were conducted on all incidents of domestic assault recorded by NSW Police between 2001 and 2010. Factors associated with reporting of offences to police were examined using the Australian Bureau of Statistics, Crime Victimisation Survey 2008-2009. Results included: The overrepresentation of Indigenous Australians as both victims and offenders of domestic assault has not changed over the last decade. Less than half of all respondents who had been the victim of a domestic assault in the previous 12 months reported the incident to the police. Older victims, those who were married and victims of assaults that did not involve weapons or serious injury were less likely to report to police. Conclusions: While the incidence of domestic assault has been stable across the last 10 years, it continues to be problematic at certain times, in certain places and particularly in some Indigenous communities.

'When considering perpetrators of domestic assault, both Indigenous males and females have offending rates higher than non-Indigenous persons. Indigenous male offending is more than seven times higher than non-Indigenous male offending (2,760 per 100,000 population compared to 365 per 100, 000). Indigenous females are recorded as perpetrators of domestic assault at 10 times the rate of non-Indigenous women (753

and 73 per 100,000 for Indigenous and non-Indigenous women, respectively; Figure 13).' (p8)

***Langton, M., et al (2020) Improving family violence legal and support services for Aboriginal and Torres Strait Islander* women. Research Report, ANROWS.**

Working collaboratively with elders, this report identifies priorities for reducing and preventing violence against, and improving services for, Aboriginal women in the Victorian and New South Wales towns of Mildura, Albury and Wodonga. A total of 97 participants, including Aboriginal victims and service providers, took part in this study across both field sites. We conducted 27 individual interviews and held 22 focus groups (with a total of 70 participants). There were 31 participants in Mildura, 61 in Albury–Wodonga and five in other locations.

The participants highlighted that there was reluctance to report family violence to authorities (eg police etc) because of:

- the real and immediate threat of homelessness, as there was often a financial reliance on their violent partner to provide financial support to the household, and the fear of isolation from family and community; and
- a dominant fear of losing their children. (p15)

For many women, fear of a lack of privacy in Aboriginal organisations was a barrier to accessing their services. (p16)

Meyer S, Stambe R-M. Mothering in the Context of Violence: Indigenous and Non-Indigenous Mothers' Experiences in Regional Settings in Australia. *Journal of Interpersonal Violence*. (2022) 37 (9-10) *Journal of Interpersonal Violence* NP7958–NP7983, doi.org/10.1177/0886260520975818.

Abstract: Domestic and family violence (DFV) disproportionately affects women and children in Australia and globally. On average, one in three women experiences DFV during adulthood and the majority of these women identify as mothers. The prevalence of DFV is higher for Indigenous women and their experiences disproportionately range at the more severe end of physical abuse. For women affected by DFV, mothering during and post this type of victimization is complicated by strategic entrapment, undermining of the mother–child relationship, and threats of harm directed at children and mothers. While a substantial body of literature

has examined the experiences of mothers affected by DFV more broadly, research on the experiences of Indigenous mothers affected by DFV remains scarce. Research evidence is further limited when trying to understand the specific constraints experienced by mothers affected by DFV in regional settings. This article examines the experiences of Indigenous and non-Indigenous mothers affected by DFV in regional Queensland, Australia. Data derived from 17 qualitative face-to-face interviews are used to explore the lived experiences of these mothers. Findings identify the immediate and long-term effects of DFV on mothers and children, including similarities and differences in women's experiences of mothering in the context of DFV, experiences of entrapment in an abusive relationship, experiences of post-separation abuse, strategies used to mitigate its impact on children, and surviving as a female-headed single-parent household in regional settings. While mothers in this study shared a number of similar experiences, regionality, the risk of cultural disconnectedness, and socio-structural marginalization disproportionately affected Indigenous mothers in this study. Findings raise key implications for supporting mothers and children's safety and recovery, access to safe and sustainable housing in regional towns, and the empowerment of Indigenous women to overcome the lasting effects of colonization and disproportionate experiences of disadvantage.

Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, *Invisible women, invisible violence: Understanding and improving data on the experiences of domestic and family violence and sexual assault for diverse groups of women: State of knowledge paper* (ANROWS, 2016).

This paper reviews the literature about the experiences of domestic and family violence and sexual assault against women from diverse groups, including Aboriginal and Torres Strait Islander women (pp 19-21). It highlights intersections of disadvantage and marginalisation and stresses that these intersections are not adequately captured by existing survey instruments in Australia. It emphasises the importance of understanding family violence in Aboriginal and Torres Strait Islander communities within the context of colonisation and continued cultural dispossession, discrimination, and oppression. Intergenerational trauma is also key to this understanding. Research suggests that Aboriginal and Torres Strait Islander women experience some types of violence more frequently than non-Indigenous women, including bi-directional violence, negative behaviours between extended family members, and lateral violence.

Putt, Judy, Robyn Holder and Cath O'Leary, *Advocacy for safety and empowerment: Good practice and innovative approaches with Aboriginal women experiencing family and domestic violence in*

remote and regional Australia—Key findings and future directions **(ANROWS, 2017).**

This project aimed to address a lack of evidence on the way in which specialist domestic and family violence (DFV) services work with and for Aboriginal women as clients/survivors, workers, board and community members.

A key finding is the identification by women (and mainly Aboriginal women) of what they value from services and as outcomes of contact at times of crisis (p 4):

- Active and careful listening;
- Clear and non-judgemental communication;
- Immediate and practical help; and
- Assertive advocacy on behalf of women with other organisations and people in the community.

A number of practice guides including for advocacy, safety planning, and measuring outcomes are available at the project link above.

Senate Legal and Constitutional Affairs Committee, (commenced 2022) Missing and murdered First Nations women and children. Parliament of Australia (Webpage).

This inquiry is tasked to examine issues associated with missing and murdered First Nations women and children, with particular reference to:

- the number of First Nations women and children who are missing and murdered;
- the current and historical practices, including resources, to investigating the deaths and missing person reports of First Nations women and children in each jurisdiction compared to non-First Nations women and children;
- the institutional legislation, policies and practices implemented in response to all forms of violence experienced by First Nations women and children;
- the systemic causes of all forms of violence, including sexual violence, against First Nations women and children, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of First Nations women and children;
- the policies, practices and support services that have been effective in reducing violence and increasing

safety of First Nations women and children, including self-determined strategies and initiatives;

- the identification of concrete and effective actions that can be taken to remove systemic causes of violence and to increase the safety of First Nations women and children;
- the ways in which missing and murdered First Nations women and children and their families can be honoured and commemorated; and
- any other related matters.

The website includes submissions, details of hearings and other documents including statistics requested by the Committee.

Soldatic, K. et al., (2023). Indigenous LGBTIQSB+ People's Experience of Family violence in Australia. Journal of Family Violence, online first, https://doi.org/10.1007/s10896-023-00539-1

Based on 16 interviews with Indigenous LGBTIQSB + people in the state of New South Wales, Australia. This article explores the social and emotional wellbeing of Indigenous LGBTIQSB + young people living in New South Wales. The findings 'demonstrate the intersectional nature of family violence highlighting the fact that Indigenous LGBTIQSB+ young people are integral parts of extended kinship networks, families and communities and are deeply impacted by any acts of family violence.'

Note LGBTIQSB+ : Lesbian, gay, Bisexual, trans, Intersex, Queer, Sistergirl, Brotherboy, Plus.

The article concludes:

Participants' stories spoke of family and community violence that focused on intimidation, bullying and threats of violence. These kinds of behaviours were at times aimed at making the young person feel uncomfortable, to feel unwanted, invisible, excluded and even to force them to change their 'lifestyles' or at least shape their behaviours so that their gender and sexuality diversity were kept hidden. Even though participants spoke about how they successfully negotiated these events, LGBTIQ + phobic and racist behaviours also caused feelings of isolation, distress, a feeling of invisibility, lack of worth and exclusion.

LGBTIQSB + young people reported significant amounts of violence from communities, some related to their gen- der and sexuality diversity and other behaviours related to perceptions about their Indigeneity. LGBTIQSB+-phobia in Indigenous families and communities was reported more within extended families, older generations and rural or remote communities. Negative interactions and attitudes from Indigenous

families and communities are significant given the importance of culture, family, and community for Indigenous people. These are still central to young Indigenous LGBTIQSB + lives with participants speaking about the heart break of not being able to go home to Country to visit grandparents and Elders in rural and remote communities. (p11).

Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2016 – Report* (Productivity Commission, 2016).

In 4.12, 'Family and community violence,' the Productivity Commission looks at the impact of family violence on the health and welfare of Aboriginal and Torres Strait Islander people. Some of the key statistics provided are:

- In 2014-15, around one in five (21.8 per cent) Aboriginal and Torres Strait Islander adults reported experiencing physical or threatened violence, similar to 2002 and 2008. After adjusting for differences in population age structures, this was 2.5 times the rate for non-Indigenous Australians;
- In 2014-15, hospitalisation rates for Aboriginal and Torres Strait Islander family violence-related assaults were 530 females per 100 000 female population and 191 males per 100 000 male population. After adjusting for differences in population age structures, this was 32 times the rate for non-Indigenous females and 23 times the rate for non-Indigenous males (p.4.98)
- Hospitalisations for assaults increased with remoteness — from 156.5 per 100 000 population in major cities to 1044.4 per 100 000 population in remote areas for non-fatal family violence-related assaults and 390.8 per 100 000 population in major cities to 2013.6 per 100 000 population in remote areas for total assaults (tables 4A.12.15 and 4A.12.23). Data on non-fatal hospitalisations for assaults by jurisdiction, sex and relationship of victim to offender, and by remoteness are in tables 4A.12.16–24.

The report notes that a multitude of interrelated factors that contribute to the occurrence of family and community violence in Aboriginal and Torres Strait Islander populations, including: the trauma attributable to colonisation and dispossession; the breakdown of traditional culture and kinship practices; the removal of Aboriginal and Torres Strait Islander children from their families; experiences of violence, including childhood experience of violence and abuse; low education and income levels and high unemployment levels, welfare dependency; poor and overcrowded housing conditions; poor physical and mental health; and high levels of alcohol misuse and illicit drug use (p.4.100).

Webster, Kim, *A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women: Key findings and future directions* (ANROWS, 2016).

An estimated three in five Indigenous women have experienced physical or sexual violence by an intimate partner since the age of 15 (p 4). Page four of this short resource explains that intimate partner violence contributes an estimated 10.9% to the burden of disease for Indigenous women aged 18-44 years, which is more than any other risk factor (including alcohol use, overweight/obesity, or tobacco use). Close to two-thirds (63.7%) of the burden of homicide and violence among Aboriginal and Torres Strait Islander women is due to intimate partner violence.

Wendt, Sarah, Donna Chung, Alison Elder, Antonia Hendrick and Angela Hartwig, *Seeking help for domestic and family violence: Exploring regional, rural, and remote women's coping experiences – Key findings and future directions* (ANROWS, 2017).

This resource is a short summary of a qualitative study examined the experiences of women seeking help for domestic and family violence who live in regional, rural, and remote areas in Australia. The research drew on interviews with 23 women and interviews / focus groups involving 37 managers and practitioners (see *Seeking help for domestic violence: Exploring rural women's coping experiences: Final report* for the full report). Many of the key findings relate to the experience of Aboriginal women, for example, Aboriginal women's dignity and pride being associated with being able to keep their children safe and rely on families (p 3);Aboriginal women using temporary stays at refuges as a way of staying safe (p 3); and social isolation as a result from fleeing partners for safety reasons, causing Aboriginal women to be away from their family and homes (p 7).

Willis, Matthew, 'Non-Disclosure of Violence in Australian Indigenous Communities' (2011) 405 *Trends and Issues in Crime and Criminal Justice* 1.

This article reviews the literature to consider the factors specific to Indigenous Australians that influence individual decisions to disclose violence. The paper suggests that some people may fear negative consequences from reporting: escalation, breach of confidence, reprisals (both from the perpetrator and in the wider Indigenous community, and stigmatisation/ostracism from community), and distrust of police and the

justice and government systems. Shame and lack of awareness of services are also identified as factors. In particular the author notes the reluctance to disclose in 'small, interconnected and isolated communities where anonymity cannot be maintained' (p4).

Wilson, Mandy, et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' [2017] January-March *SAGE Open* 1.

'Drawing on in-depth interviews with incarcerated Aboriginal and Torres Strait Islander mothers in Western Australia, we report on the women's use of violence in their relationships with others. Results reinforce that Aboriginal women are overwhelmingly victims of violence; however, many women report also using violence, primarily as a strategy to deal with their own high levels of victimization. The "normalization" of violence in their lives and communities places them at high risk of arrest and incarceration. This is compounded by a widespread distrust of the criminal justice system and associated agencies, and a lack of options for community support' (p.1).

Wiyi Yani U Thangani (Women's Voices) *First Nations Women's Safety Policy Forum Outcomes Report* (2022) Australian Human Rights Commission.

The Wiyi Yani U Thangani First Nations Women's Safety Policy Forum (the Forum) was held virtually on 12 September 2022. It brought over 150 participants together including First Nations community members, practitioners, researchers, specialist experts and government participants to consider how to address the root causes and drivers of violence, as the government prepares to deliver on its commitment to develop a standalone National Plan to End Violence against First Nations Women and Children.

The report recognizes a number of intersecting factors that increase Aboriginal and Torres Strait Islander women's vulnerability to violence. For example there is evidence that 70-90% of Aboriginal and Torres Strait Islander women in prison have experienced violence, almost 90% of Aboriginal children in out of home care are there because of family violence and First Nations children are imprisoned at 26 times the rate of non-Aboriginal children (p.13). 49% of Indigenous Australians are employed (cf 75% of other Australian) and 30% of First Nations womn care for someone in need (p14).

This project has developed 'ways of working' with First Nations people which include: co-design and

collaborate; strength-based approach, deep listening, a commitment to self-awareness and reflection, rebalance power, be intersectional, think in context and relationships, be informed by women's law and culture, be visionary and sustainable and take a healing informed approach. (p19-20).

How violence should be understood:

Research highlights the impacts of colonisation and trauma in a historical sense, as an ongoing intergenerational process, and as perpetuating and causing contemporary issues and cycles of harm. Dispossession of land, separation of families and communities, ongoing marginalisation from racism and discrimination and in particular the forcible removal of children, are historic traumas and continue through current structures. They are deeply linked with the experiences of family violence, serving both as a cause and effect of intergenerational trauma and violent behaviours. (p26)

Policing and the criminal justice system are part of the problem in First Nations family violence matters. Specifically, family violence can be perpetuated by poor and discriminatory system responses to First Nations people experiencing family violence, for example by police, child protection agencies and mainstream services. (p30)

Aboriginal and Torres Strait Islander people - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 2 discusses a range of issues affecting Aboriginal people and their experience of court processes.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

- Chapter 7 provides demographic information about Indigenous people in Queensland. Chapter 8 considers culture and kinship. Chapter 9, Indigenous language and communication, provides helpful information in relation to interpreters and giving evidence. See also Chapter 10, Indigenous people and the criminal justice system.
- Most relevantly for this bench book, Part III of Chapter 10 looks at particular difficulties for Aboriginal women including Aboriginal women as victims of violence. It notes: 'There is a high incidence of domestic and family violence against Aboriginal women, particularly in remote communities. Common effects of long-term violence include low self-esteem and feelings of fear and shame. For Aboriginal women, these effects are compounded by other cultural factors, such as the nature of women's business, community pressure, and mistrust of police and the criminal justice system' (p.109).

Vic

Judicial College of Victoria, *Family Violence Bench Book* (2014).

The section 5.7 – Indigenous People 'discusses indigenous people's experiences of family violence, the prevalence of family violence within indigenous communities, and some of the barriers to indigenous people reporting family violence and accessing support services'. It provides information on the legislative context around Indigenous people and domestic violence; the prevalence of, and factors contributing to, family violence in Indigenous communities; barriers to reporting and accessing services; and information on assistance and services.

WA

Fryer-Smith, Stephanie, *Aboriginal Bench Book for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008).

This bench book provides demographic information about Aboriginal people in Western Australia. It provides information about local customs, traditions and language. In particular see Section 8.4.1 domestic violence as an aggravating feature of sentencing; and Section 7.5 Evidence which includes information about vulnerable witnesses, female witnesses and gender-restricted evidence.

In relation to perpetrators, Chapters Six and Seven provide comprehensive information on specific considerations that may need to be taken into account for Aboriginal people in Western Australian courts.

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

See chapter 11 *Aboriginal people* for information on demographic and other helpful information. See also: 10.4.4 *Points to consider in relation to particular groups of women*:

There are several issues that particularly affect Aboriginal women:

- Be sensitive towards issues of sexuality. It may be a taboo subject and may connote “shame”.
- Some women may hide physical injuries due to feelings of shame.
- There may be community repercussions from the legal process for the woman, her family and children.
- Be aware that leaving a violent relationship is especially problematic for Aboriginal women as they also may fear reprisal from extended family members.
- Do not make the assumption that all Aboriginal people will necessarily want access to Aboriginal services.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 20 discusses Indigenous peoples and domestic violence in the Canadian context, though there are some parallels in terms of historic systemic oppression and dispossession. The bench book highlights that a

one size fits all approach is not sufficient, and that historical 'harm to culture … has created social conditions conducive to high levels of domestic violence in some Indigenous communities'. See particularly Sections 20.3.1 and 20.3.2, which highlight that Indigenous victims of domestic violence are often wary of turning to authorities, and outline cultural barriers to disclosure. See also Section 20.7 which provides guidance for assessing domestic violence in an Indigenous context.

Aboriginal and Torres Strait Islander people - Other Resources

[Former] Federal Circuit Court of Australia, Reconciliation Action Plan 2019 – 2021.

"This RAP provides a platform to introduce practical measures to promote reconciliation, and addresses some of the barriers faced by Aboriginal and Torres Strait Islander peoples in interacting with the Court. It also prioritises establishing relationships with Aboriginal and Torres Strait Islander communities and community leaders, agencies servicing Aboriginal and Torres Strait Islander peoples, legal services and other stakeholders, in order to assist Aboriginal and Torres Strait Islander peoples to access the Court."

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of useful resources and links.

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;

- The complexity of legal problems experienced by Indigenous women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Law Society Northern Territory, *Indigenous Protocols for Lawyers* (second edition, 2015).

This handbook is written for lawyers and identifies and discusses six protocols to assist lawyers in communicating with their clients. See p5 which sets out the six protocols. The remaining part of the document discusses these protocols in depth.

Protocol 1:	Assess whether an interpreter is needed before proceeding to take instructions.
Protocol 2:	Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.
Protocol 3:	Explain your role to the client.
Protocol 4:	Explain the relevant legal or court process to the client prior to taking instructions.
Protocol 5:	Use 'plain English' to the greatest extent possible.
Protocol 6:	Assess whether your client has a hearing or other impairment that may affect their ability to understand

James Cook University, website, Indigenous Legal Needs Project, 2015.

This website was produced as part of an Australian Research Council funded research project that aims to identify and analyse the legal needs of Indigenous communities in non-criminal legal areas such as discrimination, consumer matters, credit and debt, child protection, education, employment, health, housing and wills and estates. The website includes reports and papers, bibliographies on relevant topics, useful videos and some legal resources.

Senate Legal and Constitutional Affairs Committee, *Missing and murdered First Nations women and children* Parliament of Australia (commenced 2022).

This inquiry is tasked to examine issues associated with missing and murdered First Nations women and children, with particular reference to:

1. the number of First Nations women and children who are missing and murdered;
2. the current and historical practices, including resources, to investigating the deaths and missing person reports of First Nations women and children in each jurisdiction compared to non-First Nations women and children;
3. the institutional legislation, policies and practices implemented in response to all forms of violence experienced by First Nations women and children;
4. the systemic causes of all forms of violence, including sexual violence, against First Nations women and children, including underlying social, economic, cultural, institutional and historical causes contributing to the ongoing violence and particular vulnerabilities of First Nations women and children;
5. the policies, practices and support services that have been effective in reducing violence and increasing safety of First Nations women and children, including self-determined strategies and initiatives;
6. the identification of concrete and effective actions that can be taken to remove systemic causes of violence and to increase the safety of First Nations women and children;
7. the ways in which missing and murdered First Nations women and children and their families can be honoured and commemorated; and
8. any other related matters.

The website includes submissions, details of hearings and other documents including statistics requested by the Committee.

Aboriginal and Torres Strait Islander people - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Cassy

Melissa

Aboriginal and Torres Strait Islander people - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Attorney-General (SA) v Pennington **[2019] SASC 180 (25 October 2019) – South Australian Supreme Court**

At [45], the Court noted:

'Traditional western psychological therapy is better equipped than therapy from traditional healers to address some of the respondent's specific issues that might lead to reoffending such as control of aggression, anger and avoiding alcohol.'

Munda v Western Australia **[2013] HCA 38 (2 October 2013) – High Court of Australia**

The majority at [53]: 'Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide'.

At [55]: 'A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-

fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law'.

Reid v Smith **[2014] ACTSC 349 (21 October 2014) – Australian Capital Territory Supreme Court**

Penfold ACJ at [24]: In *Bugmy v The Queen*, the High Court said at [37],[41],[44],[44]: 'An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence… the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background… An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender'.

At [27]: '[W]hile the decision in Bugmy is certainly relevant to the sentencing of aboriginal offenders, it is also relevant in clarifying that a claim of failure to give adequate weight to particular considerations arising in such a sentencing is not a useful appeal ground. While it might have been an error on the Magistrate's part if she had entirely disregarded Mr Reid's somewhat troubled background, her Honour instead made specific mention of it. The fact that she did not as a result grant as much leniency to Mr Reid as he apparently hoped for does not establish a specific error of the kind alleged'.

Drew v R **[2016] NSWCCA 310 (16 December 2016) – New South Wales Court of Criminal Appeal**

At [84], N Adams J held –

> *'…A Court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities. Whether or not the victim in each case is in such a class of vulnerable victims will always be a matter that must be proved beyond reasonable doubt based on the evidence in that case.'*

At [88], her Honour states –

> *'It is notorious that offences committed within the context of domestic violence are under-reported and that such under-reporting is not confined to Indigenous communities.'*

At [89], her Honour states –

> *'High rates of non-disclosure by Indigenous victims of domestic violence have been attributed, among other things, to the potential for stigma and ostracism from family and community members. Indigenous victims may also, for historical and pragmatic reasons, fear contact with police and the courts or regard the authorities as unable to help them'*

Emitja v The Queen **[2016] NTCCA 4 (21 October 2016) – Northern Territory Court of Criminal Appeal**

Grant CJ and Kelly J quoted from *Amagula v White* (unreported, Northern Territory Supreme Court, 7 January 1998): *'The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased'.*

Their Honours continued at [32]-[34]: 'As this Court has repeatedly observed before and since that statement was made, such conduct must be dealt with in a manner which reflects the serious nature of the offending and its corrosive effect on well-being in Aboriginal communities'.

While 'some Aboriginal communities have an unusually high incidence of serious crimes of violence and that the courts are powerless to alleviate the dysfunction and deprivation which underlies that violence. Aboriginal women and children living in those communities 'are entitled to equality of treatment in the law's responses to offences against them'. The protection which the law affords includes the imposition of sentences which include a component designed to deter other members of the community from committing crimes of that nature'.

There are also practical societal reasons to consider personal and general deterrence. As in *The Queen v Haji-Noor*: *'The offender's crime against Mr Ellis was committed in a domestic context. Domestic violence is a leading contributor to death, disability and illness in the community. Such violence affects the whole community. Medical and hospital treatment for the victims of domestic violence is extremely costly and imposes a considerable strain on the health system and those who work in it'.*

R v Stevenson **[2015] NTSC – Sentencing Remarks 21353266 (Kelly J) (14 September 2015) – Northern Territory Supreme Court**

Kelly J: 'Taking away somebody's life is one of the most serious crimes anyone can commit. I have to give you a sentence that says just how much the court and the whole community disapproves of violent crimes like this and that will discourage other men from doing the same thing. Drunken violence is far too common in our community. It is particularly common, unfortunately, in Aboriginal communities and vulnerable Aboriginal women, vulnerable people of all kind, deserve the fullest protection that the law can give them'.

R v Chong; ex parte Attorney-General of Queensland **[2008] QCA 22 (22 February 2008) – Queensland Court of Appeal**

The offender had stabbed her mother. Atkinson J at [36]: 'The fact that the respondent is an Indigenous woman living on Mornington Island is relevant to the question of the effect on her family. Her imprisonment will necessarily mean her removal to the mainland far away from her children and particularly the baby and thus any practical means of maintaining personal contact to them through visits or maintaining breastfeeding of the baby'.

While the Court noted that the effect on an offender's children can only be one relevant circumstance in determining sentence, the Court considered that exceptional circumstances were present. The respondent was a breastfeeding mother. Imprisonment would necessitate moving to the mainland, which would remove any practical means of maintaining the breastfeeding of the baby and personal contact with her other children. Her Honour quoted various secondary sources which discuss the substantial effect of incarceration on families, particularly on Aboriginal and Torres Strait Islander families (see at [37]-[42]).

R v Bell & Anor; ex parte Attorney-General (Qld) **[1994] QCA 220 (20 June 1994) – Queensland Court of Appeal**

The appellant was an Aboriginal man. Fitzgerald P: 'It was right for [the sentencing judge] to have regard to the respondent's disadvantages and open to him, as a result, to sentence the respondent as leniently as the circumstances of his offence admitted. However, such disadvantages do not justify or excuse violence against women or, to take another example, abuse of children. Women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. A proposition that such offences should not be adequately penalised because of disadvantages experienced by a group of which an offender is a member is not one which is acceptable to the general community or one which we would expect to be accepted by the particular community of which an offender and complainant are members'.

R v Kina **[1993] QCA 480 (29 November 1993) – Court of Appeal Queensland**

Fitzgerald P and Davis JA: 'In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice'.

Wongawol v The State of Western Australia **[2011] WASCA 222 (17 October 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [39]: 'This is a case where the protection of the community in which the appellant lives and both personal and general deterrence are very weighty sentencing considerations. The incidence of alcohol and drug fuelled violence within Aboriginal communities is distressingly high. A new generation of children are scarred. The cycle continues'.

People living in regional, rural and remote communities

People living in regional, rural or remote communities may be at greater risk of experiencing domestic and family violence [Henstridge et al 2007], may be more vulnerable to its impacts, and may face additional barriers to accessing help due to a range of geographic, economic, cultural and social factors more likely to be present in smaller communities than in larger towns and cities [Wendt et al 2015].

Successive Australian research identifies some of the common factors as [Bagshaw et al 2000]:

- Physical and social isolation
- The close, conservative nature of Australian rural and farming communities, in particular, perceived lack of confidentiality, privacy and anonymity in small communities where news travels quickly through informal networks
- Ready access to firearms and other weapons
- Greater likelihood of victim or perpetrator having a pre-existing relationship with local police, emergency services or other service providers
- Limited or lack of local services, professionals and trained workers to assist victims, children and perpetrators including 24 hour on-call police response, safe and culturally appropriate crisis accommodation, intervention and behaviour remediation programs
- Distance from critical services and limited public transport options
- A sense of shame in extended family and community members knowing about the abuse and the abusive relationship
- Economic and structural decline of some Australian regional, rural and remote communities, and an inadequate social security safety net
- Heightened financial and emotional stress within families due to the effects of drought, fire, flood or poor trading markets. [George & Harris 2014]

These factors vary in degree and combination for each community and for each of the individuals and circumstances involved. A number of these factors may also contribute to the nature and severity of the domestic and family violence, and the extent to which perpetrator programs commonly used in urban areas

may be inappropriate in regional, rural or remote communities [Jamieson & Wendt 2008]. Research indicates that vulnerability to perpetration in these communities may be due to higher rates of substance misuse and unemployment, lower education levels, and poorer mental and physical health outcomes due to lack of or limited access to essential services [Edwards 2015].

As in urban areas, women are overrepresented as victims of domestic and family violence. Research suggests that the prevalence of more conservative and traditional views, norms and gender roles in smaller communities and family farming enterprises may contribute to victims being more vulnerable to the controlling behaviours of their intimate partners, and less likely to seek help and recourse for the violence they experience. For example, a victim who has principally performed domestic and nurturing roles within the family while the intimate partner, the perpetrator, has run the family business and become a prominent member of the local community, may lack any financial independence or the skills necessary for paid employment. A victim in these circumstances may be reluctant to disclose the violence or to leave the abusive relationship due to a fear of losing privacy and pride, a perceived pressure related to community expectations of self-reliance and resilience, or a fear of further violence [Wendt et al 2015]. Where financial and property arrangements are seemingly too complex to unravel, the victim may fear poverty and homelessness, or may perceive that the need to preserve the family name and inheritance outweighs a personal need for safety and wellbeing [George & Harris 2014].

Where victims do manage to leave the abusive relationship and find alternative accommodation, but are not able to leave the local community, research reports that victims continue to feel a heightened sense of fear and anxiety knowing that they remain highly visible to the perpetrator and vulnerable to their abusive behaviours [George & Harris 2014].

People from culturally and linguistically diverse groups may experience compounded isolation through extreme lack of specialised services, for example interpreters [NSW Office for Women's Policy 2008]. Similarly, the effects of rurality and remoteness [Cunneen 2010] may compound vulnerabilities experienced by Aboriginal and Torres Strait Islander people.

People living in regional, rural and remote communities - Key Literature

Australia

Bagshaw, Dale, et al, 'Reshaping Responses to Domestic Violence' (Final Report, University of South Australia and Partnerships Against Domestic Violence, Commonwealth of Australia, April 2000).

This Australian research used a variety of methods including an anonymous 'phone-in' and focus groups. 102 women who were victims/survivors of domestic violence participated in the phone-in, 27 callers were from rural areas. This report provides an overview of literature (pp86-87). Rural callers identified extreme isolation, entrapment and alienation, financial dependency, and safety issues as factors heightening vulnerability; additional barriers to disclosing abuse and limited access to resources were noted (pp86-89). Specific to perpetrators of domestic violence from rural areas, pp86 and 89 note that similar issues need to be considered as for victims, including confidentiality, privacy, limitations on certain interventions, and lack of availability of some services.

Campo, Monica and Sarah Tayton, *Domestic and family violence in regional, rural and remote communities: An overview of key issues* (Child Family Community Australia, Australian Institute of Family Studies, 2015).

This paper provides a brief overview for understanding the issues unique to domestic and family violence in regional, rural and remote communities. The key messages are that:

- 'Women in regional, rural and remote areas are more likely than women in urban areas to experience domestic and family violence'.
- 'Women living in regional, rural and remote areas who experience domestic and family violence face specific issues related to their geographical location and the cultural and social characteristics of living in small communities' (p.1). Social norms and structures in rural communities include rural masculinity, self-reliance and privacy, lack of perpetrator accountability, and complex geographical issues (pp.3-4). Geographical issues include isolation, gun ownership and natural disasters (p.5).
- 'There is a common view in rural communities that 'family problems' such as domestic and family violence are not talked about, which serves to silence women's experience of domestic and family violence and deter them from disclosing violence and abuse'.

- ‘Fear of stigma, shame, community gossip, and a lack of perpetrator accountability deter women from seeking help’.
- ‘A lack of privacy due to the high likelihood that police, health professionals and domestic and family violence workers know both the victim and perpetrator can inhibit women’s willingness to use local services’.
- ‘Women who do seek help find difficulty in accessing services due to geographical isolation, lack of transportation options and not having access to their own income’ (p.1).

Cunneen, Chris, ‘Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities’ (Research Report, Department of Communities (QLD), 2010).

This report addresses the issue of whether the legal system is responding adequately to domestic and family violence against Indigenous people in Queensland. The research utilised a combination of legal research, qualitative interviews and quantitative analysis. This report provides a comprehensive overview of specific issues facing Indigenous women in the context of domestic violence, and identifies a variety of barriers for Indigenous women to reporting violence and accessing protection including family and kinship issues, removal of children, and lack of community support and services (Chapter 6, from p97). Compounding effects of rurality and remoteness are referred to throughout the report.

In relation to perpetrators of domestic and family violence, p27 notes issues around lack of alternative accommodation for either party, while p127 notes that fulfilling the responsibility to explain protection orders to the respondent may be more difficult in rural and remote areas where the respondent is less likely to be present in court, less likely to have access to services to assist with understanding the order, and more likely to experience language problems.

George, Amanda, and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Centre for Rural and Regional Law and Justice, Deakin University, 2014).

This research combines the findings of two studies undertaken by the Centre for Rural and Regional Law and Justice (CRRLJ) and explores the experiences of and outcomes for women and children survivors of family violence in regional and rural Victoria, examining their contact with and perceptions of government agencies

(including the Victorian magistrates' courts). From p46-51 the authors identify and discuss barriers facing survivors in regional and rural Victoria from seeking assistance. Barriers include geographic isolation, social isolation and their high visibility in their community. Access to services is particularly difficult for women from culturally and linguistically diverse women (p51). It notes the prevalence of guns and firearms increased women's vulnerability (p55). Limited alternative/crisis accommodation is identified (p57). Reduced access to legal services (p59) and complex financial arrangements (eg family farm) (p60). Some of these difficulties maybe faced by Indigenous women who live in remote communities, and additionally Indigenous people may face strong family pressures (p49).

Henstridge, John, et al, 'Analysis of the 2005 Personal Safety Survey' (Analysis Report, Data Analysis Australia, June 2007).

Prevalence rates of all types of violence, towards both women and men, were higher in major urban areas, followed by outer regional and remote areas. The lowest prevalence rates were in inner regional areas (p11).

Jamieson, Shirley, and Sarah Wendt, 'Exploring Men's Perpetrator Programs in Small Rural Communities' (2008) 18(1) *Rural Society* 39.

This research reports on a study conducted in a small rural community in South Australia in 2006. The key findings of the research were that concerns about anonymity and community attitudes, which condoned male control of female partners, would prevent men from using behaviour change programs in small rural communities, and therefore impact on their viability. The article also notes that perpetrator programs in rural communities may have been designed for metropolitan areas, thus inappropriate for men in rural towns (p40). It also points to the fact that 'Many of the factors which may exacerbate men's use of violence are not unique to rural men. However, the isolation, beliefs about rural masculinity which encourage stoicism and repressed emotions, and limited access to, and use of, medical and health facilities all indicate that rural men require different assistance to men from urban areas to understand and address their use of violence' (p42).

Meyer S, Stambe R-M. Mothering in the Context of Violence: Indigenous and Non-Indigenous Mothers' Experiences in Regional Settings in Australia. *Journal of Interpersonal Violence*. November 2020.

Abstract: Domestic and family violence (DFV) disproportionately affects women and children in Australia and globally. On average, one in three women experiences DFV during adulthood and the majority of these women identify as mothers. The prevalence of DFV is higher for Indigenous women and their experiences disproportionately range at the more severe end of physical abuse. For women affected by DFV, mothering during and post this type of victimization is complicated by strategic entrapment, undermining of the mother–child relationship, and threats of harm directed at children and mothers. While a substantial body of literature has examined the experiences of mothers affected by DFV more broadly, research on the experiences of Indigenous mothers affected by DFV remains scarce. Research evidence is further limited when trying to understand the specific constraints experienced by mothers affected by DFV in regional settings. This article examines the experiences of Indigenous and non-Indigenous mothers affected by DFV in regional Queensland, Australia. Data derived from 17 qualitative face-to-face interviews are used to explore the lived experiences of these mothers. Findings identify the immediate and long-term effects of DFV on mothers and children, including similarities and differences in women's experiences of mothering in the context of DFV, experiences of entrapment in an abusive relationship, experiences of post-separation abuse, strategies used to mitigate its impact on children, and surviving as a female-headed single-parent household in regional settings. While mothers in this study shared a number of similar experiences, regionality, the risk of cultural disconnectedness, and socio-structural marginalization disproportionately affected Indigenous mothers in this study. Findings raise key implications for supporting mothers and children's safety and recovery, access to safe and sustainable housing in regional towns, and the empowerment of Indigenous women to overcome the lasting effects of colonization and disproportionate experiences of disadvantage.

Office for Women's Policy (NSW), 'Discussion Paper on NSW Domestic and Family Violence Strategic Framework'(Department of Premier and Cabinet, 2008).

This policy paper reviews relevant literature. At p10 it is noted that women living with domestic and family violence in rural or regional areas 'experience social and physical isolation due to geographical location, transport difficulties, and unreliable or unavailable telephone services… [Their isolation], the limited availability of legal services, such as police, legal aid, and advocacy support, and domestic violence services, such as long term counselling and refuge accommodation, mean that accessing help can be challenging. In addition, when services are available they are often not used because of a variety of reasons including concerns over confidentiality.'

Wendt, Sarah, 'Constructions of Local Culture and Impacts on Domestic Violence in an Australian Rural Community' (2009) 25(2) *Journal of Rural Studies* 175.

The study described in this paper explored local culture in a South Australian rural community and how it affected women's experiences of, and men's perpetration of, domestic violence. It found several local cultural discourses that influenced the issue, including self-reliance, pride, privacy, belonging and closeness, family, and Christianity. The power and influence of these discourses made it difficult to name and challenge domestic violence. This paper emphasises that rural women are not a homogenous group.

Relevant to perpetrators, it also notes that 'studies have found that victims and perpetrators needs are not being met due to a lack of coordination amongst services, confusion amongst service providers of who was doing what, and lack of understanding by workers of the complexities of violence and abuse' (p176).

Wendt, Sarah, Donna Chung, Alison Elder, Antonia Hendrick and Angela Hartwig, *Seeking help for domestic and family violence: Exploring regional, rural, and remote women's coping experiences—Final report* (ANROWS, 2017).

This qualitative study examined the experiences of women seeking help for domestic and family violence who live in regional, rural, and remote areas in Australia. The research drew on interviews with 23 women and interviews / focus groups involving 37 managers and practitioners. Key findings of the report are summarised on pages 4 and 5 and include:

- When they felt they could not cope alone, women experiencing violence mostly tried to seek informal help (family, friends, acquaintances);
- Experiences of shame and embarrassment impacted help-seeking, and continued for many during the process of recovery and rebuilding;
- Women's descriptions of social isolation were focused on having limited social networks and supports and social resources;
- Despite efforts to cope alone or using informal networks, all the women in the study experienced intervention by police; and
- Having access to emergency specialist accommodation was crucial to give a safe space and an entry-point to support.

Wendt, Sarah, Donna Chung, Alison Elder, Lia Bryant, *Seeking help for domestic violence: Exploring rural women's coping experiences: State of knowledge paper* (ANROWS, 2015).

This report presents 'the research and literature that examines the effects of social and geographic isolation on the ability of women to disclose, report, seek help, and receive appropriate interventions following domestic and family violence and sexual assault' (p.2). Part I examines the extent of domestic and family violence in rural and remote Australia and shows that there are high reported rates of domestic and family violence in such areas (p.1).

Part II looks at the nature and experience of domestic and family violence in socially and geographically isolated areas. The report notes that 'women experience unique structural and cultural barriers that impact on their ability to disclose, report, seek help and receive appropriate services following domestic and family violence and sexual assault. Women living in socially and geographically isolated places often cope with domestic and family violence by themselves for long periods of time. Informal support plays a vital role in women's decisions to seek formal help. Coping and help-seeking is particularly complex and nuanced for different groups of women, particularly Indigenous women, because of the impacts of colonisation and dispossession. This report outlines contextual factors that influence domestic and family violence in regional communities such as living in farming, mining, sea-change/treechange communities as well as those experiencing environmental disasters and poverty' (p.1).

Part III of the report provides an overview of the challenges and possibilities relating to service provision in social and geographically isolated places. It notes that there is limited research on help-seeking activities of regional, rural and remote Australian women when dealing with domestic and family violence and sexual assault. It notes social and geographic isolation are key factors to consider in service provision and understanding coping and help-seeking for regional, rural and remote communities.

Social isolation (close-knit communities, ideas about gender roles) – can shape women's feelings of embarrassment and wanting to remain silent, or not seeking assistance because they want to cope on their own. Geographic isolation consists ofphysical barriers e.g. long distances to travel and difficulties accessing services (p.1).

International

Edwards, Katie M, 'Intimate Partner Violence and the Rural-Urban-Suburban Divide: Myth or Reality? A Critical Review of the Literature' (2015) 16(3) *Trauma, Violence and Abuse* 359.

The author presents a review of the published empirical and theoretical literature to date on similarities and differences in intimate partner violence (IPV) in rural locales compared to urban and suburban locales. A review of 63 studies indicates that (1) the rates of IPV are generally similar across rural, urban, and suburban locales, although some groups of rural women (e.g., multiracial and separated/divorced) may be at increased risk for IPV compared to similar groups of urban women, and rates of intimate partner homicide may be higher in rural locales than urban and suburban locales; (2) IPV perpetrator and victim characteristics in rural locales are generally similar to IPV perpetrator and victim characteristics in other locales with the exception of some demographic characteristics that can generally be accounted for by broader rural–urban–suburban demographic differences; (3) IPV perpetrators in rural locales, compared with perpetrators in urban locales, may perpetrate more chronic and severe IPV, which could be due to the higher rates of substance abuse and unemployment documented among rural perpetrators; (4) IPV victims in rural locales may have worse psychosocial and physical health outcomes due to the lack of availability, accessibility, and quality of IPV services; and (5) attitudes about IPV vary to some extent across locales, with individuals in rural locales generally supporting less governmental involvement in IPV issues than in urban locales.

- Literature on perpetrators and risk factors for IPV perpetration in rural communities is reviewed on pp363-364, determining that there are not major differences between rural and urban perpetrators for the most part, though some studies have found rural perpetrators were more likely to engage in some forms of abuse (such as harming pets), violate protective orders and commit more severe IPV, while also being more likely to have lower employment and educational attainment.

Sudderth, Lori, 'An Uneasy Alliance: Law Enforcement and Domestic Violence Victim Advocates in a Rural Area' (2006) 1(4) *Feminist Criminology* 329.

The 'Background' section of this article (p330-335) is relevant. Drawing on available international literature, it highlights issues for rural victims of domestic violence including restricted services (including emergency response), restricted public transportation, isolation, officers knowing the perpetrators, the operation of

traditional gender expectations (resulting in financial dependence, primary child care responsibility), less anonymity and more limited law enforcement.

People living in regional, rural and remote communities - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.11 discusses the particular vulnerabilities faced by victims, unique patterns of family violence perpetrated, distinctive drivers of family violence, and unique barriers faced by victims in terms of reporting and accessing necessary services and assistance, which result from geographical location in which family violence is experienced.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 9 focuses on 'Regional and remote WA'. [9.4.7] 'Family violence and sexual assault matters' discusses the particular issues people in those areas face, including limited victim and offender programs, police officers knowing the parties involved, isolation, accessibility of firearms; and it identifies that Aboriginal and CALD people experience compounded isolation (language and cultural barriers; lack of interpreter services).

Specific to perpetrators in regional and remote areas, the section also identify points to consider around the fact that accommodation for men is limited, and that 'high levels of alcohol consumption and other drugs may exacerbate violent outbursts'. It goes on to note more general considerations for offenders in regional communities, such as lack of availability of certain penalties.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 8.8.3 recognises rurality as a risk factor.

People living in regional, rural and remote communities - Other Resources

Non-inquest findings into the death of Rinabel Tiglao Blackmore, Coroners Court of Queensland (Cairns), 4 April 2019.

The following is a summary of the key facts relating to the domestic violence related death of Ms Blackmore and the key findings of Northern Coroner, Nerida Wilson. There are other matters raised in the Coroner's findings relating to police responses that are not covered in this summary.

Key facts:

Ms Blackmore migrated to Australia from the Philippines in 1991; English was not her first language. After separating from her husband (with whom she had three sons) in 2014, she moved from Brisbane to Middlemount in central Queensland to continue a relationship with Mr Dickson that had commenced prior to the separation from her husband. Ms Blackmore was concerned that her family would not approve of her living with a man she was not married to, so she was secretive about her relationship with Mr Dickson, her living arrangements and whereabouts. Ms Blackmore's reluctance to tell her family about the new relationship was a source of consternation for Mr Dickson and was allegedly the trigger for two separate (although causally connected) episodes of domestic violence in the 48 hours prior to her death.

Ms Blackmore spent the 2014 Christmas period in Brisbane whilst Mr Dickson visited friends in Bundaberg. During their time apart, Mr Dickson exhibited controlling and jealous behaviours. He demanded that Ms Blackmore take photos of the people she was with so that he could satisfy himself that she wasn't cheating on him. Mr Dickson sent messages to Ms Blackmore's male friends from her mobile phone, impersonating her, and asking when they were free to have sex again, in an attempt to 'catch her out' for alleged infidelity.

On 28 December 2014, Ms Blackmore travelled from Brisbane to Bundaberg to meet and stay overnight with Mr Dickson at a local motel. An argument ensued in the motel room, with Mr Dickson asking Ms Blackmore why he was her "dirty little secret", and then pushing and grabbing her on the shoulders. They then both went to the motel's front office where the manager witnessed Mr Dickson and Ms Blackmore in a tug of war over a handbag, Ms Blackmore saying she wanted to break up, and Mr Dickson becoming more agitated as he tried to convince Ms Blackmore to get into the car with him. Ms Blackmore whispered to the manager to call the police. When Mr Dickson went outside to sit in his car, Ms Blackmore told the manager that he (Mr Dickson)

had earlier put his hands around her neck, that she was frightened for her life, and that if the manager didn't get the police he (Mr Dickson) would kill her.

The police attended the motel, took statements from the parties, and told Mr Dickson that they would be applying for a protection order on Ms Blackmore's behalf. The police supervised the return of personal effects to Ms Blackmore and the exchange of their respective mobile phones. Ms Blackmore told the police she intended to catch a train to Rockhampton. Mr Dickson then left the motel, as did the police. Not long after however, Mr Dickson returned to the motel and Ms Blackmore told the manager that Mr Dickson had taken $400 from her bag. The manager became concerned for Ms Blackmore's safety and assisted her to be collected by a friend.

The Application for a Protection Order prepared by the police included grounds that it was necessary and desirable to protect the aggrieved due to the respondent's violent nature and history and the aggrieved's level of fear towards the respondent.

Ms Blackmore asked a friend to drive her to Middlemount so she could collect her property and passport from Mr Dickson's unit. They arrived in the early hours of 30 December 2014. Before the friend left Ms Blackmore, they agreed on a code in case Ms Blackmore was in trouble and the police should be called.

Mr Dickson told police that when he arrived at his unit around lunchtime on 30 December 2014, Ms Blackmore was waiting for him so she could retrieve her possessions. He said he and Ms Blackmore had sex on two occasions, they fell asleep, and then argued. He admitted to grabbing Ms Blackmore around the collar bone or shoulder, shaking and squeezing her, resulting in red marks on her shoulders and around her neck. He also admitted to making contact with her lip causing it to bleed. Mr Blackmore claimed that Ms Blackmore was screaming at him to stop, while also crying and saying that she loved him and didn't want to leave him.

Mr Dickson told police that late in the evening of 30 December 2014 he and Ms Blackmore decided to drive to Brisbane in his vehicle. He said initially Ms Blackmore sat in the rear while Mr Dickson drove as she appeared to be searching for something in one of her bags. A later examination of the vehicle revealed that Mr Dickson had taken possession of Ms Blackmore's mobile phone and had put it in the driver's door well. Mr Dickson said Ms Blackmore subsequently climbed over to the front passenger seat, complaining of motion sickness; then another argument ensued involving Mr Dickson screaming verbal abuse at Ms Blackmore. Mr Dickson denied using any physical violence against Ms Blackmore while they were in the vehicle. Mr Dickson told police he was driving the vehicle at around 100km per hour when Ms Blackmore suddenly opened the door

and exited the vehicle. Mr Dickson told police he then took steps to locate Ms Blackmore, keep her alive, contact emergency services and assist in her transfer to hospital.

Ms Blackmore's head injuries resulted in her death on 2 January 2015. There were no alcohol or drugs detected in her system.

Mr Dickson pleaded guilty to (the alternative charge of) manslaughter of Ms Blackmore, and served time. See para 135 on pages 15-16 for the Judge's sentencing remarks.

Key findings by the Coroner:

- Ms Blackmore's death occurred at separation and during a period of prolonged violence perpetrated by her intimate partner. She died within 40 hours of her first and only report of domestic violence to police. In the 40 hours preceding her exit from the vehicle, Ms Blackmore had been subjected to several causally connected episodes of verbal abuse and significant physical violence by Mr Dickson.
- Ms Blackmore's actions were a desperate act of self-preservation. The Coroner found that it is more probable than not that Ms Blackmore exited the vehicle to escape the terror of the events unfolding inside whilst in fear for her life.
- Ms Blackmore was all the more vulnerable by virtue of the fact she was a Filipino woman, English was not her first language, and she resided in Middlemount (a remote and isolated location). Her physical isolation was compounded by her isolation from family, including her children. Her support network and resources were extremely limited.

People living in regional, rural and remote communities - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Erin

Fiona

Jennifer

People living in regional, rural and remote communities - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

DPP v Darcy-Shillingsworth **[2017] NSWCCA 224 (13 September 2017) – New South Wales Court of Criminal Appeal**

Per Fagan J at [104]

‘The violence to the respondent's female partner was perpetrated in a remote community at least a hundred kilometres from the nearest permanent police presence. It was a serious aspect of count 3 that this assault, constituted by punching Ms Stanton in the face, pulling her from the car and knocking her to the ground with another blow, took place in the presence of her father. He had attended to try to stop the attack. Although police could not be summoned quickly enough to provide the immediate physical protection which his daughter's situation evidently required, Mr Stanton did not escalate the violence or take the law into his own hands. He warned that he was calling the police. This ought to have caused the respondent to come to his senses and draw back from his cowardly attack. Instead… he commenced to beat Mr Stanton himself. Grievous bodily harm resulted. As the jury found, the respondent foresaw this as a possible outcome of his actions.’

Morgan v Kazandzis **[2010] WASC 377 (10 December 2010) – Supreme Court of Western Australia**

EM Heenan J at [72]: ‘His violent conduct towards the victim on 27 September 2008 had been repeated less than five weeks later and she was in obvious fear of him. The fear must have been recognised as being well justified because of the actions taken by the police in evacuating her by air from Oombulgurri immediately after each episode. She was much younger than the appellant, had been in a relationship with him and was pregnant. Violent treatment of women in this fashion cannot be tolerated anywhere in the State, but it is of particular importance that in isolated communities such as Oombulgurri that the punishment of an offender who commits such offences in a short space of time should be such as to demonstrate to all members of the community that that conduct is unlawful and that effective punishment will be imposed in order to deter the

general community from the use of violence. Specific deterrence of the individual offender was, in this case, also a necessary and essential ingredient of the sentence. For these reasons, I do not consider that any error has been demonstrated by the learned magistrate in deciding upon immediate sentences of imprisonment rather than suspending one or both of them'.

***Lutley v Jacques* [2010] WASC 78 (28 April 2010) – Supreme Court of Western Australia**

Simmonds J at [80]-[81]: 'Counsel for the respondent also pressed on me that the offences occurred in the remote Pilbara region, which counsel said had the second highest rates of violence against women in the state. Also, she pointed out that there were data showing that remote areas have about five times the rate of domestic violence than capital cities'.

'I accept without deciding that I can take judicial notice of these matters, and that I should regard them as going to the prevalence of offences of domestic violence to which the Restraining Orders Act is part of the legal response. On the relevance of the prevalence of offending of a particular type, see *Yates v The State of Western Australia* [2008] WASCA 144 [55] (Steytler P), [94] (McLure JA). I also accept without deciding that sentences for the same offending committed in different parts of the state may be affected by differences in the prevalence of that offence in those parts of those magnitudes. However, I note that counsel was unable to refer me to authority for that last approach'.

People affected by substance misuse

Misuse of alcohol or other drugs by perpetrators or victims of domestic and family violence may indicate an increased risk in the frequency and severity of the violence or a heightened vulnerability to the experience or impact of the violence [Laslett 2015].

Research demonstrates that a perpetrator with alcohol or other drug misuse problems is more likely to abuse the victim more frequently; more likely to sexually assault or physically injure the victim; and more likely to be physically violent outside the home [Mouzos & Makkai 2004].

A significant development however has been the recognition that, while alcohol or other drugs may be associated with the perpetration of domestic and family violence, their misuse is unlikely to be the direct cause. Rather, the strongest risk factors for violence are perpetrator behaviours including generally high levels of aggression, exerting dominance and control over their intimate partners and believing they are entitled to do so [Mouzos & Makkai 2004], and holding negative or sexist attitudes towards women. [Renzetti et al 2015] A perpetrator's misuse of alcohol or other drugs in this context is likely to be an aggravating factor: the more dangerous the misuse, the higher the probability the violence will be more frequent and more severe, and the physical and emotional harm to the victim more serious.

Depression, anxiety, attempted suicide and post-traumatic stress disorder are among the frequently reported effects of domestic and family violence on victims. A victim may misuse alcohol or other drugs to medicate the physical and emotional pain caused by the violence and to cope with the ongoing violence. Some perpetrators may use the victim's condition to rationalise and escalate the violence and further exploit the victim's vulnerability. A further known risk is that a victim is more likely to have an intimate partner who also misuses alcohol or other drugs, an aggravating factor already identified.

People affected by substance misuse - Key Literature

Australia

Dowling, Chistopher and Anthony Morgan, *Is Methamphetamine Use Associated with Domestic Violence?*, Research Report No 563, December 2018, Australian Institute of Criminology.

There is considerable evidence of the impact of methamphetamine (often known as ‘ice’, ‘speed’, MDMA or ‘ecstasy’) use on violent behaviour. This paper presents findings from a review of existing research on the association between methamphetamine use and domestic violence. Eleven studies met the criteria for inclusion. Results of the research showed that domestic violence is common among methamphetamine users; however, methamphetamine users account for a small proportion of all domestic violence offenders. There is evidence that methamphetamine users are more likely than non-users to perpetrate domestic violence. Importantly, methamphetamine use is frequently present along with other risk factors. This means methamphetamine use probably exacerbates an existing predisposition to violence, rather than causing violent behaviour.

Laslett, Anne-Marie, et al., *The Hidden Harm: Alcohol’s Impact on Children and Families* (Foundation for Alcohol Research and Education, 2015).

This research paper presents a helpful overview of the literature. It also draws on two national surveys of alcohol’s harm to others, service system data and qualitative interviews with families conducted in 2008. Twelve per cent of carers reported that their children were verbally abused, left in an unsupervised or unsafe situation, physically hurt or exposed to domestic violence because of others’ drinking (p10). The paper identifies high numbers of incidents of alcohol-related domestic violence (p12). It notes that based on analyses of victimisation data from the 2005 Australian Personal Safety Survey, it was estimated that alcohol contributed to 50 per cent of all partner violence, and 73 per cent of physical assaults by a partner (p15). This review of the literature concludes that alcohol emerges as a consistent risk factor in the perpetration of domestic violence; there is a consistent relationship between alcohol use and increased severity of partner aggression and studies show women experience a heightened risk of partner violence on days that men have been drinking (p16). It also identifies that alcohol related harm may be prevented by changing the drinking of the drinker, protecting those affected and/or insulating contact between them (p103).

Mayshak, Richelle et al, *Alcohol/Drug-Involved Family Violence in Australia (ADIVA) – Research Bulletin*, Research Bulletin No 7, June 2018, Australian Institute of Criminology.

Family and domestic violence is a significant health and social issue. Alcohol and drugs are two risk factors found to contribute to family and domestic violence. This project sought to investigate the relationship between alcohol and other drug use and family violence, key demographic and environmental factors, differences between cases with and without alcohol and other drug involvement, and the major trends in family violence.

Morgan, Anthony and Alex Gannoni, Methamphetamine dependence and domestic violence among police detainees, Trends & Issues in Crime and Criminal Justice No. 588, Australian Institute of Criminology, February 2020, 12(2) *Journal of Aggression, Conflict and Peace Research* 55-62.

This study explores the relationship between methamphetamine dependence and domestic violence among male police detainees interviewed as part of the Drug Use Monitoring in Australia program. Detainees who were dependent on methamphetamines (61%) were significantly more likely to report recent violence towards a current or former intimate partner than those who had used methamphetamines but were not dependent (37%). There was also a significant association between cannabis dependence and self-reported domestic violence. Further, detainees expressing attitudes minimising the impact of violence were also more likely to self-report domestic violence. Overall, the results show the importance of integrated responses that address the co-occurrence of substance use disorders and domestic violence, and the risk factors underpinning these harmful behaviours.

Mouzos, Jenny, and Toni Makkai, 'Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)' (Research and Public Policy Series No 56, Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and

sexual violence including childhood violence. It identifies research that demonstrates a correlation between alcohol use and violence and research that has found that abusive males with alcohol or drug problems inflict violence against their partners more frequently, are more apt to inflict serious injuries, are more likely to be sexually assaultive, and are more likely to be violent outside the home than abusers without a history of substance abuse (p58). This paper also identifies that recent research has found that male controlling behaviours over female partners made 'a more important statistical contribution to predictions about violence than did alcohol, age, type of relationship, or class variables' (p58). However study results indicate that the strongest risk factors for intimate partner physical violence are associated with the 'male's behaviour — his drinking habits, general levels of aggression, and his controlling behaviour.' (p61)

Mouzos, Jenny, and Lance Smith, 'Partner Violence Among a Sample of Police Detainees' (2007) 337 *Trends and Issues in Crime and Criminal Justice* 1.

Using data from the Drug Use Monitoring in Australia (DUMA) program, this paper explores involvement in intimate partner violence, and provides first-time results from face-to-face interviews with a group of 1,597 police detainees. The study found that the levels of intimate partner violence are much higher among this group (49%) than is found from general population surveys. More than two-thirds of the detainees who were involved in partner violence reported being both a victim and a perpetrator in the past 12 months. Detainees who were classified as drug dependent were twice as likely as non-drug dependent detainees to be involved in intimate partner violence. None of the individual drugs was found to be significantly associated with intimate partner violence, suggesting that the level of illicit drug use (dependency), rather than the type of illicit drug, is a greater predictor of involvement in intimate partner violence. Alcohol dependency was also found to be a significant risk marker for involvement in partner violence (p5).

Noonan, P., A. Taylor and J. Burke, *Links between alcohol consumption and domestic and sexual violence against women: Key findings and future directions* (ANROWS, 2017).

This literature review found that "there is little evidence that alcohol use is a primary cause of violence against women. The paper does, however, identify that there are clear associations, and in some cases, strong correlations between alcohol use and violence against women, including, for instance, in the severity of the violence." The relationship between alcohol and violence against women manifests in three ways:

- Alcohol use is linked with the perpetration of violence against women.
- Alcohol use is linked with women's victimisation by violence.
- Alcohol is used as a coping strategy by women who have experienced violence

Qadara, Antonia, Mary Stathopoulos and Rebecca Jenkinson, 'Establishing the Connection [Between Alcohol and Other Drug Use and Sexual Victimisation]' (State of Knowledge Paper 6, Australia's National Research Organisation for Women's Safety Landscapes, July 2015).

This literature review draws upon Australian national surveys to consider the prevalence of sexual abuse and its association with substance abuse (p9). For example in one ABS study it was reported that among women who reported one type of gender-based violence, over 23% of victims also reported experiencing a substance use disorder. Where women had experienced more than three types of gender-based violence, 47% of them had also experienced a substance use disorder over their lifetime (p9).

International

Bennett, Larry and Patricia Bland, *Substance Abuse and Intimate Partner Violence* (National Online Resource Center on Violence Against Women, 2008).

This review of the literature identifies that substance abuse and intimate partner violence often have many causes and their apparent correlation applies to only a sub-group of batterers and victims. For some men who batter, substance abuse increases the frequency or severity of their violence. For other men, substance abuse and intimate partner violence are separate issues whose apparently high rate of co-occurrence may stem from shared pre-conditions such as antisocial personality or from a belief that when they get drunk or high, they are going to be violent. Finally, for some men, both substance abuse and intimate partner violence may be manifestations of an underlying need for power and control related to gender-based distortions and insecurities.

Gilchrist et al., 'The interplay between substance use and intimate partner violence perpetration: A meta-ethnography' (2019) 65 *International Journal of Drug Policy* 8.

The authors reviewed qualitative studies between 1995 and 2016 to determine how substance use features in

survivors' and perpetrators' accounts of intimate partner violence (IPV) perpetration. Results showed the emergence of six core themes, five of which related to the complex nexus between substance use and IPV perpetration in the context of intoxication, withdrawal and addiction, impact on relationship, and broader dynamics of power and control and psychological vulnerabilities. The other theme related to survivors' agency and resistance to IPV perpetration.

Although survivors were more likely to see intoxication and withdrawal as part of a pattern of abusive behaviour, perpetrators described a causal link between intoxication and discrete incidents of IPV perpetration. The likelihood of violence was increased by feelings of frustration caused by withdrawals from alcohol or illicit drugs, and/or a failure or partner refusal to procure money for drugs. Survivors were more likely than perpetrators to identify abuse in relation to the impact of substance use on their relationship and dynamics of power and control. The authors recommend the need for tailored integrated interventions that address the complex intersection between substance use and IPV perpetration, in the context of social, psychological and environmental factors. Interventions should also focus on how perpetrators describe their own and, where relevant, their partner's substance use.

Mehr, J. et al., (2023) Intimate partner violence, substance use, and health comorbidies among women: A narrative review. *Frontiers in Psychology*, 13: 1028375.

Abstract: Exposure to intimate partner violence (IPV), including physical, sexual, and psychological violence, aggression, and/or stalking, impacts overall health and can have lasting mental and physical health consequences. Substance misuse is common among individuals exposed to IPV, and IPV-exposed women (IPV-EW) are at-risk for transitioning from substance misuse to substance use disorder (SUD) and demonstrate greater SUD symptom severity; this too can have lasting mental and physical health consequences. Moreover, brain injury is highly prevalent in IPV-EW and is also associated with risk of substance misuse and SUD. Substance misuse, mental health diagnoses, and brain injury, which are highly comorbid, can increase risk of revictimization.

This paper provides a helpful literature of the connections between intimate partner violence, substance abuse and other health issues.

National Center on Domestic Violence, Trauma & Mental Health, *Understanding Research on Intimate Partner Violence and Substance Use* (2008).

This research highlights key findings on the relationship between intimate partner violence (IPV) and substance misuse. These findings are:

1. 'IPV survivors are more likely to use or become dependent on substances, compared to people who have not experienced IPV'.
2. 'There are high rates of IPV among people receiving substance use disorder treatment services'.
3. 'Mental health conditions, including post-traumatic stress disorder (PTSD) and depression, may mediate the relationship between IPV and substance use'.

The fact sheet concludes that this research does not provide sufficient information on factors that may help explain *why* IPV and substance use co-exist (p.5).

Renzetti, Claire M, Kellie R Lynch and C Nathan DeWall, 'Ambivalent Sexism, Alcohol Use, and Intimate Partner Violence Perpetration' (2015) 33(2) *Journal of Interpersonal Violence* 183-210

Abstract: 'Research on risk factors for men's perpetration of intimate partner violence (IPV) has shown a high correlation with problem alcohol use. Additional studies, however, indicate that the alcohol–IPV link is neither simple nor necessarily direct and that a range of factors may moderate this relationship. Using a national, community-based sample of 255 men, the present study examined the moderating effects of ambivalent sexism (i.e., hostile and benevolent sexism) on the relationship between alcohol use and IPV perpetration. The findings show that both greater alcohol consumption and high hostile sexism are positively associated with IPV perpetration, and that hostile sexism moderates the alcohol–IPV relationship for perpetration of physical IPV, but not for psychological IPV. Moreover, high levels of alcohol consumption have a greater impact on physical IPV perpetration for men low in hostile sexism than for men high in hostile sexism, lending support to the multiple threshold model of the alcohol–IPV link. Implications of the findings for prevention, intervention, and future research are discussed.'

- The introduction includes a comprehensive literature review of the most recent studies' findings on the correlation between alcohol use and domestic intimate partner violence, including: 'Bennett and Bland (2008) caution, however, that the relationship between alcohol use and IPV is neither simple nor

necessarily direct. As they point out, most heavy drinkers do not perpetrate IPV, which suggests that IPV perpetration is influenced by additional factors that may interact with alcohol use' (p3). See especially 'The Alcohol-IPV Link' (pp3-6) which provides a great discussion of the various explanations and complex understandings of the relationship between alcohol-use and intimate partner violence perpetration.

- 'Our findings, in fact, showed that the men in our sample who consumed alcohol more frequently and in higher quantities as measured by three items from the NIAAA COGA Study reported more psychological and physical IPV perpetration. These results are consistent with the findings of previous studies that have investigated the relationship between level of alcohol consumption and IPV perpetration' (p18)
- 'As Foran and O'Leary (2008a) have pointed out, for individuals who are already at high risk of IPV perpetration without consuming alcohol—that is, in this case, men who are high in hostile sexism—heavy drinking and intoxication may contribute relatively little additional risk. However, heavy alcohol use may facilitate physical IPV perpetration among men who score low in hostile sexism by serving as a disinhibitor to the open expression of hostility toward women (Swim et al., 1995) as well as by contributing to cognitive distortions of their partner's behavior and motives' (p20)

Rivera, E. A., Heather Phillips, Carole Warshaw, Eleanor Lyon, Patricia J. Bland, and Orapen Kaewken, *'The relationship between intimate partner violence and substance use: An Applied Research Paper'* (Report: National Center on Domestic Violence, Trauma & Mental Health, 2015).

This applied research paper provides an overview of recent studies on the relationship between substance use and experiencing intimate partner violence (IPV), including the prevalence of co-existing substance use and IPV. While there is some evidence suggesting a relationship between experiencing IPV and substance use, solely focusing on IPV and substance use may be misleading in its simplicity. Given that, this paper describes factors that may mediate the relationship between substance use and IPV, as well as caveats and cautions for interpreting this body of research.

People affected by substance misuse - Other Bench Books

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.2 notes that situational factors such as alcohol or drug abuse, while not a direct cause, may increase the risk of family violence. It also notes that alcohol and/or drug abuse is a contributing factor to both perpetrating and experiencing family violence. 5.7.4 discusses this specifically in the context of Indigenous people. 5.4.1 notes that family violence is a choice that men make, and it cannot be excused by factors such as alcohol.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

In considering family violence and sexual assault matters, section [9.4.7] directs judicial officers to consider that 'High levels of alcohol consumption and other drugs may exacerbate violent outbursts.' (p[9.4.9]).

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 5.4.4: What about victims who misuse alcohol or drugs? discusses how to interpret evidence of victims misusing alcohol or drugs and how to respond to that evidence. Consideration of whether the misuse is actually evidence of harm resulting from domestic violence is important, and guidance is provided as to how to assess that evidence.

Also see:

- Section 7.2.1: Alcohol and drug rationalization, which states that: '[w]hile heightened risk of domestic violence and of attendant bodily injury is associated with perpetrators' heavy alcohol consumption and drug use, and alcohol or drugs are often blamed for domestic violence, experts agree that drugs and alcohol are more a rationalization than a cause';
- Section 7.4.10: When the perpetrator claims the targeted parent misuses alcohol or drugs;
- Supplementary Reference 3: Perpetrator Rationalizations.

People affected by substance misuse - Other Resources

Office of the Assistant Secretary for Planning and Evaluation and the Family and Youth Services Bureau, Division of Family Violence Prevention and Services U.S. Department of Health and Human Services, October 2020 ***Understanding Substance Use Coercion as a Barrier to Economic Stability for Survivors of Intimate Partner Violence: Policy Implications*****.**

This policy brief "seeks to further the limited research, policy, and practice on substance use coercion and to increase awareness about this issue among relevant stakeholders."

Extract:

WHAT IS SUBSTANCE USE COERCION?

Substance use coercion occurs when perpetrators of intimate partner violence undermine and control their partners through substance-use related tactics and actively keep them from meeting treatment and recovery goals.

WHAT ARE EXAMPLES OF SUBSTANCE USE COERCION?

Substance use coercion can take many forms. For example, an abuser may:

- Force, initiate, or pressure their partner to use substances.
- Sabotage their partner's recovery efforts by deliberately keeping substances around their home.
- Refuse to provide their partner with childcare or transportation needed to participate in substance use treatment.

HOW COMMON IS SUBSTANCE USE COERCION?

A survey of National Domestic Violence Hotline callers who had experienced domestic violence revealed that 43 percent of respondents had experienced at least one of three types of substance use coercion:

- Had a partner pressure or force them to use substances;
- Had a partner threaten to report their substance use to the authorities to keep them from getting something they wanted or needed; and/or
- Were afraid to call the police because a partner said they would not be believed or they would be

arrested based on substance use.

People affected by substance misuse - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Cassy

Faith

Fiona

Francis

Gillian

Ingrid

Julia

Lisa

Melissa

Sally

Sandra

People affected by substance misuse - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Loulanting **[2015] ACTSC 172 (23 June 2015) – Australian Capital Territory Supreme Court**

Refshauge J at [1]: 'There is no doubt that the addiction to drugs creates significant problems for the community, as well as for the user and his or her family. When the drug is methylamphetamine, or ice, the violence that it also generates can create further problems, particularly if there are stressed family situations leading to family violence. When mental health issues are added to the situation, it creates great complexity in trying to deal with the multiple issues that arise'.

R v Bell **[2005] ACTSC 123 (1 December 2005) – Australian Capital Territory Supreme Court**

Higgins CJ at [31]: 'I appreciate that personality disorders may often underlie the criminal behaviour of men who beat women. Alcohol or other substance abuse may sometimes be a triggering factor. Nevertheless, they must take responsibility for their actions and be seen to have done so. The offence is often hidden, so general deterrence is a factor that is quite prominent. So also is specific deterrence. No offender engaging in this kind of behaviour, nor their victims, should feel that it is to be treated lightly. Rather, it must be made the subject of condign punishment. That is not to say, of course, that any mitigatory factors or prospects for rehabilitation will be disregarded'.

Price v Tasmania **[2016] TASCCA 22 (6 December 2016) – Court of Criminal Appeal Tasmania**

Estcourt J noted generally at [39] that: '[I]n the present case the learned sentencing judge was correct to observe that domestic or family violence is particularly unacceptable because of its insidious nature, the difficulty in detection and the impact on the victim, broad family units, and the wider community. As His Honour commented, the issue is of much community concern, and excessive alcohol consumption and argumentativeness on the part of a victim provide no excuses whatsoever. This crime against s 170 of the

Code is a very serious example of domestic violence, made all the more egregious by the fact that the immediate aftermath of the complainant being set alight was witnessed by her youngest daughter'.

Hopkins v The Queen **[2015] VSCA 174 (19 June 2015) – Victorian Court of Appeal**

Redlich JA at [42]: 'The evidence demonstrates that the applicant's conduct was to be explained as done in a drug-fuelled rage. Though affected by his drug consumption, it was very clear that the applicant understood precisely what he was doing. The submission cannot be sustained that his drug consumption in some way reduced his moral culpability. The regrettable fact is that this Court sees only too often the results of drug-induced violence that explains the infliction of horrific injuries. Absent circumstances in which an offender has no forewarning that the consumption of drugs may so affect him, the consumption of drugs does not constitute a mitigating circumstance. Counsel for the applicant accepted that was so. There being no medical evidence that the applicant otherwise suffered from a mental disorder, the finding of the sentencing judge is, in our view, unimpeachable'.

Director of Public Prosecutions (Victoria) v Turner **[2017] VSC 358 (23 June 2017) – Victorian Supreme Court**

Bell J at [24]: "I do not accept that alcohol or substance abuse is the only or even the main explanation for your crimes. The manner and circumstances in which you killed Ms Cay were the product of uncontrolled anger, aggression and rage … I would refer to what King J said in R v Mulhall, which applies equally to your case:

> Women are entitled to have domestic relationships with people that do not result in their death simply because their partner loses their temper or has too much to drink or a combination of [drugs] and alcohol reduces their inhibitions. It is inexcusable"

Rosewood v The State of Western Australia **[2014] WASCA 21 (29 January 2014) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [15]: 'The fact that the appellant was heavily intoxicated at the time is not mitigatory. The sentencing objectives of personal and general deterrence weigh heavily in relation to acts of domestic

violence that are committed when drunk or sober'.

People who are lesbian, gay, bisexual, transgender, intersex and queer +

LGBTIQ+ (or lesbian, gay, bisexual, transgender, intersex and queer + [Campo & Smart 2017]) encompasses people whose sexual orientation, gender identity or sex differ from heterosexual or male-female sex and gender norms. As in the broader community, the identities and experiences of people in these communities are enormously diverse and influenced by factors such as age, ethnicity, migration experience, geographical location, disability, and socio-economic status. There is however a disproportionate number of LGBTIQ+ people who experience poorer health than other groups in the Australian community, in particular mental ill health and suicide, which may be due to their fear of or actual discrimination, 'outing', violence, abuse, or exclusion. Research also identifies a greater prevalence of other risk factors for LGBTIQ+ people including more harmful and frequent use of alcohol and other drugs, homelessness and poverty, disengagement from schooling, and chronic health disorders [Rosenstriech 2013].

Of the research that has been conducted over recent years findings suggest that the incidence of this form of violence in LGBTIQ+ communities is similar to that experienced in the broader community, though specific data for transgender and intersex people is lacking [Cochrane 2017].Other findings suggest possible differences and vulnerabilities particular to LGBTIQ+ people in their experience of domestic and family violence [Ansara 2015], including:

- There is likely to be a higher proportion of men as victims and women as perpetrators than in the general population
- Heterosexual stereotypes about men and women may result in false assumptions that, for example, lesbian women are not capable of physical violence, or gay men are not masculine [Campo & Tayton 2015]
- While all forms of violence may be experienced, there may be some differences in the perpetrator's behaviours, for example, threatening to out or actually outing the victim in terms of their sexuality or HIV status, withholding hormone treatments, preventing participation in LGBTIQ+ events, name calling, ridicule and public humiliation [ACON 2004]
- Parents, siblings and other family members may also be perpetrators of violence, especially towards young LGBTIQ+ people

- LGBTIQ+ people may be less likely to identify the behaviour they experience as violence, and they may be less likely to report the behaviour or seek the help they need for fear of ostracism and discrimination; a negative response from the police and courts; escalating the violence; being 'outed'; being disbelieved or blamed; or due to personal feelings of shame or embarrassment or a need to protect the perpetrator or the relationship
- Lesbian abusers may seek to access women's shelters or support groups already accessed by their partner in order to continue perpetrating violence against their partner [Campo & Tayton 2015]
- Mainstream services, including refuges and court assistance and counselling, may not be well developed to understand and meet the complex and diverse needs of LGBTIQ+ victims and perpetrators [Cochrane 2017] and appropriate services may be unavailable.

People who are lesbian, gay, bisexual, transgender, intersex and queer + - Key Literature

Australia

AIDS Council of New South Wales (ACON), *Tales from Another Closet: Personal Stories of Domestic Violence in Same-sex Relationships* (2004).

This is a compilation of personal stories outlining the experiences of domestic violence in same sex relationships.

Ansara, Y. Gavriel, 'A Multidimensional and Inclusive Understanding of Gender-Based Family and Interpersonal Violence: Findings from the National LGBTI Health Alliance 2014 Investigation' (2015) 2 *Australia's National Research Organisation for Women's Safety Footprints* 14.

In July and August 2014, the National LGBTI Health Alliance undertook a national consultation on the direct needs and concerns of LGBTI populations who had experienced violence in their family and interpersonal relationships. Consultees reported (among other things):

- Concerns about violent/homophobic family members were identified (p 15).
- Intersex people may be afraid to seek medical treatment due to their physical distinctions (p 15).
- Difficulty accessing 'women-only' and 'men-only' shelters (p 16).
- People with non-binary genders reported being threatened with loss of custody due to their genders (p 16).
- Women and men of trans experience reported being ridiculed and misgendered by police when reporting experiences of family and interpersonal violence (p 16).
- Lesbian women and gay men described how stereotypes about butch and femme gender presentation were used to deny appropriate help in response to intimate partner violence (p 16).
- Bisexual people of all genders described the invisibility and stigma they experienced when trying to report violence against them (p 16).
- People with intersex variations described having been coerced by medical professionals and biological relatives into unwanted 'normalising' medical interventions that caused irreversible damage. (p 16);

- Gay men, lesbian women, and bisexual people in mixed orientation marriages (i.e. marriages between a gay, lesbian, and bisexual person and a heterosexual person) reported being threatened by their spouses with ‘outing’ and loss of child custody (p 16).

Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia* (Report, 2018).

This report usefully compiles and summarises current statistics on family violence, domestic violence and sexual violence from multiple sources. Its key points are:

- women are at greater risk of family, domestic and sexual violence;
- some groups of women are more vulnerable to all three types of violence (in particular, women who are Indigenous, young, pregnant, separating from a partner or experiencing financial hardship and women with disability);
- children are often exposed to the violence;
- the three types of violence are leading causes of homelessness and adverse health consequences for women and create significant financial cost; and
- family violence is worse for Aboriginal and Torres Strait Islander people.

The report also identifies important gaps in the current research on family, domestic and sexual violence. No or limited data is available on:

- children’s experiences, including attitudes, prevalence, severity, frequency, impacts and outcomes of these forms of violence;
- specific at-risk population groups, including Indigenous Australians, people with disability, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people, including those in same-sex relationships;
- the effect of known risk factors, such as socioeconomic status, employment, income and geographical location;
- services and responses that victims and perpetrators receive, including specialist services, mainstream services and police and justice responses;
- pathways, impacts and outcomes for victims and perpetrators; and
- the evaluation of programs and interventions.

Callan A, Corbally M, McElvaney R. *A Scoping Review of Intimate Partner Violence as It Relates to the Experiences of Gay and Bisexual Men.* Trauma Violence Abuse. 2021 Apr;22(2):233-248. PMID: 33205700

"Across studies, gay and bisexual men were observed to experience IPV similarly to heterosexual couples involving psychological, physical, and sexual violence. However…distinctive features of violence included sexual orientation outing, unprotected sexual intercourse, homophobia, internalized homophobia, and difficulties accessing minority men-focused services."

Campo, Monica and Sarah Tayton, 'Intimate Partner Violence in Lesbain, Gay, Bisexual, Trans, Intersex and Queer Communities' (Child Family Community Australia Practitioner Resource, December 2015).

This article discusses intimate partner violence in LGBTIQ relationships, and the ways in which the predominant focus on heteronormative understandings of abuse have resulted in under acknowledgement and misunderstandings of violence in LGBTIQ communities. Considerations relevant to perpetrators are discussed on p4, including the ways in which stereotypes about both men and women inhibit recognition of intimate partner violence in LGBTIQ relationships – i.e. 'In lesbian relationships involving physical violence, for instance, there may be the assumption that women are incapable of exerting physical power over other women. Similarly, stereotypes about gay men not being "masculine" might result in views that they are not capable of violence'. It emphasizes, as a result, the importance of identifying the perpetrator, particularly in the context of specific behaviours perpetrators in LGBTIQ relationships may engage in, such as presenting at victims as shelters (p5).

Cochrane, Brandy, 'Family Violence and the LGBTIQ Community' (Research Paper, Monash University, 2017).

This paper examines the LGBTIQ community's experiences of domestic and family violence (DFV). Generally, the LGBTIQ community experiences DFV at a similar, or slightly higher, rate compared to heterosexual people. However, lesbian women were more likely than gay men to report having been in an

abusive relationship, and young LGBTIQ people are more likely to experience violence in their relationships than their heterosexual peers. There are also unique pressures that may affect LGBTIQ people in a DFV context:

- threats to 'out' a person;
- the use of gender to belittle the victim;
- homophobia experienced when accessing support services;
- fear that acknowledgement of DFV will contribute to homophobia;
- A lack of support from family;
- homelessness;
- an increased risk of HIV;
- loss of custody of children;
- viewing same-sex relationships through heterosexual stereotypes, which may prevent effective service provision; and
- mistrust of the police by LGBTIQ people.

Stereotypes and misconceptions about the LGBTIQ community and DFV can lead to issues and poor outcomes within the legal system, which highlights the need for greater awareness and understanding of these circumstances among legal professionals.

Constable, Annaliese, et al, *One Size Does Not Fit All: Gap Analysis of NSW Domestic Violence Support Services in Relation to Gay, Lesbian, Bisexual, Transgender and Intersex Communities' Needs* (AIDS Council of New South Wales (ACON), 2011).

This research paper reports on the results of a study drawing on 65 service providers' responses to a survey and interviews with 9 community members who were interviewed about their experiences of service provision resulting from domestic violence in a same sex relationship. It reports that negative experiences included being referred for sexual reorientation instead of domestic violence support, the lack of appropriate accommodation and other support services for men, and having to deal with the prejudices of mainstream service providers regarding men seeking support in relation to same sex domestic violence.

Fileborn, Bianca, 'Sexual Violence and Gay, Lesbian, Bisexual, Trans, Intersex, and Queer Communities' (Australian Centre for the Study of Sexual Assault Resource Sheet, Australian Institute of Family Studies, March 2012).

This paper provides a review of current research into sexual violence in LGBTIQ communities. It provides definitions of 'biological sex' and 'gender identity'. There is a section on intimate partner violence (pp5-6). Research suggests that rates of intimate partner violence in LGBTIQ are similar to those in heterosexual communities. Notably, research suggests that in cases of intimate partner sexual abuse, the abusive partner may exploit broader issues around homophobia and heterosexism as a mechanism to prevent the victim/survivor from disclosing the abuse.

Henry, Nicola, Asher Flynn and Anastasia Powell, *Image-based sexual abuse: Victims and perpetrators* (Australian Institute of Criminology Report No. 572 March 2019).

Report abstract:

Image-based sexual abuse (IBSA) refers to the non-consensual creation, distribution or threatened distribution of nude or sexual images. This research examines the prevalence, nature and impacts of IBSA victimisation and perpetration in Australia. This form of abuse was found to be relatively common among respondents surveyed and to disproportionately affect Aboriginal and Torres Strait Islander people, people with a disability, homosexual and bisexual people and young people. The nature of victimisation and perpetration was found to differ by gender, with males more likely to perpetrate IBSA, and females more likely to be victimised by a partner or ex-partner.

Mitra-Kahn, Trishima, Carolyn Newbigin and Sophie Hardefeldt, *Invisible women, invisible violence: Understanding and improving data on the experiences of domestic and family violence and sexual assault for diverse groups of women: State of knowledge paper* (ANROWS, 2016).

In relation to lesbian, gay, bi-sexual, transgender, intersex and queer women, the paper provides an overview of the existing research at pp.27-30. Key findings include that, '[t]here is limited data on the prevalence of domestic and family violence and sexual assault for lesbian, gay, bi-sexual, transgender/trans*, intersex and queer (LGBTIQ) women in Australia. Similarly, there is very little quantitative or qualitative research on

domestic and family violence and sexual assault for LGBTIQ women in Australia or internationally. Of the studies analysed, a consistent finding is that LGBTIQ victims-survivors of domestic violence rarely seek support, information or advice on the abuse and violence they experienced and report struggling with identifying that what they were experiencing was domestic violence' (p.30).

Rosenstriech, Gabi, *LGBTI People Mental Health and Suicide* (National LGBTI Health Alliance, 2nd revised ed, 2013).

This report is focused on mental ill-health and suicidality in LGBTI communities. It is noted that there is an elevated risk of mental ill-health and suicidality in these communities due to discrimination and exclusion (p4).

Soldatic, K. et al., (2023). Indigenous LGBTIQSB+ People's Experience of Family violence in Australia. *Journal of Family Violence*, online first, doi: 10.1007/s10896-023-00539-1

Based on 16 interviews with Indigenous LGBTIQSB+ people in the state of New South Wales, Australia. This article explores the social and emotional wellbeing of Indigenous LGBTIQSB+ young people living in New South Wales. The findings 'demonstrate the intersectional nature of family violence highlighting the fact that Indigenous LGBTIQSB+ young people are integral parts of extended kinship networks, families and communities and are deeply impacted by any acts of family violence.'

Note LGBTIQSB+: Lesbian, gay, Bisexual, trans, Intersex, Queer, Sistergirl, Brotherboy, Plus.

The article concludes:

> Participants' stories spoke of family and community violence that focused on intimidation, bullying and threats of violence. These kinds of behaviours were at times aimed at making the young person feel uncomfortable, to feel unwanted, invisible, excluded and even to force them to change their 'lifestyles' or at least shape their behaviours so that their gender and sexuality diversity were kept hidden. Even though participants spoke about how they successfully negotiated these events, LGBTIQ + phobic and racist behaviours also caused feelings of isolation, distress, a feeling of invisibility, lack of worth and exclusion.
>
> LGBTIQSB + young people reported significant amounts of violence from communities, some related to

their gen- der and sexuality diversity and other behaviours related to perceptions about their Indigeneity. LGBTIQSB+-phobia in Indigenous families and communities was reported more within extended families, older generations and rural or remote communities. Negative interactions and attitudes from Indigenous families and communities are significant given the importance of culture, family, and community for Indigenous people. These are still central to young Indigenous LGBTIQSB + lives with participants speaking about the heart break of not being able to go home to Country to visit grandparents and Elders in rural and remote communities. (p11).

Szalacha, Laura A et al, 'Mental Health, Sexual Identity, and Interpersonal Violence: Findings from the Australian Longitudinal Women's Health Study' (2017) 17(94) BMC Women's Health (online).

This study investigates the linkages between interpersonal violence, mental health, and sexual identity (pp 2-3). The results indicate that:

- Compared to exclusively heterosexual women, mainly heterosexual and bisexual women were significantly more likely to report physical, sexual, and emotional abuse (p 4);
- Mainly heterosexual and lesbian women were more likely to report severe physical abuse (p 4);
- Mainly heterosexual women were more than three times as likely to have been in a violent relationship in the past three years (p 4);
- All sexual minorities were two to three times as likely to have experienced harassment (p 4);
- Bisexual women reported significantly higher levels of depression and scored lower on mental health than did exclusively heterosexual women (pp 6, 7);
- Interpersonal violence strongly predicted poorer mental health for lesbian and bisexual women (p 6);
- Mental health indicators were similar for exclusively heterosexual and sexual minority women who did not report interpersonal violence (pp 6, 7);
- Experiencing multiple types of interpersonal violence was the strongest predictor of stress, anxiety and depression (p 6).

Interpersonal violence is a significant contributor to mental health disparities for women, particularly for those belonging to sexual minorities (pp 7-8).

Ussher, J. et al. ***Crossing the line: Lived experience of sexual violence among trans women from Culturally and Linguistically Diverse backgrounds in Australia*** **(2020) Sydney: ANROWS**

The key findings of this study are that:

- There are positive implications for trans women's overall health and wellbeing when trans women feel included and accepted;
- Trans women of colour from CALD backgrounds, as well as women who identify as lesbian, bisexual or queer, may experience additional prejudice and discrimination due to the intersection of gender, sexuality, social class, race and religion;
- Support in gender transitioning, through facilitation of access to hormone therapy, reduces the risk of transphobic violence; and
- CALD trans women's experiences of gender-based sexual violence are comparable with those of non-CALD trans women and cisgender women, however trans women also experience transphobic violence.

The study's recommendations are to:

- Conduct further awareness-raising and education for healthcare providers, legislators, police and policymakers, as well as the general public, in relation to transgender experience and gender transitioning;
- Challenge societal attitudes which support, condone or trivialise sexual violence against women, including violence against trans women; and
- Ensure policy and practice documents and clinical guidelines use language that is inclusive of gender and sexuality diversity when discussing sexual violence against women.

International

Donovan, Catherine and Rebecca Barnes, 'Help-Seeking among Lesbian, Gay, Bisexual and/or Transgender Victims/Survivors of Domestic Violence and Abuse: The Impacts of Cisgendered Heteronormativity and Invisibility' (2019) 56(4) ***Journal of Sociology*** **554-570 doi: 10.1177/1440783319882088**

Despite growing research into domestic violence and abuse in lesbian, gay, bisexual and/or trans ('LGBT') people's relationships, LGBT people remain largely invisible in domestic violence and abuse policy and

practice. Research evidence indicates that they primarily seek help from privatised sources such as counsellors/therapists and friends. The gap in knowledge about LGBT victims/survivors' help-seeking reflects and reinforces the success of neoliberal trends in privatising social problems by promoting self-care and individual responsibility. Using qualitative data from a mixed-methods UK study, this article offers an ecological analysis of LGBT victims/survivors' help-seeking decisions and barriers, demonstrating how cisgendered heteronormativity and LGBT invisibility permeate help-seeking at individual, interpersonal and socio-cultural levels. The conclusion argues for LGBT domestic violence and abuse to be recognised as a social problem rather than a private trouble. Recommendations are offered for necessary steps towards better recognising and supporting LGBT victims/survivors.

Henry RS, Perrin PB, Coston BM, Calton JM. Intimate Partner Violence and Mental Health Among Transgender/Gender Nonconforming Adults. J Interpers Violence. 2021 Apr; 36(7-8):3374-3399.

Abstract: There is significant evidence to suggest that intimate partner violence (IPV) is associated with mental health problems including anxiety and depression. However, this research has almost exclusively been conducted through heteronormative and cisgender lenses. The current study is an exploratory, quantitative analysis of the relationship between experiences of IPV and mental health among transgender/gender nonconforming (TGNC) adults. A national sample of 78 TGNC individuals completed a survey online measuring participants' experiences with IPV and depression, anxiety, and satisfaction with life. Of the sample, 72% reported at least one form of IPV victimization in their lifetime: 32% reported experiencing sexual IPV, 71% psychological IPV, 42% physical IPV, and 29% IPV assault with injury. All four types of IPV were positively associated with anxiety, and all but physical abuse was significantly associated with depression. None of the four types of IPV was associated with satisfaction with life. In a canonical correlation, IPV victimization and mental health had 31% overlapping variance, a large-sized effect. Sexual IPV and anxiety were the highest loading variables, suggesting that TGNC individuals who have experienced sexual IPV specifically tended to have higher levels of anxiety. These findings support previous qualitative, small-sample studies suggesting that IPV is a pervasive problem in the TGNC community. TGNC individuals who have experienced IPV may be at increased risk for mental health problems, and therefore, IPV history may trigger appropriate mental health screenings and referrals for this population in health care settings.

Jackson, A. et al., (2022) Prevalence and correlates of Violence experienced by Trans women. *Journal of Women's Health*, 31 (5), 648-655, doi: 10.1089/jwh.2021.0559

This research measured the prevalence and correlates of intimate partner, physical, and sexual violence experienced by trans women. A National HIV Behavioral Surveillance (NHBS) Study of 201 trans women was conducted in San Francisco from July 2019 to February 2020. Among 201 trans women interviewed, 26.9% were currently homeless. In the past year, 59.7% had been homeless, 34.3% changed housing, 60.7% had a housing situation other than renting or owning. Experiences of violence were common: 36.8% experienced any form of violence, including sexual (16.9%), intimate partner (14.9%), and other physical (25.4%) in the past year. Experiences of violence were significantly associated with multiple measures of housing insecurity. Younger age, being misgendered, and substance use were also associated with experiences of violence.

King, K. et al., Transgender Individuals and Psychological Intimate Partner Violence: a National Study (2022) 37 Journal of Family Violence 289-300 doi: 10.1007/s10896-020-00219-4

This American study examined associations among Intimate Partner Violence (IPV), demographics, sex work, and substance use in a national sample of transgender individuals. National data from the 2015 Transgender Survey (n = 27,715) was analyzed. Results indicated that nearly half (48.3%) of transgender individuals had experienced IPV in their lifetime. Lifetime IPV differed significantly based on demographics, sex work and substance use. Individuals at highest risk for lifetime IPV were those who self-identified as a trans man, were 25–64 years old, were Native American/Alaskan Native or Middle-Eastern/North African, had some college or less, had an annual income of $1–$24,999, had been part of a religious/spiritual community, had engaged in sex work and had used substances.

Messing, JT, Thomas, KA, Ward-Lasher, AL & Brewer, NQ 2021, 'A Comparison of Intimate Partner Violence Strangulation Between Same-Sex and Different-Sex Couples', *Journal of Interpersonal Violence*, vol. 36, no. 5/6, pp. 2887–2905.

US based study. Abstract: Strangulation is a common and dangerous form of intimate partner violence (IPV). Nonfatal strangulation is a risk factor for homicide; can lead to severe, long-term physical and mental health sequelae; and can be an effective strategy of coercion and control. To date, research has not examined strangulation within same-sex couples. The objective of this cross-sectional, observational research is to

identify whether and to what extent the detection of strangulation and coercive control differs between same-sex and different-sex couples in police reports of IPV. Data (n = 2,207) were obtained from a single police department in the southwest United States (2011-2013). Bivariate analyses examined differences in victim and offender demographics, victim injury, violence, and coercive controlling behaviours between same-sex (male-male and female-female) and different-sex couples (female victim-male offender). Logistic regression was used to examine associations between strangulation, victim and offender demographics, coercive controlling behaviours, and couple configuration. Strangulation was reported significantly more often in different-sex (9.8%) than in female and male same-sex couple cases (5.2% and 5.3%, respectively; p <.05). Injury, however, was reported more frequently in same-sex than in different-sex couples (p <.05). Couple configuration (p <.05), coercive control (p <.05), and injury (p <.05) significantly predict strangulation. Findings suggest that nonfatal strangulation occurs within at least a minority of same-sex couples; it is possible that underdetection by law enforcement makes it appear less common than it actually is. Regardless of couple configuration, timely identification of strangulation and subsequent referral to medical and social service providers is essential for preventing repeated strangulation, life-threatening injury, and the long-term health effects of strangulation.

Sarah M. Peitzmeier et al. “Intimate Partner Violence in Transgender Populations: Systematic Review and Meta-analysis of Prevalence and Correlates”, *American Journal of Public Health* 110, no. 9 (September 1, 2020): pp. e1-e14.

Abstract:

Authors’ Conclusions: Transgender individuals experience a dramatically higher prevalence of IPV victimization compared with cisgender individuals, regardless of sex assigned at birth. IPV prevalence estimates are comparably high for assigned-male-sex-at-birth and assigned-female-sex-at-birth transgender individuals, and for binary and nonbinary transgender individuals, though more research is needed.

Public Health Implications: Evidence-based interventions are urgently needed to prevent and address IPV in this high-risk population with unique needs. Lack of legal protections against discrimination in employment, housing, and social services likely foster vulnerability to IPV. Transgender individuals should be explicitly included in US Preventive Services Task Force recommendations promoting IPV screening in primary care settings. Interventions at the policy level as well as the interpersonal and individual level are urgently needed to address epidemic levels of IPV in this marginalized, high-risk population.

Rollè, Luca, Giardina, Giulia, Caldarera, Angela, Gerino, Eva, and Piera Brustia, 'When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence' (2018) 9 *Frontiers in Psychology* 1-13.

The paper conducts a literature review on intimate partner violence (IPV) occurring in same sex couples. The authors aimed to provide an overview of the psychological literature on lesbian, gay and bisexual (LGB) IPV (specifically focusing on interventions for both victims and perpetrators), and to propose recommendations for future directions in research for LGB-oriented psychological and community services in relation to IPV. Despite the long-standing perception that IPV is an issue exclusive to heterosexual relationships, many studies have found the existence of IPV among lesbian and gay couples. Whilst there are similarities between heterosexual and LGB IPV, there are unique features specific to LGB IPV. Such features mainly relate to identification and treatment of LGB IPV in the community and to the importance of considering the role of sexual minority stressors. The authors found that there were minimal studies that address LGB individuals involved in IPV due to the silence that has existed around violence in the LGB community. The authors identify and review the principal themes discussed in the published studies, and conclude that it is important to create a free and open forum to discuss this issue, both by LGB and heterosexual people. Interventions for LGB IPV victims and perpetrators should be included in an integrate and complete treatment plan that should be adapted to the specific situation.

Woodyatt, Cory and Rob Stephenson, 'Emotional intimate partner violence experienced by men in same-sex relationships' (2016) 18(10) *Culture, Health and Sexuality* 1137-1149.

This US study is the first to examine the types, antecedents and experiences of emotional intimate partner violence ('IPV') that occur between male partners (p 1145). The study conducted 10 focus group discussions with gay and bisexual men (n = 64 participants) (p 1140). The study found that gay and bisexual men perceive emotional IPV to be commonplace and the 'most threatening form of intimate partner violence' (p 1144-6). The participants identified the most common antecedents to be jealousy, power differentials, and internalised homophobia (p 1143). The descriptions of emotional IPV in male-male relationships is similar to male-female relationships, but some coercive behaviours manifest differently (p 1145). For example, threatening to disclose a partner's sexual identity was identified as an example of emotional violence and

coercive control (p 1145).

People who are lesbian, gay, bisexual, transgender, intersex and queer + - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 8 discusses a range of issues affecting lesbians, gay men and bisexuals and their experience of court processes. Section 9 discusses a range of issues affecting gender diverse people and people born with diverse sex characteristics, and their experience of court processes.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Chapter 15 provides a discussion of sexuality and gender identity. It includes a discussion of issues of discrimination and legal recognition of relationships. In Part III, there is a brief overview of domestic violence in gay and lesbian relationships (pp.189-190). It notes that: ‘As with any other relationship, people in same-sex relationships can be victims of domestic violence. Indeed, the problem of domestic violence may be exacerbated in such relationships due to reduced understanding of the problem in the wider community and the limited availability of specialised support services. Many of the reasons for victims of domestic violence not leaving abusive relationships canvassed in the previous Chapter remain relevant here’.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.9 discusses the nature and prevalence of family violence within same-sex relationships, as well as some of the barriers gay, lesbian, bisexual transsexual, transgender and inter-sex people experience when reporting same-sex partner abuse.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2022).

Chapter 12A provides a discussion of ‘Diverse sexuality: lesbian, gay and bisexual people and people with other diverse sexualities’. It includes relevant statistics, legal recognition (of relationship and age of consent) and explanations of terminology. At 12A.2 common misconceptions are overviewed. At 12A.5 practical matters are dealt with, including appropriate mode of address, gender reference etc.

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Being in a same sex relationship is acknowledged to be a risk factor for experiencing domestic violence (Sections 4.2, 8.8.3), which may require ‘special screening and assessment protocols’ (Section 18.2.3.4.1). Further, Section 19.9.2 recognises that ‘[r]esearch on domestic violence in gay, lesbian, bi-sexual intimate relationships is voluminous, growing and evolving. At the moment there are unsettled controversies in this research. While many argue and present data demonstrating that the dynamics of domestic violence are essentially the same in all intimate relationships, others argue that the power dynamics are somewhat different when intimate partners are of the same or altered sex. Most important in terms of the legal system, however, is understanding how domestic violators may use a targeted person's sexual orientation to isolate, to manipulate, to intimidate and threaten, to restrict access to services. It is important to appreciate the extra effort and courage required to leave these relationships. Disclosure of partnership status can lead to yet more social isolation. Family and community support may be lacking; furthermore many of the domestic violence support services have been designed with heterosexual couples in mind.’

People who are lesbian, gay, bisexual, transgender, intersex and queer + - Other Resources

Campo, Monica and Jessica Smart, 'LGBTIQ+ Communities: Glossary of Common Terms' (CFCA Resource Sheet, Australian Institute of Family Studies, 2017).

This glossary is designed to help service providers create a safe environment for LGBTIQ+ people. The glossary deals with the following terms about bodies, gender and gender identities, sexual orientations, and social attitudes and issues

Bodies, gender and gender identities

- Sex: determined by biological characteristics. Sex is assigned male or female at birth. However, some people are born intersex, or their sex may change over time.
- Intersex: people who have biological characteristics different from conventional understandings of males or females. They may identify as a man, woman, or non-binary.
- Gender: determined by social circumstances. People are expected to behave as masculine or feminine, depending on their sex. However, some do not fit into these rigid norms.
- Gender identity: one's sense of self as a man or a woman, masculine or feminine, or in between. Some people move between or outside of the gender binary.
- Gender binary: classification of gender into men or women, based on biological sex.
- Transgender/Trans/Gender diverse: people whose assigned sex at birth does not match internal gender identity. Trans people may or may not change dress, legal status or medical treatment. They may adopt different pronouns – see misgendering below.
- Cisgender/cis: people's whose assigned sex at birth corresponds to their gender identity.
- Gender questioning: people who are unsure which gender they belong to.
- Sistergirl/Brotherboy: terms for transgender people within some ATSI communities. Sistergirls are Indigenous women who were classified male at birth. Brotherboys are Indigenous people who live as males.

Sexual orientations

Note that these categories are not exhaustive.

- Lesbian: identifies as a woman and is attracted to other people who identify as women. Using the language ‘identifying as a woman’, rather than ‘woman’, is designed to include trans people, who may not biologically be women.
- Gay: identifies as a man and is attracted to other people who identify as men.
- Bisexual: attracted to both men and women.
- Pansexual: attracted to any person, regardless of gender identity.
- Asexual: does not experience sexual attraction. May experience romantic attraction.
- Heterosexual: attracted to the opposite gender.
- Queer: describes full range of LGBTIQ+ identities. Once a derogatory term, has now been reclaimed.

Social attitudes/issues

- Homophobia/biphobia: negative beliefs, prejudices and stereotypes about people who are not heterosexual.
- Transphobia: negative beliefs, prejudices and stereotypes about people who are transgender and gender diverse.
- Heterosexism: privileging heterosexuality and cisgendered identity over other identities.
- Heteronormativity: belief that heterosexual relationships are the only normal relationships.
- Homonormativity: privileging certain people within the queer community (usually cisgendered, white, gay men) over other identities.
- Cisnormativity: assuming that everyone is cisgendered and that all people will continue to identify with the gender they were assigned at birth.
- Misgendering: describing a person using language that does not match their gender identity. This can be harmful to trans people. It is best to ask what words the person would like to use.

Victorian pride centre. (Website 2023).

Assists LGBTIQ+ clients across Victoria with legal issues including discrimination, unfair dismissal, change of name/gender, Centrelink and NDIS appeals, criminal law, family violence and evictions.

Inner City Legal Centre (Kings Cross, NSW), *Safe Relationships Project – Domestic Violence Court Assistance*.

The aim of the Safe Relationships Project (SRP) is to provide men and women who are experiencing domestic violence in same sex relationships with support, advocacy, referral and information.

The Safe Relationships Project can assist clients in accessing legal representation and to apply for Apprehended Domestic Violence Orders (ADVO) or Apprehended Personal Violence Orders (APVO) to help put an end to the violence they are experiencing.

This is available to ensure that a person's right to safety is protected through the legal process no matter what their sexual orientation is.

- **Queer without Fear - domestic and family violence in lesbian, gay, bisexual and transgender (LGBT) relationships.**

International

New Zealand

Hohou Te Rongo Kahukura - Outing Violence, 'Power and control wheel for rainbow relationships' (2017)

The power and control wheel for rainbow relationships, adapted from the Duluth model, describes the kinds of violence which 'rainbow' community members experience inside Rainbow relationships. A Rainbow relationship is defined as any relationship where at least one person identifies under the sex, sexuality and general diversity umbrellas. Power and control is at the core of the wheel, and is surrounded by various different behaviours utilised by abusive partners to maintain power and control. This includes use of: children; intimidation, coercion and threats; economic abuse; isolation; internalised homophobia, biphobia or transphobia; denying, minimising and blaming; emotional abuse; and white, cis and other privilege.

People with poor literacy skills

New migrants and refugees may experience language and literacy barriers when they are unable to access information in the manner and form they need to feel informed and confident to seek help or legal redress for domestic and family violence. Also, research demonstrates that literacy levels among adult Aboriginal and Torres Strait Islander people are significantly lower than those for other Australians [Eady et al 2010]. People with a low level of education, poor literacy in their first language, or cognitive disability may also experience these barriers. A victim in these circumstances may delay taking any action and may, over time, become more vulnerable to further violence.

There is a range of challenges service providers face in ensuring that clients with poor literacy and language skills are, and feel, properly supported in their engagement with police and court processes, and in securing their housing, financial and other needs. Some of these challenges may include:

- Accessing and engaging interpreters who are trained in the client's particular language or dialect, independent of the parties involved, gender appropriate, and sensitive to the complex issues related to domestic and family abuse [WLS NSW 2007]
- Translating legal and specialised terms into a language where those terms have no equivalent usage
- Providing critical information in oral, visual and pictorial formats where the client's literacy is not sufficient to comprehend a written translation [Allimant & Ostapiej-Piatkowski 2011]
- Cautioning against the use of the client's children, friends or partners as interpreters
- Ensuring the client's confidentiality and privacy
- Offering interpreting and translation services that are affordable and able to deliver on time according to court schedules
- Providing additional resources to assist clients with practicalities requiring literacy and language skills, for example understanding and completing court and government agency forms, directives and orders.

People with poor literacy skills - Key Literature

Australia

Allimant, Annabelle, and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD Backgrounds Who are Victim/Survivors of Sexual Violence: Challenges and Opportunities for Practitioners' (Australian Centre for the Study of Sexual Assault Wrap No 9, Australian Institute of Family Studies, 2011).

This review of the literature is primarily aimed at support workers who work with people from culturally and linguistically diverse (CALD) backgrounds. Importantly the review notes that service providers should be aware that: 'In relation to written information, it is recommended that services are mindful that: literacy levels of many women from CALD backgrounds are limited in both English and their own language' (p12).

Australian Bureau of Statistics (ABS), (2013) *Programme for the International Assessment of Adult Competencies, Australia: Statistics about the competencies of Australians in the domains of literacy, numeracy and problem solving skills in technology-rich environments*.

"For literacy and numeracy, proficiency scores have been grouped into six skill levels with Below Level 1 being the lowest level and Level 5 the highest……

Around 3.7% (620,000) of Australians aged 15 to 74 years had literacy skills at Below Level 1, a further 10% (1.7 million) at Level 1, 30% (5.0 million) at Level 2, 38% (6.3 million) at Level 3, 14% (2.4 million) at Level 4, and 1.2% (200,000) at Level 5."

In the ABS article titled "Young women lag behind young men on numeracy skills, but perform well on literacy" released 9/10/2013 referring to the data collected in this survey ABS Director Myles Burleigh observed: "The higher the level, the better your skills, so Level 2 represents higher skill levels than Level 1, and so on. Level 3 or above for literacy and numeracy represents relatively advanced skills."

Dimopoulos, Maria, 'Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities' (Issues Paper 20, Australian Domestic & Family Violence Clearinghouse, 2010).

This comprehensive literature review examines CALD communities in Australia and occurrences of Domestic and Family Violence within CALD communities. The paper emphasises the lack of fluency and literacy in English as barriers to accessing justice for recent migrants and notes limited awareness of family and domestic violence laws. The researcher also identifies lack of literacy, including in the immigrant's mother tongue (p6); and notes that where there are low levels of literacy, translation of written legal information is not enough (p7). The author also notes that oral traditions in some communities may guide how communication takes place (p7).

Eady, Michelle, Anthony Herrington, and Caroline Jones, 'Literacy Practitioners' Perspectives on Adult Learning Needs and Technology Approaches in Indigenous Communities' (2010) 50 (2) ***Australian Journal of Adult Learning*** **260-286.**

Current reports of literacy rates in Australia indicate an ongoing gap in literacy skills between Indigenous and non-Indigenous Australian adults, at a time when the literacy demands of work and life are increasing. There are many perspectives on what are the literacy needs of Indigenous adults, from the perspectives of community members themselves to the relatively under researched perspective of literacy practitioners. This paper provides the insights, experiences and recommendations from adult literacy practitioners who work with adult Indigenous learners in communities across Australia.

The results of recent rounds of the Program for International Student Assessment (PISA) point out the continuing over-representation of Indigenous 15 year olds among Australian 15 year olds with the lowest literacy levels. The PISA data also point to the importance of taking into account socioeconomic status and home location in understanding educational attainment among young Indigenous adults in Australia. As noted by Masters (2007) in his analysis of the 2006 PISA results, "approximately 40 per cent of Indigenous students, 26 per cent of students living in remote parts of Australia and 23 per cent of students from the lowest socioeconomic quartile are considered by the OECD to be 'at risk'."

The gap between Indigenous and non-Indigenous adults in Australia, in educational attainment and in literacy, is lived out within contexts that lack appropriate employment and training opportunities for many Indigenous people.

Women's Legal Services NSW, *A Long Way to Equal, An Update of Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women* (July 2007).

The report considers barriers faced by migrant and refugee women in accessing legal services. The report draws on information collected in focus groups: 5 focus groups involving 60 migrant and refugee women; and consultations with 9 community legal service representatives and 12 migrant service providers. The research showed serious and systemic issues with regard to access to interpreters, especially female interpreters and especially for emerging communities. The report identified that the low levels of literacy among migrant and refugee women in their first language features consistently as a barrier to accessing information about the Australian legal system and where to gain legal assistance (p32). This means that even where there is written material available in the person's language the person still may be unable to read it.

People with poor literacy skills - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 1 notes that 15% of the NSW population whose first language is English have very poor literacy skills. Section 5 notes that approx 17-18% of Australians aged 15-74 have very poor English prose and document literacy skills, and for those with English as a second language it is 34%.The section also notes that although not generally counted as a disability by people with disabilities, poor literacy skills are dealt with in Section 5 as they can often be managed using some of the communication skills techniques listed in 5.4.3. Section 10.1 notes that some of the difficulties that may be faced by self-represented parties include their inability to fully understand legal language and the complexities of relevant legislation and case law.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

Chapter 12 on Self-represented Litigants notes that: ‘Access to electronic information still depends on an SRL’s knowledge of the existence of these sources and capacity to utilise them effectively. Some SRLs who are vulnerable or disadvantaged may lack the resources, knowledge or skills necessary both to locate and use a computer to obtain such information, or systems may not be set up to enable them to do so. These people may include older persons, people with low levels of formal education and literacy, people living in some institutions (including prisons) and people with sensory disabilities’ (p.137).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

5.6.4 notes that language and literacy issues, a lack of knowledge of Australian law and available services, and poor interpreting services are among a range of barriers inhibiting the ability of people from CALD backgrounds to access the family violence system.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Notes at [8.3.4] “The adversarial system is particularly difficult for people for whom English is a second language, who do not speak English or who have poor or minimal literacy skills. This can be exacerbated if litigants are also unrepresented.”

People with poor literacy skills - Other Resources

Communication barriers and family violence: Fact sheet (ANROWS 2016)

This fact sheet summarises the ASPIRE Project findings about the impact of communication barriers on women's experiences of family violence.

[Former] Federal Circuit Court of Australia, Reconciliation Action Plan 2019 – 2021.

"This RAP provides a platform to introduce practical measures to promote reconciliation, and addresses some of the barriers faced by Aboriginal and Torres Strait Islander peoples in interacting with the Court. It also prioritises establishing relationships with Aboriginal and Torres Strait Islander communities and community leaders, agencies servicing Aboriginal and Torres Strait Islander peoples, legal services and other stakeholders, in order to assist Aboriginal and Torres Strait Islander peoples to access the Court."

Interpreters and family violence: Fact Sheet (ANROWS 2016)

This fact sheet summarises the ASPIRE Project findings about the impact of interpreting issues on women's experiences of family violence.

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2015).

See the Executive Summary (p6-9) which makes a number of recommendations.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and

- Unethical and poor professional conduct by interpreters.

Law Society Northern Territory, *Indigenous Protocols for Lawyers* (second edition, 2015).

This handbook is written for lawyers and identifies and discusses six protocols to assist lawyers in communicating with their clients. See p5 which sets out the six protocols. The remaining part of the document discusses these protocols in depth.

Protocol 1:	Assess whether an interpreter is needed before proceeding to take instructions.
Protocol 2:	Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.
Protocol 3:	Explain your role to the client.
Protocol 4:	Explain the relevant legal or court process to the client prior to taking instructions.
Protocol 5:	Use 'plain English' to the greatest extent possible.
Protocol 6:	Assess whether your client has a hearing or other impairment that may affect their ability to understand

National Accreditation Authority for Translators and Interpreters, 'Certification Tests'.

Summarises the various levels of NAATI accreditation, including what the accreditation enables interpreters and translators to do.

Department of Immigration and Border Protection, 'Working with TIS National Interpreters'.

This webpage has some general tips on how to make interpreting as effective as possible (including who to address, what language to use).

Australian Institute of Interpreters and Translators (AUSIT) Code of Ethics (November 2012).

Sets the standards for ethical conduct of interpreters and translators in Australia and New Zealand.

People with poor literacy skills - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Sara

Victims as (alleged) perpetrators

Adult victims of domestic and family violence (primary victims) may be accused of perpetrating domestic and family violence or (other) criminal or unlawful acts, and misidentified by the criminal justice system as the primary aggressor. Primary victims of domestic and family violence may: [Transforming legal understandings of intimate partner violence: Final report]

(This is not an exhaustive list)

- offend because their abusive partner has demanded that they do so;
- offend in response to a dangerous situation (for example sudden and unexpected homelessness) that has arisen as a result of violence perpetrated against them;
- use physical violence to resist violence and/or defend themselves and/or their children;
- use retaliatory aggression after experiencing a build-up of abusive behaviours;
- assist or encourage their violent partner or family member to offend because it may be unsafe for them to do otherwise;
- claim Work and Income support that they are not entitled to because they are coerced to do so, or in order to pay for rent and food when their abusive partner refuses to financially support them and their children and/or undermines their own capacity to provide that support; [Domestic violence, social security and the couple rule]
- commit neonaticide, kill or harm their children whilst in a state of extreme trauma or dissociation as a result of their experience as a victim of domestic and family violence;
- know that their partner is also abusing their children but be unable to stop them from doing so;
- be impeded in their ability to parent because they are suffering from trauma or other mental health issues as a result of their partner's violence;
- offend in order to spend time in prison as a break from the violence;
- be named as the respondent or cross-applicant in protection order proceedings; [Gender and Intimate Partner Violence: A Case Study from NSW]
- behave in a manner perceived as obstructive by family courts and/or breach family court orders in an attempt to keep their children safe from a violent former partner;

- appear agitated or uncooperative with first responders based on prior negative experiences, whereas perpetrators may present as calmer, more cooperative and more convincing, often in a deliberate attempt to persuade others that they are not abusive.
- breach sentence conditions for offending (for example, shoplifting) because of their circumstances and experience as a victim of domestic and family violence, sometimes with the consequence that these are escalated to higher-tariff sentences;
- be spuriously reported for child abuse or domestic abuse because of systems abuse.

In understanding a primary victim's presentation, behaviour and constraints, it may be appropriate for the decision-maker to consider:

- the abuser's pattern of coercive and controlling behaviour, the true nature of which may appear benign to others;
- the realistic safety options available to the primary victim; and
- the broader structural inequalities that limit available options for the primary victim.

This combination of factors is sometimes referred to as 'social entrapment'. [Transforming legal understandings of intimate partner violence: Final report]

The impact of trauma on victims of abuse may also influence presentation and behaviour of a primary victim. [FCA 2013]

In some cases it may be useful and appropriate to hear expert evidence about these factors.

Some primary victims may not be able to safety separate from an abusive partner given the level of risk and/or resources available to them.

Some concepts like "Battered Woman Syndrome" do not take into account the safety options available to the primary victim or the structural inequalities faced.

Decision-makers may perceive primary perpetrators of domestic and family violence as victims when only the immediate circumstances of alleged domestic and family violence or (other) offending are considered.

Victims as (alleged) perpetrators - Key Literature

Australia

Bartels, Lorana, Violent offending by and against Indigenous women. (2012) 8(1) *Indigenous Law Bulletin* 19-22.

The author examines the relationship between violent offending by Indigenous women and their victimisation, observing that most Indigenous women who violently offend are themselves victims of violence. Indigenous women violent offenders are also overrepresented in prison populations to a greater extent compared with the general female prisoner population and also to a greater extent than the Indigenous male violent offender prisoner population is compared with the general male prisoner population. Greater study of the relationship between Indigenous women's victimisation and violent offending is recommended.

Boxall, Hayley, Christopher Dowling and Anthony Morgan, *Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory violence.* Trends and Issues No. 584, January 2020, Australian Institute of Criminology.

This article examined the prevalence of self-defensive and retaliatory violence in incidents where women were identified as persons of interest (POIs) in investigated domestic violence reports. As compared to male POIs female POIs were more likely to be historically recorded victims of violence by a domestic partner. Half of reported female domestic violence episodes involved violent resistance. 20% of episodes were directly preceded by a tipping point involving abusive actions or intimidation by their male partner. 33% had previously been the victim of their current male partner based on police data. Indigenous women were more likely to have engaged in violent resistance than non-Indigenous women and also more likely than non-Indigenous women to still be in a relationship with the reported victim, while those continuing relationships were often unstable.

Domestic and Family Violence Death Review and Advisory Board, 2019–20 Annual Report (2020) Queensland Government, Brisbane.

Extract: Domestic and family violence death review processes are a key component of a robust service

system response to domestic and family violence. They function for the purposes of learning from such tragedies and aim to improve systems, services and practices in the hopes of preventing future deaths from occurring. Accordingly, the Board is established under section 91A of the Coroners Act 2003 to:

- identify preventative measures to reduce the likelihood of domestic and family violence deaths in Queensland;
- increase recognition of the impact of, and circumstances surrounding, domestic and family violence and gain a greater understanding of the context in which these types of deaths occur; and
- make recommendations to the Attorney-General for implementation by government and non-government entities to prevent or reduce the likelihood of domestic and family violence deaths.

During the 2019-20 reporting period, the Board completed in-depth systemic reviews into five cases involving seven deaths. Based on its discussion of these cases, the Board released two systemic reports of the intimate partner homicides of ‘Jack’ and ‘George’.

In both cases the female victim of domestic and family violence killed her male intimate partner in the context of domestic and family violence perpetrated primarily by the deceased. The Board decided to release its findings in these cases due to the compelling themes identified upon its review. Both cases highlight the impact of cumulative trauma and victimisation experienced by women that can persist throughout their life course and the issues experienced by women who may not present as the ‘ideal victim’, a concept that is explored further in Chapter 3.

In addition, the Board identified a need for services to improve their understanding of the patterns of behaviour used by perpetrators of domestic and family violence to avoid detection and accountability for their violence. These findings are not new and have been consistently been made by the Board in prior Annual Reports. In this year of operation, the Board sought to extend and reflect upon its prior findings and recommendations as it remains clear that more needs to be done.

Douglas, Heather and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-Applications For Domestic Violence Protection Orders’ (2013) 36(1) *University of New South Wales Law Journal* 56.

This article reviews cross-applications and orders in Queensland’s courts (2008-2010). It identifies concerns around the misuse of DVPOs for vindictive, strategic or tactical reasons (pp58; 60-62). Tactics include cross-orders being used to pressure the other party to mutually withdraw their application (p86).

Douglas, Heather and Robin Fitzgerald, The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Strait Islander people. (2018) 7 (3) *International Journal for Crime, Justice And Social Democracy* 41-57.

The authors examine Queensland court administrative records in relation to domestic violence protection orders. Their analysis concludes that a disproportionate number of ATSI people are named on DVOs (as both aggrieved and respondent) and subsequently charged with contravention of a DVO, compared to non-Indigenous people. ATSI women are overrepresented in these charges compared to non-Indigenous women and 69 per cent of women who were sentenced to serve a period of imprisonment for a contravention of a DVO in the 2013-2014 year were ATSI women (while only 3.3 per cent of the Qld population were ATSI women).

They argue that the political commitment to strong responses to DFV has resulted in increased sentences for breaches of a DVO which disproportionately impacts ATSI women. Studies have shown ATSI women may be more likely than other victims of DFV to use physical violence and fight back in response to DFV. This makes it more likely police will make applications for DVOs against ATSI women and in turn more likely they will be charged with contravention of a DVO. They reference literature that finds a formulaic police response fails to consider circumstances of coercive control and other factors that influence patterns of violence and victimisation and this may contribute to high incarceration rates for ATSI women. The higher rate of applications and cross-applications for DVOs by police where ATSI people are the respondents also contribute.

Douglas, H., McGlade, H., Tarrant, S., & Tolmie, J. (2020). Facts seen and unseen: improving justice responses by using a social entrapment lens for cases involving abused women (as offenders or victims). *Current Issues in Criminal Justice*.

Abstract: This article explores two recent cases. The first, where a woman from a culturally and linguistically diverse background (Rinnabel Blackmore) was killed by her abusive partner and the second, where an Aboriginal woman (Jody Gore) killed her abusive partner. In both cases, we consider the implications of using a social entrapment lens, which focuses on coercive control, the limits of the family violence safety response

and the role of structural intersectionality to understand the form of violence the woman faced before being killed by her abuser or killing her abuser. We show how a social entrapment framework can reveal relevant facts and improve understanding of the dynamics of violence and might have led to different actions and decisions by the agencies and individuals responding to the violence in these cases.

Douglas, H., Tarrant, S. and Tolmie, J. (2021) Social entrapment evidence: understanding its role in self-defence cases involving intimate partner violence. *UNSW Law Journal* Vol 44 (1).

This article considers what evidence juries need to help them apply the defence of self-defence where a woman claims she has killed an abusive partner to save her own life. Drawing on recent research and cases we argue that expert evidence admitted in these types of cases generally fails to provide evidence about the nature of abuse, the limitations in the systemic safety responses and the structural inequality that abused women routinely face. Evidence of the reality of the woman's safety options, including access to, and the realistic support offered by, services such as police, housing, childcare, safety planning and financial support should be presented. In essence, juries need evidence about what has been called social entrapment so they can understand how women's safety options are deeply intertwined with their degree of danger and therefore with the question of whether their response (of killing their abuser) was necessary based on reasonable grounds. We consider the types of evidence that may be important in helping juries understand the concept and particular circumstances of social entrapment, including the role of experts in this context.

Jillard, Alicia and Julia Mansour, Women victims of violence defending intervention orders. (2014) 39(4) *Alternative Law Journal* 235-240.

This article summarises the findings of the Women's Legal Service (WLS) "Women Defendants Report" which examined the increase in WLS clients defending NSW ADVO proceedings and criminal charges of domestic violence offences instructing that they are the victims of violence in their relationship and that the person seeking protection is the perpetrator. The report analysed all relevant 2010 WLS client cases. It found that 2/3 of women clients defending ADVOs instructed that they were the primary victim of violence in their relationship with the person seeking protection and a significant number said they were the primary victim of the incident that prompted the ADVO application. 1/5 had an existing final ADVO against the person seeking protection and the clear majority of ADVO applications against women were made by police. Many reported

they felt police perceived them as lacking credibility due to their state of stress and anxiety when police were called. A number believed the person seeking protection initiated proceedings as a form of legal abuse or means to control their future behaviour with threats of reports to police. Nearly all final orders against women were either made by consent or following an uncontested hearing and women reported a reluctance to face the other party in court.

The article also considers the potential consequences of other proposed amendments to streamline the grant of provisional ADVOs and information sharing consequences for vulnerable women where incorrect information is relied upon.

Meyer, S, Reeves, E, Fitz-Gibbon, K. The intergenerational transmission of family violence: Mothers' perceptions of children's experiences and use of violence in the home. *Child & Family Social Work*. 2021; 1– 9.

Abstract: Intimate partner violence (IPV) on average affects one in four women, with the majority of victim survivors identifying as mothers in national survey data. Children experiencing parental IPV are now equally understood as victims. Extensive research documents the short- and long-term impacts of children's experiences of IPV on their safety and wellbeing. More recently, research has started to examine adolescent children's use of violence in the home as adolescent family violence (AFV). Contributing to this emerging body of research, we draw on narrative interview data from mothers who participated in a larger study on IPV, help-seeking and the perceived impact on children to better understand how mothers make sense of children's use of violence in the home. Mothers identified an emergence of AFV in male children with childhood experiences of adult IPV. Although mothers' experiences of adult and adolescent violence highlight their dual victimisation, mothers frame their abusive children as victims rather than perpetrators. Implications for future research, policy and trauma-informed practice are discussed.

Nancarrow, Heather (2019) *Unintended Consequences of domestic violence law: Gendered consequences and racialised realities.* Palgrave, Cham.

See especially chapter 7 which focusses on the gendered and racialised power in the law. It seeks to explain how and why laws designed to stop men’s violence against women resulted in increased criminalisation of

women, particularly Indigenous women. It posits three parts to the explanation: 1. Formal equality in the law embeds gender and racialised power relationships. 2. The formulaic implementation of the law reinforces these relationships to the detriment of women – in particular Indigenous women. 3. Feminist advocates had not envisioned (or had ignored) a complex set of meanings and motivations for violence in couple relations. (pp 187-207).

Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the "person most in need of protection" in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

Abstract: This in-house project was conducted by ANROWS. It aimed to support the effective identification of the "person most in need of protection" in cases where there is some ambiguity about who perpetrated domestic violence and abuse.

The research responded to a recommendation of the Queensland Domestic Violence Death Review and Advisory Board in its 2016-17 Annual Report. The Advisory Board reported that in just under half (44.4%) of all cases of female deaths subject to the review, the woman had been identified as a respondent to a domestic and family violence (DFV) protection order on at least one occasion. Further, in nearly all of the DFV-related deaths of Aboriginal people, the deceased had been recorded as both respondent and aggrieved prior to their death (p. 82). The Board's report recommended research to identify how best to respond to the person most in need of protection where there are mutual allegations of violence and abuse (Recommendation 16).

Responding to that recommendation, the research used a mixed methods approach. This included a national analysis of statistical data (domestic violence order applications, police-issued orders and related criminal charges) and a national desktop review of existing legislative and police requirements and guidance on identifying the DFV victim or perpetrator. The project also involved an in-depth case study of Queensland as a state that has already incorporated the concept of the person most in need of protection into legislation.

The final report emphasises the need for improved guidance for police on identifying patterns of coercive control, and guidance for magistrates on how and when they can dismiss inappropriate applications and/or orders. It recommends clarifying processes of decision-making and accountability between police and the courts as a way of addressing the current ambiguity surrounding responsibility for the determination of the

person most in need of protection.

No to Violence (NTV). (2019) *Discussion paper: Predominant aggressor identification and victim misidentification*, (Melbourne, No to Violence).

This paper provides a discussion of misidentification of victims of intimate partner violence as perpetrators. It defines misidentification 'as falsely assessing victims of IPV as perpetrators by members of the justice system' (p6). The discussion identifies a number of factors that contribute to misidentification including police perspectives (p11), assumptions about the perfect victims (p12), and stereotypes about perpetrators (p13).

Reeves, E. 'I'm Not at All Protected and I Think Other Women Should Know That, That They're Not Protected Either': Victim–Survivors' Experiences of 'Misidentification' in Victoria's Family Violence System. (2021) 10 (4) International Journal for Crime, Justice and Social Democracy 39-51.

This article explores the impacts of misidentification on the lives of women victim–survivors of family violence in Victoria (Australia. Using data from interviews with 32 system stakeholders and survey responses from 11 women who have experienced misidentification in Victoria, this study explores misidentification within the family violence intervention order system. It demonstrates that being misidentified as a predominant aggressor on a family violence intervention order can have a significant impact on women's lives and their access to safety, highlighting the need for improved policing and court responses to the issue beyond existing reforms.

Reeves, Ellen, Family violence, protection orders and systems abuse: views of legal practitioners. (2019) 32 *Current Issues in Criminal Justice* 91-110.

This article drew on interviews with lawyers who represent women defendants to family violence intervention orders (FVIO) applications to examine the use of FVIOs by perpetrators of domestic violence to "play the system" and use them as a tool to further their abuse of their partners. The author spoke to 8 female lawyers who represent women respondents to FVIO applications and reports their observations drawn from their experience. The article concludes that greater awareness of systems abuse by all stakeholders may reduce the inconsistency of legal responses to victim misidentification.

Observations included that victim distress could be used by perpetrators to support their claims, and that victims presenting as angry and victims who have mental health or substance misuse issues can have their credibility questioned by police. CALD women were seen as particularly vulnerable to having their agency and narrative taken by the perpetrator as their partners often had better English language skills which could be used to frame the woman as perpetrator, and may even be called upon to translate for police. One lawyer noted that where court personnel and police had received domestic violence training they observed fewer incidences of misidentification that where inadequate training had been provided. A number felt prosecutors were inadequately empowered to change their decisions to support FVIO applications were systems abuse was identified or suspected.

Where 2/3 of FVIO applications are made by police factors leading to perpetrator misidentification include poor police understanding of domestic violence, erroneous beliefs that women provoke their partner, are able to leave at any time, a single incident of violence is a one-off, not indicative of a systematic pattern of control and abuse and a failure to identify emotional abuse, vexatious applications and non-physical family violence. Time constraints and lack of legal aid meant it was difficult to encourage women to contest applications for FVIOs and it was observed that the grant of interim FVIOs could often negatively impact family law outcomes for women, especially where respondents were rendered homeless quickly establishing the "status quo" for contact with and residence of children.

Sheehy, Elizabeth, Julie Stubbs and Julia Tolmie, 'Securing just outcomes for battered women charged with homicide: Analysing defence lawyering in R v Falls' (2014) 38(2) *Melbourne University Law Review*666

This article documents strategies that may support successful defences of abused women seeking to rely on a defence of self-defence with specific reference to R v Falls, in which a battered woman charged with murder in 'non-confrontational circumstances' was acquitted on the basis of self-defence.

Sleep, Lyndal (2019) *Domestic violence, social security and the couple rule* ANROWS

This project considered the use of the couple rule by Centrelink to determine the eligibility of applicants to

social security payments tying abused women's access to social security payments to the income and assets of their perpetrator. It uses reports of domestic violence as evidence of a committed relationship.

This project detailed the dynamic between domestic violence, social security payment, and the couple rule. It examined the pre-existing data set of Administrative Appeal Tribunal decisions of couple rule matters and compared this to decisions made in New Zealand (where domestic violence is interpreted as evidence of no relationship).

Tarrant, S., et al Women who kill abusive partners: Understandings of intimate partner violence in the context of self-defence. Key findings and future directions (ANROWS 2019)

A summary of the research contained in Tarrant, Stella, Julia Tolmie and George Giudice, *Transforming legal understandings of intimate partner violence: Final report* (ANROWS, 2019).

Tarrant, Stella, Julia Tolmie and George Giudice, *Transforming legal understandings of intimate partner violence: Final report* (ANROWS, 2019).

The report examines homicide trials in which self-defence is raised by women who have killed an abusive intimate partner. It explores how legal professionals and experts understand intimate partner violence (IPV). These understandings influence which facts are selected and presented as relevant to understanding a case, the language used to frame those facts, and the conclusions drawn from them. The report outlines and applies a "social entrapment framework" analysis. A social entrapment framework recognises, in line with current research, that the victim's ability to resist abuse is constrained by the abuser's behaviour, her available safety options, and broader structural inequities in her life. Using a social entrapment framework requires analysis at three levels:

- documenting the full suite of coercive and controlling behaviours employed by the abuser, including the strategic and responsive dimensions of this behaviour (and the isolation and fear that this creates for the victim);
- examining the responses of family, community and agencies to the abuse; and
- examining the manner in which any structural inequities experienced by the victim supported the abuser's use of violence (including thwarting her attempts to resist the abuse).

Voce, Isabella and Samantha Bricknall (2020). Female perpetrated intimate partner homicide: Indigenous and non-Indigenous offenders. Statistical Report No. 20. Australian Institute of Criminology

The report is a statistical analysis of female perpetrated intimate partner homicide (IPH) in Australia aiming to identify the personal, contextual and situational factors that contribute to IPH offending and whether these factors differ between indigenous and non-indigenous IPH offenders. It finds that most female IPH perpetrators are in established relationships with their victim, half characterised by a history of domestic violence. 67% of Indigenous female IPH perpetrators are in abusive relationships and 61% of perpetrators' partners had violent criminal histories. The authors suggest that future studies consider offender access to and engagement with formal support services and whether this decreases the likelihood of violence towards intimate partners.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 *University of New South Wales Law Journal* 945.

This article reviews cross-applications and orders in NSW courts (2002-2003). The article argues that the use of cross-applications is a form of harassment or a bargaining tool (from p967). The article draws on interviews with women and professionals who suggest cross-applications are 'a possible extension of the violence and abuse itself' and identify that 'the use of the law against victims of domestic violence is rarely depicted as part of their continuing experience of violence, yet it is seen that way by victims and clearly evidences a type of act that is directed at exerting control (or reasserting control)' (p968).

Wangmann, J, Laing, L & Stubbs, J 2020, 'Exploring Gender Differences in Domestic Violence Reported to the NSW Police Force', *Current Issues in Criminal Justice*, vol. 32, no. 3, pp. 255–276.

Abstract: Whether men and women are equally violent in their intimate relationships has animated considerable debate in the scholarly literature, and increasingly, in policy and law reform processes. This

debate about the gendered nature of domestic violence (DV) has re-intensified over the past decade with police data from various countries documenting an increase in women identified as DV offenders. While there has been considerable research exploring the increase in women DV offenders overseas (particularly in the USA) there has been little research in Australia. This article seeks to fill some of these gaps. It reports on a NSW study which explored differences between women and men identified as 'persons of interest' in an incident reported to police in 2010, and then over time (2006–2012) to see whether that person was the predominant victim or offender. This article focuses on cases in which the police intended to take legal action arising from the 2010 incident; this is important, as one would anticipate greater similarity between men's and women's use of violence in cases warranting the attention of the law. The article highlights the limitations of an incident focus when examining a patterned form of behaviour such as DV.

'Findings from this study indicate the importance of contextual factors in understanding the identification of women as POIs in DV cases. Whilst the woman may have used violence in the presenting incident (and violence requiring the attention of the law), this is less likely (compared to male offenders) to be her dominant position within the relationship when examined over time' at 273.

International

Ali, Parveen and Julie McGarry (2016) 'Classifications of Domestic Violence and Abuse', in Parveen Ali and Julie McGarry, eds. *Domestic Violence in Health Contexts: A Guide for Healthcare Professions* Springer, 35-49

This guide identifies three types of women perpetrators: (1) women who use violence in self-defence; (2) women who abuse and exert power and control in a mutually abusive relationship; and (3) women who are the primary perpetrator of the violence.

Swan and Snow's Typology

Research involved 108 DVA perpetrator women and "explored women's experience of victimisation and perpetration of DVA" (43). The study identified three subtypes of women: victims (women were violent, but their partners were much more abusive); abused aggressors (women were more abusive than their partners); and mixed relationships (women were either more physically abusive than their partners but their partners were more coercive, or, women were less physically abusive but more coercive). 43% of women fell within the victims category; 12% in abused aggressors; and 50% in mixed relationships.

Miller and Meloy's Typology

Research involved 108 DVA perpetrator women and "explored women's experience of victimisation and perpetration of DVA" (43). The study identified three subtypes of women: victims (women were violent, but their partners were much more abusive); abused aggressors (women were more abusive than their partners); and mixed relationships (women were either more physically abusive than their partners but their partners were more coercive, or, women were less physically abusive but more coercive). 43% of women fell within the victims category; 12% in abused aggressors; and 50% in mixed relationships.

Miller and Meloy's Typology

Study of 95 female offenders attending treatment programs. The study identified three types of violence: generalised violent behaviour; frustration response; and defensive behaviour. 30% of women fell within the frustration response category, meaning their abusive behaviour was in response to abuse by their partner. The study noted that while the women used force in an attempted to stop the abuse, their violence did not "change their partner's abusive behaviour or the power dynamics in their relationship" (44). 65% of women fell within the self-defence category.

Bachman, Ronet and Dianne Carmody, Fighting fire with fire: The effects of victim resistance in intimate versus stranger perpetrated assaults against females. (1994) *9 Journal of Family Violence* 317-331.

This article explores the extent to which victim resistance, either physical or verbal/passive, during an assault differentially produced injury between intimate and stranger perpetrated assaults. It relied on the responses of 647 women who reported intimate partner violence and 257 women who reported being assaulted by a stranger to the National Crime Victimisation Survey (US) between 1987-1990.

Review of Existing Literature

The study was particularly influenced by 1980s research suggesting that the more likely husbands perceived it was that their wife would hit them back, the more likely they were to abuse.

Results:

78% of victims of IPV reported using some form of self-protection. Only 52% of these women believed their efforts helped, while 19% believed self-protection made the situation worse. The results in Table II revealed that an IPV victim's use of self-protection actually increased the probability of injury: "[T]he odds of sustaining injury from intimate assaults increased by a factor of 1.7 if the victim used any physical self-protection measure. Further, the odds of the victim sustaining injury almost doubled (a factor of 1.978) if she responded to her assaulter verbally (e.g, pleading or arguing)." (327). The study noted that while the probability of a victim of IPV sustaining an injury increases if she tries to self-protect, the extent to which female victims of intimate assaults needed medical care did not. The researchers provided that this may be because the women "fear retaliation from their abuser for seeking public assistance with their injuries or they may suffer embarrassment and shame as the result of their victimisation." (329).

Barlow, Charlotte and Siobhan Weare, 'Women as Co-Offenders: Pathways into Crime and Offending Motivations' (2019) 58(1) *The Howard Journal of Crime and Justice* 86-103.

This article examines a qualitative study in the UK which aimed to investigate co-offending women's pathways into, and motivations for engaging in, criminal behaviour. It considers not only the impact of co-offending relationships on women's criminality, but also factors which intersect with these relationships in their lives. Interviews with eight women who accessed a women's advice and support centre were conducted. Findings showed that while co-offending relationships were a central pathway into offending, this often intersected with other circumstances in the women's lives, including drug addiction, socio-economic circumstances, and 'significant life events'. Moreover, women who co-offended with female friends were more likely to acknowledge their agency than those who co-offended with intimate male partners. Findings also demonstrated the significance of understanding the complex nature of the lives co-offending women, and the decision-making process.

Coker, Donna and Ahjane Macquoid 'Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement' (2015) *5 University of Miami Race and Social Justice Law Review* 585.

The authors argue that the hyper-incarceration observed in the United States has increased the risk of domestic violence in vulnerable populations. They observe that incarceration rates of women have increased

80% since the late 1970s and that poor women of colour are particularly vulnerable to incarceration. A significant number of those women are in prison as a result of attempts to escape, survive or ameliorate their violent victimisation, particularly at the hands of their abusive domestic partners. They identify that the limitations of the defence of duress, limits to reduction in sentences on the basis of coercion and the broad application of conspiracy law have all contributed to long sentences for women who are coerced to offend by abusive partners or who play minor roles in drug crimes largely perpetrated by their abusive partner. Patterns of racist imagery in public and political discourse have contributed to withdrawal of investment in vulnerable communities, diminishment of the welfare state and to increases in incarceration rates, all leading to increasing disadvantage to poor women of colour.

Durfee, Alesha and Leigh Goodmark, Is there a protection order to prison pipeline? Gendered dimensions of cross-petitions. (2019) *Journal of Aggression, Maltreatment & Trauma*, 1–20.

This article examines cross-filings for protection orders. It analyses 313 cross-filings (cross-applications) for protection orders, comparing them to 1,004 single-filings. It finds that cross-filings are a gendered phenomenon, with men more likely to be involved in cross-filings than women, and men less likely than women to report the types of abuse that qualifies for an order. Cross-filings may be an example of abusers leveraging the legal system to extend control over victim/survivors, rendering victim/survivors ineligible for resources and making them vulnerable to arrest and other forms of state control.

Fanslow, Janet, Pauline Gulliver, Robyn Dixon and Irene Ayallo Hitting back: Women's use of physical violence against violent male partners, in the context of a violent episode. (2015) 30(17) *Journal of Interpersonal Violence* 2963–2979.

This article explores women's use of physical violence in the context of experiencing intimate partner violence (IPV). Data were drawn from the New Zealand Violence Against Women Study, a cross-sectional household survey. Of the 843 women who had experienced physical violence perpetrated by an intimate partner, 64% reported fighting back at least once or twice whereas 36% never fought back. Analyses showed that women's use of violence more than once or twice was associated with experience of severe IPV, IPV that had "a lot of effect" on their mental health, and with children being present when the woman was being physically abused.

Women's use of physical violence only once or twice was associated with both partners having alcohol problems and both having been exposed to violence as a child. Of the women who fought back, 66% reported that this did not result in the violence stopping.

Goodmark, Leigh, When Is a Battered Woman Not a Battered Woman? When She Fights Back (2008) 20 *Yale Journal of Law and Feminism* 75-129

This article looks at the conflicting narratives of victims of domestic violence who ask the civil justice system for assistance. It first discusses the importance of narrative in the construction of identity, both in constituting one's self and in determining how that self is presented to the world. It then juxtaposes the prevailing narrative of the domestic violence victim-the passive, middle-class white woman-against the narratives of women who fight back. The Article argues that victims of violence are encouraged to tailor their stories as closely as possible to the prevailing narrative to persuade the legal system of their need for protection, and presents the consequences both for victims and for their advocates in constructing narratives that deny women the right to defend themselves.

Hester, Marianne Portrayal of Women as Intimate Partner Domestic Violence Perpetrators (2012) 18(9) *Violence Against Women* 1067–1082.

The study followed 128 cases of IPV over the course of six years with the aim of exploring the portrayal of women as perpetrators of IPV in police records. More specifically, the study looked at the extent to which women are characterised as what may be termed ‘batterers’, their identification as primary aggressors, and shifts in positioning from female victim to female perpetrator (1069). Of the 128 participants, 32 of the women were the sole perpetrators of IPV while in a further 32 cases women were ‘dual’ perpetrators. The data used in the study was collected from "a comprehensive computer-based system for recording and linking domestic violence incidents across police districts" (1071).

Results:

The research found that the behaviours exhibited by female perpetrators did not fit within the ‘batterer’ description normally attached to male perpetrators as females rarely acted with the intention to control their

partner. The research also found that "women were 3 times more likely than men to be arrested when they were identified as a primary aggressor in a particular incident, and the police appeared more ready to arrest women: (1075). Furthermore, women were arrested for a wider range of offences than male perpetrators, particularly as their use of weapons for self-defence was often overlooked or dismissed due to the focus of English police on individual incidents rather than viewing the woman's actions within a history of victimisation. There was some evidence, however, to suggest that police officers were beginning to move away from this 'individual incident' approach at the advice of the Association of Chief Police Officers and instead "taking a gender-sensitive approach to determining the primary aggressor" in situations with dual perpetrators (1076). This involved officers looking at any pattern of incidents over time. The researchers thus noted that an understanding of gender dynamics was essential to police being able to accurately identify the primary aggressor and enabled them to contextualise any retaliatory violence by a female victim and thus allowing officers to ensure the women's safety (1079-80).

The study also found that male victims were often able to use their 'gendered position of power' to ensure their own safety, diffusing the situation by escaping the vicinity of their violent partner and/or removing weapons or imposing restraints.

Larance, Lisa, Leigh Goodmark, Susan Miller and Shamita Dasgupta, Understanding and Addressing Women's Use of Force in Intimate Relationships: A Retrospective. (2019) 25(1) *Violence Against Women* 56–80.

The article explores the use of force in intimate relationships by women in marginalised communities, the law's response to this use of force, and the development of and best practices in gender-responsive programming to respond to women's use of force in their intimate heterosexual relationships.

Black Battered Women The study noted that black women were disproportionately affected by IPV. More specifically, "the Bureau of Justice Statistics found that Black women experience IPV at a rate 35% higher than that of White women and about 2.5 times the rate of women of other races". It was also noted that black women were less likely to report IPV due to fears of discrimination, distrust of police and negative stereotyping" with these fears considerably narrowing the help available to them (59).

South Asian Immigrant Battered Women Fear of racism, cultural restrictions and family pressures often prevent South Asian battered women from seeking help and disclosing details of their abuse. The women are

also hindered by the belief of South Asian communities "that no good can come of engaging with the police and the legal system in family matters" (61) and by fear that their abusive husband might withdraw their immigration sponsorship. When the women do manage to seek help, language barriers force police to turn to the abuser to gather information. This creates further issues as the abusers use the opportunity to their advantage by either omitting their violence entirely or exaggerating their partners.

Legal Response to Women's Use of Force In 1994, mandatory arrest laws were introduced in America to meet the demands of early anti-violence movements. While the laws deterred recidivism in some states, it either had no impact or contributed to violence against women in others. Female arrests rates rose significantly, particularly in marginalised communities as law enforcements focussed on "gender neutrality in policing IPV' and lacked "sensitivity to the cultural contexts and individual barriers that move many women to resist abuse with force" (63).

Programming for Women Who Use Force "The programs and their curricula share the goal of providing gender-responsive advocacy, support, and intervention while reducing and eradicating IPV" (69).

Larance et al., 'Understanding and Addressing Women's Use of Force in Intimate Relationships: A Retrospective' (2019) 25(1) *Violence Against Women* 56–80.

This article surveys the evolving US-based understanding of women's use of force in intimate heterosexual relationships and explores the common characteristics of women who use force. Most women who use force in intimate relationships have been victimised by their male partners; however the notion of a woman retaliating against her abusive partner is at odds with prevailing stereotypes applied to women subjected to abuse. Through an intersectional lens, the authors also consider the experiences of women in marginalised communities, for example, South Asian immigrant battered women. Further, the article examines how the legal response to intimate partner violence has affected women who used force and how that response has evolved to address women's use of force. To conclude, the article identifies the challenges in effectively responding to women's use of force.

Larance, Lisa and Susan Miller, In Her Own Words: Women Describe Their Use of Force Resulting in Court-Ordered Intervention. (2017) 23(12) *Violence Against Women* 1536–1559.

The article examines use of force by 208 women as well as their consequent arrest and court-ordered participation in anti-violence intervention programming. The data used was collected from two separate intervention programs over a period of six months and eventually sorted into nine categories: aggressive use of force (n2) – use of force without a history of abuse; anticipatory (n8) – using force as a result of historical substantive harm causing the women to believe she will soon be abused; both use force (n1); self-defence (n61); asserting dignity (n79) – defined as "women seeking autonomy by using non-self-defensive force" (pg 1547); edgework (n4); false accusations (n32) – "partner embellishing events from the incident to leverage law enforcement against her" (1549); partner self-inflicts injuries (n4); and horizontal hostility (n17 women) – when a woman uses force against a third party.

The substantial number of women within the ‘Asserting Dignity’ category "brings attention to the critical importance of understanding context" (1551). Experiences of women who fell within the ‘Horizonal Hostility’ category indicate that a "closer look must always be taken to better understand who orchestrated the events that led to the presenting incident" (1552). The large number of women falling within the ‘Self-Defence’ category suggests that "the only difference between a women’s court order to intervention and encouragement for her to seek voluntary survivor support services may be the extent of the responding officer’s investigation" (1551). The study also found that Women were more likely to admit to the use of violence and/or detail their actions in full than men. "This contributes to the likelihood that they will be arrested instead or in addition to the men who have abused them" (1540).

Li, Simiao, Ani Levick, Adelaide Eichman, and Judy Chang, Women’s Perspectives on the Context of Violence and Role of Police in Their Intimate Partner Violence Arrest Experiences. (2015) 30(3) *Journal of Interpersonal Violence* 400–419.

Researchers conducted 18 semi-structured qualitative interviews with women who were court-ordered to attend IPV education groups with the aim of investigating the women’s experiences with violence and arrest.

The women’s use of violence could be divided into four categories: (1) self-defence (typically an isolated occurrence in direct response to an immediate physical threat); (2) driven to violence (had chronically

experienced verbal and physical violence from their partners); (3) proving a point (violence was a messaged they wished to convey to others, particularly the abusers); and (4) protecting others (406). These categories align with those from existing research. The study also supports previous findings regarding motivations for violence (e.g., social, historical, institutional, and individual variables) however did not find coercion to be a motivator (414).

Participants who called police themselves were generally seeking help and protection while when the women's partners called police it was it was often to avoid their own arrest or minimise their abuse. The study noted that, to counter this, "police should made aware of the possibility that male partners may falsely portray themselves as victims or even use calls to the police as methods of controlling or manipulating their victims" (415).

Most women reported negative arrest experiences. While some officers allowed them to explain the situation, others arrested the women "based on a literal interpretation of the mandatory arrest law" and demonstrated a very limited understanding of the situation's context and the use of self-defence (411). Furthermore, "where injuries were used to determine which party would be arrested, the women's injuries were often unnoticed or did not appear until later" (412-13).

Miller, Susan & Michelle Meloy (2006) Women's Use of Force: Voices of Women Arrested for Domestic Violence. *Violence Against Women*, 12(1), 89–115.

The article 'explores the perceptions and experiences of arrested women enrolled in three domestic violence treatment programs in one state'. Researchers observed the participation of 95 women in these programs for a period of six months through watching the tape-recorded group sessions and reading their transcripts. Analysis revealed three violence different categories of violent behaviour which led to participants' arrest:

'generalised violent behaviour': (5% of women) the use of violence in many circumstances, not just in intimate relationships. These women did not have the control or power over their targets; experiences of participants they used violence in response to an immediate incident rather than form part of a history of victimisation and violence.

'frustration response (or 'end of her rope') behaviour' (30% of women). These women often had histories of

domestic abuse in their backgrounds…and reacted violently when nothing else seemed to stop his behaviour' (100/12). The violent behaviour of the women in this category 'did nothing to change the abuse and power dynamics of their relationships' (101).

'defensive behaviour': (65% of women). 'Women who exhibited defensive behaviour were trying to get away during a violent incident or were trying to leave to avoid violence when they knew they partners was about to become violent' (102). The participants were often unable to escape their partners during these situations or acted in protection of a child.

Women in all three categories took responsibility for their violent behaviour during the treatment sessions. The study noted this to be a primary difference between female and male perpetrators as research on male batterer treatment groups has typically found men to minimise and deny their violent behaviour (105). By accepting this responsibility and being willing to actively participant in the treatment, the women felt more empowered and better able to deal with the frustrations and issues in their lives (105).

Nouri, Shevan (2015). Critiquing the defence of compulsion as it applies to women in abusive relationships. *Auckland University Law Review*, 12(1), 21, 168–192.

Examines the cases of women who commit offences under threat of harm from their abusive partners. Considers the New Zealand defence of compulsion and whether it provides an adequate defence for victims of family violence. Argues the defence is too narrowly framed to adequately provide a defence for victims who offend at their abusive partner.

Sheehy, Elizabeth 'Expert Evidence on coercive control in support of self-defence: The trial of Theresa Craig' (2018) 18 (1) *Criminology & Criminal Justice* 100

This article examines defence evidence led in the first Canadian case where an attempt was made to use coercive control expert evidence to support a defence of self-defence by an abused woman who killed her abuser. Evan Stark, an academic in social work, gave evidence of the nature of coercive control.

Skubak, Marie and Emily Wright, Intimate Partner Violence and the Victim-Offender overlap. (20130 51(1) *Journal of Research in Crime and Delinquency* 29-55.

This article examines the prevalence and correlates of intimate partner violence (IPV) victimization and offending, as well as the overlap of these experiences. Data from wave 4 of the National (US) Longitudinal Study of Adolescent Health were analysed to examine IPV among 5,114 adults ages 24 to 33. Approximately 20% of respondents reported some IPV involvement in the past year, one-third of whom reported victimization and perpetration. The victim-offender overlap was observed for males and females across various measures of IPV. Bivariate correlations suggest victimization and perpetration have common correlates. Multivariate analysis, however, reveals considerable differences once we distinguish between victims, offenders, and victim-offenders and control for other variables. Perpetrators and victim-perpetrators were more likely to live with a non-spouse partner; feel isolated; display negative temperaments; and report substance use problems. "Victims only" were more likely to live with children and have lower household incomes.

Tolmie, Julia, Rachel Smith, Jacqueline Short, Denise Wilson and Julie Sach, Social entrapment: A realistic understanding of the criminal offending of primary victims of intimate partner violence (2018) 2 *New Zealand Law Review*, 181-217

This article argues that understanding intimate partner violence as a form of social entrapment can assist the application of the law to victims of intimate partner violence who are also offenders. By way of example it considers self-defence to homicide where the primary victim kills their abuser and the prosecution of mothers who are victims for neglectful parenting. Note the appendix to this article by the New Zealand Death Review Committee which proposes an evidential approach to the defence of victims of intimate partner violence who are also offenders.

Victims as (alleged) perpetrators - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 7.6 considers women and the criminal law and includes a section on (7.6.1) on female offenders.

Victims as (alleged) perpetrators - Other Resources

International

Freyd, J et al., What is DARVO? Website: https://dynamic.uoregon.edu/jjf/defineDARVO.html.

DARVO refers to a reaction perpetrators of wrong doing, particularly sexual offenders, may display in response to being held accountable for their behaviour. DARVO stands for "Deny, Attack, and Reverse Victim and Offender." The perpetrator or offender may Deny the behaviour, Attack the individual doing the confronting, and Reverse the roles of Victim and Offender such that the perpetrator assumes the victim role and turns the true victim -- or the whistle blower -- into an alleged offender. This occurs, for instance, when an actually guilty perpetrator assumes the role of "falsely accused" and attacks the accuser's credibility and blames the accuser of being the perpetrator of a false accusation. This website includes links to empirical research about the concept and discussions about its impact on victims and others. It also includes podcasts and other materials.

Osthoff, Sue and Jane Sadusky, A Toolkit for Systems Advocacy on Behalf of Victims of Battering Charged with Crimes. 2016, National Clearinghouse for the Defense of Battered Women.

This toolkit provides ideas, strategies, and techniques for addressing the needs and challenges related to making victims of battering charged with crimes visible and central in a community's response to battering. Includes resources, references, as advocacy organization survey, and a data collection workbook

New Zealand Family Violence Death Review Committee, Appendix to article titled 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence', 22 Aug 2018

Substance Abuse and Mental Health Service Administration, Essential Components of Trauma-Informed Judicial Practice (2013).

This paper provides information, specific strategies, and resources that many treatment court judges have

found beneficial (in US). It provides a list of communication and court management strategies to help reduce the traumatic experiences often associated with going to court.

Victims as (alleged) perpetrators - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Celia

Ingrid

Victims as (alleged) perpetrators - Cases

State of NSW v Monteiro (Final) **[2020] NSWSC 881 (8 July 2020) – New South Wales Supreme Court**

The defendant made a false report to police in an apparent attempt to pre-empt the complainant's report:

> [12] By Christmas 2007 the defendant agreed to move out of the parties' shared accommodation but he did not have the financial means for this and still resided with the victim up to the date of the offence. From Christmas Day 2007 until 2 January 2008 the victim stayed with her family in Goulburn. She invited the defendant to attend their flat when she returned, for him to hand over his keys. She arrived back at the flat with her parents and the defendant was there. After the parents had left the defendant rushed at the victim, pushed his hand against her face to force her into the bedroom, slapped her about the face, forced her onto the bed and pulled her clothes off. He continued to push and slap her face and when she screamed he threatened to suffocate her with a pillow. He had penile-vaginal intercourse with her, briefly and violently, against her resistance. He then rolled off her and "carried on as if nothing had happened", according to Norrish DCJ.
>
> [13] This offence occurred in about the middle of the day or early in the afternoon. The defendant remained with the victim for the rest of the day and overnight. Next morning he followed her as she made her way to work and engaged in running verbal altercations. She arrived at her workplace in a distressed state with visible injuries to her face. She subsequently attended Paddington police station where it transpired that the defendant had earlier made a false report that he had been assaulted by the victim and that she had threatened to invent a charge of rape. This was apparently an attempt to pre-empt the victim.

R v Blockey **[2021] QCA 77 (21 April 2021) – Queensland Court of Appeal**

The Court (Sofronoff P and McMurdo JA and Boddice J) noted the sentencing judge's remarks, including the relevance of the applicant's history as a repeated victim of domestic violence in sentencing:

> [8] The sentencing Judge accepted that the applicant's plea of guilty was a timely plea; that the deceased had been killed in anger; that the applicant had a past history of alcohol abuse and illicit substance abuse; and that the applicant's adult relationships had been largely with partners who abused alcohol and illicit substances, many of whom subjected the applicant to domestic abuse.

[9] The sentencing Judge accepted that, having regard to the applicant's history of having sustained repeated serial domestic violence, there was an increased likelihood of the applicant reacting aggressively when threatened or assaulted by a domestic partner.

[10] The sentencing Judge found that the applicant stabbed the deceased after he had pursued her into her home, with a degree of aggressive intent, and after he had, at some stage, punched or slapped the applicant causing a bruise and some bleeding. Further, the applicant, at one point, had yelled for the deceased to "get out".

[11] The sentencing Judge found that: "The fact that you were such a victim of domestic violence as well as a perpetrator of domestic violence is, to my mind, sufficient to enable me to reach the conclusion that it is not reasonable in the present circumstances to treat the fact that your offending was a domestic violence offence as an aggravating feature."

R v Wallace **[2015] QCA 62 (21 April 2015) – Queensland Court of Appeal**

McMurdo P, (with whom Gotterson JA and Douglas J agreed) noted that lawyers acting for clients charged with criminal offences who claim to be the victim of domestic violence should take such claims very seriously to determine the relevance to their client's alleged offending. They should then put such evidence before the primary court either as a defence, or in sentence mitigation.

See in particular the following remarks of McMurdo P at [37] -

'… The further evidence led in this application established that at the time of the offending the applicant was in an abusive, exploitive relationship which impaired her capacity to realise the full repercussions of her fraudulent behaviour and her ability to formulate a mature response to her financial and personal difficulties as she continued to take more and more money from the nursing home in the impossible hope that she would eventually repay it. As Dr Schramm (a psychiatrist) explained, she was not acting completely rationally. She was exhibiting behavioural disturbances following her prolonged and significant physical and emotional abuse, commonly known as "battered persons syndrome." This took her offending behaviour out of the worst category of fraudulent offending in which the sentencing judge placed it. The further evidence raises the possibility that some other sentence than that imposed may be warranted; if so, its exclusion would result in a miscarriage of justice.'

***R v MacKenzie* [2000] QCA 324 (11 August 2000) – Queensland Court of Appeal**

McMurdo P observed that a grave history of abuse contributed to (as a psychologist who interviewed the applicant woman put it at [21]), 'ineffective problem solving behaviour and a perception by [the applicant] of the narrowing of her options over time. A perception of narrowed options can often result in decisions made by the abused woman that from the outside look like poor judgment.' The history of abuse by the victim towards the applicant was an additional mitigating factor which partly explains how her behaviour came about.

***Director of Public Prosecutions (Vic) v Walker* [2018] VSC 83 (28 March 2018) – Victorian Supreme Court**

Taylor J: [48] "Family violence is insidious. It need not find expression in physical violence to be described as grave or create a mindset in its victims of fear and helplessness. That mindset arises from all forms of violence experienced by victims and is not triggered only at the time of a physical assault."

Fair hearing and safety

Due to the complex nature of domestic and family violence matters, it may be necessary for judicial officers in their conduct of related proceedings to consider and respond to a range of factors to ensure that parties are afforded fair and equal access to justice and those at risk of harm are protected. In order to properly respond to domestic and family violence judicial officers will often need information presented to them, not just about individual incidents of violence, but also about the history and pattern of violence in the relationship. Judicial officers should actively consider the power of the court to regulate its own proceedings.

There is a developing understanding among judicial officers in Australia that domestic and family violence rarely involves a single incident or a series of discrete incidents of physical violence. Rather, it manifests as a complex pattern of violent and abusive behaviours through which a perpetrator exercises control over the victim, often for extended periods, sometimes referred to as coercive control. The facts of a particular matter and the circumstances of the affected parties are likely to have a direct and substantial bearing on the manner in which a judicial officer discharges their obligations in the conduct of proceedings and the protection of parties.

For some victims their engagement with law enforcement agencies and the courts may exacerbate or prolong the trauma they have experienced as a result of the domestic and family violence. For example, absence of legal representation, lack of interpreter services, giving oral evidence, being cross examined, being present in the court room or court precinct with the perpetrator, or having to repeatedly return to court for mentions, adjournments and hearings may contribute to a victim's revictimisation or secondary abuse through the court system. Judicial officers should ensure, where practically possible and resources permit, that these factors and their adverse consequences are addressed.

It is critical that parties feel that they have been properly informed of their rights and what to expect in the court process and that they have been taken seriously and given due opportunity to be heard.

For victims, it is critical that their safety and protection are assured and that they are in control of their participation in the proceedings and of choices affecting their lives beyond the court room. In facilitating these outcomes, a judicial officer may need to take into account a victim's individual vulnerabilities, and their specific experience of domestic and family violence or its impacts.

For perpetrators (or offenders), Australian research indicates the possible adverse effects of a lack of understanding of court processes, the terms of orders, and the consequences for breaches of orders. These effects may include a perception by the perpetrator (or offender) that the process is unfair or unjust [Chung et al 2014], or that the order has no real force [CIJ 2015]. This suggests that efforts by judicial officers to address these perceptions may produce more positive outcomes. Australian research indicates the value of judicial officers looking at and directly speaking to perpetrators/offenders [Mack & Anieu 2011]. US research emphasises the importance of the interaction between judicial officers and perpetrators/offenders, and that a process of shared respect may be a key factor in compliance [Petrucci 2002]. The Canadian Domestic Violence Bench Book also highlights a range of behaviours and perceptions that are common among many domestic and family violence perpetrators, and points out that when judicial officers keep in mind these behaviour patterns when listening to evidence, perpetrators have fewer opportunities to mislead [Neilson 2020].

Fair hearing and safety - Key Literature

Australia

Chung, Donna, Damien Green, Gary Smith and Nicole Leggatt, *'Breaching Safety: Improving the Effectiveness of Violence Restraining Orders for Victims of Family and Domestic Violence'* (Report: The Women's Council for Domestic and Family Violence Services, 2014).

This Western Australian (WA) study aimed to gain an understanding of men's perspectives and experiences about being charged with breaching a protection order; their understandings of why the protection order was issued and the events that led to them being charged with breach; and to identify policy and service delivery measures to promote safety for victims.

Ten men were recruited from a WA men's behaviour change program to participate in a semi-structured, individual interview. The interviews were complemented with a focus group of service providers in the men's and women's domestic violence services, Family Violence Court, Family Court, Legal Aid and the Department for Child Protection and Family Support.

The findings were broadly grouped into three categories:

1. The men minimised their use of violence and externalised responsibility to 'the relationship' and/or their partner. They diminished or minimised the role and purpose of protection orders, commenting that they are 'just a piece of paper' and 'anyone can get one'. Most men agreed that protection orders were important for 'those that really need it' however they did not see their partners as being in need of protection describing them as being unreasonable or over-reacting. The men's deflections and minimisations about their violence including breaches of protection orders were reinforced (and strengthened) through, what they perceived to be, violence supportive responses by police or service providers, for example when breaches did not result in police investigation or charges. A pronounced theme throughout all aspects of the interviews was the participants' lack of empathy or regard for the safety and wellbeing of their current or former partners.
2. Men's perception that protection order processes were unfair or unjust. In particular, the men exhibited a lack of understanding about how their violence towards their intimate partner, children and family could result in restrictions to their contact with their children and/or exclusion from their property. The perception of unfairness was exacerbated by a lack of understanding about the process for obtaining a

police order or violence restraining order (VRO) including the grounds in which an order can be made, court processes, the conditions an order can impose and penalties of a breach.

3. Participants explained their breaches in three ways: 1) they were responsible for the breach and related consequences; 2) they claimed their partner was responsible for the breach e.g., initiating or 'agreeing' to contact; and 3) they described themselves as 'accidental breachers' i.e. the breach occurred because the protected person and respondent were 'accidentally' in the same physical location.

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

The aim of this Australian report is to identify opportunities for the police, civil and criminal justice and court systems to develop early intervention strategies that are likely to encourage perpetrator engagement with justice processes; understanding of and accountability for their violent behaviours; and behavioural reform through program participation and other interventions.

One of the criticisms of the current civil responses include (at p 21):

- Respondents do not always understand the legal basis of the order, or the terms with which they are expected to comply. A recent WA study found that many respondents questioned the validity of the court's role, not understanding its power to issue an order despite the fact that the police had not laid charges. Some believed that 'anybody could get one of those' and felt that the orders were 'just a piece of paper', while others inadvertently breached the order repeatedly simply because they did not understand its terms. The latter was also nominated by practitioners in the Northern Territory as a particular problem for perpetrators in remote communities, to the extent that courts often preferred to impose limited conditions…

Mack, Kathy and Anieu, Sharyn Roach, *'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices'* (2011) 37(1) *Monash University Law Review* 187.

In Australia, magistrates and their courts have undertaken steps to make the disposition of cases more

appropriate and more sensitive to the varied needs of defendants. One development is more engaged approaches to judging, which entails direct judicial interaction with court users, requiring judicial communication skills and perhaps greater emotional capacities such as empathy. Careful analysis of empirical evidence of judicial attitudes and practices in court identifies important links between conventional judging values, skills and actions and some elements of the newer forms of judging. This research identifies magistrates' commitment to core judicial values such as impartiality, their views about skills and practices associated with more engaged judging, such as listening and empathy and their orientation to the social value of their work. The article then examines in-court behaviours, including the demeanours magistrates display towards defendants and the circumstances in which they look at and speak directly to defendants (at pp 206-28). The findings suggest apparent tensions between legitimacy based on a conventional judicial role in an adversary process and the legitimacy of more engaged, active judging. This research finds ways in which values and practices of less-adversarial judging can be incorporated within a relatively conventional understanding and performance of the judicial role.

International

Burke, Kevin and Steve Leben, 'Procedural Fairness: A Key Ingredient to Public Satisfaction' (2007) 44 *Court Review: The Journal of the American Judges Association* 4-25.

This paper discusses the role of judges in addressing public dissatisfaction with the judiciary by giving effect to the key elements of procedural fairness, in particular, voice, neutrality, respectful treatment and engendering trust in authority. Procedural fairness is a value that Americans expect and demand from the judicial system. The purpose of the paper is to address research on the American court system, and to identify and promote changes that will improve the daily work of the courts and judges.

Guzik, Keith, *Arresting Abuse: Mandatory Legal Interventions, Power, and Intimate Abusers*, (Northern Illinois University Press, 2009).

US research into the practice in many jurisdictions of enhancing the criminal prosecution of domestic abuse cases by adopting mandatory arrest policies for the police and no-drop policies for the prosecution. The author reports that many abusers subjected to the force of these policies feel they are being unfairly treated, and for behaviour they believe is justifiable. Denials, minimisations, excuses and justifications were common among the abuser narratives, as well as claims of self-defence and other disclaimers of responsibility,

claiming they were responding to a genuine threat to his person or to his traditional masculine identity.

National Center for State Courts, *Court Guide to Effective Collaboration on Elder Abuse* (2012).

This Guide provides a comprehensive discussion on elder abuse, discusses the prevalence of the incidence of elder abuse and describes the court settings and the types of legal actions that may be used to address elder abuse. Note issues about assessing cognitive, physical and other conditions that may be relevant to an older person's needs; crafting appropriate remedies; maximising access and participation of older person (p6). See also the Judicial Benchcard associated with this resource.

Petrucci, Carrie J., *'Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence'* (2002) 38(2) *Criminal Law Bulletin* 263.

A US study. Abstract: Specialized courts and therapeutic jurisprudence both share an emphasis on the judge-defendant interaction. What a judge says, how he or she says it, and how defendants respond, may prove to be a key factor affecting outcomes within the specialized court process. Research has yet to carefully describe this judge-defendant interaction. Using participant observation, transcripts of judicial monitoring sessions, and judge and defendant interviews, this article analyzes one judge's use of therapeutic jurisprudence in judicial monitoring sessions in a specialized domestic violence court. The findings highlight seven key areas that describe progress report hearings: general characteristics, the process, general content, specific content, the judicial role and approach, defendants' perceptions of the judge, and the demeanor of the judge and the defendant. Taken together, these components exhibit a relationship depicted by a process of shared respect between the judge and defendant that may be a key factor in defendant compliance.

Fair hearing and safety - Other Bench Books

Canada

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

In Section 7.3.2, Neilson suggests that judicial officers can be alert to behaviours and perceptions that are characteristic of many domestic and family violence perpetrators, as demonstrated by the evidence adduced and displayed by the perpetrator in the courtroom context. Neilson states that when judges keep in mind these common behaviour patterns when listening to evidence, perpetrators have fewer opportunities to mislead. Perpetrator traits include:

- Good public behaviour and character evidence;
- Control;
- Entitlement or the belief that one has special rights and privileges with accompanying responsibilities;
- Lack of empathy for the feelings, views and value of their partner;
- Possessiveness including high levels of jealousy and monitoring of their partner;
- Manipulation;
- Denial or minimisation of their own violence;
- Projection of responsibility, including claiming their violence was in self-defence, a product of their partner's bad behaviour, or mutual; or that their partner is overly sensitive or mentally ill or unstable.

A more detailed discussion of the social characteristics and behaviours of perpetrators can be found in Supplementary Reference 3: Perpetrators: Perpetrator Characteristics; Perpetrator Litigation Tactics.

Fair hearing and safety - Other Resources

LawAccess NSW, Representing Yourself – Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs

- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and

courts in domestic and family violence matters.

No to Violence (2021) Tips for engaging men on their use of family violence (fact sheet) Domestic Violence Resource Centre Victoria.

This resource gives five tips for engaging men on their use of family violence:

1. Safety – do not engage in a way likely to increase risk to the safety of vicitms;
2. Identify invitations by men to collude in their behaviour - when responding to a man's attempts to minimise, excuse or justify their use of violence, it is important to encourage them to re-evaluate their behaviour and self-exploration;
3. Open the conversation - being curious and asking questions can help put his behaviour on the table;
4. Experience of ex/partners and kids - encourage empathy for how his partner/kids are experiencing his behaviour, rather than his intentions or identity; and
5. Change and support - identifying what a desirable future looks like can help reflection around what needs to change.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Fair hearing and safety - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***Hurst v R* [2017] NSWCCA 114 (31 May 2017) – New South Wales Court of Criminal Appeal**

At [132], the Court states –

> *'It is, of course, not unusual with offences of this kind for there to be a considerable delay between the occurrence of the offence and complaint being made. That is a distinctive feature of domestic violence scenarios. Given the psychological considerations which may well have been in play, delay of this kind should not in any way be held against the victim. It is in fact a direct product of the nature of the offending itself and in that sense, it would be incongruous if an offender could gain a benefit from such delay.'*

***R v Ahmed* [2019] NSWSC 55 (8 February 2019) – New South Wales Supreme Court**

In refusing to allow a judge-alone trial: at [28]-[30], Schmidt J states –

> *'Sadly, all too many killings which juries have been called on to deal with at trials involve the violent deaths of women caused by their husbands or partners, requiring those juries to consider confronting evidence, including photographs of the kind which may need to be tendered in this case. It is also not unusual in such cases for juries to have to consider evidence about an alleged offender's mental state, in determining whether the Crown has established its case.'*
>
> *'But the infliction of violence in domestic circumstances is not confined to members of our community who are of particular racial origin or religion. Ours is a community comprised of people who have not only been born here, but who have come from every corner of the world and who adhere to many different religions, or none at all.'*
>
> *'That there has long been real community interest and concern about deaths which involve domestic violence is understandable and well known. That is nowadays not only reflected in considerable media*

coverage, when alleged offenders are apprehended and charged, but also in resulting discussion on social media, which unsurprisingly is commonplace…'

Impact on consent and disclosure

A victim's experiences of and vulnerabilities to domestic and family violence may affect their capacity to voluntarily consent [Stubbs 2007] to or willingness to disclose [Mouzos & Makkai 2004] the violent behaviours, or other matters resulting from their relationship with the perpetrator, for example matters arising in relation to a protection order [Wangmann 2012], a breach [Douglas 2008] of a protection order, a parenting order [Kaspiew et al 2009], other legal remedies or proceedings [Hunter 1999], financial dealings [Cameron 2014] and immigration processes.

The table below highlights some of the contexts or reasons that may affect a victim's consent and disclosure having regard to vulnerabilities commonly experienced by victims of domestic and family violence and more particular vulnerabilities relating to the violent behaviour or the victim's circumstances. In some cases, these contexts or reasons may intersect; in other words, a victim may not disclose certain behaviours or matters for the same reasons they have been coerced into consenting to them.

It may be appropriate for judicial officers in domestic and family violence related proceedings to inquire as to the contexts or reasons affecting the victim's consent or disclosure in a particular case where the evidence before the court does not sufficiently address or explain these issues.

Vulnerabilities – common	**Possible contexts or reasons for:**	
	Consent	**Non-disclosure**
History/pattern of domestic and family violence	• Capacity to voluntarily consent compromised over time due to physical, mental or emotional impacts of coercive and controlling behaviours [Stubbs 2007]	• Coercive and controlling behaviours not recognised as domestic and family violence - seen as normal part of relationship • Violence not seen as sufficiently serious to warrant disclosure [Meyer 2010]
Relationship with perpetrator	• Perceived need to preserve ongoing relationship with perpetrator • Fear of further/escalation of violence • Economic dependence on perpetrator, fear of poverty and homelessness	• Perceived need to preserve ongoing relationship with perpetrator • Perceived need to protect perpetrator • Fear of perpetrator retaliation, further/escalation of violence • Economic and social dependence on perpetrator, fear of poverty and

		homelessness [ALRC/NSWLRC 2010]
Self perception	Sense of self-worth and entitlement to volunteer/withdraw consent diminished over time by coercive and controlling behaviours	Fear of others' judgment – feelings of shame, humiliation, embarrassment about being in violent relationship or being disbelieved [Evans & Feder 2016]
Presence of children	Concern for children's safety and wellbeing Perceived need to keep the family together Perceived need to preserve relationship between children and perpetrator	Concern for children's safety and wellbeing Perceived need to keep the family together Perceived need to preserve relationship between children and perpetrator [Evans & Feder 2016]
Understanding/prior experience of legal and judicial processes	Lack of awareness of domestic and family violence related laws Lack of awareness of legal rights and available advice and support services Consent to orders compelled by expense and stress of ongoing proceedings and continuing opportunities for systems abuse by perpetrator	Lack of awareness of domestic and family violence related laws Lack of awareness of legal rights and available advice and support services Feeling that concerns won't be believed or taken seriously Feeling of lack of control over process and outcomes Fear of criminal justice consequences for perpetrator Fear of child protection agency intervention, having children removed Fear of 'hostile parent' claim in parenting proceedings [Kirkwood 2007] – being accused of alienating children from perpetrator [Kaye et al 2003]
Vulnerabilities – particular	**Possible contexts or reasons for:**	
	Consent	**Non-disclosure**
Sexual violence	Violence is forced or unwanted – involuntary consent Past consensual relations [Carline & Easteal 2014] between victim and perpetrator and victim difficulties in proving no consent [Logan et al 2015] Facilitated by alcohol or drugs [Cox 2016]	Lack of awareness of criminality of violence Fear of losing relationship Feelings of shame, self-blame and failure Fear of perpetrator retaliation, further/escalation of violence

	• Perceived need to comply with perpetrator's sexual demands to keep the peace, minimise the violence already experienced, and avoid further/escalation of violence [Heenan 2004]	• Fear of rejection by family and friends • Fear of health and reproductive consequences • Fear of adverse police or judicial responses [Heenan 2004] [Lievore 2003]
Economic abuse	• Consent to financial dealings is demanded, forced or fraudulently obtained [ALRC/NSWLRC 2010] • Emotional manipulation inferring secrecy or lack of trust if refusal to comply with demands [Hand et al 2009] • Fear of further/escalation of violence	• Fear of being legally/criminally implicated in fraud or other wrongdoing • Fear of economic loss/insecurity • Fear of perpetrator retaliation, further/escalation of violence
People from vulnerable groups	• Exploitation of diminished capacity to voluntarily consent due to exacerbating circumstances or physical, mental or emotional disability, impairment or illness • Cultural/community expectations and practices	• Heightened physical, geographical or social isolation • Practical difficulties in accessing advice and support services • Advice and support services not properly equipped to address victim's specific circumstances/needs • Past negative experiences of legal and judicial processes eg people with disability [Jennings 2003] • Victim has offending/criminal record • Fear of other legal consequences eg visa cancellation, deportation • Cultural/community expectations and practices eg Aboriginal and Torres Strait Islander [Willis 2011], culturally and linguistically diverse, remote and rural [Wendt et al 2015], LGBTIQ [Calton et al 2015]

Impact on consent and disclosure - Key Literature

Impact on Consent

Australia

Australian Bureau of Statistics (ABS), *Personal Safety, Australia, 2016*, ABS cat no. 4906.0 (2016).

This release presents information from the Australian Bureau of Statistics' (ABS) 2016 Personal Safety Survey (PSS).

The survey collected detailed information from men and women aged 18 years and over about their experiences of violence since the age of 18, as well as experiences of current and previous partner violence, stalking, physical and sexual abuse and harassment, abuse before the age of 15, and general feelings of safety.

'Approximately half of all women who experienced physical assault by a male perceived alcohol or another substance to be a contributing factor to the most recent incident (49% or 519,700)' (see Table 8), while '[j]ust under two-thirds of men who experienced physical assault by a male perceived alcohol or another substance to be a contributing factor to the most recent incident (61% or 804,000)' (see Table 9).

Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response, Report 114 (2010).

See p592 onwards which discusses 'Economic and emotional abuse offences', including recognition of fraud, and coercion of victims to claim social security payments in the context of domestic and family violence. Chapter 25 deals with sexual offences, including consent specifically (from p1147). Section [25.114] (p1156) Notes that 'stakeholders emphasised that the issue of consent in the context of family violence and intimate relationships is complex; and that complexity is magnified where there is a history of violence and coerced 'consent'. The disjunction between the criminal justice system's focus on isolated incidents, as opposed to a pattern or history of family violence, was identified as a particular challenge in proving lack of consent.'

Section [25.118] (p1157) observes that stakeholders also suggested that the circumstances vitiating consent should be expanded to include:

- economic abuse;
- where consent is purported to be given by persons with a cognitive impairment to sexual activity with a carer;
- fear of force or fear of harm of any type; threats to harm animals; and
- threats to damage property.'

Australian Law Reform Commission, 'Family Violence and Commonwealth Laws – Improving Legal Frameworks' (ALRC Report 117, 2012).

See p72- discusses the contrast between autonomy and paternalism, particularly in the context of safety concerns. This section draws on particular examples of how paternalistic approaches can disempower people who are subject to abuse.

See chapter 6 'Social Security – Relationships' in relation to consent in financial contexts, discussing difficulties that arise in relation to determining a person is a member of a couple, for the purposes of s4(3) of the *Social Security Act* (from p151). Concerns are raised from pp152 that 'economic abuse may obviate consent to the 'significant pooling of financial resources'' (p153), and further, that people may be unable to leave a relationship due to violence. 'The Commonwealth Ombudsman noted anecdotal instances when Centrelink has determined that a customer is a member of a couple, even where it appears the 'relationship' may have only continued as a result of duress or financial abuse' (p153), while concerns were also raised that' information about family violence—such as police reports—has been used to demonstrate the existence of a couple relationship, rather than finding that one did not exist' (p154).

Bagshaw, Dale et al, 'Family Violence and Family Law in Australia The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006' (Monash University for the Australian Attorney-General's Department, 2010), vol 1.

This research was conducted to examine the impact of family violence, which had occurred before, during and or after parental relationship breakdown, on post-separation decision making and arrangements as viewed by children and parents both pre and post 2006 changes to family law. The report is based on data

collected via an online survey of 931 adults; an online children survey of 65 children; phone-in interviews with 105 parents and phone-back interviews with 33 parents. Some of the key findings for the context of consent include:

At pp 6-7: '[t]he other group most affected was the post-2006 group. They reported being coerced by the combined pressure from legal advisors and family dispute resolution practitioners to agree to arrangements that were unsafe or inadequate for their children, including shared parenting, overnight or unsupervised contact, or any contact'.

'Some of the female respondents reported that they had felt powerless at separation and still felt this way, although this was the smallest group. These respondents felt particularly powerless over sharing care of the children and finances and felt they had been pressured into agreements that were unfair. For example, as one respondent said: 'the power he held over me during the relationship continued afterwards in regard to parenting arrangements and finances'. She was bluffed into thinking she must agree to the equal time, although this was prior to the 2006 legislation. Another respondent just said: 'I made decisions based on my fear of him'' (p50).

'Just under 19% of those who did not access formal services indicated that they made that choice because family violence perpetrated against them made use of the services dangerous or impossible, that is, that victims were bullied into agreements outside the formal system or that the victims rejected formal services because they would provide further avenues for abuse (such as through family dispute resolution)' (p64). Some 'women noted that they were threatened with violence and with court action if they did not agree to arrangements for children' (p79).

Cameron, Prue, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Research Report, Wire Women's Information, 2014).

This research draws on interviews, focus groups and surveys involving more than 200 women. The behaviours associated with economic abuse are explored from p11, noting the difference between controlling behaviours (e.g. preventing access to money or financial independence) and exploitative behaviours (e.g. being intimidated into assuming responsibility for debts and expenses). It notes that 15% of women in the study reported their partner used their name to take out loans or borrow credit (p12).

Camilleri, Owen, Tanya Corrie and Shorna Moore, Restoring Financial Safety: Legal Responses to Economic Abuse (Good Shepherd and Wyndham Legal Service, 2015).

'This project sought to explore and respond to the legal challenges to restoring survivors' financial safety after their experiences of economic abuse. The researchers examined the legal cases of 25 people who had taken out intervention orders through Wyndham Legal Service. All of the participants were women who were being abused by a man. The authors summarise findings, including that 'debt was a common way of abusers controlling their partners' including by forcing women to assume debts or pay for utility debt (jointly accumulated or accrued in his name) p13.

Carline, Anna and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014).

Partner rape is discussed from p208, including discussion of consent from p212. The authors comment that 'unsurprisingly' in a partner context, proving that the woman did not consent (a physical element) or an absence of consent that the defendant knew of, but chose to ignore (the fault element) is difficult, because of the history of consensual sexual intercourse (p212).

Cox, Peta, *Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper* (ANROWS, 2015).

This literature review examines the intersection between sexual assault and domestic violence. In relation to consent, the paper highlights that the ability to provide consent for sexual activity may be compromised when it is occurring within the context of the perpetration of intimate partner violence (IPV). This is because the perpetration of IPV creates a climate of ongoing fear or control (p 29). Additionally, for sexual violence perpetrated by intimate partners, demonstrating lack of consent is complicated because sexual violence may have been perpetrated in a context where consensual relations may have taken place before and/or after the assault, and in the context of established patterns of sexual behaviours that do not include verbalised consent (p 29).

Understandings of consent in established relationships affect how intimate partner sexual violence is framed both by victims as well as third parties. See pages 47-48 for a discussion of the way social norms

affect what is understood as “real rape” (non-consensual sexual activity). Importantly, research has found that intimate partner sexual violence is viewed by the community as both less serious and more justifiable than sexual assault by a stranger or acquaintance (p 47). Indeed, the greater the familiarity between the victim/survivor and perpetrator, the greater likelihood that reports will be considered a lie or misinterpretation (p 47).

IPSV victims/survivors themselves often face difficulty in recognising sexual violence as violence, assault or rape (p 26). Similarly, research shows that younger women rarely identify sexually coercive behaviours by boyfriends as sexual assault, and tend to excuse sexually violent behaviour by saying that their own behaviour justified the assault or by pointing to extenuating circumstances (p 48). This again points to the strength of commonly held perceptions of what “counts” as consensual or non-consensual sexual activity.

Cox, Peta, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS, 2016 Rev.ed.).

This report provides substantial additional analysis of the data produced through the Australian Personal Safety Survey (PSS) 2012. In relation to consent, p36 notes that for female victims, ‘in over 900,000 incidents, alcohol or other drugs were believed to contribute to the most recent physical assault by a male. This is over half the incidents of physical assault of a female by a male (53.4%). In a similar percentage of cases alcohol or other drugs were believed to contribute to the most recent sexual assault by a male (474,600, 55.7%); and Physical threat by a male (351,700, 50%). Whether alcohol or drugs ‘contributed to the incident’ was defined to mean ‘whether they were under the influence of alcohol or other substances; whether alcohol or drugs were added to their drink without their consent; and whether they believed the perpetrator was under the influence of alcohol or drugs’ (p36). However, the author also highlighted that ‘of all incidents of sexual assault where women indicated that alcohol and other drugs contributed to the incident, it was mostly the perpetrator’s use that was assessed as being a contributing factor’ (p61). (Note: this article refers to a previous release of the ABS’ Personal Safety Survey, but the analysis remains useful. See Australian Personal Safety Survey (PSS) 2016 for most recent release.)

Consumer Utilities Advocacy Centre, Helping Not Hindering: Uncovering Domestic Violence and Utility Debt (CUAC, 2014).

This report from Consumer Utilities Advocacy Centre (CUAC) Victoria assesses the legal and operational framework that currently applies to the payment of utility bills in the context of domestic violence, specifically where domestic abuse leads to a breakdown of a household, and victims are at a point of crisis. The report discusses economic abuse specifically in the context of utilities and notes a range of common problem scenarios from p10-12 including that women frequently are not aware of the utility bills and associated debts until after the abuser leaves the household (p11). Also see 'Consent' (from p33), discussing issues around obtaining the *abusive partner's* consent when attempting to resolve issues of joint accounts for utilities in domestic violence situations.

Douglas, Heather, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439.

This article reports on a study of breach of protection order charges in Queensland, in this context it also discusses reasons why, in many cases, victims try to prevent prosecutions of criminal charges or refuse to assist as prosecution witnesses. Reasons include fear of increased violence, perception that assisting prosecutions may break up the family unit and the stress of the court process (p453-457). At p454, it is noted 'both individual judges and research have also recognised that the cyclical and complicated nature of domestic violence relationships often leads victims to seek to withdraw charges or understate the harm of particular conduct during periods of calm in the relationship'.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This study examines cross-applications and resulting orders in two Queensland magistrates' courts. It explores the context in which cross-applications are made and the outcomes in such cases. Consent to mutual cross-orders by victims is discussed on pp61-62, where the authors note concerns that cross-orders are often consented to 'to avoid violent reactions from the perpetrator, expedite the process, and cooperate with busy lawyers and magistrates and, in some cases, police' (p61).

Field, Rachael 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21 *Australian Dispute Resolution Journal* 185.

This article discusses the range of issues that arise for victims of family violence in family dispute resolution that can make it a dangerous and unsafe process for them unless appropriate precautions are taken. See especially 'Concerns for victims of family violence in mediation' (from p189-191), identifying the fact that women's self-determination is undermined in mediation where family violence is present. For example: 'It is problematic to assume that the fear a victim experiences (because of the history of violence) can be addressed through basic process interventions such as giving him or her a fair opportunity to speak, or asking the perpetrator to stop interrupting. The reality is that these interventions, whilst appropriate and positive in supporting constructive negotiations in most other matters, cannot reverse what might be years of violent domination, coercion and control.' (p191)

Hand, Tammy, Donna Chung and Margaret Peters, *The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation* (Stakeholder Paper 6) (2009, Australian Domestic & Family Violence Clearinghouse, University of New South Wales).

This Stakeholder paper considers the issue of how victims 'consent' to have their phones and funds monitored by perpetrators through various means of technology. The authors note: 'the checking [of phones] may be undertaken covertly, or overtly by demand; where a woman hesitates to 'volunteer' the phone for checking, the notion of 'trust in relationships' is employed to undermine the woman's decision. In this situation, a woman is often told that she 'must have something to hide'; that is, that she cannot be trusted. The woman is not viewed as having any right to privacy. This has the effect of making her the 'difficult one' in the couple. This form of coercive control over a women causes anxiety and can promote a woman's self-blame that she is not more accommodating in the relationship' (p4). The authors note that perpetrators may use physical violence against their current or former partners to force them to disclose their email passwords, so that they can monitor email communications (p6). Some perpetrators gain 'consensual' access to internet banking to view spending and sometimes to tamper with accounts (p6). See p6 'perpetrators may use physical violence against their current or former partners to pressure them to disclose their email passwords, so that they can monitor email communications.'

Hardesty, Jennifer L and Lawrence H Ganong, 'How Women Make Custody Decisions and Manage Co-parenting with Abusive Former Husbands' (2006) 23(4) *Journal of Social and Personal Relationships* 543.

This study examines the processes by which women make custody decisions and manage co-parenting after divorce with abusive former husbands. Nineteen women who left abusive husbands were interviewed. The study identifies that fears, pragmatic concerns, and family ideology pushed many women toward child agreements that continued their involvement with former husbands after divorce. Men who were controlling during marriage were very involved with children post-divorce and continued to exert control over mothers. As a result, women managed conflict, set boundaries, and resisted control in the context of ongoing fear (see p558).

Heenan, Melanie, 'Just 'Keeping The Peace': A Reluctance to Respond to Male Partner Sexual Violence' (2004) 1 *Issues* 1 (Australian Centre for the Study of Sexual Assault).

This Issues Paper identifies the relative silence about male partner sexual violence by women who have experienced it and by service providers. It examines some of these concerns through identifying and discussing five key areas including the law and legal treatment of the issue and the difficulties women face in recognising or naming their experience of sexual violence by a male partner as rape. For example the authors point that in cases where a male partner is charged with rape defence lawyers may attribute the 'falsity' of charges to her wanting a favourable property settlement; to secure custody of children, to continue an affair unobstructed; or as revenge (p7).

In relation to women's reluctance to name partner sexual assault the authors posit a number of reasons based on research including: fears of retaliation, of being rejected or blamed by family members and friends; their fears of reporting to police, of revealing the details of what has remained secret; of having to reflect on the humiliation and degradation they have endured ; fear of the loss of the relationship itself- having shared a life, children, a house, friendships; sense of shame they feel at having failed in their perceived duty as a wife, or in their failure to have made the relationship with their partner work (p15).

Note also the discussion of different levels of coercion in relation to male sexual behaviour including: cultural expectations of women to fulfil their "wifely duties" or the pressure to provide sexual services to their husbands regardless of their own desires; a degree of emotional manipulation that comes with women

feeling obliged to have sex after their partners have threatened to seek sexual satisfaction elsewhere, or more simply, to keep the peace; the use or threat of force women described ranged from being held down, being subjected to degrading, humiliating or painful sexual acts, to being raped in the context of other physical violence and battering(p9).

Hunter, Rosemary, 'Having Her Day in Court? Violence, Legal Remedies and Consent' in Jan Breckenridge and Lesley Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (Allen & Unwin, 1999) 61.

This book chapter is relevant for the discussion of the pros and cons for concluding legal proceedings by consent. Hunter observes consent can bring matters to a quicker and much less costly conclusion. Consent in family court matters does provide the litigant with some control over the outcome, rather than relying on an 'unpredictable judicial decision-maker'. Hunter points out that family law litigants have no option to walk away they must either reach agreement of have one imposed upon them. In protection order cases there are advantages to consent- the applicant gets the order. Consent also saves trauma in having to relates experiences to the court in front of an abuser and a courtroom full of strangers. A consent order may result in the abuser being less aggressive and therefore she may be safer (see p65-66).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

See Chapter 9: 'Legal system professionals regularly made the point that women felt pressured to agree to outcomes in family law negotiations that they didn't feel were in their children's interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence.

Also see '15.1.2 Consent orders' (from p337), noting that 'The tensions in this area are succinctly summarised in this comment by a legal practitioner about the choice litigants face in deciding whether or not to settle: "Most of them settle by consent and you've got a real tension because those that settle by consent feel as if they've been bullied into it, get a settlement because they can't afford it and they want to

get it over and done with. Those that run the full trial feel as though they got shafted anyway because they didn't get heard properly. So either way they feel as though they've lost". In reflecting on their practices concerning consent orders, a common observation among registrars and judicial officers was the limited supervisory role courts have in the context of a system that encourages parties to reach agreement by themselves.'

Kaye, M et al., Compromised 'consent' in Australian Family Law Proceedings. (2021) 35(1) International Journal of Law Policy and the Family 1-25, doi: 10.1093/lawfam/ebab033

Drawing on data from a large study that explored the experiences of self-represented litigants (SRLs) in Australian family law proceedings involving allegations about family violence, this article examines the pressures experienced by female SRLs, who are victims of family violence, to consent to orders. These pressures include judicial pressure, lawyers' practices, fear of their former partner, and the financial and emotional costs of litigation. These pressures are significant and can impede the extent to which these agreements can be viewed as consensual. Participants reported that these significant and intersecting pressures resulted in them 'agreeing' to orders that they saw as unsafe, or financial orders that were less than they were entitled to. Whilst these orders are subject to judicial scrutiny; this study raises questions about the quality and utility of resultant consent orders.

Kaye, Miranda, Julie Stubbs and Julia Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93.

This article outlines the results of an Australian study examining the experiences of 40 women who negotiated and facilitated child contact arrangements with an ex-partner who has abused them. Results are supplemented by findings from interviews with 22 individuals and representatives of bodies professionally involved in the process of facilitating the development or implementation of child contact arrangements. See especially from pp9-11, discussing the concerns some interview participants had about whether agreements made by women were genuine or in the women's and their children's best interests. The study found that 'Among those with concerns about unsafe outcomes, women who had consent orders and those with privately negotiated agreements gave similar reasons for having agreed to the arrangements. These included the fact that it was easier to give in to an uncooperative and abusive co-parent, or that they

believed that the children had a right to see their father and they hoped that if they gave him what he wanted he would be easier to deal with. However, several women with consent orders also cited factors associated with the dispute resolution process as having shaped their decision. For example: they thought they were legally obliged to agree; they felt under pressure from their former partner and/or the counsellor to agree; and/or they thought the arrangements were standard' (p11)

Lievore, Denise, 'No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault' (Report, Australian Institute of Criminology, June 2005).

Semi-structured interviews were conducted with 36 female victim/survivors of adult sexual assault; consultations were conducted with 65 individuals representing services across Australia and fifty-five staff at fourteen sexual assault services across Australia were consulted about their experiences of collaborating with criminal justice and forensic medical personnel. Case studies on p74 provide an insight into sexual coercion/lack of consent in the context of intimate partner violence, including:

Tanya: 'From the beginning of their relationship her husband pressured her to engage in "sex" when she did not want to and in unwanted sexual acts. She gave in to his demands to keep him happy, but says "it wasn't dutiful sex; it was more than that. I had no control over my own body. … Tanya did not report the sexual assault to police because she did not identify her experience as sexual assault until her doctor named it'; and Dianne: 'Dianne met her husband when she was 15 and married when she was 18; she did not realise she could refuse consent and thought that if she pleased him he would love her for herself'.

Based on this research the author reports that 'women who are sexually assaulted by intimate partners may feel more powerless than those sexually assaulted by strangers, while women who are physically and sexually assaulted by their partners may experience pronounced physical and psychological effects that are specific to intimate partner sexual assault' (p76). The author notes 'women who are raped in marriage feel violated even if they don't have the words for their experience. It's part of a continuum, but how do you name it? Women are being called frigid; there's so-called persuasion; giving in to keep the peace; or men demanding sex as "reconciliation", after giving their wives a bashing, so that women submit to avoid retaliation, but it would look like consent in a court of law' (p105).

Politoff, Violeta, et al. *Young Australians' attitudes to violence against women and gender equality*. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS).

In 2017, ANROWS administered the National Community Attitudes towards Violence against Women Survey (2017 NCAS), a survey aiming to help understand attitudes toward violence against women, what influences those attitudes, and if there have been changes to those attitudes over time. Two of the key studied attitudes were "disregarding the need to gain consent for sexual activity", and "mistrusting women's reports of violence".

This report focuses particularly on the attitudes of young people, given higher prevalence and particular impacts of violence on young women (p 5). Overall, across the measured themes, young people's attitudes were least favourable on the theme "mistrusting women's reports of violence". Some of the key findings relating to consent were:

- One in seven respondents believed that "many allegations of sexual assault made by women are false".
- Nearly one in eight respondents did not agree or were not aware that it is a criminal offence for a man to have sex with his wife without her consent.
- Nearly a third of young men believed that "a lot of times, women who say they were raped had led the man on and then had regrets".
- More than one in four respondents believed that if a woman sends a nude image to her partner, she is partly to blame if he shares it without her consent.
- One in eight respondents believed that women mean "yes" when they say "no".

The link includes short videos on *Understanding consent: Findings from the 2017 NCAS Youth report*.

Stubbs, Julie, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7(2) *Criminology & Criminal Justice* 169.

This paper explores key issues that remain under-developed in the restorative justice literature from a feminist perspective, taking domestic violence as a focus. The authors point out that the virtues claimed for

restorative justice include its emotional engagement with crime and the opportunities afforded to participants by its discursive character, yet these issues are rarely explored from a perspective that is attentive to gendered or other asymmetrical forms of social relations. Central to this analysis are questions of victims' interests and safety, expectations about the victim's role and the appeal to apology and forgiveness in much of the restorative justice literature. It is argued that the challenge of taking gendered harms seriously may require an approach that differs from common restorative justice practices such as the development of hybrid models that draw from both conventional criminal justice and restorative justice. At p180 – 'We need to move beyond polarized debates that characterize women as either free agents empowered through choice or as too victimized to act in their own interests and to recognize agency as constrained by material circumstances and cultural narratives and practices.'

Wangmann, Jane, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 *Sydney Law Review* 695.

This article considers the protection order system in NSW. At p714-716 the article explores the emphasis on settlement in protection order proceedings, noting that the notion of consent in protection order proceedings is problematic. See p715 'While there are a range of benefits associated with the ability to consent to a protection order without the necessity of a contested hearing, there are also a range of disadvantages, for example, such a regime assumes that the parties are equal in their negotiations, that there are no other factors, such as intimidation and threats, that influence the willingness to consent, and it fails to provide a public forum in which the woman's story is affirmed and the man's actions are clearly denounced'.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 *University of New South Wales Law Journal* 945.

This article examines the differences in men's and women's complaints for civil protection orders in NSW. The article looks at the ways in which perpetrators use cross-applications for protection orders as a way to continue their abuse. The author notes that cross-applications 'are not only a mechanism through which a person may raise counter allegations about violence (and hence a data source to compare men's and women's allegations); they are also a legal mechanism that appears to be used by some men as a tactic or

'bargaining tool' to bring about a particular resolution- ideally mutual withdrawal. The research identifies that 45.5 per cent of cross applications in the court file sample resulted in mutual withdrawal; 28.6 per cent resulted in mutual orders; 18.2 per cent resulted in the woman being granted an order and not the man; and the remaining 7.8 per cent being were resolved by mutual dismissal' (at p967).

Webster, Kim, Diemer, K., Honey, N., Mannix, S., Mickle, J., Morgan, J., … Ward, A, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (ANROWS, 2018).

In 2017, ANROWS administered the National Community Attitudes towards Violence against Women Survey (2017 NCAS), a survey aiming to help understand attitudes toward violence against women, what influences those attitudes, and if there have been changes to those attitudes over time. One of the key studied themes is attitudes toward consent for sexual activity.

The 2017 NCAS shows the pervasiveness of concerning attitudes toward consent, such as (pp 11-12):

- 31 percent of respondents agreed that "a lot of times", women who say they were raped had "led the man on and then had regrets";
- 42 percent agreed that sexual assault accusations are commonly used to get back at a man;
- 23 percent agreed that women find it flattering to be pursued, even if they are not interested;
- 12 percent still agree that women "often" say no when they mean yes;
- 28 percent believed that when a man is very sexually aroused, he may not realise that a women doesn't want to have sex;
- 33 percent agreed that rape results from men not being able to control their need for sex; and
- 19 percent still do not agree that rape in marriage is a crime (p 6).

The 2017 NCAS also investigated whether or not Australians would justify non-consensual sex in different circumstances. The survey found that few Australians believed a man would be justified if he tried to have sex with a woman he was kissing after she had pushed him away. However, the proportion of Australians justifying the behaviour was greater in the scenario in which the woman had taken the man into the bedroom and started kissing him before pushing him away (p 13).

The findings show that a concerning number of Australians are unclear about what constitutes consent,

and the line between consensual sex and coercion. The report states that “gendered power dynamics, expectations and stereotypes related to sexuality influence how consent is understood and negotiated” (for example, men as aggressive and women as submissive) (p 13).

International

Basile, Kathleen C, ‘Rape by Acquiescence: The Ways in Which Women “Give In” to Unwanted Sex with their Husbands’ (1999) 5(9) *Violence Against Women* 1036.

In this article, the author examines women's processes of acquiescence to unwanted sex in marriage. Analyses of 41 interviews with (USA based) women who have experienced some form of unwanted sex in a marital or long-term intimate relationship. Notably 21 women described severe coercion (including verbal bullying, physical force and/ or threats of force) (p1045). The author uncovers five types of acquiescence to unwanted sex and discusses the conditions under which women adopt a given type. Types of acquiescence (from p1045): unwanted turns to wanted; it’s my duty; easier not to argue; ‘[d]on’t know what might happen if I don’t’ (p1049), and ‘[k]now what will happen if I don’t’ (p1049). The latter two types especially draw on coercive and controlling behaviours in the relationships to explain women’s acquiescence to sex.

Cara Person, Kathryn Moracco, Christine Agnew-Brune and J. Michael Bowling, ‘“I Don’t Know That I’ve Ever Felt Like I Got the Full Story”: A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases’ (2018) 24(12) *Violence Against Women* 1474-1496.

Intimate partner violence (IPV) is a widespread, ongoing and complex social problem. One in three women in the US has been exposed to IPV, and many seek domestic violence protective orders (DVPOs). The authors conducted DVPO hearing observations and phone interviews with District Court judges in North Carolina (US) to examine how courtroom interactions and information available to judges may influence DVPO decisions. The study provides insight into the varied engagement levels and demeanours of judges, the potential influence on litigant behaviour and judges’ use of perceptions of credibility and evidence when making decisions in DVPO cases. The courtroom observations and interviews both suggested that the information available to help judges make decisions in many DVPO cases may be insufficient as the information presented in the case file is often incomplete. Plaintiffs may not provide sufficient details about

the incident of abuse, or may not present physical evidence or witnesses during the hearing. Information in relation to whether the defendant has access to firearms may also be unknown. In addition to the gaps in the information available to judges, judges have limited time to review case files and to hear each case.

Ellison, Louise and Vanessa Munro, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberation' (2013) *17 International Journal of Evidence and Proof* 299.

The authors conducted a study in which 160 members of the public were recruited and, after observing one of four mini trial reconstructions involving an alleged rape by the complainant's ex-partner, were divided into juries and asked to deliberate towards a verdict. The vast majority of the 'jurors' were receptive, in principle, to the idea that a woman could be raped by a man with whom she had previously had a relationship. However the 'jurors' continued to consider these cases to be 'less clear-cut', 'more delicate' and 'a lot harder' than rapes involving a stranger. The authors found that 'notwithstanding the fact that [the 'jurors'] received an extended judicial direction which, in line with guidance now contained in the [relevant UK] Benchbook, emphasised that rape by an acquaintance or intimate partner is no less serious than rape by a stranger, [the] findings suggest that jurors continued to struggle to convict because of engrained expectations regarding resistance and sexual miscommunication, which often interacted in heightened and quite specific ways with the fact of a previous sexual relationship' (p303). Also see especially pp315-316 detailing the 'jurors' considerations in relation to the complainant and defendant's previous relationship, noting that they were less likely to accept the complainant may have 'frozen' during the sexual attack because the attacker was a former partner, except for where there 'had been a history of domestic abuse at the hands of the defendant, in which case it was felt that a frightened 'freezing' response might have been more credible' (p315).

Gauthier, Sonia, 'The Perceptions of Judicial and Psychosocial Interveners of the Consequences of Dropped Charges in Domestic Violence Cases' (2010) 16 *Violence Against Women* 1395.

This article presents a qualitative study exploring the dismissal of criminal charges in domestic violence cases and the various consequences of the decision to dismiss the charges. At p1376-1377 the article notes reasons why victims of domestic violence often do not cooperate with the judicial process including

refusing to testify. Reasons include: fear of spousal retaliation, forgiveness of or reconciliation with the offender, emotional dependence on the offender, victim's lack of confidence in the judicial system and inadequate protection for victim's as a witness.

Goodmark, Leigh, 'Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions In Domestic Violence Cases' (2009) 37 *Florida State University Law Review* 1.

In this article Goodmark argues that domestic violence law and policy prioritizes the goals of policymakers and battered women's advocates - safety and batterer accountability- over the goals of individual women looking for a way to address the violence in their relationships. While the focus of this article is on mandatory policies, including prosecution and reporting, it can be extrapolated to other aspects of the justice process in Australia. It looks at the conflict between women's autonomy in coercive and controlling relationships and their autonomy in the legal process (i.e. paternalism) from pp25-28. The article goes on to analyse (dis)empowerment, and its importance for battered women in the legal system.

Krahe, Barbara et al, 'Prospective Lawyers' Rape Stereotypes and Schematic Decision Making about Rape Cases' (2008) 14(5) *Psychology, Crime and Law* 461.

This article reports on two studies. In Study 1, 451 undergraduate law students rated rape scenarios with respect to defendant–complainant relationship and coercive strategy (force versus exploitation of the complainant's alcohol-induced defencelessness). Study 2 involved 129 postgraduate trainee lawyers and showed that sentencing recommendations also varied as a function of defendant–complainant relationship and coercive strategy. The authors conclude that the studies show that 'there is a general tendency to attribute less blame to the perpetrator and more blame to the victim of a rape scenario when the rape occurred between dating or marital partners than when victim and perpetrator were presented as strangers' (p462). Results from the study are presented on p467 and indicate that participants perceived the defendant's liability to be reduced in acquaintance and ex-partner perpetrated rapes, compared to stranger rapes, especially where force was used. This demonstrated that 'whilst defendant-complainant relationship did not affect perceptions of defendant liability among participants unaccepting of rape myths, those who accepted rape myths held the defendant less liable the closer his relationship to the complainant' (p467). Moreover, 'more blame was attributed to the complainant in the stranger and acquaintance rapes when the

defendant exploited the complainant's alcohol-induced incapacity than when he used force. This was reversed in the ex-partner rapes, where the complainant was blamed less in the alcohol-related than in the force-related cases.' (p468)

Littwin, Angela, 'Coerced Debt: The Role of Consumer Credit in Domestic Violence' (2012) 100 *California Law Review* 951.

The author defines coerced debt as 'all nonconsensual, credit-related transactions that occur in a violent relationship, not just matters that depend on the express application of force. Because intimidation and control pervade the type of abusive relationships in which coerced debt emerges, the line that separates fraudulent transactions from those of a coercive nature is blurry at best' (p954). Specific methods of coercing debt are considered from p986, including through fraud (p986), force (p989), and misinformation (p990). The author highlights particular issues in these sections for women who may not read/speak English, and gay and lesbian victims. 'Issues specific to secured debt' (from p992) also discusses non-consensual refinancing and home equity fraud.

Logan, TK, Robert Walker and Jennifer Cole, 'Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence' (2015) 16 *Trauma, Violence and Abuse* 111.

This article considers how domestic violence limits a victim's capacity to consent to sexual behaviour. At pp 112-113 the authors discuss the widely held assumption that prior consensual sex is evidence of present consent. The authors posit that there are three areas to examine to better define the role sexual violence plays in coercive control: (1) sexual degradation and humiliation often serve as a potentially significant undercurrent in the context of partner sexual violence (p121); (2) the boundaries of sexual autonomy and consent- identifies tactics used to obtain 'consent': sexual coercion in the context of implicit threat; substance facilitated; incapacitated (p122); (3) the trajectory of sexual violence with other forms of abuse (p121) considers links between separation and sexual violence and stalking and sexual violence. The authors analyse the role sexual violence plays in relationships characterised by coercive control – 'the core of a violent relationship is coercive control, thus sexual consent may be rendered meaningless within the context of a controlling and abusive relationship' (p122).

Impact on Disclosure

Australia

Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

This report discusses reasons behind victim's reluctance to disclose sexual offences. Includes considerations specific to those experiencing sexual or other abuse in domestic and family violence context: ongoing relationship between the victim and perpetrator; economic dependence and potential homelessness; the presence of children; and other avenues for redress such as civil protection orders. P1193-1196

Cox, Peta, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS, 2016 Rev.ed.).

This report provides substantial additional analysis of the data produced through the Australian Personal Safety Survey (PSS) 2012. It highlights important statistics around rates of disclosure. (Note: this article refers to a previous release of the ABS' Personal Safety Survey, but the analysis remains useful. See Australian Personal Safety Survey (PSS) 2016 for most recent release.)

In relation to their most recent incident of sexual assault by a male, one in six women had not told anyone about the sexual assault (p 3). When a woman's most recent incident of male-perpetrated sexual assault was perpetrated by a male cohabiting partner and she did not contact the police, the three key reasons given were: they did not want to ask for help or felt they could deal with it themselves; fear of the person responsible; and that they did not regard it as a serious offence or crime (p 69). When a woman's most recent incident of male-perpetrated physical assault was perpetrated by a male cohabiting partner, one in nine had not told anyone about the assault—this is higher than the number of women whose most recent incident of male-perpetrated physical assault was perpetrated by a stranger or an "other known male" (p 111). When a woman's most recent incident of male-perpetrated physical assault was perpetrated by a male cohabiting partner and she did not contact the police, the two key reasons given were: they did not want to ask for help or felt they could deal with it themselves; fear of the person responsible (p 106). A graph on page 104 shows the low levels of perception of sexual and physical assault as a crime when it is

perpetrated by a cohabiting partner.

Note: this article refers to a previous release of the ABS' Personal Safety Survey, but the analysis remains useful. See Australian Personal Safety Survey (PSS) 2016 for most recent release.

Jennings, Chris 'Disclose Family Violence and Risk Homelessness' (2003) 16(10) *Parity* 24.

This paper reviews literature and identifies unique barriers to disclosure for women with disabilities including: greater social isolation; the impact of previous help-seeking experiences; the difficulty many experience in being believed or taken seriously; the sheer practical obstacles they face in obtaining information or assistance; a lack of awareness and skills on the part of service-providers in dealing with women with disabilities who experience domestic violence; a lack of coordination and cooperation across services regarding these women's needs (p24).

Kaye, Miranda; Julie Stubbs and Julie Tolmie, ' Negotiating child residence and contact arrangements against a background of domestic violence: research report 1.' Socio-Legal Research Centre, Griffith University, 2003.

This research study interviewed 40 women who were involved in child residence and contact negotiations with an abusive ex-partner. The report also includes interviews with 22 professional personnel, including lawyers, counsellors, refuge workers, domestic violence court assistant scheme workers and supervised contact centre workers, who have involvement in these cases. 'In general, it appeared that women felt constrained by the lack of responsiveness of the system to hear and validate their thoughts about what was in the best interest of their children or to ensure that safety mechanisms were in place. Many questioned the ability of the court and professionals to determine these critical factors. Contrary to some views, 70.9% of women found it very difficult to disclose domestic violence to professionals they came in contact with, at least initially.

Kirkwood, Debbie *Behind Closed Doors: Family Dispute Resolution and Family Violence* (Discussion Paper No. 6) (2007, Domestic Violence and Incest Resource Centre, Melbourne).

Literature review considers issues around Family Dispute Resolution and family violence. Identifies that

there are many reasons why women may not disclose family violence, including fear for their safety and that of their children or other family members, denial, embarrassment, concern about their children knowing about the abuse, and a lack of faith in other people's ability to help them. The majority of victims do not report the violence to police or other services. Women from CALD backgrounds, Indigenous women and women with disabilities can experience even greater barriers to disclosure, including cultural and communication barriers and isolation. (p27) 'The requirement to consider the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent fails to recognise that a reluctance to do so can result from genuine concern about the wellbeing of the child where there has been family violence or child abuse. This requirement may further discourage women from disclosing family violence because they fear being perceived as a 'hostile' parent' (p12).

Lievore, Denise 'Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review' (Commonwealth Office of the Status of Women, AIC, 2003).

This review considers 'non-reporting as a rational response' (from p37). It discusses the reasons why a victim may not report sexual assault including victimisation, agency issues, self-esteem. It notes that 'if agency is understood as an ongoing, negotiated process that is facilitated by social structures, practices, relationships and contexts, it becomes easier to understand that women's silence around sexual victimisation is produced both by the effects of oppression and through their attempts to balance the varying and often conflicting demands of their personal and social situations' (p38). It observes that 'incentives and barriers to reporting are mediated by a range of factors, such as access to resources, the values of the community, knowledge about options and legal processes, geographical and social isolation, and so on. Apprehension of an offender who is a family member or intimate partner may deprive victims who are emotionally or socially dependent on the perpetrator of the minimal social and emotional resources already available' (p38).

Meyer, Silke 'Responding to Intimate Partner Violence Victimisation: Effective Options for Help-Seeking' (2010) Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology No. 389.

Draws on International Violence Against Women Survey data (2002-2003- see Mouzos and Makkai below)

and examines formal and informal forms of help-seeking among victims of intimate partner violence to identify predictors and illuminate opportunities for improving formal intervention measure.

In particular the 'findings highlight the role of children, partners' prior counselling experiences and the severity of abuse as key predictors of victims' decisions to seek formal, in addition to informal, support' 'the observed association between abuse severity and victims' help-seeking behaviours illuminates the opportunity for further reducing harm. Victims who experienced more severe and often life-threatening types of abuse are significantly more likely to approach formal sources including, but not limited to, medical professionals.' (p5)

Mouzos, Jenny and Toni Makkai, *Women's Experience of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* , *Research and Policy Series No 56* (Australian Institute of Criminology, 2004).

This paper reports on the findings of the International Violence Against Women Survey (IVAWS), which was conducted across Australia between December 2002 and June 2003. A total of 6,677 women aged between 18 and 69 years participated in the survey, and provided information on their experiences of physical and sexual violence including childhood violence. Notes reasons for non-reporting: (pp97-98)

- In some cases women may not regard it as unacceptable behaviour (evidenced by the fact that only 26% of victims in the IVAWS considered their experience a crime), and may fear the reactions of others. The reactions and support of family and friends were reported to impact significantly on women's wellbeing.
- Notes the Australian ideal of privacy in the home would also prevent many neighbours or friends from reporting known incidents of domestic violence to police.

From IVAWS survey data identifies statistics on lack of reporting:

- few women who experienced violence by an intimate partner or some other male had reported the most recent incident to police or judicial authorities (see figures 40 and 41).
- 14 per cent of women who experienced violence from an intimate partner, and 16 per cent of women who experienced violence by someone else reported the most recent incident to police.
- Differences emerged in levels of reporting based on the victim-offender relationship. In terms of

women victimised by intimate partners, a greater proportion of women who were victimised by a previous husband/partner reported the most recent incident to police (24%) compared to women who were victimised by a current husband/partner or current/previous boyfriend (8%; Figure 40).' (p101)

Spangaro, Joanne M; Anthony B Zwi and Roslyn G Poulos, '"Persist. Persist": A Qualitative Study of Women's Decisions to Disclose and Their Perceptions of the Impact of Routine Screening for Intimate Partner Violence' (2011) 1 *Psychology of Violence* 150.

This article presents the findings from a small qualitative study of routine screening for intimate partner violence (IPV) among health services in New South Wales. The researchers conducted interviews with 20 women six months after they had given positive response to IPV screening questions.

The research identifies three elements - direct asking, a trustworthy or trusted person, and choice, constituted key aspects of the screening that supported disclosure' (p155). Results indicated that disclosure facilitated when women judged it safe on three dimensions; from the abuser, from shame and from losing control (p158).

Spangaro, Joanne M; et al, 'Who Tells and What Happens: Disclosure and Health Service Responses to Screening for Intimate Partner Violence' (2010) 18(6) *Health and Social Care in the Community* 671.

Two samples of women were surveyed between March 2007 and July 2008; those who reported abuse during screening 6 months previously (122) and those who did not report abuse at that time (241). Twenty-three per cent (27/120) of women who reported abuse on screening were revealing this for the first time to any other person. Of those who screened negative, 14% (34/240) had experienced recent or current abuse, but chose not to disclose this when screened. The main reasons for not telling were: not considering the abuse serious enough, fear of the offender finding out and not feeling comfortable with the health worker.

Twenty-nine women provided explanation for their decision not to disclose IPV. The women were given a list of six reasons which they ranked as follows: abuse not considered serious enough (8); fear of offender finding out (4); not comfortable with the health worker (2); embarrassment or shame (1); worry about who

else would be told (1). None of the women selected the option 'Thought it was own fault' as the main reason for not disclosing. Nine women ticked 'Other' and gave diverse explanations such as, 'Abuse is infrequent and manageable', 'Wasn't a priority to talk about it then, just wanted to get better', 'Not with that person anymore.' (p676)

Stavrou, Efty, Suzanne Poynton and Don Weatherburn, 'Intimate partner violence against women in Australia: related factors and help-seeking behaviours' [2016] 200 *Crime and Justice Bulletin* 1.

The aim of this study was to 'determine which factors were associated with (1) female experiences of intimate partner violence (IPV), (2) female reporting of physical or sexual assault by an intimate partner to the police and (3) females seeking help and support after experiencing IPV'. It found that, '[t]he risk of IPV varies greatly across the community. Factors associated with a higher risk of IPV included being younger, Australian-born, having a long-term health condition, lacking social support, experiencing financial stress, having previously been a victim of child abuse and having experienced emotional abuse by an intimate partner' (p.1)

It also found that, '[w]here the most recent incident of physical or sexual assault in the last two years was perpetrated by an intimate partner, less than one in three assaults were reported to the police. Intimate partner assaults were less likely to be reported to the police if the perpetrator was still a current partner of the victim at the time of the interview, the assault was sexual (not physical) and if the victim perceived the assault was "not a crime" or "not serious enough". Having a physical injury after the incident was associated with an increased likelihood of reporting the assault to the police. Where the most recent incident of violence (assaults and threats) was perpetrated by an intimate partner, a counsellor or social worker was consulted after 30% of all incidents' (p.1).

Voce, Isabella and Hayley Boxall, *Who Reports Domestic Violence to Police? A Review of the Evidence* (Research Report No 559, September 2018, Australian Institute of Criminology)

The police play an important role in the management of immediate harm and risk associated with domestic violence. However, the hidden nature of domestic violence incidents means that the involvement of police is dependent on a report being made. Set against the backdrop of increasing levels of reporting of domestic violence in Australia, the current study analysed 21 Australian and international quantitative studies of

victim self-report data to identify factors associated with victim reporting of domestic violence to police. The analysis found that victims who are female, non-white, experiencing frequent violence and who have been abused in the past are more likely to report. Incidents that involve serious violence, an intoxicated offender and/or child witnesses are also more likely to be reported to the police.

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

Notes: ‘ Victims report that sexual forms of family violence, such as rape or other forced sexual acts, are particularly difficult to talk about, even when other violence has been disclosed’ (p102)

Explains that in many courts applications for protection orders are made in a public place. Notes: ‘This is not only unsafe, but the application requires victims to list the reasons they need an order, which will require the disclosure of the family violence they have suffered. For some people, this constitutes the disclosure of many years of abuse, some of which may be of a particularly sensitive nature (eg sexual violence). A public place is obviously not the most appropriate venue for such a process’ (p226).

Wendt, Sarah, Donna Chung, Alison Elder, Antonia Hendrick and Angela Hartwig, *Seeking help for domestic and family violence: Exploring regional, rural, and remote women’s coping experiences – Key findings and future directions* (ANROWS, 2017).

This qualitative study examined the experiences of women seeking help for domestic and family violence who live in regional, rural, and remote areas in Australia. The research drew on interviews with 23 women and interviews / focus groups involving 37 managers and practitioners. Some key findings from the study help to understand experiences of women living in social and geographical isolation. This includes (p 4):

- Women coping alone with violence for extended periods through various active strategies such as placating and trying to help their partner;
- shame and embarrassment delaying help-seeking;
- Aboriginal women’s dignity and pride being associated with being able to keep their children safe and rely on families;
- Aboriginal women using temporary stays at refuges as a way of staying safe; and
- Social isolation affecting help-seeking more than physical distance from local communities”.

Wendt, Sarah, Donna Chung, Alison Elder, Lia Bryant, *Seeking help for domestic violence: Exploring rural women's coping experiences: State of knowledge paper* (ANROWS, 2015).

This literature review focuses on the unique experiences and specific barriers faced by women experiencing family or domestic violence in rural and remote areas. It notes that women living in socially and geographically isolated places often cope with domestic and family violence by themselves for long periods of time (p 1). See p5-6 which discusses the structural barriers and cultural factors that prevent rural women from disclosing, including that 'self-reliance was so valued and upheld in families that to disclose or ask for help about domestic and family violence was perceived as a failure or shameful' (p 6).

The review notes that effect of social and geographical isolation is particularly important for Indigenous women's ability to disclose, and that the small and tight-knit nature of Indigenous communities can influence decisions to report (p 10).

Pages 10-12 discuss the particular barriers for culturally and linguistically diverse women (such as racism, lack of access to interpreters, and cultural isolation), those identifying as LBTIQ (such as discrimination, homophobic or transphobic attitudes, and a lack of specialist services), and women with disabilities (such as relying on the abuser for transport, and a lack of specialist services).

Willis, Matthew 'Non-Disclosure of Violence in Australian Indigenous Communities' Trends and Issues in Crime and Criminal Justice (No 405, AIC, 2011).

This paper reviews literature and explores some of the reasons for the high rates of non-disclosure of violence generally and domestic violence specifically in Indigenous communities. Reasons include:

- 'Victims may fear retaliation from the perpetrator, friends or family. This may be particularly so if the victim feels that reporting the incident may lead to police intervention but not prosecution, such as where the police treat family violence or spousal sexual assault as a 'private matter' and deal with it through conciliation or mediation rather than charging. The victim's decisions, particularly those of female victims in family violence situations, may also be heavily influenced by power, control and manipulation on the part of the offender' (p4)

- ‘Victims may not want to disrupt the perpetrator’s relationship with children, or affect relationships with other family members or friends. Anxiety about the effects on family was found to be the second most common reason for not reporting, after not being believed, in a New Zealand sample of sexual assault survivors/ victims. Whether the perpetrator is known to the victim or not, the victim may weigh up the impacts on the perpetrator of being charged with an offence, such as loss of employment, reputation or possible imprisonment’ (p4)

International

Alaggia, Ramona; Cheryl Regehr and Angelique Jenney, ‘Risky Business: An Ecological Analysis of Intimate Partner Violence Disclosure’ (2012) 22(3) *Research on Social Work Practice* 301.

This research reports on interviews with individuals and focus groups undertaken to collect data from 98 IPV survivors and service providers. The research concludes that ‘IPV disclosure remains a “risky business” with perceived negative outcomes outweighing benefits. Results reinforce that social work interventions need to occur at all levels of the human ecology in order to provide effective responses.’

This article provides a good overview of barriers to and decision-making around disclosing intimate partner violence. It considers intrapersonal factors (such as mental health and distress, resilience and resistance; p306), family and cultural dilemmas (such as shame, and presence of children), community services (including the inappropriate responses some women experienced, racism, accessibility, numerous issues around police intervention including losing control over the process that comes into play; p307), and policy and program impacts (including immigration and deportation issues, child welfare reporting, and financial vulnerability; p307-8). It concludes that ‘Individuals will carefully assess their situational context and only disclose in varied degrees and amounts, depending on their reading of anticipated risks and benefits. Until the benefits clearly outweigh the risks, disclosure will be withheld’ (p309).

Calton, Jenna M; Lauren Bennett Cattaneo and Kris T Gebhard, ‘Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence’ (2015) (May) *Trauma, Violence, Abuse*.

This article reviews the literature on LGBTQ intimate partner violence and suggests three major barriers to

help-seeking exist for LGBTQ IPV survivors: a limited understanding of the problem of LGBTQ IPV, stigma, and systemic inequities (p7).

Evans, Maggie A and Gene S Feder, 'Help-Seeking Amongst Women Survivors of Domestic Violence: A Qualitative Study of Pathways towards Formal and Informal Support' (2016) 19(1) *Health Expectations* 62.

This article reports on interviews with 31 women survivors of domestic violence abuse to explore their pathways to support and their experiences of barriers and facilitators to disclosure and help-seeking. Notes that 'for most women, disclosure to others only began after leaving the relationship. Many justified not seeking help or leaving their partner sooner by prioritising their role as a mother who needed to keep the family together' (p67). Barriers to disclosure identified include (from p68): women's self-perception (i.e. not recognising behaviour as abusive, depression, low self-esteem, perceptions of their role in the family as supporting others, fearing a judgmental response); past relationship experience (i.e. multiple abusive relationships contributing to the perception that help would not be available or being fearful of change and not being taken seriously); and fear of repercussions of disclosure.

Fanslow, Janet L and Elizabeth M Robinson, 'Help-Seeking Behaviors and Reasons for Help Seeking Reported by A Representative Sample of Women Victims of Intimate Partner Violence in New Zealand' (2010) 25(5) *Journal of Interpersonal Violence* 929.

This article identifies the link between disclosure and help. Using data from the New Zealand Violence Against Women Study the authors report on the help-seeking behaviours of the women who had ever in their lifetime experienced physical and/or sexual violence by an intimate partner (*n* = 956). More than 75% of respondents reported that they had told someone about the violence however, more than 40% of women indicated that no one had helped them. (p942)

Garcia-Moreno, Claudia; et al, '[WHO Multi-Country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses]' (World Health Organisation, 2005).

Identifies high rates of non-disclosure of domestic and family violence globally. Notes that the respondents' most common reason for not seeking help was either that they considered the violence normal or not serious' (p19).

Ver Steegh, Nancy 'The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative) Lawyers' (2009) 38 *Hofstra Law Review* 699.

Among other issues this article considers reasons why victims may not report abuse. The author observes: 'Victims of coercive-controlling violence have good reason to deny or minimize violence. If disclosure is discovered or even suspected by the perpetrator, the victim and children will likely be subjected to additional abuse… A victim may be more likely to disclose coercive-controlling violence after establishing a trusted relationship with an open and empathetic listener' (p719). Note also her suggestion that there should be multiple opportunities for victims to disclose throughout the process (p730).

Impact on consent and disclosure - Other Resources

- **False allegations of abuse - or not? Understanding the reality of domestic violence & sexual assault.**

Victim experience of court processes

Where a victim is a party to domestic and family violence related proceedings, their experience of court processes is likely to be improved where the judicial officer has a good understanding of domestic and family violence. Researchers have identified a range of judicial behaviours that may have the effect of either exacerbating a victim's experience of domestic and family violence (also known as secondary abuse) or helping to empower a victim to regain control of their circumstances, wellbeing and future. Studies have found that respectful and inclusive approaches may positively affect victims' mental health as well as their sense of satisfaction [Fleury 2002] with court processes. The following tables highlight a number of common victim experiences and suggest proactive approaches by judicial officers to improve satisfaction and minimise the risk of secondary abuse.

Judicial conduct of proceedings

Experiences	Proactive approaches
Sense of limited opportunity to speak and be heard [Kaye 2019]	> Ask about victim's fears, concerns and needs, both personal and relating to children eg child support > Allow victim opportunity to raise other issues, and ask questions to clarify > Convey clear message that victim has been heard and respected, and that the process and outcome have the force of judicial authority
Sense that abuse minimised, denied or made light of [Roberts et al 2014], or of being blamed for abuse [Ptacek 1999]; a sense of being on trial [Laing 2013]	> Recognise the complexity, seriousness and possible financial impact [Braaf & Meyering 2009] of the victim's circumstances and experiences and the impact on children's wellbeing and safety > Where possible facilitate the use of screens, phone or video evidence where victim fears having to testify against perpetrator or being in perpetrator's presence [Vulnerable witness provisions (Australia)] > Demand high standards of probity and respectful demeanour from all legal representatives acting in the proceedings > Avoid labelling behaviours as 'relationship conflict' or 'couple fighting' that can be resolved through couple-counselling, reconciliation, separation or the making mutual orders [Hunter 2006] > Avoid routine approach to duration of orders; consider how long they are needed [Hunter 2006] having regard to the victim's particular circumstances and experiences

	Avoid routine approach to shared parental responsibilities; consider how violence impacts on children's wellbeing and safety, and parents' respective capacity to care for children
Sense that greater concern for perpetrator than for protection of victim and children [Ptacek 1999], and that perpetrator not being held accountable for actions [Braaf & Meyering 2009]	Avoid familiar or colluding demeanour towards perpetrator Emphasise that court will not tolerate violence and abuse Question perpetrator's possible misuse of court processes (systems abuse) eg where multiple applications for adjournment; cross applications that publicly shame victim, seek to trivialise the victim's experiences, or seek an advantage in Family Court proceedings; applications that seek to have matters heard separately Impose sanctions for perpetrator's breach of orders or systems abuse appropriate to level of seriousness and harm caused Encourage victim to return to the court if they need to

Legal representation

Experiences	Proactive approaches
Absence of, or inability to access, or refusal of legal representation resulting in self-representation for victim and/or perpetrator	Explain to party/ies the possible consequences of self-representation including unfamiliarity with court processes, having to deal directly with the other party's legal representative, an imbalance of bargaining power between parties, consent orders or inappropriate outcomes, perpetuation of abuse through court process [Kaspiew et al Survey of Family Law Practices 2015] Where victim is self-represented, consider whether the victim's fear of the perpetrator diminishes or negates their capacity to cross-examine the perpetrator and jeopardises the court's ability to receive the necessary evidence in order to make decisions for the safety and protection of victims and children [Vulnerable witness provisions (Australia)] Where perpetrator is self-represented, consider the likely adverse impact on the victim and the victim's evidence of the perpetrator's direct cross-examination and whether steps should be taken to protect the victim from further abuse by the perpetrator while ensuring procedural fairness and access to justice (eg screens, video link) [Vulnerable witness provisions (Australia)] Ask questions of self-represented party/ies to ensure understanding of nature and effect of orders/outcomes Demand high standards of probity from legal representatives See "Judicial conduct of proceedings" above

Courthouse and courtroom

Experiences	Proactive approaches
Sense of intimidation arriving at court Lack of safety Lack of privacy [JCCD, The Path to Justice (ATSI) 2016, JCCD, The Path to Justice (CALD) 2016] Lack of safe waiting areas [Ptacek 1999] Fear of or actual confrontation with perpetrator/family and friends [Roberts et al 2014] Long waiting times	> Consider introducing 'greeters' at courts [JCCD, The Path to Justice (ATSI) 2016, JCCD, The Path to Justice (CALD) 2016] > Consider whether there is space available to establish a safe room (eg such as using an existing interview room) > Consider segregating waiting area > Consider (improved) waiting area security > Ensure court staff trained in safety and risk procedures appropriate to managing court precinct > Consider separate entries to court for victims and perpetrators. > Consider seating parties and witnesses so as to prevent eye contact between perpetrators and those they target > Where possible, facilitate the use of screens, phone or video evidence where victim fears being in perpetrator's presence [Vulnerable witness provisions (Australia)] > Consider whether victims are safe to leave the court and whether it is possible for security officers /police to escort victims to their transport > Consider splitting court days into morning and afternoon sessions so waiting is limited to half a day [JCCD, The Path to Justice (ATSI) 2016, JCCD, The Path to Justice (CALD) 2016].
Lack of facilities/services for children, people with special needs [Ptacek 1999], for example: Appropriate space Appropriate access Communication: it may be assumed that interpreters are not needed, or there may be cross-cultural communication issues, for example for Aboriginal and Torres Strait Islander people who don't speak English as their first language, communication may be difficult, and they may find non-verbal expression and body language confusing or	> Consider whether there is space available to establish a room appropriate for children while parties wait for/participate in proceedings > Ensure that all areas are accessible by wheelchair > Ensure appropriate interpreter or translator services are provided > Make court interpreter policies publicly available [JCCD, The Path to Justice (ATSI) 2016] > Consider whether information about legal options can be made available in different forms, eg written, visual, aural > Consider whether support person can be made available > Consider playing educational videos in court waiting areas [JCCD, The Path to Justice (ATSI) 2016] > Consider whether Aboriginal and Torres Strait Islander elders or cross-cultural liaison officers [JCCD, The Path to Justice (CALD) 2016] may be needed to assist with communication issues or the practicalities of giving sworn oral evidence [JCCD, The Path to Justice (ATSI) 2016].

intimidating; for culturally and linguistically diverse people who wear a form of headscarf, it may be wrongly assumed that they are of the Muslim faith	
Lack of information about processes [Gillis et al 2006] and options, and lack of appropriate court support [Ptacek 1999]	> Ensure information about legal options made available in appropriate form > Consider whether support person can be made available > Consider whether representatives from local support services can be available in the court precinct for referrals
Unfamiliar, intimidating and demeaning environment [Gillis et al 2006] Bureaucratic and indifferent treatment by court staff [Ptacek 1999]	> Consider introducing 'greeters' at courts [JCCD, The Path to Justice (ATSI) 2016] > Ensure that court staff speak to and treat victim and children respectfully, take steps to alleviate victim's fears where possible, and follow safety and risk procedures
Exclusion from courtroom in response to safety concerns resulting in sense of marginalisation and lack of participation in process [Kaspiew et al Survey of Family Law Practices 2015]	> Consider how courtroom layout and presence/absence of particular individuals may accommodate victim's presence in courtroom while alleviating safety concerns

Victim experience of court processes - Key Literature

Australia

Braaf, Rochelle, and Isobelle Barrett Meyering, 'When Does It End? The Continuation of Family Violence through the Court Process, Financial Outcomes for Women and Good Practice' (Paper presented at Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 1-3 October 2009).

Working with eight services across Queensland, South Australia and Victoria, the authors conducted interviews and focus groups with approximately forty staff and sixty female clients who have experienced abuse. It identifies a number of issues women experience with the court system, including access to and satisfaction with Legal Aid and legal representation, and financial costs. In terms of their experience of the court process generally, women commented on feeling disempowered and lacking faith in the courts due to safety issues and not feeling as if they were being heard (p3), and perpetrators not being held accountable by the courts (p4).

Douglas, Heather, 'Domestic and Family Violence, Mental Health and Well-Being, and Legal Engagement' (2017) *Psychiatry, Psychology and Law* (online).

This article draws from interviews with a group of diverse women who have engaged with the legal system after experiencing domestic and family violence (DFV). The study sought to investigate how women's experiences of legal processes 'affected their mental health and well-being' (p 1). Almost all the women experienced some type of mental health issue directly attributable to DFV (p 5). Many women engaged preventative measures prior to attending court, including pre-court counselling, contacting mental health practitioners, and taking prescribed medication (p 2). Other women self-medicated and avoided seeking help fearing that proof of mental health concerns may lead to negative court outcomes (p 2). Many women highlighted attending court (pp 5-6), having to face the perpetrator in court (pp 6-8), and giving evidence (pp 8-9) as negatively affecting their mental health (p 10). A number of suggestions are made for improving women's experiences in court, including:

- minimising the frequency with which victims are required to attend court (p 10);
- allowing women to give evidence remotely (p 10);

- minimising contact between the victim and abuser, through ensuring there are safe waiting spaces (p 10), and staggering attendance and departure times of the parties (p 11);
- providing effective training to court personnel regarding the dynamics of DFV (p 11); and
- ensuring cross-examination, and legal proceedings in general, are not misused by the abuser (p 11).

Douglas, Heather, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30(3) *Sydney Law Review* 439.

This article draws on a study of criminal prosecutions of breaches of domestic violence protection orders in Queensland, Australia and explores the process of criminal intervention in the context of domestic violence. See especially at p457 describing the added stress victims are likely to experience in the court process for domestic violence matters due to the fact that '…breach defendants were more likely to be legally represented than in other criminal matters heard in the magistrates courts; there were more returns to court for breach of domestic violence matters than other criminal matters and there was a reduced rate of pleading guilty compared to other offences' (p457).

Hunter, Rosemary, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733.

See 'Judicial 'Knowledge' About Domestic Violence' (from p754) drawing on observations of court proceedings the author notes that magistrates varied greatly in being supportive or minimising harm, affirming or not affirming women, with some questioning why the applicant stayed with her abuser (p755). Several themes emerge from this court observation study:

- magistrates' emphasis on physical violence, especially recent incidents, as discrete incidents rather than patterns of abusive behaviour;
- understanding relationship conflict as the cause of violence (resulting in obligations to leave, encouraging reconciliation, making mutual orders, and providing potentially insufficient duration of orders);
- approaching inconsistency around child contact by allowing an exception to protection orders to exercise child contact;
- denying and minimising violence through reactions to stories; engaging in narratives that frame women

as ‘bad mothers’ or strategically using intervention orders for the purposes of family law proceedings.

Kaye, Miranda, ‘Accommodating Violence in the Family Courts’ (2019) 33(2) *Australian Journal of Family Law*, 100-121

This article argues that allegations of family violence are 'the new normal' in family court matters in Australia and calls for the family law system to prioritise victim safety. It presents findings from a study with independent children's lawyers from Victoria and New South Wales, highlighting their views on issues of family violence, self-representation, safety, and physical court premises, which are in contrast to the recommendations of the recent Australian Law Reform Commission into the family law system, which failed to address the safety of court users. There needs to be a shift in thinking from providing 'special' arrangements to victim safety being the standard approach.

Jordan, Lucinda, and Lydia Phillips, ‘Women’s Experiences of Surviving Family Violence and Accessing the Magistrates’ Court in Geelong, Victoria’ (Report, Centre for Rural and Regional Law and Justice, Deakin University, 2013).

Drawing on interviews with 37 women who had survived family violence and 23 workers supporting women survivors this research considers among other things the experience of court processes in relation to domestic violence. Of particular relevance is section 3.The research found:

- many women felt they had a limited opportunity to speak and be heard (from p23)
- women who reported magistrates were ‘fair described magistrates as demonstrating compassion and understanding family violence (from p24)
- some women reported their partners made cross applications which they described as ‘a game to further manipulate and shame them’ (from p26)
- women had a strong perception that family law was over-emphasised at the expense of their protection (from p27)
- women reported that undertakings were ineffective and inappropriate (from p28)

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. The report considers allegations of false reports of family violence and tactical use of domestic violence protection orders in family law proceedings ([8.2]; p174). The report considers the question of further abuse of victims of family violence through legal processes [8.3]. Some extracts of quotations include:

- 'We are seeing the courts being used increasingly for frivolous matters and it does to some extent seem that the courts are increasingly being used as a continuation of abuse for victims of domestic and child abuse. The legal aid funding, which cannot be divorced from this analysis, is also being used in matters where there does not seem to be any merit and often the other party who is the victim experiences a great deal of difficulty in obtaining legal aid funding.' (L18, lawyer)(p177)
- 'Victims tend to be excluded from courtrooms because of their safety concerns (which is unhelpful because they don't get to hear what the judicial officer says, and it feels like marginalisation which is kind of a repeat of the abusive tactics). There needs to be better resourcing of these matters to ensure victims can fully participate.' (L402, lawyer)' (p177)

Laing, Lesley, *'It's Like this Maze You Have Make Your Way Through': Women's Experiences of Seeking a Domestic Violence Protection Order in NSW* (Faculty of Education and Social Work, University of Sydney, 2013).

Draws on interviews conducted with 40 women who were asked about their experiences in obtaining an Apprehended Violence Order (AVO) in Sydney. Chapter 2 explores the experiences of 'Going through the legal process', including applying for an AVO, going to court (facing the perpetrator and the importance of court support), and the risk of using the law. Women commonly felt that facing the offender in court was a 'challenge' and often that they were the ones 'on trial', the experience was particularly challenging when women were not sure about the processes (p26). Chapter 3 looks at 'Key issues from women's perspectives'

and identifies the importance of the appropriate response and support, and issues involved in the process of prosecution. Further chapters explore the issues with intersecting, and fragmented legal systems, and identify themes around 'struggling to be heard' and 'senses of injustice'.

Ragusa, Angela, 'Rural Australian Women's Legal Help Seeking for Intimate Partner Violence: Women Intimate Partner Violence Victim Survivors: Perceptions of Criminal Justice Support Services' (2012) 28(4) *Journal of Interpersonal Violence* 685.

This study draws on 36 in-depth face-to-face interviews. Findings reveal police and court responses reflect broader social inequalities and rurality exacerbates concerns such as anonymity and lack of service. It finds that police and the criminal justice system play an important role in de-stigmatizing intimate partner violence and legitimating its unacceptability.

Roberts, Donna, Peter Chamberlain and Paul Delfabbro, 'Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis' (2014) 22(4) *Psychiatry, Psychology and Law* 599.

Draws on interviews conducted with 15 women to examine the psychological impact of the Family Court process on women who have left abusive relationships. Women reported that the experience of engaging with the court process caused considerable distress. Principal themes related to fear of the ex-partner and having to confront him at hearings, constantly reliving the relationship via affidavits, and the insensitivity of some legal professionals to the difficulties experienced by women confronted with these experiences.

Women's Safety and Justice Taskforce (2021) Hear her voice volume 2 (Brisbane, Women's Safety and Justice Taskforce).

See pp 206- 229 where the Taskforce reports on submissions it received about judicial officers.

Examples of unsatisfactory treatment of victims by judicial officers are listed at p209 and include:

- judicial officers refusing to grant protection orders and instead, telling victims to go to the family courts.
- judicial officers refusing to put any protection orders in place unless the respondent came to court and

then placing the burden on the victim to go away and collect further evidence to get protection.

- a judicial officer requiring victims to provide a letter from a medical practitioner before they would allow the victim to make an application that the victim not be cross-examined by the perpetrator.
- judicial officers applying the law inconsistently, including in relation to coercive control.
- a judicial officer who described a perpetrator placing surveillance cameras throughout the house to watch the movements of the victim as merely being signs of an unhealthy relationship breakdown rather than domestic violence.
- a victim making her own application felt unable to pursue it due to a lack of support and inconsistent guidance from the judicial officer.
- a judicial officer who, without speaking to the aggrieved, dismissed an application for a protection order on the basis that the respondent had contacted the court to advise that they were overseas and unlikely to return.

International

Epstein, Deborah, and Lisa A Goodman, 'Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women' (2018) 167 *University of Pennsylvania Law Review* (forthcoming).

This article addresses the ways in which the credibility of female victims of intimate partner violence is discounted through their experiences of legal and social services (pp 3-4). The authors conclude that women's experiences are frequently discounted, which itself can have further traumatic impacts. Judges and other professionals often discount women's stories of abuse as implausible, particularly where the victims suffer from psychological trauma that may impact memory and comprehension (p 7). Women who suffer traumatic brain injuries (pp 9-11) or PTSD (pp 11-3) as a result of domestic violence are particularly susceptible to relaying inconsistent stories. The authors also find that cultural assumptions resulting in the prioritisation of physical over psychological violence causes judges and other authority figures to expect 'real' survivors to also prioritise physical harm, while in reality, victims may feel more significantly impacted by psychological abuse (pp 17-20).

Moreover, the results of the study indicate that gatekeepers often unjustly discount women's personal trustworthiness, based on perceptions of their demeanour (pp 21-5), their perceived motive (pp 25-32), and

their social location (pp 32-7). Even women who are able to overcome initial scepticism often find that the systems intended to provide assistance dismiss the importance of their experiences (p 37). In spite of meaningful progress, 'the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors' (p 38). Ultimately, 'the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse' (p 1).

These experiences of minimisation often echo women's previous experiences of abuse (p 46). The impacts of this discrediting are multifaceted: the dismissal itself constitutes its own injury, which can compound the harm such women experience directly from the abuse (pp 47-50); additionally, this instinctive devaluing of women's testimony becomes an independent obstacle to attempts to obtain safety and justice (pp 50-2). The authors conclude that credibility discounting is widespread and pervasive, and requires genuine institutional reform (p 59). Particularly, actors must be aware of these internalised assumptions, and seek to engage more openly with victims (see pp 54-6).

Fleury, Ruth, 'Missing Voices: Patterns of Battered Women's Satisfaction with the Criminal Legal System' (2002) 8(2) *Violence Against Women* 181.

This research explored intimate partner violence survivors' patterns of satisfaction with the criminal legal system response. 178 female survivors of intimate partner male violence from three sites were interviewed after a domestic violence-related court case closed. This article's introductory discussion highlights how a victim's sense of control over the prosecution and court system enhances their sense of satisfaction with the system. This study supports this assertion, and includes an assessment of women's satisfaction with a number of aspects of the criminal justice system, including the police and courts.

Gillis, Joseph, et al, 'Systemic Obstacles to Battered Women's Participation in the Judicial System: When Will the Status Quo Change' (2006) 12(12) *Violence Against Women* 1150.

The present study presents research from focus groups conducted in Canada with 20 abused women. It examines the experiences of women victims in domestic violence cases and the barriers they faced in dealing with the justice process. In particular generally women described a lack of knowledge of what to expect from

court proceedings and actual court proceedings as intimidating, impersonal and demeaning (p1160).

Klein, Andrew, 'Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges' (National Institute of Justice (US), 2009).

This report reviews research in the United States on domestic violence to determine what works best in protecting victims and stopping abuse. The section on judicial responses (from p52) is helpful. It recommends:

- Judges should strive to create user-friendly, safe court environments for petitioners, be sympathetic to the parties before them, but firm with respondents once abuse has been determined. Thus, victim concerns are validated, and respondents' abusive behaviors are clearly condemned. (p60) (Based on limited studies on the impact of judicial demeanour.)
- Judicial attention before trial to address the risk to victims posed by alleged abusers will result in quicker case resolution and decrease re-abuse by defendants who fail to show for trial. (p62) (based on multiple studies).
- Judges should respond to noncompliant abusers immediately to safeguard victims. (p72) (based on multiple studies).

Miller, Susan L, and Nicole L Smolter, '"Paper Abuse": When All Else Fails, Batterers Use Procedural Stalking' (2011) 17(5) *Violence Against Women* 637.

Using data from interviews with women who have exited violent relationships, attorneys, and practitioners/policy specialists, this research note explores the continuation of control as women encounter "paper abuse." It observes that women exiting violence may confront frivolous lawsuits, false reports of child abuse, and other system-related manipulations that force contact, and financially burdens them. The section 'Limits of protection orders for paper abuse' (from p643) identifies some ways in which the court system itself re-victimises victims of abuse – e.g. in one instance a woman was required to act out the abuse, and then the protection order request was dismissed anyway.

National Judges Association, *Domestic Violence and the Courtroom: Knowing the Issues… Understanding the Victim* (n.d.).

This resource provides practical guidance for judges in engaging with victims of domestic violence in the courtroom, including information on how judges can improve the court experiences of victims, such as:

- listening carefully;
- recognising coping mechanisms, such as denial and minimisation;
- acknowledging that victims may be overwhelmed by court proceedings;
- being proactive in ensuring victims are aware of their options;
- ensuring victims are given effective, meaningful opportunities to contribute to proceedings;
- minimising aspects of the court experience that may be intimidating for victims, including through implementing safety strategies (p 1).

Ptacek, James, *Battered Women in the Courtroom: The Power of Judicial Responses*. (Northeastern University Press, 1999).

This book was one of the first to look at the role of judges in the domestic violence protection order process. Ptacek approaches the issue using three inquiries. He asks: “What do judges do with their authority in restraining order hearings? How do judges interpret their role in responding to woman battering? What effect do judges have on women seeking restraining orders?” (ix).

Ptacek’s research was conducted primarily through interviews. He consulted widely with women in shelters, staff at shelters, feminist lawyers, judges, court support staff, and criminal justice researchers. He focused on two courts in Massachusetts that are considered to treat battered women with respect and take seriously their allegations. However, Ptacek identifies types of judicial behaviour can negatively affect victims in court. This form of abuse is sometimes referred to as ‘secondary abuse’.

Ptacek has illustrated the judicial responses reinforce women’s entrapment in a diagram available here and extracted in the table below.

Neglecting women's fears	> ignoring women's fears > lack of safe waiting areas in courthouse	> lack of coordination with police and probation > inadequate training of court personnel
Courtroom intimidation	> inattention to the impact of a courtroom on victims > bureaucratic and indifferent treatment of abused women	> failure to provide women with information about their legal options
Condescending or harsh demeanour	> patronising displays of authority > harsh or hostile remarks	> racist attitudes toward women of colour > bias against unmarried women
Furthering women's isolation	> failure to provide advocates > lack of resources for non-English speakers	> lack of resources for deaf and disabled women > lack of coordination with community resources
Minimising, denying, and blaming	> mirroring batterers' actions by making light of the abuse > saying the abuse didn't happen	> saying she caused it > making her feel guilty > saying it's just a "lovers' quarrel"
Neglecting the needs of children	> failing to see how batterers manipulate women through their children	> no space in the courthouse for children > lack of concern for safety of children
Colluding with violent men	> showing greater concern for defendants than for women seeking protection	> unwillingness to impose sanctions on batterers > joking and bonding with defendants
Blindness to the economic aspects of battering	> ignoring women's requests for child support and restitution	> bias against women on welfare

Conversely, Ptacek has also illustrated how the judicial responses that empower battered women in a diagram available here and extracted in the table below.

Prioritising women's	> asking about women's fears	> training court personnel on battering

safety	> asking about weapons > confiscating weapons	> making a safe space for women to wait for hearings
Making the court hospitable to abused women	> providing a separate restraining order office > informing women of their legal options	> providing translators > making the building handicap accessible
Supportive judicial demeanour	> listening to abused women > asking questions	> looking women in the eye > recognising the complexity of women's circumstances and choices
Connecting women with resources	> Providing advocates for battered women	> developing relationships with shelters, batterers' programs, and community services
Taking the violence seriously	> communicating through words and actions that the court will not tolerate battering	> encouraging women to return to the court if they need to
Focusing on the needs of children	> demonstrating concern for the safety of children > making space in the courthouse for children	> recognising the effects of battering on children
Imposing sanctions on violent men	> imposing sanctions for violating court orders > refusing to joke and bond with violent men	> correcting institutional bias toward men
Addressing the economic aspects of battering	> asking whether women need child support	> connecting women with community resources around housing and financial assistance

Victim experience of court processes - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

This bench book discusses the challenges faced by a range of vulnerable groups (Aboriginal people, people from CALD backgrounds, people of a particular religious affiliation, people with disabilities, children and young people, women, GLBTIQ people, and older people) in their experience of court processes. The discussion is mostly not specific to proceedings relating to domestic and family violence matters, however the practical guidance provided to judicial officers is likely to be useful in those proceedings.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2nd ed, 2016).

- Chapter 14 of the bench book recognises that women maybe disadvantaged generally in legal proceedings. It notes that: 'The fact that a majority of legal aid approvals are for criminal matters, in respect of which male applicants are heavily over-represented, means that less funding is available to women in family disputes, in which they represent the vast majority of applicants. A potential consequence of being unable to receive legal aid funding is the increased pressure to settle proceedings out of court, even if the terms of the settlement are inadequate. In addition, where women are at a disadvantage in terms of bargaining power (due to a lack of independent means, amongst other factors) there is an increased likelihood that women will not advocate for their rights or will be unable to advocate effectively' (p.167).
- Under 'C Domestic violence and the court process', there is a discussion of the obstacles women may face in prosecuting perpetrators of domestic violence. It notes that domestic violence is prosecuted far less often than it occurs and reasons for this include fear of further violence or other revenge from the perpetrator, feelings of shame or embarrassment, belief that the incident was too trivial or unimportant, previous negative experiences of reporting (e.g., to health professionals), a continuing emotional attachment to the perpetrator, and issues relating to children from a relationship with the perpetrator (p.173).
- The bench book also notes other issues relating to access to justice experienced by women in the legal

system including: (pp.167-170).

- Issues with accessing legal aid;
- A lack of childcare facilities in most courts, as well as difficulty making outside arrangements;
- Recognition of power imbalances in alternative dispute resolution processes;
- Issues for women as witnesses and the need to consider alternative approaches to giving evidence;
- The need to be aware that women may be excluded through the use of gender-specific language.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.1 discusses the court's power to make vexatious litigation restraint orders. 3.7 discusses the court's power to make a costs order where the application was frivolous, vexatious or made in bad faith. 5.8.6 notes that judicial officers and court staff should consider modifying their usual approach to effective communication with parties and assessing credibility and competence of witnesses when dealing with affected family members or respondents with disabilities.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 10 includes very useful pointers for judges about how to deal with victims of domestic violence. Guidelines include: emphasising that domestic violence is not the victim's fault, avoiding repetition of unfounded myths about domestic violence, understanding that sex workers and women who are not in a heterosexual relationship can also be victims of domestic violence.

Chapter 13.3 'Children and family, domestic and sexual violence' provides useful practical considerations around dealing with children in Family Court proceedings, restraining order matters, family and domestic violence and sexual assault, evidentiary issues, the effects of prolonged abuse, directions to the jury and sentencing and other decisions.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Chapter 7: Perpetration Characteristics and Litigation Tactics 'discusses options in response to the rationalizations and litigation tactics of domestic violators who engage in the coercive, controlling, dominating aspects of domestic violence in order to gain the upper hand in family and child protection litigation.'

Section 7.4: Perpetrator litigation tactics discusses the use of litigation to control or harass: '[p]rotracted litigation not only forces the targeted parent into continuing contact with the domestic violator, it also depletes resources, increases stress, and interferes with recovery from DV'. The section goes onto consider judicial responses to litigation tactics, including:

- Explicit findings in judgments relating to and denouncing the misuse of litigation;
- Engaging in coordinated case management and information sharing;
- Exercising the court's authority to prevent abuse of process by declaring a litigant to be vexatious;
- Potential cost options (e.g. interim cost orders);
- Appeal options (i.e. appealing orders is a litigation tactic; responses include requiring security for costs or requiring the appellant to comply with existing orders before entertaining the appeal);
- Avoiding orders that enable harassment and control;
- Additional options in response to excessive litigation (e.g. cost orders to pay for targeted parent's legal representation; prohibit the presence of the abusive party during discovery of documents)

Section 5.3: Detection and prevention of intimidation in discovery proceedings and hearings notes the continued tactics of intimidation and harassment targeted persons may experience in court, emphasising they may be quite subtle. Some possible judicial responses to such actions are identified:

- Monitoring cross examination, and ensuring this is conducted by a lawyer;
- Redirecting perpetrator's testimony to relevant issues;
- Enabling the victim to testify without directly facing the perpetrator (e.g. via video link of from behind a screen);
- Providing separate waiting rooms for the parties;
- Staggering the parties' entrances and exits;

- Allowing a support person to assist the victim.

It should be noted that '[s]tressful surroundings can exaggerate underlying psychological reactions and harm produced by domestic violence. Witnesses are being asked to recount traumatic abuse and violence by persons who breached an intimate trust. In such circumstances, it is particularly important for lawyers and service providers, particularly male professionals, to put the witness at ease and to ensure that all questions are phrased in a non-threatening, non-accusatory manner' (Section 5.3.3).

Victim experience of court processes - Other Resources

- **Diagram: Judicial responses that empower battered women.**
- **Diagram: Judicial responses that reinforce woman's entrapment.**

Federal Circuit and Family Court of Australia (2019) *Reconciliation Action Plan 2019-2021: Federal Circuit Court of Australia*.

This Indigenous Action Plan 2014–2016 aims to address the following identified barriers that exist for Aboriginal and Torres Strait Islanders when accessing the Family Court of Australia:

- a lack of understanding about the family law system among Aboriginal and Torres Strait Islander clients
- resistance to engagement with, and even fear of, family law system services
- literacy and language barriers
- a need for indigenous specific and culturally competent mainstream services
- the challenges arising from lengthy and multi-step Court processes for Aboriginal and Torres Strait Islander clients
- the setting being based on Western notions of child-rearing, kinship and family, and concerns as to whether they operated in a culturally safe way; and
- lack of access to services for communities in regional and remote areas.

Judicial College of Victoria (2021) Note 11: Victims of family violence; Victims of crime in the courtroom: a guide for judicial officers (eManual).

This note explains:

- What is family violence;
- Why victims stay or return to abusive relationships; and
- Key points to consider

An understanding of the dynamics of family violence can help judicial officers avoid unintentionally affirming the perpetrator's narrative in the courtroom or in sentencing reasons.

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Aboriginal and Torres Strait Islander women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2016).

See the Executive Summary (p6-9) which makes a number of recommendations. It also identifies and discusses key pre-court barriers:

- Lack of knowledge of legal rights;
- Lack of financial independence;
- The importance of integrated support services;

- Poor police responses;
- The impact of pre-arrival experiences and traumatic backgrounds;
- Community pressure on women seeking to protect themselves and their children;
- Uncertainty about immigration status and fear of deportation; and
- The cost of engagement with the legal system.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and
- Unethical and poor professional conduct by interpreters.

Identifies barriers to full participation in attending court:

- The intimidating process of arriving at court;
- Safety while waiting at court;
- Lack of understanding of court processes;
- Difficulty understanding forms, charges, orders or judgments;
- Courtroom dynamics;
- The impact of attitudes and actions of judicial officers;
- The need for judicial officers to receive cultural competency training;
- Lack of availability of men's behaviour change programs; and
- Abuse of court processes by perpetrators.

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of

useful resources and links.

Vulnerable witness provisions, Australia.

The approach to the protection of adult victims of domestic and family violence and sexual assault complainants / witnesses (sometimes called vulnerable or special witnesses) in domestic violence protection order matters and criminal cases varies throughout Australia. Protections may include closed courtrooms, using closed circuit television rather than being in court, using a screen in court, having evidence recorded so the person is only cross-examined once, allowing the presence of a support person and disallowing direct cross-examination of one party by another in certain proceedings. See 9.2.3 Vulnerable or Special Witnesses for a table outlining jurisdictional approaches.

Note that detailed information about children giving evidence in criminal proceedings can be found here: Bench Book For Children Giving Evidence In Australian Courts

Victim experience of court processes - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Carol

Faith

Felicity

Fiona

Francis

Gillian

Hilary

Ingrid

Jane

Jennifer

Julia

Leah

Lisa

Melissa

Sally

Sandra

Susan

Yvonne

Safety and protection of victim and witnesses

A number of investigations by Australian courts, law reform bodies and researchers have recognised that there are circumstances in the context of domestic and family violence related judicial proceedings where it may be appropriate or necessary to take steps to ensure the safety and protection of individuals, including those who qualify as vulnerable witnesses [Vulnerable witness provisions (Australia)] [NT Dept of Justice 2011].

Victims of violence may be in physical danger [Douglas & Stark 2010], they may feel fear and anxiety at the prospect of facing the perpetrator or the perpetrator's family and supporters in the courtroom or court precinct, they may be concerned about how their own fear and anxiety may impact on their children [Roberts et al 2015], or they may be re-traumatised by having to recount their experiences of violence [Qld Special DFV Taskforce Report 2015]. For some, their court appearance may be the first time they have spoken publicly about the violence [Douglas & Stark 2010]. Some victims reported further intimidation and abuse by the perpetrator (ranging from staring [Coy et al 2012] to physical attack [George & Harris 2014]) while waiting for their case to be called or during the conduct of the proceedings [Douglas & Stark 2010] or on leaving the court after the hearing [George & Harris 2014]. Studies have observed that on some occasions judges and court staff failed to recognise these acts of aggression [Coy et al 2012].

In regional and rural communities where individuals and families are often well known to one another, victims may also have concerns about their high visibility [Wendt et al 2015] to others, the lack of confidentiality [WESNET 2000], the ramifications of airing private matters, and may fear the shame and public exposure of giving oral evidence [George & Harris 2014]. These issues may be heightened for Aboriginal and Torres Strait Islander people who may experience language barriers in understanding the proceedings and in giving oral evidence, and may not have access to appropriate interpreter services [Alford 2012]. Any of these fears or concerns may have an impact on a victim's capacity to report and disclose their experiences of violence and to seek the legal protections they need to feel and be safe [Loddon CLC 2015].

There is a considerable variation in the resources available to courts across Australia's state, territory and federal jurisdictions. Courts in capital cities and larger metropolitan areas are likely to be able to provide a range of facilities and services for the safety and protection of victims and witnesses that are unavailable to courts in smaller or more isolated centres. While the following measures are considered best practice, it is

acknowledged that best practice may not be supported by legislation or be possible or practical in some circumstances and, as a result, judicial officers and court staff must prioritise their resources and adapt their practices to address the most critical safety and protection issues consistently with local legislation.

Physical and logistical measures

- Separate waiting areas
- Separate entry and exit points [Jordan & Phillips 2013]
- Separate interview rooms [Lynch & Laing 2013]
- Staggered arrivals and departures
- Dedicated area for children [George & Harris 2014]
- Screen; or telephone, video link or closed-circuit television attendance
- Security guard escort to and from court
- Police attendance [Chisholm 2009]

Planning and informing [Sarre et al 2013]

- Ensure court staff (including counter staff and security) are properly trained in domestic and family violence [Douglas & Stark 2010]
- Familiarisation visits (providing access to court in advance of hearing)
- Determine risk [Sarre et al 2013] and need, including preparation of safety plan [FCA/FCCA 2016]
- Identify existing orders or notifications
- Provide information about court process and support/referral options [Chisholm 2009]

Procedural measures [NT Dept of Justice 2011]

- Give evidence in courtroom from behind screen, or from outside the courtroom via telephone, video link or closed-circuit television
- Support person attendance while giving evidence
- Court closure while giving evidence, including special sittings that are recorded
- Admittance of recorded statement into evidence as all or part of the witness's evidence in chief
- Imposition of time limits within which proceedings must be commenced
- Prohibition on cross-examination [Loughman 2016] of complainant where defendant in a sexual offence or

domestic violence matter is unrepresented

- Additional protections for children
- Careful determination of appropriateness or risks of parties engaging in family dispute resolution processes [Field 2010]

Safety and protection of victim and witnesses - Key Literature

Australia

Alford, Amanda, 'Presentation by Australian Law Reform Commission Legal Officer' (Speech delivered at the National Aboriginal Family Violence Prevention Legal Service Annual Conference, Melbourne, 23 November 2012).

The speech draws information obtained as a result of consultations and submissions undertaken by the Australian Law Reform Commission. It highlights some of the difficulties faced specifically by Indigenous people in attending or participating in court proceedings. These include: logistical difficulties, including transportation and movement between communities; fear of giving evidence in open court; feelings of shame, blame and privacy concerns associated with not wanting issues publicly aired as well as community/family pressure through presence in court; language barriers and difficulties in giving oral evidence, including judicial attitudes towards the necessity of interpreters; and the potential for cross-examination of a victim by a person who has allegedly used violence.

Chisholm, Richard, *Family Courts Violence Review : A Report* (2009).

This report was referred to in the Family Court of Australia and the Federal Circuit Court of Australia's *Family Violence Plan 2014-16*. The report refers to the Family Court's *Safety at Court Protocol* which provides overarching guidance for ensuring the safety of court clients (page 154). This protocol contains a series of defined steps that must be followed where it is brought to the Court's attention that a client has safety concerns.

In essence, this involves engaging the client and:

- providing information about support options (including referrals to police and domestic violence agencies as appropriate);
- determining the level of need;
- checking for a family violence order or Notice of Child Abuse or Family Violence; and
- explaining the safety options available. These can include:
  - familiarisation visits,

- separate waiting areas,
- separate interviews,
- staggered arrivals and departures,
- telephone, video link or CCT attendance,
- security guard escort,
- police attendance and
- the presence of a support person at Court'.

Once the options have been discussed with the client and an approach agreed upon, a safety plan will be drawn up by a Client Services Officer and placed in the Court's electronic case management system (page 155).

Court Network, *Submission to Royal Commission into Family Violence (Victoria)*, June 2015.

Court Network recommends: providing a safe space for women to wait and receive support and advice; implementing creative solutions such as creating a 'window' for the woman to leave the court while the respondent is finalising paperwork; exiting the court through a back door (page 15).

Day, Andrew, Sharon Casey, Adam Gerace, Candice Oster and Deb O'Kane, The forgotten victims: prisoner experience of victimisation and engagement with the criminal justice system – Research report (ANROWS, 2018).

The following summarises the key aspects of this research report:

Premise

Many women in prison have experienced intimate partner violence. As this form of violence is often intergenerational and entrenched, women in prison are widely considered to be at particular risk of ongoing victimisation following release from custody. And yet, their support needs often go unrecognised, and it is likely that a range of barriers exists that prevent ex-prisoners from accessing services.

Approach

This research documents data from interviews with and surveys of 22 women incarcerated in Adelaide Women's Prison, as well as interviews with 12 key South Australian agencies and service providers, to arrive at an understanding of help-seeking behaviour and how this might inform service responses. The analysis is positioned within a review of current help-seeking theories that highlight how a wide range of individual, socio-cultural and structural factors can complicate a woman's decision to seek help when concerned for her personal safety, noting that the circumstances and personal histories of women in prison increase the barriers to effective help-seeking when they face violence following release.

Key observations

- The interviews with the women prisoners revealed their:
  - lack of awareness of when they should seek external support
  - lack of knowledge of available services
  - pervasive sense of mistrust and under-confidence in existing services
  - sense that better approaches can be developed drawing on the strengths of women, their peers and families.
- Women's experience of formal and informal support-seeking (positive and negative) often determine how they define intimate partner violence and whether they decide to seek to change their circumstances.
- Agencies and service providers expressed a range of views about the services that should be made available to women leaving prison, and these views were commonly shared by the women prisoners interviewed. It was acknowledged by both groups that services are not always visible or accessible to the women. There was also no sense that any integrated pathway for identifying and managing risk currently exists.

Conclusions

- Need identified for all jurisdictions: to clearly identify women in prison as a particularly vulnerable group who are likely to be at elevated risk of ongoing victimisation and intimate partner violence and who face significant barriers preventing them from accessing the types of services that may help them to keep safe; and take a specialised and integrated approach in addressing their needs. Successful models of reintegration are discussed.
- Need identified for people with lived experience of incarceration to be part of the service framework (design, delivery and goverance) in the community sector.

- Need identified for services and programs to reflect an understanding of the role violence in the lives of people who seek help (ie trauma-informed care)

Limitations

This research did not make conclusions about different cohorts of women prisoners having specific needs, for example women from Aboriginal and Torres Strait Islander cultural backgrounds.

Department of Justice, Northern Territory Government, *Report: Review of Vulnerable Witness Legislation* (2011).

Although this report is specifically about vulnerable witness legislation in the Northern Territory, it is useful in terms of highlighting the types of protection that may be able to be offered to vulnerable witnesses in other jurisdictions (i.e. which may include victims of domestic violence).

For example vulnerable witnesses may:

- give evidence by way of a closed circuit television from a place outside of the courtroom;
- give evidence in the courtroom from behind a screen so that they cannot see, or be seen by, the alleged offender;
- be accompanied by a friend, relative or other support person while giving evidence; and
- have the court closed while giving evidence.

In some cases other possibilities for protecting a witness include:

- a recorded statement may be admitted into evidence as all or part of the witness's evidence in chief;
- the examination of a vulnerable witness may be undertaken in a special sitting of the court, which is recorded…;
- when a vulnerable witness is giving evidence, the court must be closed;
- time limits within which proceedings must be commenced and
- a prohibition on cross-examination of a complainant in sexual offence proceeding by an unrepresented defendant.

In the Northern Territory there are specific protections for children and vulnerable witnesses which include:

- the court must be closed where the only protected person in the matter is a child, and while a vulnerable witness gives evidence;
- evidence of children must be given by written or recorded statement;
- a child cannot be cross-examined; and
- a vulnerable witness is entitled to given evidence by way of audio visual link and be accompanied by a support person.

Douglas, Heather and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (2010).

This research draws on interviews with 20 women who had experienced domestic violence, many of whom gave evidence in domestic violence-related court proceedings. Some of the women reported:

- Speaking out in court was the first time many women spoke publicly about their abuse;
- Some women felt that they were in danger when they went to court (p 70);
- That court staff should be properly trained about domestic violence;
- Tt would be helpful if court staff could advise when the violent partner had left court (p 71);
- It was extremely stressful waiting in the court foyer for their matter to be called. Some women experienced further intimidation and abuse from their former partners while waiting for their case to be called on while others were worried that further trouble might arise;
- When they had access to safe rooms to wait they felt much safer and less intimidated (p 73);
- Different access points to the court for victims and offenders (p 74).

Family Court of Australia, *Family Violence Best Practice Principles*, 4th edition (2016)

These Best Practice Principles are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise in the Family Court. Statement of Principle on pp. 2-3 refers to the entitlement of all people visiting the courts to feel safe and the responsibility of the courts to ‘take all appropriate measures to ensure the safety of their users’ (page 3). These appropriate measures may include the creation of an individually

tailored safety plan where necessary:

'A safety plan is a document that can be varied at any time and which includes a variety of options available to a person to ensure their safety at court. These include:

- attendance by electronic medium,
- attendance with support persons,
- staggered attendances,
- use of security entrances and,
- where necessary, security personnel.

All court staff are able to prepare a safety plan. Safety planning is one of the strategies that may be implemented to ensure that a person who fears for their safety remains protected from harm. A safety plan for attendances at court events is but one component of safety planning that needs to be incorporated into the individual's overall plan for their safety' (page 3).

Field, Rachael, 'FDR and victims of family violence: Ensuring a safe process and outcomes' (2010) 21(3) *Australasian Dispute Resolution Journal* 185.

The author identifies that family dispute resolution (FDR) is a positive first-stop process for family law matters, particularly those relating to disputes about children. However the author identifies a range of issues that arise for victims of family violence in FDR that can make it dangerous and unsafe:

- because of the power and control dynamic in cases involving domestic violence it is very difficult to achieve party self-determination in matters where there is a history of family violence. (p6)
- because family violence is about a perpetrator's use of power and control over the victim, it is very difficult for a victim of violence to confidently represent, and negotiate for, their own interests, or those of the children (p6)
- some victims may not identify violence as they feel that mediation is the only affordable option (p7)
- separation is particularly dangerous so there should not be an assumption that because the parties are separated the violence has ended (p7).

The author suggests that safety in mediation can be improved where parties understand and are properly informed about mediation, when they are well-prepared and have legal advice.

George, Amanda and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Deakin University School of Law's Centre for Rural Regional Law and Justice, 2014).

Drawing on interviews with survivors of domestic violence and support workers this report considers the experiences of and outcomes for women survivors of family violence in regional and rural Victoria. Of particular relevance, this report looks at women's experience of the court setting and draws attention to a number of issues surrounding safety and protection for women:

- Fear of giving evidence, shame and public exposure: 'While shame and fear are feelings that many women in cities experience when taking a family matter to court, in smaller communities such feelings can prevent women making the decision to seek protection and safety from the court. The relative anonymity of city courts is not available to rural and regional women' (page 84).
- 'The use of court-based video-link facilities can reduce the fear and distress experienced by being in the physical presence of the defendant. However, lawyers and workers said that even in newer courts this technology is infrequently used' (page 85).
- Leaving court: 'Leaving court after a hearing can be an intimidating and dangerous time for women applicants, regardless of whether they have an order. Perpetrators may use their network of family or friends to intimidate or attack survivors' (page 86).
- Children at court: 'There is an urgent need to address the issue of children coming to court in intervention order matters, both to shield them from any further exposure to harm through hearing about family violence and to ensure that women are able to get the best outcomes from their applications. None of the courts the researchers visited have dedicated areas for children' (page 87).

Jordan, Lucinda and Lydia Phillips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria* (Centre for Rural Regional Law and Justice, Deakin University Australia, 2013).

In looking at women's experiences of applying for FVIOs at the Geelong Magistrates' Court, this report highlights women's experiences of the court building. It notes that '[c]onsistently, participants pointed to the

need for the Geelong Magistrates' Court to provide separate waiting areas and separate entry and exit points for women appearing for FVIO applications. Workers in particular agreed that the promotion of the safe room at the court would be beneficial, as many applicants were unaware of this facility' (p 21).

Kaye, Miranda, 'Accommodating Violence in the Family Courts' (2019) 33(2) *Australian Journal of Family Law*, 100-121

This article argues that allegations of family violence are 'the new normal' in family court matters in Australia and calls for the family law system to prioritise victim safety. It presents findings from a study with independent children's lawyers from Victoria and New South Wales, highlighting their views on issues of family violence, self-representation, safety, and physical court premises, which are in contrast to the recommendations of the recent Australian Law Reform Commission into the family law system, which failed to address the safety of court users. There needs to be a shift in thinking from providing 'special' arrangements to victim safety being the standard approach.

Loddon Campaspe Community Legal Centre, *Will Somebody Listen to Me? Insight Actions and Hope for Women Experiencing Family Violence in Regional Victoria* (2015).

The Loddon Campaspe Community Legal Centre (LCCLC) provides family violence duty lawyer, advice and ongoing case work across the Loddon and Campaspe region. This project examines the experiences of women who have experienced family violence and the legal system, and aims to improve their safety, social and health outcomes. 190 women were surveyed at Bendigo, Echuca, Maryborough, Kyneton and Swan Hill Magistrates' Courts and in-depth conversations were undertaken with 27 women as part of this project (page 8). As part of examining court structures and processes, the report looks at the safety of women at court. It notes that:

- '[t]here was an overwhelming consensus with the women about the lack of court safety and privacy. The women felt that the fear they hold at facing the offender in court is not understood. None of the women felt safe or particularly comfortable waiting for their case and in the court room' (page 68).
- 'For many women this fear had an impact on their capacity to disclose their lived experiences to either the lawyer or magistrate in a way that did them justice. They recommended well-signed supervised

waiting areas for applicants and respondents, and separate entrances and exits…The lack of court safety in all the courts compounds the chronic fear these women have felt for a long time' (page 69).

- The report also highlights that a lack of adequate security systems is also a concern for women. 'While police are in the precinct they do not have a consistent presence throughout the court space' (page 70).

Loughman, Janet, 'Protecting vulnerable witnesses in family law' (2016) 3(1) *Law Society of NSW Journal* 26.

This article considers the traumatic impact of cross-examination of vulnerable witnesses by perpetrators of violence (page 26).

Lynch, Denise and Lesley Laing, *'Women get lost in the gaps' – Service providers' perspectives on women's access to legal protection from domestic violence* (2013).

Drawing on focus groups with service providers in NSW, the authors identify the need for a well-designed and appropriately located 'safe room' (a separate room, in the courthouse, specifically for women applying for ADVOs) for both women and workers (ideally with direct access into the court room and an adjourning room for solicitors and a bathroom and kitchen). Some interviewees noted that safe rooms sometimes are too small; are located in areas defendants commonly walk past (for example to get to the men's toilets or be some distance from the court room) (page 14).

Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Drawing on submissions and consultations this report identified issues with courtroom safety including being re-traumatised by the requirement to repeat the story of the abuse and having to face perpetrators in and outside the court room (lack of separate waiting areas, particularly in remote areas (p 268).

Roberts, Donna, Peter Chamberlain and Paul Delfabbro, 'Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic

Analysis' (2015) 22(4) *Psychiatry, Psychology and Law* 599.

Drawing on interviews with 15 women who had left abusive relationships and who had, or were currently, engaged with the Federal Family Court process the authors identify, relevant to safety and protection, fear and anxiety as another core theme in the sample results and was evident in several contexts: 'fear of the ex-partner, anxiety around attending court, and how their thoughts and feelings impacted on the children' (page 607).

Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K., *"A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence* (Research report, 12/2020). Sydney: ANROWS.

Complex trauma refers to multiple, repeated forms of interpersonal victimisation and the resulting health problems and psychosocial challenges. Women with experiences of complex trauma are a significant but overlooked group of victims and survivors of gender-based violence in Australia. They often have interlinked health and safety needs, and are frequently in contact with crisis services and police. This research project sought to develop a comprehensive picture of how complex trauma is being constructed in public policy and practice, and how it is viewed by women with experiences of complex trauma. It found that at the policy level, complex trauma overlaps with frameworks on violence against women and mental health. However, the impact of complex trauma is not comprehensively addressed by these frameworks, which contributes to the fragmented response to women in distress. The research demonstrated that there is a strong need for a whole-of-government commitment to the implementation and coordination of trauma-informed practice across sectors.

Sarre, Rick and Alikki Vernon, 'Access to Safe Justice in Australian Courts: Some Reflections upon Intelligence, Design and Process' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 133.

This article examines broadly the issue of safety in courts in Australia. The report collected data from three Australian state jurisdictions (Victoria, South Australia and Western Australia) and one federal jurisdiction (Family Court of Australia) over a three period from 2009-2012.

Four safety and security aspects were identified as most important to addressing and managing risk:

- improving the communication and the sharing of information across security personnel within courts and across jurisdictions and states;
- security personnel working collaboratively and cooperatively with court staff and the judiciary on 'safety planning';
- encouraging more thorough reporting of critical incidents; and
- implementing proactive (not just reactive) approaches to reducing or avoiding incidents in or around the courts' (page 135).

The report notes the Family Court's approach to involve the victim in the process of risk assessment through the development of a 'safety plan' is viewed as an advance on reactive strategies that were adopted on the day of the hearing without planning or specific measures put in place (like staggered arrivals, separate waiting areas, security guard escort, and so forth' (page 137).

In terms of court design, the report notes that older courts, designed for functionality rather than safety, continue to provide safety concerns (page 140). In other court buildings, the general layout of entrances and exits is raised as being an issue, especially in domestic violence cases. However, even more than improved security measures and separate entrances/exists is having separate rooms for people to retreat to. These should be standard and known to individuals before they reach the building (page 141). Finally, the report notes that importance of developing policies and procedure manuals regarding safety and security in and around courts, and to provide ongoing training to court staff (p 142).

Sentencing Advisory Council, *Sentencing of Adult Family Violence Offenders Final Report No. 5* (2015).

The report considers the role of specialist family violence lists or courts in dealing with family violence offences. In relation to court safety it notes some special arrangements for victim safety: Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.

Offender programs: Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. Some

courts have offender support workers to engage and refer offenders to behavioural change programs.

Wendt, Sarah, Donna Chung, Alison Elder and Lia Bryant, *Seeking help for domestic violence: Exploring rural women's coping experiences – State of knowledge paper* (ANROWS, 2015).

This literature review focuses on the unique experiences and specific barriers faced by women experiencing family or domestic violence in rural and remote areas. It notes that women living in socially and geographically isolated places often cope with domestic and family violence by themselves for long periods of time (p 1). See p5-6 which discusses the structural barriers and cultural factors that prevent rural women from disclosing, including that 'self-reliance was so valued and upheld in families that to disclose or ask for help about domestic and family violence was perceived as a failure or shameful' (p 6).

The review notes that effect of social and geographical isolation is particularly important for Indigenous women's ability to disclose, and that the small and tight-knit nature of Indigenous communities can influence decisions to report (p 10).

Pages 10-12 discuss the particular barriers for culturally and linguistically diverse women (such as racism, lack of access to interpreters, and cultural isolation), those identifying as LBTIQ (such as discrimination, homophobic or transphobic attitudes, and a lack of specialist services), and women with disabilities (such as relying on the abuser for transport, and a lack of specialist services).

Women's Services network (WESNET), *Domestic Violence in Regional Australia: A Literature Review – A Report for the Commonwealth Department of Transport and Regional Services* (2000).

Lack of confidentiality also presents a unique set of circumstances for women living in rural and remote areas. Given the stigma attached to domestic violence in rural and remote communities, the public attention often afforded to women seeking legal protections, including write-ups in the local newspaper, is a major deterrent for women (p 17).

International

Coy, Maddy et al, *Picking up the pieces: domestic violence and child contact* (Rights of Women and CWASU, 2012).

Section 5 of this report presents quantitative and qualitative data on women and legal professional's experience of legal proceedings. Pages 41-45 summarise issues surrounding women's safety at court. 'Three quarters of women (74%, n=23) said they had concerns for their safety while attending court. Some feared that they would be in physical danger, being fully aware of their ex-partners' capacity for violence. Many perceived that their ex-partners 'took advantage of the fact that they were required to be present in order to be intimidating' (Kaye et al, 2003: 7; see also Rights of Women, 2011)' (page 41).

Several women reported their ex-partners 'staring' at them throughout the proceedings and in some cases, judges and other courtroom personnel failed to recognise this act of aggression. In addition, women were particularly fearful of leaving the courtroom at the close of proceedings (page 42).

Special measures have been developed in the criminal courts to provide women with protection during proceedings namely, separate waiting rooms are provided and sometimes separate exits for victims and witnesses. However, 'almost half of legal professionals (47%, n = 35) reported that special facilities were not advertised for vulnerable and intimidated court users' (page 43).

When asked what could be done to improve their safety while at the courtroom, many suggested that safe spaces and measures to avoid seeing their ex-partner would have made a significant difference (page 44).

Safety and protection of victim and witnesses - Other Bench Books

Australia

Australasian Institute of Judicial Administration Incorporated, Bench Book for Children Giving Evidence in Australian Courts (updated 2020)

This bench book is intended primarily for judicial officers who deal with children giving evidence in criminal proceedings as complainants or witnesses, not as accused. It does not specifically address domestic violence, however is relevant in that context where child witnesses are involved in proceedings. Chapter 3 discusses the issues related to children and the court process, including cross-examination and good practices for questioning children. Chapter 4 discusses the judicial role in child sexual abuse cases and preparation for trial. Chapter 5 discusses procedures for children giving evidence.

NSW

Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (2022).

[1-358]: In relation to closed courts, the bench book provides that '[w]here proceedings are in respect of a prescribed sexual offence… [the Act requires] that certain proceedings or parts of proceedings, for a prescribed sexual offence be held in camera'

[1-360] Another section of the bench book 'addresses directions or warnings where evidence is given by alternative means particularly Closed Circuit Television (CCTV), alternative seating arrangements, the use of screens, support persons, the admission of pre-recorded out-of-court representations to police and evidence given via audio visual link'. There is a useful Table setting out in summary form many of the relevant provisions for a 'vulnerable person', a complainant/sexual offence witness and a domestic violence complainant

[1-840] Finally, the bench book deals with the cross-examination of victims and witnesses in sexual offence proceedings and vulnerable witnesses in criminal proceedings by unrepresented litigants. Special procedures apply in these circumstances in that 'any cross-examination must be conducted through a court-appointed intermediary'. 'The purpose of the provisions is to spare the witness 'the need to answer questions directly asked by him or her by the person said to have committed the offence' (*Clark v R* [2008] NSWCCA 122).

Judicial Commission of NSW, *Equality before the Law: Bench Book* (2022).

See section 7.5 discussing violence against women including especially 7.5.6 on sexual assault. See also 7.7 which highlights practical considerations.

Judicial Commission of NSW, Local Court Bench Book (2022).

Section [8-000] discusses evidence by domestic violence complainants.

Judicial Commission of NSW, Sexual Assault Trials Handbook (2022).

Section [10-500] discusses important general directions in sexual assault trials. Section [7-000] contains relevant literature, including [7-240] procedure in prescribed sexual offence cases.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 14 Practice and Procedure for Court Proceedings discusses a number of issues relevant to the safety and protection of victims and witnesses, including the sexual assault counselling privilege, explanation of proceedings and orders, protection of children, cross-examination, protected witnesses, impaired capacity, abuse of process.

Queensland Courts, Supreme and District Courts Criminal Directions Benchbook (2022).

Chapters 7 and 8 discuss procedures and approaches in relation to different types of protected witnesses. Chapters 10 and 11 discuss procedures in relation to child and special witnesses respectively. The bench book's additional material includes guidelines for pre-recording evidence of an affected witness.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1.7 discusses the prohibition on personal cross-examination of protected witnesses in the context of family violence intervention order proceedings. 2.4.6 notes the court's power to prevent improper questioning of witnesses. 2.5.3 discusses measures for minimising the trauma children can suffer when participating in court proceedings, and notes that children are automatically protected witnesses.

Judicial College of Victoria, Open Courts Bench Book (2019).

This bench book addresses the principle of open justice in the context of Victorian courts and tribunals, and the qualifications to that principle. Chapter 3 considers the grounds and categories under which a suppression or closed court order can be made. The relevant grounds and categories to family violence are:

[3.4] Ground 1: Administration of justice (preventing prejudice to the jury or ensuring a fair trial for the accused);

[3.6] Ground 3: Safety of persons.

[3.7] Grounds 4 and 5: Undue distress or embarrassment to a complainant or witness in sexual offence and family violence proceedings, and to child witnesses in criminal proceedings.

Judicial College of Victoria, Victorian Criminal Charge Book (2017).

2.3 discusses procedures for taking evidence in certain circumstances, including to reduce the stress of giving evidence on particular witnesses, to prevent the accused from personally cross-examining certain witnesses, and to allow evidence that has been pre-recorded to be used in certain legal proceedings.

Judicial College of Victoria, Victorian Criminal Proceedings Manual (2015).

Chapter 13 of the manual examines the procedures for taking evidence from witnesses. The same material is produced in the *Criminal Charge Book* (above).

WA

Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australia Courts* (2nd ed, 2008).

- The appearance of an Aboriginal accused by video/audio link may be appropriate and advantageous for a number of reasons including '[t]o assist the court to obtain the best evidence from special witnesses or where an Aboriginal accused or an Aboriginal witness is intimidated by the court environment' (7.1.2).
- Female Aboriginal witnesses may face particular difficulties in giving evidence including: the feeling that 'the physical courtroom is intimidating'; 'the presence of the accused person or other Aboriginal people in the courtroom may exacerbate the intimidation experienced by the female witness'; and 'sign language may be used by someone in the back of the court to intimidate the witness while she is giving evidence, which sign language goes unnoticed by the court' (7.5.2).
- The court may order that certain persons leave or be excluded from the courtroom proceedings 'to facilitate Aboriginal witnesses giving full and frank evidence to the court. Otherwise, Aboriginal customary law barriers (such as bans upon speaking in front of certain people, or revealing particular kinds of information to certain people) may inhibit the giving of such evidence' (7.5.4).

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

In Section 5.3, the bench book discusses detection and prevention of intimidation in court rooms. In terms of detecting intimidation in the court, the bench book notes that the targeted person may be subject to subtle forms of intimidation in the courtroom, and further, that subtle forms of intimidation can have different meanings in different cultures. It provides possible strategies for judges to employ when cultural factors may be an issue (Section 5.3.1).

A list of options for preventing in-court intimidation is provided, including: monitoring communication between parties; learning about DFV; consulting cultural experts; preventing abusive questioning; ensuring cross-examination is conducted by a lawyer; redirecting perpetrator testimony; allowing the victim to testify without being confronted by the perpetrator; providing separate waiting rooms; and adjourning to take relevant actions (Section 5.3.2).

The bench book also discusses court options available if a child is to offer direct testimony in a family law case involving domestic violence in Section 6.8. These may include, relevant to safety and protection: preventing cross-examination of the child by a party (as opposed to lawyer for a party); allowing the child to testify behind a screen or from another room via video link; allowing a support person to sit near the child; removing a party or parent from the court during the child's testimony; preventing age-inappropriate questioning.

Safety and protection of victim and witnesses - Other Resources

Australia

Federal Circuit and Family Court of Australia, *Do you have fears for your safety when attending court?* (2020).

This guideline provides contact numbers, web and email addresses for parties who have concerns about safety when attending court.

No to Violence (2021) Tips for engaging men on their use of family violence (fact sheet) Domestic Violence Resource Centre Victoria.

This resource gives five tips for engaging men on their use of family violence:

1. Safety – do not engage in a way likely to increase risk to the safety of vicitms;
2. Identify invitations by men to collude in their behaviour - when responding to a man's attempts to minimise, excuse or justify their use of violence, it is important to encourage them to re-evaluate their behaviour and self-exploration;
3. Open the conversation - being curious and asking questions can help put his behaviour on the table;
4. Experience of ex/partners and kids - encourage empathy for how his partner/kids are experiencing his behaviour, rather than his intentions or identity; and
5. Change and support - identifying what a desirable future looks like can help reflection around what needs to change.

International

Ramsay, Gordon and Rhonda Martinson, 'Building Attention to Witness Intimidation into Your Domestic Violence Policy', (2014) *The Police Chief Magazine* 34-37.

This article outlines the steps taken by criminal justice agencies and other service providers in Duluth, Minnesota, to address witness intimidation in the context of domestic violence. Duluth was selected as one of

three demonstration sites for creating a Blueprint for Safety, a comprehensive plan integrating knowledge, research, demonstration projects and practice into a "blueprint" for city and county agencies responding to domestic violence. In 2011, Duluth criminal justice agencies partnered with other service providers to introduce the use of the safety audit process to determine where and how witness intimidation arises in the justice system, and how successful the system was in providing safety to victims and witnesses. Results of the audit found that while the Blueprint for Safety policy work incorporated attention to witness intimidation, it did not offer guidance for police officers and other responders to identify, document, or respond to witness intimidation. To address this gap, recommendations were made to create practice guides and training to police officers and responders to aid in identifying, documenting, investigating and prosecuting witness intimidation, as well as providing education to and safety planning with victims about the potential for witness intimidation. It was recommended that systemic problems that provide windows of opportunity for offenders to intimidate victims into dropping out of the criminal justice process, such as delays or gaps in information sharing, be addressed using Duluth’s existing coordinated community response structure.

Safety and protection of victim and witnesses - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***R v Skey* [2020] QDC 27 (9 March 2020) – Queensland District Court**

Per Cash QC DCJ:

[17] The evidence discloses sufficient reason to receive the evidence of the complainant in a manner that differs from usual procedures. As noted, the prosecution proposed that the complainant testify over video-link with a support person and that the evidence be recorded before the trial. The defendant did not object to a support person but opposed the other measures. The defendant submitted that to receive evidence by video-link would detract from the "atmosphere" of the trial and the ability of the jury to assess the reactions and demeanour of the complainant in a case where her credit was central to the trial. In this way the defendant would suffer impermissible disadvantage.

[18] I did not accept this submission. Taking evidence by video-link is now almost commonplace. The notion that juries who see video evidence are less able to determine issues of credit is not a proposition with which I would readily agree. There is research to suggest that an average person's ability to detect lies based on "demeanour" is little better than chance.*

* Citing: Ekman, P, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, New York, 1985); Aamodt, MG and Custer H, 'Who can best catch a liar? A meta-analysis of individual differences in detecting deception' (2006) (Spring) *The Forensic Examiner*, 6–11; Bond, CF and DePaulo, BM, 'Accuracy of deception judgments' (2006) 10 *Personality and Social Psychology Review*, 214–234.

Legal representation and self-represented litigants

Where a party is self-represented in domestic and family violence related proceedings, there may be adverse consequences to both parties and more generally to the administration of justice.

Bench books, best practice guidelines and other resources have been developed in a number of Australian jurisdictions [Other Bench Books] [Other Resources] to assist judicial officers in ensuring that self-represented parties are afforded procedural fairness and access to justice while maintaining their independence and neutrality (see Judicial Action guide [Self-Represented Litigants - Judicial Actions]).

Where a party who is a victim of domestic and family violence is self-represented and required to cross-examine the perpetrator, their capacity to appropriately and fully question may be diminished or negated by their fear of the perpetrator [Coy et al 2012]. Where the perpetrator is represented, a self-represented victim may feel particular pressure to withdraw or not proceed with an application [Qld Special DFV Taskforce 2015], or to consent to orders or undertakings as a result of fear or intimidation, or to avoid being compromised or intimidated by a hearing or other ongoing proceedings [Kaspiew et al 2009].

A perpetrator may choose to be self-represented so as to secure the opportunity to directly cross-examine the victim. The victim's capacity to give evidence or the quality of the victim's evidence in these circumstances may be compromised by the victim's fear of the perpetrator and, as a consequence, the probative value of the evidence may be diminished or negated. Importantly, there are some jurisdictions where in certain circumstances direct cross-examination of the victim by the perpetrator is prohibited or limited – see 7.2.1 table and 9.2.3 table for legislation references and summaries of the restrictions on direct cross-examination.

Where a perpetrator uses their own or the victim's self-represented status to subject the victim to further abuse through judicial processes, the victim may experience a form of secondary abuse.

Not only does the absence of legal representation potentially prejudice the self-represented party and limit their access to justice, it may also jeopardise the ability of the court to receive the necessary evidence and to make decisions for the safety and protection of victims and children [Chisholm 2009].

Research has shown the value to the court and parties of self-represented parties receiving advice and

information on appropriate conduct and language in the courtroom prior to any court appearance or hearing [Central Coast CLC 2014]. Legal assistance providers deliver duty lawyer services to self-represented litigants in many courts, including providing legal advice and information about court processes, help with the preparation of documents, and in some cases, representation.

Australian studies reveal that many victims, mostly women, appear in protection order application proceedings without legal representation; this may be due to lack of access to legal assistance or the cost of engaging private lawyers [George & Harris 2014]. A party may not qualify for legal assistance if they own property, notwithstanding earning a low income [Braaf & Meyering 2011].

The problem of lack of private legal representation may be exacerbated in regional and rural communities where there may be fewer lawyers available, and the perpetrator may be given priority based on their standing in the community, their prior dealings or relationship with lawyers, or their financial resources [Kyle et al 2014]. Further in this context, where the perpetrator is aware that the victim may be in a financial position to engage legal representation, the perpetrator may use a tactic known as 'conflicting out', which involves seeking preliminary advice from multiple lawyers in the geographical area so as to deny the victim access to legal representation on the basis of conflict of interest.

Aboriginal and Torres Strait Islander people [JCCD, The Path to Justice (ATSI) 2016] and people from culturally and linguistically diverse backgrounds may also be less likely to be legally represented or to seek representation due to language barriers, limited knowledge of their legal rights, and a lack of trust in judicial processes [Cleak et al 2015].

The approach to the protection of adult victims of domestic and family violence and sexual assault complainants / witnesses (sometimes called vulnerable or special witnesses) in domestic violence protection order matters and criminal cases varies throughout Australia. Protections may include closed courtrooms, using closed circuit television rather than being in court, using a screen in court, having evidence recorded so the person is only cross-examined once, allowing the presence of a support person and disallowing direct cross-examination of one party by another in certain proceedings. See 9.2.3 Vulnerable or Special Witnesses for a table outlining jurisdictional approaches.

Note that detailed information about children giving evidence in criminal proceedings can be found here: Bench Book For Children Giving Evidence In Australian Courts

Important note: The expression "self-represented" is used in this bench book to refer to any situation where

a party is not represented by a lawyer. It is acknowledged that the expression may be inappropriate in some contexts. It may, for example, suggest that a party has exercised a choice to represent themselves, when in fact they do so due to lack of financial resources or access to legal assistance. On the other hand, some parties choose to represent themselves because they believe they are best equipped to do so and may object to the use of an expression such as “unrepresented” on the basis that it may, for example, be interpreted to suggest that they are unable to properly or fully participate in the proceedings in their own right.

Legal representation and self-represented litigants - Key Literature

Australia

Braaf, Rochelle and Isobelle Barrett Meyering, *Seeking security: promoting women's economic wellbeing following domestic violence* (Australian Domestic and Family Violence Clearinghouse, 2011).

This report specifically examines 'the impact of domestic violence on women's *economic* wellbeing and the intersection of this with their recovery overall' (p 3). The report identifies legal issues as being key to issues affecting women's financial outcomes (p 55). In terms of legal costs, some of the women surveyed did not qualify for legal assistance but could not afford private services. 'They found they were ineligible if their cases were deemed too complex or would take too long to settle; if their ex-partner was already represented by Legal Aid; or if they owned property, even though they were on low incomes' (p57). Ultimately, many women 'felt that their access to justice was compromised because they lacked the financial means to pursue legal action or to access quality legal representation. 'If I had money' was a recurrent theme in the interviews' (p 58).

Bryant, Diana and John Faulks, 'The 'helping court' comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 93.

The Family Court has taken a range of initiatives in response to the increasing number of self-represented litigants entering their court. They produced *Litigants in Persons Guidelines.* These guidelines are as follows:

- A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
- A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses;
- A judge should explain to the litigant in person any procedures relevant to the litigation;
- A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;

- If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he or she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
- A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of her or his rights;
- A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated (*Neil v Nott* (1994) 121 ALR 148 at 150);
- Where the interests of justice and the circumstances of the case requires it, a judge may:
  - Draw attention to the law applied by the court in determining issues before it;
  - Question witnesses;
  - Identify applications or submissions which ought to be put to the court;
  - Suggest procedural steps that may be taken by a party; and
  - Clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias (p 103).

Chisholm, Richard, *Family Courts Violence Review* (2009).

In discussing appropriate legal representation, the report notes that the ‘importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence’. Where one or more parties are unrepresented this jeopardises the ability of the court to receive appropriate evidence and to make decisions about the child’s best interests (p 168).

Cleak, Helen et al, 'Family violence in culturally and linguistically diverse communities: An evaluation of a family relationship centre' (2015) 26 *Australasian Dispute Resolution Journal* 26.

This article evaluates a family relationship centre, in this context considers the reasons for why many people from culturally and linguistically diverse (CALD) groups often do not access legal services. It reviews recent research and notes reasons include language barriers, limited knowledge about rights and lack of trust toward legal authorities. It notes that the available data suggests that people from CALD communities often struggle to find a visible entry point into the legal system' (p 28).

Central Coast Community Legal Centre, *Lawyerless and Lost at Court: Are we really helping?* (Law and Justice Foundation of NSW, 2014).

This report examines the effectiveness of the Central Coast Community Legal Centre (CCCLC)'s AVO Legal Advice Clinic at Wyong Local Court in improving unrepresented defendants' knowledge in AVO matters (p 3). It found 78% of surveyed defendants said they would not have obtained legal advice if the CCCLC service had not been available at the court. 81% of defendants obtained advice prior to the first mention of their AVO matter in Court. (p 13).

The research underlines the importance of legal advice and indicates that 'there has been a clear increase in defendants' self-reported knowledge after obtaining legal advice from the CCCLC' (p 26). Defendant knowledge of legal options improved dramatically after obtaining legal advice relating to the AVO application against them. 'Common enquiries that defendants have relate to where they physically stand in court, how they address the Magistrate when they speak as well as what they are expected to say in court'. The report reports that procedural advice provided a calming or reassuring impact on defendants before court (p 17).

George, Amanda and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Deakin University School of Law's Centre for Rural Regional Law and Justice, 2014).

This report draws and extends upon a 2013 report released by the Centre for Rural Regional Law and Justice (Victoria) (Jordan, Lucinda and Lydia Phillips, *Women's experiences of surviving family violence and*

accessing the Magistrates' Court in Geelong, Victoria (Centre for Rural Regional Law and Justice, Deakin University Australia, 2013)). George and Harris' report 'examines the experiences of and outcomes for women survivors of family violence in regional and rural Victoria' (p 2). Of relevance, the report looks at the role of lawyers in the Family Violence Intervention Order (FVIO) process. It found:

- very few private lawyers appeared for applicants', many women appeared in court without legal representation;
- the (often prohibitive) cost of lawyers means that many survivors and respondents cannot secure representation.

Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. Of relevance here see:

- See Chapter 9: 'Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn't feel were in their children's interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements' (p 221).
- Also see '15.1.2 Consent orders' (from p337), noting that 'The tensions in this area are succinctly summarised in this comment by a legal practitioner about the choice litigants face in deciding whether or not to settle: "Most of them settle by consent and you've got a real tension because those that settle by consent feel as if they've been bullied into it, get a settlement because they can't afford it and they want to get it over and done with. Those that run the full trial feel as though they got shafted anyway because

they didn't get heard properly. So either way they feel as though they've lost". In reflecting on their practices concerning consent orders, a common observation among registrars and judicial officers was the limited supervisory role courts have in the context of a system that encourages parties to reach agreement by themselves'.

Kaye, Miranda, 'Accommodating Violence in the Family Courts' (2019) 33(2) *Australian Journal of Family Law*, 100-121

This article argues that allegations of family violence are 'the new normal' in family court matters in Australia and calls for the family law system to prioritise victim safety. It presents findings from a study with independent children's lawyers from Victoria and New South Wales, highlighting their views on issues of family violence, self-representation, safety, and physical court premises, which are in contrast to the recommendations of the recent Australian Law Reform Commission into the family law system, which failed to address the safety of court users. There needs to be a shift in thinking from providing 'special' arrangements to victim safety being the standard approach.

Kyle, Louise, Richard Coverdale and Tim Powers, *Conflict of Interest in Victoria Rural and Regional Legal Practice* (Deakin University, 2014).

Based on interviews with legal practitioners and others and surveys with legal practitioners this research found:

- 'Conflicts of interest are more likely to occur in regional communities where there are smaller numbers of practising solicitors; parties are more likely to be known to each other and past dealings with others in the community are more likely to have occurred. (p 11).
- 'A common frustration among family violence service providers is that lawyers will 'go with the status quo' when a decision has to be made about who will be their client. This manifests in the legal practitioner more frequently acting for the alleged perpetrator for several reasons- the alleged perpetrator is the person who: has to answer to an application to the court; is often a person of standing in the local community; the client who is able to pay. The outcome of this approach is that women are too often appearing in court without legal support and representation and therefore with reduced access to the

protection from further violence that a court order might offer' (p 70).

Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Submissions to taskforce raised the lack of legal representation and assistance as a major concern for victims, particularly where a male respondent can afford legal representation. Submissions stated that this often results in the victim withdrawing or not pursuing a legal response and can lead to a failure in protection for an aggrieved. Submissions also noted the benefits from a duty lawyer system:

- 'Mitigating the trauma of the court process for victims;
- Parties are better informed of their rights and the legal process and know what they can and cannot ask of the court
- Victims will receive assistance and advice with completing their application forms. This will ensure all relevant information is before the court. The court process will proceed more smoothly as a consequence of properly prepared documents and legally informed clients appearing before it
- Queensland Police Prosecutors will also indirectly benefit as a consequence in the same way as the court will
- More appropriate orders and conditions can be applied for which improves victims safety, and reduces the risk of recidivism, breach and applications for variations of the orders
- Timely legal advice and information to respondents could lead to a less litigious approach to proceedings and appropriate referrals
- Victims will be empowered to pursue their matters and not withdraw because of fear or intimidation by the perpetrator or because of lack of knowledge of the complex legal system. The result will be greater safety for older people, women and children experiencing domestic and family violence. (p 312)

Wangmann, J., Booth, T., & Kaye, M. (2020). *"No straight lines": Self-represented litigants in family law proceedings involving allegations about family violence* (Research report, 24/2020). Sydney: ANROWS.

Abstract: This research focuses on documenting current practice and generating new knowledge about the

impact and effect of self-representation by one or both parties in Family Law proceedings involving allegations of family violence.

The research team conducted semi-structured interviews with SRLs and professionals who engage with SRLs in family law proceedings to produce a general interview sample. The researchers then also undertook an intensive case study that involved court observation, case file review, and interviews with SRLs or other representatives involved in those observed/reviewed cases.

The research confirmed that there are high numbers of SRLs engaged in family law cases involving allegations of family violence, and the primary motivation for self-representing is financial. The study revealed that SRLs are impacted by their self-representation, as well as histories of family violence, in numerous ways. Primarily, SRLs lack knowledge of the legal process: for example, they are often unaware of the heavy emphasis on paperwork and negotiation in family law cases, and they are unprepared to complete paperwork, or negotiate, in ways that effectively support their case. Intersecting with the lack of knowledge is the impact of family violence: ability to complete paperwork and negotiate is also affected by experiences of violence and resulting trauma, and perceptions of safety.

Given these findings, the report stresses the importance of enhanced, up-to-date and practical information for SRLs in multiple formats, as well as increased access to lawyers and legal advice. The report also raises the need to explore possible system change, particularly with a view to the fragmentation of areas of law that respond to family violence. Alongside enhancing family violence expertise across key court personnel, the report recommends integrating information about safety into routinely accessed documents in order to raise awareness about available services.

International

Buel, Sarah M, 'Fifty Obstacles to Leaving, *aka,* Why Abuse Victims Stay' (1999) 28(10) *The Colorado Lawyer* 19.

'When the victim lacks a tenacious advocate, she often feels intimidated, discouraged, and, ultimately, hopeless about being able to navigate the complex legal and social service systems needed to escape the batterer. Some well-intentioned advocates engage in dangerous victim-blaming with the assumption that there is something about the victim's behaviour or past that precipitates the violence' (p 19).

Coy, Maddy et al, *Picking up the pieces: domestic violence and child contact* (Rights of Women and CWASU, 2012).

Section 5 of this report presents quantitative and qualitative data on women and legal professionals' experience of legal proceedings. In relation to legal representation, this report found that there were instances where women had to represent themselves (and thus have to cross-examine men who had been violent to them) or face the prospect of being cross-examined by their ex-partners. Women were afraid of these two scenarios (p 38). Solicitors and barristers surveyed identified two issues relating to potential abuse and intimidation that self-representation raises. First, 'perpetrators representing themselves used cross-examination as another route to harass and undermine their ex-partners'. Second, fearful victim-survivors representing themselves may not disclose the full details of their abuse and may inhibit themselves from questioning perpetrators about their actions and motivations (p 39). The report identifies multiple ways in which the outcome of the case can be influenced where women and/or their abusive ex-partners represent themselves:

- Victim-survivors are not enabled to give their best evidence about histories of abuse, which may be crucial to determining whether contact, and in what form, is deemed appropriate.
- The difficulties of cross-examining their perpetrators may mean they do not ask sufficiently probing questions or challenge responses, which again informs what evidence is available to the court.
- They are rarely equipped with the legal knowledge and experience to prepare documentation and negotiate family law processes e.g. requesting finding of fact hearings.
- Pressure to reach speedy resolution may mean that women accede to arrangements which are not necessarily in their own or their children's best interests' (p 40).

Przekop, Mary, 'One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts' (2010-2011) 9 *Seattle Journal for Social Justice* 1053.

Although the article is not directly about legal representation, it makes the observation that female abuse survivors in family court settings 'are far less likely than men to be represented, which places them at a disadvantage. The most common reason why they are without representation is because they cannot afford

to hire an attorney. This fact is not surprising, as studies show that the financial situation of divorced fathers improves after a divorce, which places men in a better position to afford representation in the first place' (p 1062).

Legal representation and self-represented litigants - Other Bench Books

NSW

Judicial Commission of NSW, Civil Trials Bench Book (2022).

Section [1-0800] discusses the issues related to unrepresented litigants and lay advisers in the context of court proceeedings.

Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (2022).

[1-800]. This part details court procedure in relation to self-represented accused. It is noted that '[a]n accused person may appear personally, and may conduct his or her own case…While the election by an accused to appear self-represented is a fundamental right which should not be interfered with…the operation of the adversarial system 'may be severely impaired' by the absence of legal representation'. The bench book goes on to discuss the duty of the trial judge, suggested advice and information to be provided to the accused in the absence of the jury, and the right of the accused to challenge in empanelling the jury

[1-845] The bench book also provides discussion of cross-examination of complainants in prescribed sexual offence proceedings and vulnerable witnesses in criminal proceedings by unrepresented litigants. Special procedures apply in these circumstances. 'If the accused is self-represented, any cross-examination must be conducted through a court-appointed intermediary'. 'The purpose of the provisions is to spare the witness 'the need to answer questions directly asked by him or her by the person said to have committed the offence' (*Clark v R* (2008) 185 A Crim R 1)'. A suggested procedure to follow is detailed.

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 10 discusses a range of issues affecting self-represented parties and their experience of court processes.

Judicial Commission of NSW, Sexual Assault Trials Handbook (2021).

Section [10-500] discusses important general directions in sexual assault trials. Section [7-000] contains relevant literature, including [7-240] procedure in prescribed sexual offence cases.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 14.9 deals with the rights of appearance and representation of parties to the proceeding, and adjournment where a child has not had a reasonable opportunity to obtain legal representation.

Queensland Courts, Supreme and District Courts Criminal Directions Benchbook (2022).

Chapter 5 discusses procedures and approaches in relation to unrepresented defendants.

Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016).

- Chapter 12 of the bench book considers the equal treatment of self-represented litigants in court proceedings. While all litigants have the right to appear in person, self-represented litigants both face and pose a significant challenge to the administration of justice in Queensland. Part II examines the areas of difficulty faced by self-represented litigants including: a lack of understanding of the relevant law and legal process, an inability to assess the merits of their claim accurately, and lacking the specialist skills of cross-examination and testing of evidence.
- Part III provides a working guide for judges to assist with dealing with self-represented litigants during a hearing. The issues covered in this section include: (1) examination of the evidentiary issues that may arise for self-represented litigants (2) matters specific to criminal proceedings (3) McKenzie friends (4) pro bono assistance (5) vexatious proceedings. The bench book also provides guidance for judges on their role before and after a hearing.

Vic

Judicial College of Victoria, Victorian Criminal Charge Book (2017).

2.3 discusses procedures for taking evidence in certain circumstances, including to reduce the stress of giving evidence on particular witnesses, to prevent the accused from personally cross-examining certain witnesses, and to allow evidence that has been pre-recorded to be used in certain legal proceedings.

Judicial College of Victoria, Victorian Criminal Proceedings Manual (2015).

- Chapter 9 of the manual issues relating to self-represented accused persons. It notes that while representation is not compulsory, '[a] self-represented accused lacks the qualities of a professional skill and objective judgment that legal representatives bring to a case'.
- In part 9.2.1, the bench book provides a discussion of the degree of assistance required for self-represented litigants. The bench book cites with approval Family Court guidelines for conducting family law hearings involving self-represented litigants. These guidelines include:
- A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.
- A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses.
- A judge should explain to the litigant in person any procedures relevant to the litigation.
- A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
- If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.
- A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

- A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 121 ALR 148 at 510.
- Where the interests of justice and the circumstances of the case require it, a judge may:
- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.
- Part 9.2.2 provides a discussion of appropriate intervention and assistance.
- Part 9.2.3 provides a discussion of a McKenzie Friend. When determining whether to permit an accused to have the assistance of a McKenzie Friend, the court should consider the following factors: 'the complexity of the evidence and the issues; the accused's ability to understand the evidence and the course of proceedings; the accused's ability to express him or herself in the court setting; whether the accused can receive the same benefits by conferring with his friend or lay adviser during adjournments'. In criminal trials, the courts are reluctant to grant leave for a McKenzie friend because 'experience has shown that the practice is fraught with danger. Proceedings are more likely to become protracted, or miscarry'.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 8 of the bench book considers issues facing self-represented litigants in terms of equality before the law. It provides a list of the reasons why people represent themselves. These include the fact that a person may:

- 'be appearing in a jurisdiction where self-representation is encouraged or representation is statutorily precluded;
- have been refused Legal Aid or presume they are ineligible;
- not be able to afford legal representation;
- have been told by lawyers that their case has no merit, but believe that it does have merit;

- have been considered by lawyers to be in some way too “difficult” (for example, they are unable to speak English or to communicate well or sufficiently logically);
- not trust lawyers;
- believe they are the best person to put their case across;
- have withdrawn instructions from their lawyer relatively recently and not had time to find alternative representation; and /or
- represent themselves for part of the court proceedings and engage a lawyer only for the part they consider (or have been advised) is most important or critical’.
- Further, in discussing the difficulties faced by self-represented litigants, the bench book notes that self-represented people may:
- not understand the complexities of relevant legislation and case law;
- not fully understand legal language;
- not fully understand the purpose of the proceedings and/or the interlocutory steps in the proceedings;
- not fully understand and/or be able to apply properly the court rules (for example, what they must file when, the rules of evidence and cross-examination);
- need an interpreter;
- not be skilled in advocacy and able to test adequately an opponent’s evidence, or crossexamine effectively;
- be intimidated by the other party or witnesses in proceedings involving family or domestic violence; and/or
- as a result of many or all of these issues, be feeling anxious, frightened, frustrated, and/ or bewildered. The case may also be impacting, or starting to impact, on their emotional and/or physical health’.
- Self-represented litigants may also present difficulties for the court itself and for the parties involved.
- The bench book stipulates practical considerations judges may have a mind to when confronted with a self-represented litigant before a court appearance, at the start of court proceedings, as the court proceedings progress, directions to the jury, and in sentencing, other decisions and judgment writing or decision writing.

Legal representation and self-represented litigants - Other Resources

Australia

Family Court of Australia, Reconciliation Action Plan 2018-2020.

The Family Court of Australia's Reconciliation Action Plan identifies the following barriers to Aboriginal and Torres Strait Islander people using the Family Court's services:

- lack of understanding about the family law system among Aboriginal and Torres Strait Islander clients;
- resistance to engagement with, and even fear of, family law system services;
- literacy and language barriers;
- need for Indigenous-specific and culturally competent mainstream services;
- the challenges arising from lengthy and multi-step court processes for Aboriginal and Torres Strait Islander clients;
- the setting being based on Western notions of child-rearing, kinship and family, and concerns as to whether they operated in a culturally safe way; and
- lack of access to services for communities in regional and remote areas

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;

- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Indigenous women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of useful resources and links.

LawAccess NSW, Representing Yourself – Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Self-Represented Litigants - Judicial Actions.

There are steps judicial officers can take to ensure that self-represented litigants are afforded procedural fairness and access to justice while maintaining their independence and neutrality. The following actions are identified in Australian state and territory bench books [Other Bench Books]. They serve as a non-exhaustive guide to assist judicial officers in exercising their discretion in proceedings involving self-represented litigants (SRL). For specific legislative requirements on limits to cross-examination where a defendant is self-represented or judicial duties/discretions to disallow improper questions, see 5.4 Legal representation and self-represented litigants statement.

Stage of proceedings	Judicial action
Prior to commencement	> Check that SRL has considered all legal representation options > Check with parties whether matter capable of being resolved by mediation/negotiation > Check that SRL has access to information about court processes and relevant services/agencies > Check that SRL has filed/served on other party all necessary documents/statements and received any subpoenaed documents > Check that SRL's witnesses available to give evidence
At commencement	Where provided in local bench books, follow specific directions in addressing SLR. Otherwise, explain to SRL in simple, direct, non-legal language: > Conventions >> who is in court, their names and roles, and how they are to be addressed >> no recording of the proceedings, handwritten notes permitted >> mobile phones must be off or in silent mode >> SRL to ask judicial officer if they don't understand something or need a break >> one person speaks at a time, each party has the opportunity to present their case, politeness and respect required, no badgering of witnesses >> no interjection or disturbance to proceedings by SRL family and friends > Purpose and scope of proceedings > Central issues to be considered/decided > Role of judicial officer >> duty to ensure fairness to all parties and neutrality in actions and language >> duty to ensure that neither party uses the court process to intimidate or abuse the other party >> ask questions/intervene to ensure SRL understands >> respond to any questions/concerns raised by the other party regarding fairness/neutrality >> explain the reason for any intervention >> intervene in a neutral and non-provocative manner > Order of proceedings/procedures >> who does what, when >> when SRL will have the opportunity to speak/present case/cross-examine >> where there is a change in normal procedure, explain to SRL the effect of the change

	and right to object
	- Court room approaches
	  - direct SRL where to sit so that other party (and their lawyer) have ready access to/from court room without having to pass SRL
	  - direct SRL to sit while asking questions if their stature, demeanour or mood is likely to be intimidating or heighten tensions between the parties
	  - where SRL unable to control their behaviour, direct SRL to attend proceedings via video link

In progress	Explain to SRL in simple, direct, non-legal language:
	- SRL evidence
	  - Steps in presenting/proving case: standard and onus of proof applicable; giving own evidence; calling witness evidence; purpose of sworn evidence; what is allowed to be said/shown in evidence; purpose and scope of final submissions
	  - Giving own evidence: swearing in; admitting written statement (if admissible), confirm true and correct, opportunity to correct; oral evidence in absence of written statement, a sequential account of what SRL has personally seen; judicial officer may intervene to clarify SRL's account or counsel on relevance/admissibility and applicable law
	  - Other party entitled to question (cross-examine) SRL evidence: judicial officer may intervene where other party's questions unfair or improper
	  - SRL entitled to add to/clarify own evidence following cross-examination and to seek leave to admit new evidence: other party entitled to question in response
	  - SRL to call witnesses in the order they determine best explains their case: refer guidance for 'giving own evidence' above; limit questions to matters not covered in statement and likely to help prove case; short questions to elicit witness's account
	  - Other party entitled to question (cross-examine) SRL witness
	  - SRL entitled to ask witness further questions to clarify earlier answers: judicial officer may intervene where SRL fails to ask necessary questions
	  - Other party entitled to question witness where new or altered evidence introduced
	  - Judicial officer to consider whether necessary to take steps to have a party declared a vexatious litigant
	- SRL testing of other party's evidence
	  - Other party entitled to present their case following the same rules as applied to SRL
	  - SRL may only interrupt where they believe other party/witness is saying something that breaks the rules, otherwise remain silent; judicial officer to decide, and may intervene to advised SRL where they have right to object to inadmissible evidence or a claim of privilege
	  - SRL entitled to question (cross-examine) other party and witnesses: judicial officer to explain purpose of cross-examination, permissible questions, short questions one at a

	time; intervene if SRL questioning not assisting in testing evidence > Judicial officer may, following SRL cross-examination, question other party/witnesses to clarify a point or test the validity of any evidence
Final submissions	Explain to SRL in simple, direct, non-legal language: > Purpose and scope of final submissions > Standard of proof applicable > SRL opportunity to explain to the court how they have proved their case, why SRL evidence should be accepted, any problems with the other party's case/evidence, and the outcome they are seeking; judicial officer may seek to clarify any submissions or identify any substantive issues overlooked > SRL and other party entitled to make final submissions without interruption unless one believes the other is not following the rules or needs to ask a question to clarify a point > Judicial officer to advise when decision will be given and in what form
Directions to jury	> Explain that a party's self-represented status must not influence their decision > Where applicable, explain why self-represented defendant not permitted to directly cross-examine complainant and that this fact must not influence their view of the evidence
Sentencing, other decisions & judgment writing	> Be aware of potential for bias either in favour of SRL or represented party and eliminate bias > Consider whether appropriate to refer to the difficulties the fact of self-representation raised and how they were addressed > Consider whether necessary to take steps to have a party declared a vexatious litigant > Ensure SRL is advised of outcome, sentence and effect of decision explained, appeal rights

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

International

Lee, Kaofeng and Ian Harris, How to Gather Technology Abuse Evidence for Court, Self-represented Litigants Series, Safety Net Project at the National Network to End Domestic Violence (February 2018).

This is a resource to assist self-represented litigants to gather evidence of their experience of technology abuse in a form that will be allowed by a court. It also provides links to additional resources including information about documenting technology abuse and technology safety. Note however that this is an American resource and the helpline number provided is unlikely to be available to those calling from Australia.

The introduction reads: If someone is using technology like text messages, email, or social media (like Facebook) to harass you, this guide will help you “capture” the evidence of the harassment, so you can bring it to court. You might think you can just show the judge your phone in court—but you probably won’t be allowed to just show your device. Even if you are allowed, you could risk the court taking your device as evidence. To be sure the judge considers your evidence and that you don’t lose your phone (or other device), you need to gather evidence in a form allowed by the court. This guide will provide suggestions on how to capture evidence that can be admitted in court from your devices, such as your cell phone, computer, or tablet (such as an iPad).

Legal representation and self-represented litigants - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Ingrid

Interpreters and translators

To ensure a fair hearing in domestic and family violence related proceedings and the full participation by parties, it may be appropriate for judicial officers to facilitate the engagement of interpreter or translator ("language") services where a party has limited linguistic ability, hearing impairment or other physical or mental disability. For example, among the groups identified in this bench book as being at greater risk of experiencing domestic and family violence or more vulnerable to its impacts, people from culturally and linguistically diverse [JCCD, The Path to Justice (CALD) 2016] or Aboriginal and Torres Strait Islander backgrounds, and people who experience disability, mental illness, or poor literacy may indicate a need for language services. Where people are unable to access language services to ensure their full participation in proceedings, they may experience heightened vulnerability to the impacts of domestic and family violence [Wakefield & Taylor 2015].

Research acknowledges the complexity of the issues [Hale The Need to Raise the Bar 2011], for the parties involved and the judicial officers making decisions about the use and nature of language services in a given case [Wakefield & Taylor 2015]; and the value of best practice guidelines [Eckert 2013-14] to assist in decision making [JCCD, The Path to Justice (ATSI) 2016, JCCD, The Path to Justice (CALD) 2016]. Some of the issues judicial officers may need to consider include:

- A party's need for language services. A party may be reluctant to disclose a need for language services or may overstate their linguistic ability for a variety of reasons including: embarrassment and shame, fear of being mocked by the other party, distressing prior experience with a language service provider, reluctance to disclose their story to an unknown person or a person known to both parties, privacy and confidentiality concerns, or a mistaken belief that their linguistic ability will be sufficient in a courtroom environment [Hunter 2008].

  Where a judicial officer questions a party to determine the need for language services, it is important to reassure the party that the purpose is to ensure a fair hearing and their full participation in proceedings [Barassi-Rubio 2011].Where it is determined that a party requires language services, it may be appropriate for the judicial officer to take steps to ensure that these services will be made available to the party for the duration of all proceedings.
- The consequences of a party being denied access to language services during the police

process [Cavallaro 2010] prior to the matter coming before the court and the steps that may need to be taken to ensure the party's understanding of the matter and confidence in the ongoing judicial process.

- The availability of language service providers appropriate to the party's specific needs [Hale Breaking Through the Language Barrier 2011]. For example, there is a widespread shortage throughout Australian jurisdictions of language service providers who have a specialised understanding of domestic and family violence matters and the legal terminology used in related proceedings. Further, there may be limited language service providers available for some Aboriginal and Torres Strait Islander and new and emerging languages, and this may be more prevalent in rural and remote communities. Where it is established that a party speaks more than one language, it may be possible to access language service providers more readily for one language than for another. In some countries it is not uncommon for people to speak three or four languages. It is important not to make assumptions about a party's predominant language based on their country of origin or residence; they may have moved often, or spent extended periods in refugee camps, which may influence their language choice and usage. Certain countries and territories may also have multiple distinct language groups.

  In some circumstances, based on a belief that there are no alternative options they would be comfortable or confident with, a party may express a preference for their own linguistically able child to provide the language services they require. It is important for judicial officers to appreciate the range of potential adverse impacts on children providing language services to a parent in legal proceedings [Hale Breaking Through the Language Barrier 2011] especially when they involve allegations of domestic and family violence.

- The qualifications and competencies of language service providers. The National Accreditation Authority for Translators and Interpreters (NAATI) [Outline of NAATI Credentials 2010] is Australia's national standards and accreditation body. While it is the only agency authorised to issue accreditations for practitioners who wish to work in these roles in Australia, the profession is unregulated, and there is no statutory requirement that translators and interpreters be accredited. At times, there may be no NAATI-accredited language service provider available, or the language service provider is not accredited at the appropriate level. In these circumstances a judicial officer may need to consider options for the best possible practice taking into account the practicalities of the particular case.
- The appropriate gender of the language service provider [Hale Breaking Through the Language Barrier 2011]. A party requiring language services may feel more comfortable and confident with a provider of the same gender.

- Whether it is appropriate to engage separate providers for each party requiring language services [Beutz 2004]. A party may be reluctant to disclose their story to a provider who is also providing language services to the other party, and therefore may feel more comfortable and confident with an independent provider. It is likely that a party will not object to the same provider for themselves and their witnesses.
- The independence and neutrality of the language service provider having regard to the familial, social, financial and proprietary interests of all parties to the proceedings [Hunter 2008]. This is especially important in the context of a small community where parties are likely to be concerned about privacy and confidentiality [Ostapiej-Piatkowski & Allimant 2013]. It may in some circumstances be necessary for parties to access language services located outside the particular community.
- The most appropriate and practical means of providing the language services, whether face-to-face or via telephone [Barassi-Rubio 2011]. These considerations extend to the availability of appropriate language service providers and technical facilities in the courtroom, and arrangements necessary for the payment of associated expenses.
- The potential for injustice [Cussen & Lyneham 2012] where a party is not provided with the language services they require, or the services are inadequate, incompetent or poorly managed [Assafiri & Dimopoulos 1995].

Interpreters and translators - Key Literature

Australia

Assafiri, Hana and Maria Dimopoulos, 'The Legal System's Treatment of NESB Women Victims of Male Violence' (Paper presented at the Australian Institute of Criminology Conference, "The Criminal Justice System in a Multicultural Society", 1995).

Abstract: 'This [presentation] considers the way NESB women are perceived and defined in their dealings with the legal system. The authors provide examples which highlight how some magistrates unwittingly perpetuate racist assumptions about the prevalence of domestic violence in ethnic communities.'

Some non-English speaking women's negative experiences of Magistrates are reported, including a woman asked to rely on her daughter to interpret, another woman required to 'act' out the violence, and a failure to address the cultural dissonance experienced by a Croatian woman who was provided with a Serbian interpreter.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

The Report notes that the provision of interpreters is essential (p74). This conclusion is based on submissions that emphasised the following in regards to reporting, prosecution and pre-trial processes:

- 'Women from CALD backgrounds also face a range of cultural and systemic barriers—based on language and other issues —including: … cultural and linguistic communication barriers, such as the lack of information in diverse community languages or of professional interpreters …' (p1195)
- 'The Immigrant Women's Support Service highlighted the need for service providers to provide 'relevant information in appropriate community languages' as well as the need for professional interpreters' (p1210).

Barassi-Rubio, Cecilia, 'Working with Interpreters' (2011) 9(4) *Centre for Domestic and Family Violence Research Reader* 15.

Author notes that ‘making a decision about engaging an interpreter should be based on fact rather than assumption…a person may have a reasonable level of conversational English but may find it difficult to understand more abstract information…’ This paper also identifies several helpful points for dealing with interpreters:

- Ideally the interpreter should be briefed before undertaking the interpreting;
- Explain your role and make the purpose of the procedure clear;
- Allow time;
- Communicate your understanding of what was said;
- Speak in your normal tone of voice. For example, speaking too slowly or loudly will not ensure better understanding;
- Use concise and well-constructed sentences;
- Direct all communication to the person accessing the service. (e.g Ms. Jones please tell me how I can help you today? Instead of: ‘Interpreter please ask Ms. Jones how I can help her today.)
- Avoid jargon and slang.
- Always ask the person what is the language they speak. Never rely on physical appearance or accent to identify the language spoken by the person.

Cavallaro, Lisa, *‘I Lived in Fear because I Knew Nothing’: Barriers to the Justice System Faced by CALD Women Experiencing Family Violence* (InTouch Multicultural Centre Against Family Violence, Victoria Law Foundation, 2010).

The primary objective of this research was to identify and explore the barriers faced by Victorian CALD women who have been in situations of family violence and who have accessed or attempted to access the legal system. The methodology comprised three components including: surveys and focus groups with over 50 CALD women, consultations with representatives of 180 service providers and an online survey with 144 individual service providers. Workshops were also conducted to help formulate recommendations.

The use of interpreters is analysed throughout, but see especially:

- ‘Failure to utilise interpreters’ (p20), discussing the main ‘failings around police intervention’ being not using interpreter services;

- '4.2.2 Barriers to court processes and legal representation: Interpreters' (p21) recounting comments by women and service providers about the lack of access to family violence-trained interpreters in court
- 'Challenges when working with interpreters' (p23), noting broader issues with accessing 'confidential and competent interpreters with expertise in legal language'
- '5.2 Overcoming language barriers' (p27) providing an overview of the need for consistent use of interpreters, including by courts.

Cussen, Tracy and Mathew Lyneham, 'ACT Family Violence Intervention Program Review' (Technical and Background Paper 52, Australian Institute of Criminology, 2012).

This report presents the results of the review of the ACT Family Violence Intervention Program (FVIP). The main purpose of the review was to describe the effectiveness of the current program including its governance arrangements' (p xiii). It explores a number of areas including the profile of family violence in the ACT and insider views of the Family Violence Intervention Program. The section 'Experience of family violence' (from p71) is most relevant, briefly identifying some cases where interpreter services would have been beneficial to ensure the victim from a CALD background had full access to the criminal justice system. These include cases where the victims noted that: a statement to the police contained inaccuracies (p74); a police report contained mistakes and should have been made with the presence of an interpreter (p83); the victim's husband 'wasn't given the opportunity for an interpreter' (p89).

Eckert, Rebecca, 'Good Practice Principles for Working With Refugee Women Experiencing Domestic Violence' (2013-2014) 54 *Australian Domestic and Family Violence Clearinghouse Newsletter* 11.

This paper identifies several principles of good practice for working with interpreters. Page 12 briefly discusses the need to provide access to appropriate interpreters for refugee women who are survivors of domestic violence. Issues for considerations include: requests for female interpreters; that interpreters not be family members; and that interpreters understand the expectations of their role and need for confidentiality.

Hale, Sandra, 'The Need to Raise the Bar: Court Interpreters As Specialised Experts' (2011) 10(2) *Judicial Review* 237.

Abstract: ‘In this paper, [Hale] examines the complexities of the court interpreting process and identifies the key competencies for court interpreters. Apart from a high level bilingual competence, an interpreter requires an understanding of the interpreting process; cross-linguistic differences; the discourse strategies of the courtroom; and the nature of his or her role; as well as the expertise to know when and how to intervene. [Hale] opines that the responsibility for the quality of court interpreting must lie with all participants in the process and urges systemic improvements, highlighting the pressing need for pre-service specialised court interpreter training.’

Hale, Sandra, ‘Breaking through the Language Barrier: Empowering Refugee and Immigrant Women to Combat Domestic and Family Violence through Cultural and Language Training’ (Report, University of Western Sydney, 2011).

This project emphasises the need for professional interpreters for women of CALD backgrounds affected by domestic and family violence (p7). It identifies the lack of professional interpreters, particularly female interpreters, for new and emerging languages. The section ‘3.1.2 Language issues’ (from p23-25) is very relevant, noting respondents’ views from a discussion group on the difficulties that arise around interpreting in domestic violence contexts. The main issues identified include: ‘shortage of interpreters in the relevant languages, the need for female interpreters when domestic violence issues were discussed, the problem with using children to provide language brokerage and the problem with unethical and incompetent interpreters’ (pp23). The also analyses a survey of interpreters, including ethical considerations around interpreting for a woman experiencing domestic violence.

Hunter, Rosemary, *Domestic Violence Law Reform and Women's Experience in Court* (Cambria Press, 2008).

- This research investigates how civil courts hear and understand women's experiences of domestic violence, and examines women's experiences of attempting to tell their stories in those settings, focusing on domestic violence intervention order and family law proceedings in Australia. As part of the research there is some discussion about the use of interpreters in domestic and family violence cases.
- The difficult context of using interpreters, including their lack of training in domestic violence or being from a small community is noted.

- The section ‘Language Barriers’ discusses issues relating to assessing women’s need for an interpreter; the availability of interpreters in court (e.g. only be used for particular types of matters due to funding, or magistrates looking for children to interpret); and the difficulties women may have with interpreters even if they are available (e.g. unprofessionalism, issues with confidentiality, women being uncomfortable relating their stories through a third person).

National Council to Reduce Violence against Women and their Children, *Time For Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009).

In relation to interpreting and translating in the context of domestic and family violence, this report’s recommendations include:

- 3.3.7 At every point in the service and justice system, ensure services are adequately funded to provide professional interpreting to victims/survivors who are not confident in their English language competency.
- 3.3.8 Ensure interpreter services for women experiencing violence (including interpreters competent in Auslan) receive training to ensure interpreters understand issues related to sexual assault, and domestic and family violence, and are able to interpret in a sensitive yet impartial manner

The Plan also identifies that continuing barriers to women’s access to justice include not having trained interpreters available, or only having one interpreter for both the complainant and defendant (p96); and emphasises the importance of having appropriately screened and selected interpreters for sexual assault and domestic and family violence victims (p139).

Ostapiej-Piatkowski, Beata and Annabelle Allimant, ‘Best Practice Considerations when Responding to People from Cald Backgrounds, Including Refugees, with Mental Health Issues and Experiences Of Domestic And Sexual Violence’ in Zannettino, Lana, et al (eds), *Improving Responses to Refugees with Backgrounds of Multiple Trauma: Pointers for Practitioners in Domestic and Family Violence, Sexual Assault and Settlement Services* (Practice Monograph 1, Australian Domestic and Family Violence Clearinghouse, 2013). (from p14)

This chapter notes best practice considerations that should be followed by practitioners when using

interpreters with people from CaLD backgrounds, including the need to use professional interpreters, respond to gender requirements, and be aware of potential issues where the interpreter and client are from a small community (p18).

Wakefield, Shellee, and Annabel Taylor, 'Judicial Education on Family Violence: State of Knowledge Paper' (State of Knowledge Paper 2, Australia's National Research Organisation for Women's Safety Landscapes, June 2015).

Abstract: 'The experience in court of domestic and family violence matters may be particularly difficult for people from vulnerable communities and magistrates have the challenging task of responding to people with various needs. For example, one issue for many migrant women participating in court procedures is the need to have access to interpreters. A lack of proficiency in English language becomes an obstacle when providing evidence in court, communicating, and understanding information or advice on legal rights, and understanding obligations and consequences (Erez and Hartly, 2002; Schetzer, Mullins, and Buanamano, 2002). To ensure meaningful understanding of legal matters, interpreters may be provided. However, these interpreters may be known to the women and this may lead to women fearing community shame associated with domestic and family violence, which in turn deters them from accessing the legal system (Women's Legal Services Australia, 2014).' (p14)

Also notes Ptacek's research on p16, which advised that providing interpreters can improve the hospitableness of the court experience for immigrant women, consequently empowering them; and Braun and Clarke's study which found a number of judicial officers surveyed had noted linguistic barriers (and lack of interpreters) as a major issue for domestic violence victims from diverse backgrounds (p22).

International

Beutz, Molly, et al, *Government Response To Domestic Violence Against Refugee and Immigrant Women In The Minneapolis/St. Paul Metropolitan Area: A Human Rights Report* (Minnesota Advocates for Human Rights, 2004).

The discussion in this report is based on more than 150 interviews with judges, lawyers, prosecutors, public defenders, advocates, probation officers, immigration officials, medical service providers, interpreters, and child protection employees in the Minneapolis/St. Paul metropolitan area (USA) about their engagement with

battered refugee and immigrant women. Of particular relevance at pp145-146 the report provides some key points about interpreters:

- Courts should consider appointing two interpreters, one for each party, in civil and criminal proceedings involving domestic violence;
- Ensure that documents provided or sent by the court to limited English proficient individuals are translated into the appropriate languages.
- In criminal cases where either party has limited English proficiency, request information regarding interpretation services available to both the offender and the victim at the time of arrest, during the investigation and throughout the pre-trial proceedings. To the extent they are relying on such information for their decisions regarding risk analysis, bail evaluation and release of offenders, judges should assess whether interpretation services were adequate during those stages.
- In both civil and criminal cases, during court appearances where interpreters are present, begin court proceedings with a statement of the interpreter's proper role in the courtroom.
- Take steps to be aware of possible interpreter bias in domestic violence cases. Such steps should include asking interpreters about their experience and possible conflicts in the case prior to any appearance or hearing. If bias is detected, judges should immediately disqualify the interpreter for purposes of the proceeding.
- Use female interpreters whenever possible when requested in domestic violence cases involving limited English proficient women.
- Require interpreters appointed to interpret at protection order hearing to remain available to interpret the order at the time it is issued, so that the interpreter may translate the order for limited English proficient parties and facilitate the correction of mistakes or the elimination of confidential information included in the order.

Erez, Edna, and Carolyn Hartley, '[Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective]' (2003) 4(2) *Western Criminology Review* 155.

In part of this essay the USA based authors consider 'Interpreters, Immigrant Battered Women and the Justice System' (from p159). They analyse a number of relevant issues for Immigrant Battered women who do not speak English. Issues include the need to rely on family, friends or community members when seeking

out help, who may not be well-informed about woman battering or may collude with the abuser. Similarly, relying on children can be problematic if they are uncooperative or feel their loyalties are being divided, or where it endangers those children where the abuser views assistance as collusion. It also illustrates issues that may arise where there is a lack of professional, unbiased interpreters, and police are therefore required to act on incomplete information and sometimes the account of the abuser.

Interpreters and translators - Other Bench Books

NSW

Judicial Commission of NSW, Civil Trials Bench Book (2022).

Section [1-0900] discusses the issues related to litigants and witnesses requiring the assistance of an interpreter in the preparation and giving of evidence.

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

In the context of people from CALD backgrounds, 3.3.1 discusses the assessment of need for an interpreter or translator, the engagement of appropriate services and liability for costs, national standards to be adhered to, and guidelines for judicial officers when working with interpreters in court. In the context of Aboriginal people, 2.3.3.4 notes that an interpreter should be used where there is any doubt about an Aboriginal person who speaks Aboriginal English understanding the questions being asked.

Judicial Commission of NSW, Local Court Bench Book (2022).

Section [14-000] discusses the issues related to parties and witnesses requiring the assistance of an interpreter during court proceedings.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 11.3 discusses the court's option to engage interpreters or other assistance to explain the proposed order to the parties.

Queensland Courts, Supreme and District Courts Criminal Directions Benchbook (2022).

Chapter 21 discusses issues relating to interpreters and translators.

Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016).

- Chapter 6, 'Effective Communication in Court Proceedings' focuses on the issues judges may encounter when dealing with legal matters involving people from culturally and linguistically diverse backgrounds and identifies some guidelines and strategies that judges may choose to employ to address such issues. The first part of the Chapter looks at the use of interpreters and translators in court to enable comprehension and prevent misunderstanding. It provides a detailed overview of the different interpretation techniques and the standards of accreditation before examining the issue of legal interpreting in Part III (p.46). The bench book notes the *Guidelines for Magistrates and Judges on Working with Interpreters in Court* that have been developed at p.47.
- Chapter 9 of the bench book, 'Aboriginal and Torres Strait Islander Language and Communication, also looks at interpretation and translation in court proceedings. It highlights significant cases which have recognised the importance of defendants being able to understand the proceedings and evidence in a criminal trial, before providing an overview of how to determine competency in English generally and practical difficulties specifically in Aboriginal interpreting (such as lack of trained interpreters, inability to obtain the services of an interpreter, effects of the court environment, use of untrained interpreters, lack of conceptual equivalence in the language, and language/semantic differences).
- Chapter 11, 'Persons with Disability', also looks at the specific issues arising in relation to communication and interpreters for people with a disability (p.130 onwards)

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.4 notes that a witness may give evidence through an interpreter. 5.6.1 notes factors that may explain the small number of applications for intervention orders by people from CALD backgrounds recorded as accessing interpreter services. 5.6.4 notes that language and literacy issues, a lack of knowledge of Australian law and available services, and poor interpreting services are among a range of barriers inhibiting the ability of people from CALD backgrounds to access the family violence system.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

A very detailed section on interpreting and translating is provided from 7.3.1. It highlights when to use an interpreter or translator, including the different translating techniques that may be used by translators. The presumption that people who need a translator are provided one is noted, with reference to the specific relevant legislative provisions from 7.3.1.1. While there is no right to an interpreter in WA, the importance of having access to one when necessary for a fair trial is emphasised, along with a useful overview of when an interpreter should be used. The section goes on to detail the type of interpreter or translator to use, specific suppliers of interpreters, information on who pays for an interpreter of translator, and practical considerations for working with an interpreter. The added difficulties of cultural differences in understandings of the role of the legal system is also explored from 7.3.1.1, while practical difficulties involved in the availability of interpreters for people speaking Aboriginal languages is specifically highlighted in 9.3.4 (including useful contacts).

Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australia Courts* (Australian Institute for Judicial Administration, 2nd ed, 2008).

- 'Chapter Six: Pre-Trial Matters' deals specifically with interpreters from 6:16. Includes discussion of the right to an interpreter, practical difficulties (such as determining competency in English, obtaining services of accredited interpreters, lack of conceptual equivalence of words/phrases, interpreter's conduct etc), and calls for accredited Aboriginal Interpreter Training Programs. It also provides appendices detailing guidelines for testing whether an Aboriginal interpreter is required, and contacts for interpreter services in WA.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Section 20.9.1 considers language issues, including the right to an interpreter (Section 20.10.1.1), and assessing the need for an interpreter (Section 20.10.1.2). Relevant considerations when choosing an interpreter include whether the proposed interpreter is related to any party, is aligned with any party, is

familiar with the particular dialect, and is competent, as well as whether the interpreter understands the impact of domestic violence on the victim, and whether the interpreter's gender may impact the victim's testimony (Section 20.10.1.3). It is also noted in Section 18.2.7 that it is important to ensure that the relevant parties have 'confidence in the ability and neutrality of the interpreter, particularly if the interpreter is a member of either party's community'.

Interpreters and translators - Other Resources

Communication barriers and family violence: Fact sheet (ANROWS 2016).

This fact sheet summarises the ASPIRE Project findings about the impact of communication barriers on women's experiences of family violence.

Australian Department of Home Affairs "Hints and tips for working with interpreters video.

Australian Institute of Interpreters and Translators (AUSIT) Code of Ethics

Sets the standards for ethical conduct of interpreters and translators in Australia and New Zealand.

Department of Immigration and Border Protection, 'Working with TIS National Interpreters'.

This webpage has some general tips on how to make interpreting as effective as possible (including who to address, what language to use).

- **Department of Social Services (Cth) (2019) Interpreters and Family Safety. (fact sheet)**
- **Department of Social Services (Cth) (2019) Using interpreters and family safety. (fact sheet)**

[Former] Federal Circuit Court of Australia, Reconciliation Action Plan 2019 – 2021

"This RAP provides a platform to introduce practical measures to promote reconciliation, and addresses some of the barriers faced by Aboriginal and Torres Strait Islander peoples in interacting with the Court. It also prioritises establishing relationships with Aboriginal and Torres Strait Islander communities and community leaders, agencies servicing Aboriginal and Torres Strait Islander peoples, legal services and other stakeholders, in order to assist Aboriginal and Torres Strait Islander peoples to access the Court."

Interpreters and family violence: Fact Sheet (ANROWS 2016).

This fact sheet summarises the ASPIRE Project findings about the impact of interpreting issues on women's

experiences of family violence.

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Indigenous women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts (A report for the Judicial Council on Cultural Diversity)*, (2016).

See the Executive Summary (p6-9) which makes a number of recommendations. It also identifies and discusses key pre-court barriers:

- Lack of knowledge of legal rights;
- Lack of financial independence;

- The importance of integrated support services;
- Poor police responses;
- The impact of pre-arrival experiences and traumatic backgrounds;
- Community pressure on women seeking to protect themselves and their children;
- Uncertainty about immigration status and fear of deportation; and
- The cost of engagement with the legal system.

Identifies communication barriers: Working with interpreters:

- Lack of clarity about who is responsible for engaging an interpreter;
- Failure to assess the need for an interpreter, or incorrectly assessing need;
- The skill of interpreters being engaged;
- Lack of awareness amongst judicial officers and lawyers about how to work with interpreters;
- Engaging interpreters who are inappropriate in the circumstances; and
- Unethical and poor professional conduct by interpreters.

Identifies barriers to full participation in attending court:

- The intimidating process of arriving at court;
- Safety while waiting at court;
- Lack of understanding of court processes;
- Difficulty understanding forms, charges, orders or judgments;
- Courtroom dynamics;
- The impact of attitudes and actions of judicial officers;
- The need for judicial officers to receive cultural competency training;
- Lack of availability of men's behaviour change programs; and
- Abuse of court processes by perpetrators.

Law Society Northern Territory, *Indigenous Protocols for Lawyers* (second edition, 2015).

This handbook is written for lawyers and identifies and discusses six protocols to assist lawyers in

communicating with their clients. See p5 which sets out the six protocols. The remaining part of the document discusses these protocols in depth.

Protocol 1:	Assess whether an interpreter is needed before proceeding to take instructions.
Protocol 2:	Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.
Protocol 3:	Explain your role to the client.
Protocol 4:	Explain the relevant legal or court process to the client prior to taking instructions.
Protocol 5:	Use 'plain English' to the greatest extent possible.
Protocol 6:	Assess whether your client has a hearing or other impairment that may affect their ability to understand

National Accreditation Authority for Translators and Interpreters, 'Outline of NAATI Credentials' (Version 1.0, October 2010).

Summarises the various levels of NAATI accreditation, including what the accreditation enables interpreters and translators to do.

Interpreters and translators - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Rosa

Trisha

Support person in court

Australian research [Laing 2011] has shown that victims participating in domestic and family violence related proceedings value having a support person accompany them in the courtroom and court precinct. The protections afforded by a support person are set out in various state bench books [Other Bench Books], and are similar to those available to vulnerable witnesses in some jurisdictions [NT Dept of Justice 2011]. These protections reflect recent inquiry findings highlighting the difficulties victims experience navigating the court system without support [Qld Special DFV Taskforce Report 2015] and the benefits of making a range of specialised court services available to victims [Tas Sentencing Advisory Council 2015].

Women victims who are supported report [George & Harris 2014] feeling less vulnerable in the courtroom, safer in the court precinct, better able to understand and deal with the court process, and that their experience of domestic and family violence has been recognised and validated [Laing 2011]. A significant aspect of victims' fears relates to their experience of violence and the prospect of ongoing contact with the perpetrator in the court context [Laing 2011].

Support person in court - Key Literature

Australia

Department of Justice, Northern Territory Government, *Report: Review of Vulnerable Witness Legislation* (2011).

Although this report is specifically about vulnerable witness legislation in the Northern Territory, it highlights that in most jurisdictions one of the protections available to vulnerable witnesses is the entitlement to be accompanied by a friend, relative, or other support person while giving evidence (p 4). A vulnerable witness, in the NT, relevantly includes a child (defined as someone under the age of 18); a witness who is a victim of a sexual offence to which the proceeding relates; or is the protected person named in a domestic violence order (DVO) (p 3).

George, Amanda and Bridget Harris, *Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria* (Deakin University School of Law's Centre for Rural Regional Law and Justice, 2014).

This report draws and extends upon a 2013 report released by the Centre for Rural Regional Law and Justice (Victoria) (Jordan, Lucinda and Lydia Phillips, *Women's experiences of surviving family violence and accessing the Magistrates' Court in Geelong, Victoria* (Centre for Rural Regional Law and Justice, Deakin University Australia, 2013)). George and Harris' report 'examines the experiences of and outcomes for women survivors of family violence in regional and rural Victoria' (p 2). It briefly explores women's experiences of support workers at courts. It notes that their presence in the courtroom, standing beside survivors, was usually appreciated. It made women feel 'less vulnerable and braver' in the courtroom (p125). 'Survivors recounted how, in addition to escorting women to their cars, workers organised separate waiting rooms for them. Workers from ATSI services explained that dedicated support at court was vital for ATSI women, who often have little trust in the court system and face complex layers of disadvantage and need. An ATSI survivor insisted that 'women won't go [to court] unless they are supported … they will do it if they are supported'. Support workers also provided assistance to survivors in 'demystifying the court process'. 'Workers thus had significant roles as advocates for women because of their knowledge about court processes' (p 125).

Laing, Lesley, *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence* (2010).

Women attending court for domestic violence matters found domestic violence services and workers extremely helpful. 'Practical support from domestic violence workers, such as accompanying women to the Family Court, was appreciated' (page 82).

Laing, Lesley, 'They should have this in every court'. Evaluation of the NSW Women's Refuge Movement: Women's Family Law Support Service (2011).

This report presents an evaluation of the Women's Family Law Support Service (WFLSS) in NSW. The evaluation draws on interviews with 16 clients who engaged with the service and 9 interviews with court staff. The women interviewed for this study reported that the support provided in accompanying women in court was highly valued: 'I was over the moon to have someone who knows the system standing beside me' (Woman 3); 'Because I had suffered domestic violence, facing him and being alone would have been even harder. She sat beside me the whole time' (Woman 4); 'Now I'm back in Court again this month and [Coordinator] is going to be there with me the whole way' (Woman 11). The interviewee reported that the support was highly important to a woman whose family was in a distant state and she had to give testimony about her abuse. Other aspects of the service that were praised included the flexibility of the support, ongoing nature of the support, the emotional support provided (page 12), and the validation that the woman had experienced violence (page 13).

Loddon Campaspe Community Legal Centre, *Will Somebody Listen to Me? Insight Actions and Hope for Women Experiencing Family Violence in Regional Victoria* (2015).

The Loddon Campaspe Community Legal Centre (LCCLC) provides family violence duty lawyer, advice and ongoing case work across the Loddon and Campaspe region. This project examines the experiences of women who have experienced family violence and the legal system. 190 women were surveyed at Bendigo, Echuca, Maryborough, Kyneton and Swan Hill Magistrates' Courts in Victoria and in-depth conversations were had with 27 women as part of this project (p 8). As part of examining court structures and processes, the report briefly notes the importance of support for women going to court. Many of the women commented

positively on the support provided. As per Sophie, the support workers ‘did not leave my side. They were really supportive and made me comfortable because he was doing the stare thing. And they’re going just don’t look, don’t…they sat like this side of me and they were wonderful. So so wonderful. They were great’ (p73).

Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

The taskforce noted that ‘Many victims experience difficulties when attempting to navigate the justice response to domestic and family violence’ including: ‘Lack of court support workers, for women and men’ (p 268). It found that ‘having adequate court support workers available to assist parties to understand the process is essential to ensure the best possible outcome for all parties’. The report also notes that providing information to male respondents is ‘important in increasing engagement and accountability of perpetrators’ (p 310).

Sentencing Advisory Council, *Sentencing of Adult Family Violence Offenders Final Report No. 5* (2015).

The report considers the role of specialist family violence lists or courts in dealing with family violence offences. Specialist family violence courts share a number of common elements. These are identified in the Joint Report and include: specialised personnel including specialised victim support workers and may be chosen because of their specialised skills, or be given specialised training in family violence. This report notes the emphasis on specialised support services: There will be someone, employed by the court or another organisation available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling.

Support person in court - Other Bench Books

NSW

Judicial Commission of NSW, Criminal Trial Courts Bench Book (2022).

Section [1-368] discusses the right to a support person of a complainant in sexual offence proceedings and vulnerable people in criminal proceedings. See ‘support person’ section of table at [1-360].

Judicial Commission of NSW, Sexual Assault Trials Handbook (2021).

Section [10-500] discusses important general directions in sexual assault trials. Section [7-000] contains relevant literature, including [7-240] procedure in prescribed sexual offence cases.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 14.7 notes that an aggrieved is entitled to have an adult support person with them throughout the proceeding. Chapter 14.11.1 notes that the court must consider the appropriateness of an order that a protected witness be accompanied by an approved support person.

Vic

Judicial College of Victoria, *Victorian Criminal Charge Book* (2017).

Chapter 2.3.1 contains bench notes with respect to alternative arrangements for giving evidence. One of these measures is ‘permitting a person chosen by the witness and approved by the court to be beside the witness while he or she is giving evidence, for the purpose of providing emotional support (‘emotional support person’). In proceedings relating wholly or partly to a sexual offence or family violence offence, ‘the court must direct that the complainant’s evidence be given from a place other than the courtroom, unless: the prosecution applies for the complainant to give evidence in the courtroom; the court is satisfied that the complainant is aware of his or her right to give evidence from another place; and the court is satisfied that the

complainant is able and wishes to give evidence in the courtroom'. Irrespective of where the complainant gives evidence, 'the court must direct that he or she be permitted to have an emotional support person beside him or her when giving evidence, unless it is satisfied that the complainant is aware of the right to have an emotional support person with him or her, and he or she does not want such a person to be present'.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Note some of the suggestions identified are specific to Canadian context.

- The bench book notes that one of the options by which to facilitate accurate victim witness testimony includes '[a]llowing a support person or a domestic violence victim advocate to assist and sit near the victim witness'. It notes the court may wish to clarify explicitly the role of the support person (Section 5.3.3).
- 'If referral to mediation or to another settlement process would be helpful in the circumstances of the case, there are a number of safety provisions that can be considered as part of the referral process, for example: … A provision that the targeted parent is to be permitted to include an advocate or other support person in the process' (Section 17.26.3). Furthermore, allowing 'victim witnesses to bring a support person to meetings and to court' may help to enhance the accuracy of victim testimony (Section 20.9.1).
- In terms of procedure for a Judicial Dispute Resolution (JDR) session, the bench book suggests '[a]llowing the targeted party to include a support person' in addition to the lawyer. Further, it suggests that special precautions should be taken 'such as having the parties' lawyers or support persons relay suggestions or options rather than the JDR judge relaying options and suggestions directly – to ensure that participants and particularly the targeted party does not feel unduly obligated or pressured to accept judicial suggestions' (Section 18.2.7).

Support person in court - Other Resources

Supporting Victims and Witnesses at Court

This document has been adapted from DDP New South Wales, 'Supporting Victims and Witnesses at Court' (prepared by the Witness Assistance Service (WAS) at the Office of the Director of Public prosecutions (ODPP NSW)) 2021, the original document is available at: https://www.odpp.nsw.gov.au/sites/default/files/2021-08/Supporting-Victims-and-Witnesses-at-court.pdf.

Information for court support persons

A support person might be required to provide court support for a victim of crime or witness in a hearing in the Local or Magistrates Court or a hearing or trial in the District / County or Supreme Court. This information sheet refers to both these proceedings as "hearings".

What is a support person?

A support person is a person who assists and supports a witness, when that person gives evidence at court. A support person might also provide support for the family in matters where the primary victim died as a result of the crime.

Who can be a support person for a witness?

A witness can say who they would like their support person to be. A support person should be an adult and can be a friend or family member, a worker or volunteer from a support group or court support service or a professional counsellor. A support person cannot be someone who is going to give evidence in the case. Sometimes if the defence object to the choice of support person, the Judge or Magistrate may have to make decisions about who the support person will be. In some specific cases there can be two court support persons.

What is your role as a support person?

Your role as a support person is to assist and support the witness before, during and after they give their evidence. This might include being with the witness while they are waiting at court, sitting and listening while the witness gives evidence, giving emotional support, reassuring the witness and explaining what is happening.

Once they have finished giving their evidence and have been allowed to leave the witness box by the Court the witness can leave the court and go home or if they wish they can sit in court and hear other evidence.

In some cases a support person might provide support for a victim, witness or family member who wishes to sit in court and listen to the proceedings or at critical times such as the Crown closing address, the Judge or Magistrate's summing up, when the jury give their verdict, or for the sentencing judgment.

Supporting victims and witnesses who are giving evidence

Before the court hearing:

Before the court hearing you should ask the witness how they would like you to assist and support them when they give evidence in court. Prior to the court hearing the witness usually meets with the ODPP Lawyer and the Crown Prosecutor to discuss their evidence. You can accompany the witness to this meeting and, if the witness and ODPP Lawyer agree, you can sit in the meeting to support the witness or wait outside and provide support after the meeting.

Planning

- When and where will you meet the witness?
- Is there an arrangement for the witness to meet the Police or the Prosecutor?
- Has the witness let the Police or Prosecutor know where you will be waiting or given them a mobile number so they can contact you or the witness urgently?
- At some courts there may be a special witness room where you and the witness can wait.
- Be prepared to do some waiting at court. Sometimes the witness will have to come back to court for more than one day.
- It is a good idea for the witness to bring something along to read or do while waiting at court. Some people also bring something to eat and drink with them. If the witness has a medical condition they might need to bring along any medications that they have to take during the time at court.

At the court hearing:

- When providing support for a witness giving evidence, you may be sitting in the courtroom, or in some specific cases, you will be in a separate witness room where the witness gives evidence via closed circuit television (CCTV) or Audio Visual Link (AVL) from another location.
- Make sure you tell the ODPP lawyer and Crown Prosecutor that you are the support person for the witness. If the court hearing is a 'closed court' (i.e. closed to the public) the ODPP Lawyer or Crown Prosecutor will need to seek permission from the court, for you to stay in the courtroom or CCTV room.
- If the witness is giving their evidence from the courtroom, check that you are allowed into the courtroom

and determine the best place to sit so that the witness can see you easily and you are not close to the accused person. Often a good place to sit is in the public gallery on the side of the courtroom that the prosecutor is sitting. If there is a good reason for you to sit closer to the witness then discuss this with the ODPP Lawyer or Crown Prosecutor so they can seek permission from the Judge or Magistrate.

- Generally a prosecution witness gives their evidence to the court with the prosecutor asking questions. They will then be cross examined by the defence lawyer. The prosecutor can then ask a few more questions if they need to which is called re-examination. The Judge or Magistrate will then excuse the witness which means they have finished giving their evidence and they are free to leave the witness box

After the witness has finished giving evidence:

After a witness has finished giving their evidence they might want to talk with you as their support person about how they are feeling. The witness can stay in touch with the prosecutor or Police Officer-in-Charge as to the progress or outcome of the hearing. The witness may be able to claim witness expenses while they are at court. This can be discussed with the prosecutor or Police Officer-in-Charge.

What if the witness gives evidence via closed circuit television?

- When closed circuit television (CCTV) is used, the witness gives evidence from a separate witness room to the courtroom. The ODPP Lawyer or Crown Prosecutor can seek permission for a support person to sit with the witness in the CCTV room.
- While separated from the court the CCTV room is still part of the Court and the same rules apply as in the courtroom. A court officer should be in the CCTV room with you and the witness. You will be guided by the Judge / Magistrate and court officer as to where to sit and generally this will be to the side of the witness.
- The court officer ensures that the CCTV room functions as part of the Court and will assist with providing tissues and water for the witness and showing the witness any exhibits requested by the Court. There is a phone in the CCTV room so the court officer can speak with the Court. The witness will give an oath or affirmation to promise to tell the truth from the CCTV room. The witness can be seen by all the people sitting in the courtroom on a larger TV screen. In some courts the Judge or Magistrate also has a small TV screen so they can see everyone in the CCTV room.

Things to know about CCTV

- When the equipment is turned on, everyone present in the court can see and hear the witness on the TV

screens in the courtroom;

- The witness in the CCTV room should be able to see and hear the lawyer asking questions or the Judge or Magistrate on one of the screens;
- The witness should not be able to see the accused person on any of the screens;
- The witness should not see themselves on the screens. If this is the case, this image can be turned off by the court officer;
- The witness should be able to clearly hear and see the Judge or Magistrate and the lawyers asking questions, and their taped evidence if relevant.
- The witness can ask for a break e.g. if they need to use the toilet.
- If there is a short adjournment the equipment is usually turned off. However this is not always the case and the court may still be able to see and hear the witness even though the witness cannot see anything on their screen;
- When the equipment is turned off, is not transmitting or breaks down, you may assist or comfort the witness, however you must not talk about the case, the evidence or the questions they are being asked.
- Some witnesses might have their electronically recorded statement played to the court as part or all of their evidence. In this case they will watch their tape on one of the screens in the CCTV room while it is played to the court. The court cannot see the witness whilst they are watching their recorded evidence. They will then will be cross-examined by the defence and possibly re-examined by the prosecutor.
- Before going into the CCTV room, it is a good idea to discuss with either the prosecutor or court officer, what will happen if there are any problems with the technology while the witness is giving evidence. If you notice any problems such as the witness not hearing very well or the accused can be seen on the screen, you can quietly bring this to the attention of the court officer who will inform the Court. Witnesses can also tell the Judge or Magistrate if there is a problem with technology. If there is still a problem, you or the witness can tell the prosecutor during the break.

Supporting family victims

A support person may be supporting family members in a case where the primary victim died as a result of the crime. Sometimes family members are witnesses and the information about supporting witnesses will be relevant. The family of a deceased victim may also want to be at court to hear the court proceedings for some or all of the case. Attending court and listening to the evidence can at times be stressful, upsetting and draining and the family may appreciate some contact with a support person during the court proceedings. If

you are the support person in this type of case it is important to check with the family what type of support they would like and how often they would like you to come to court.

Hints for court support people

- Remember as a support person you are there for the witness or victim of crime.
- Even if you have had your own experience at court in another court case, now is not the time to discuss that case or your own experience.
- Allow the victim or witness some space and time while waiting at court – sometimes they just want a bit of timeout on their own.
- In some cases you may hear some distressing evidence so it is also important to take care of yourself and find someone other than the victim or witness to discuss your feelings.
- It is best that you don't show your emotions while the witness is giving evidence
- As a support person it is important to stay calm for the witness.
- If you or the person you are supporting are not sure about what is happening speak to the Police Officer-in-Charge or the prosecutor.
- If you or the witness have concerns about safety or security speak to the Police Officer-in-Charge, the prosecutor or court security;
- Whether supporting someone giving evidence or someone who is listening to the court proceedings it is important to observe the basic rules and traditions of the Court.

Basic court rules

- Switch off mobile phones before entering the courtroom
- Be polite
- Maintain a quiet and respectful manner in court
- Sit quietly in the courtroom
- Dress appropriately, this means smart casual, comfortable and warm
- Take off your hat, cap or sunglasses
- Do not eat, drink, chew gum or smoke inside the courtroom
- Remember to bow when you go in or leave the court
- Remember the Magistrate or Judge is the person in charge in the court.

The prosecution case must be conducted fairly and the Judge or Magistrate will ensure that basic rules of the court are followed and that each person is carrying out their role correctly. When you are the support person for a witness there are some additional things you need to know that you cannot do.

Things you must not do when supporting a witness at court

- You must not talk about the evidence with the witness at any time. You must not help the witness to prepare the evidence and you must not rehearse what he or she is going to say.
- You must not help the witness to answer questions or tell the witness what to say when he or she is giving evidence. You must not give body signals to the witness about the evidence or behave in a way that looks as if you are helping or telling the witness what to say. If you do you may be removed from the courtroom.
- You must not take notes in the court hearing.
- You must not touch the witness during the court hearing.
- If the witness becomes upset, or if you have any concerns, please raise these in the first instance with the court officer, the prosecutor or where necessary, with the Court.
- You must not speak during the court hearing, even if the witness is upset, unless the Judge or Magistrate asks you a question.
- You cannot do anything that might influence or interfere with the court case.

Support for the support person

If you are unsure about your role as a support person, or concerned about the person you are supporting, you can speak to the ODPP solicitor or Police Officer.

If as a support person you feel that you are affected by the court process or what you have heard while the witness is giving evidence it is important to seek out support for yourself. If you need to talk to someone about how you are feeling you can contact the following counselling line:

Lifeline: on 131114 or go to www.lifeline.org.au for more information

Referral to support services

On some occasions it may be appropriate for courts to refer victims and perpetrators of domestic and family violence to in-court and external support services. While it is the responsibility of the perpetrator to stop or prevent domestic and family violence, there may be a range of services available for both the victim and the perpetrator. Such support services may include providing assistance with filling out forms, legal advice, interpreting and translating, counselling, housing, substance misuse, mental health and perpetrator interventions. The extent and efficacy of court referrals [Chisholm 2009] are significantly influenced by key systemic factors including a party's understanding of their rights and willingness to seek help, their experience of vulnerability, and the availability of services tailored to their needs.

Research indicates that there are certain groups in the community that are less likely to access support services for particular reasons. For example, gay, lesbian, bisexual, transgender, queer or intersex people [ACON 2014] may fear blame or disbelief or the threat of being outed; Aboriginal and Torres Strait Islander people [Cox et al 2009] may feel misunderstood or marginalised by approaches that are not culturally or historically sensitive, or be at risk of homelessness [Fabinyi 2014] due to having to leave an unsafe home occupied by the perpetrator; culturally and linguistically diverse people [Allimant & Anne 2008] may not be able to recognise domestic and family violence by reference to their cultural norms and experiences, language and social [Allimant & Ostapiej-Piatkowski 2011] barriers may prevent them from accessing the information they need, and they may fear engagement with the Australian legal and immigration systems [WLS NSW 2007]; and people with disability [Duric 2003] may be deterred by their physical isolation, prior negative experiences in seeking help such as not being believed or taken seriously, or a lack of awareness and skills on the part of service providers in responding to their specific needs. Courts may be able to play a role in promoting awareness of appropriate support service in particular cases or in linking parties to services where appropriate referrals can be made.

Many experiences are common to victims across diverse groups and inform their reluctance to seek help, including a lack of available local services, a lack of financial resources, feelings of shame and embarrassment, fear of the perpetrator and the potential for retribution, fear of homelessness [Moshinsky Vic RCFV 2015], fear of child protection services removing children from their care, discrimination and stigma [Allimant & Ostapiej-Piatkowski 2011]. Where victims face multiple challenges, they are likely to experience multiple barriers to

service provision [Zweig et al 2002].

Studies have shown that the most positive outcomes for victims in the court process [Laing 2013] are linked to well-coordinated and prioritised service provision or referral, effective liaison between service providers, and services that are tailored to victims' needs and resources [Alford & Croucher 2011]. It is widely acknowledged by Australian courts that these support services are vitally important to the protection and recovery of victims of domestic and family violence; however their capacity to deliver access is constrained by court resources, especially in smaller and more remote registries [Chisholm 2009].

Referral to support services - Key Literature

Australia

ACON, Submission No 75 to Australian Senate Finance and Public Administration References Committee, *Inquiry into domestic violence in Australia*, 31 July 2014.

This report identifies that Lesbian Gay Bisexual Transgender and Intersex (LGBTI) people are less likely than people in the general community to seek support from mainstream domestic and family violence services and further, when they do seek support, 'they are less likely to find support services that meet their specific needs' (p 6). Reasons for this include:

- Similar to others experiencing domestic and family violence, LGBTI people are 'less likely to report abuse to police for fear of ostracism, fear of police, fear of escalating the abuse, fear of disbelief, fear of blame, self-blame, shame and embarrassment, and protection of the abuser';
- However, there are also reasons specific to LGBTI that prevent them from seeking assistance and these include 'the fear of being outed, and a lack of awareness that what participants had experienced was domestic and family violence' (p 7).

Alford, Amanda and Rosalind Croucher, 'The ALRC and Indigenous People – Continuing the Conversation' (2011) 7(22) *Indigenous Law Bulletin* 18.

In the context of family violence, Indigenous people face a number of issues in terms of access to services and facilities. These issues include: linguistic and cultural barriers but also broader access issues including lack of 'designated services for Indigenous women, legal services and advice; support services; liaison and contact office positions within government and non-government services'. A number of measures should be taken to mitigate this disadvantage including prioritising the provision of, and access to, culturally appropriate victim support services such as:

- legal advice (including specialised legal advice and representation for Indigenous women),
- counselling and
- other support services, but ensuring victims are able to –choose whether to access culturally-specific services;

- Ensuring the provision of professional translating and interpreting services where required and/or requested; and
- Introducing or re-introducing Indigenous-specific victim liaison, support and advocacy positions throughout the legal system, including within the police, the courts and service providers (p 20).

Allimant, Annabelle and Stephanie Anne, 'No Room…Homelessness and the Experiences of Women of Non-English Speaking Backgrounds' (Paper presented at 5th National Homelessness Conference, Adelaide, 21st-23rd May 2008).

Access to emergency accommodation and long term housing that is both secure and affordable is an issue relevant to many Australians, but especially for women and children of non-English speaking backgrounds (NESB) escaping domestic and family violence in Australia. Women from NESB experience a heightened risk of homelessness due to multiple barriers in reporting their experiences of domestic violence and in accessing relevant information and support services' (page 1). Personal barriers include 'recognising and defining violence; knowledge of rights/access to information; communication barriers; personal fears; isolation; cultural barriers; residency status of women and income support' (p 3). Systemic barriers for women from NESB include 'inappropriate use of professional interpreters; limited understandings of refugee experience; experiences of racism and discrimination; poor recruitment of people from culturally and linguistically diverse backgrounds and limited or no provision of information in community languages (p 6).

Allimant, Annabelle and Beata Ostapiej-Piatkowski, 'Supporting women from CALD backgrounds who are victims/survivors of sexual violence: Challenges and opportunities for practitioners' (2011) 9 *Australian Centre for the Study of Sexual Assault (ACSSA) Wrap* 1.

This literature review identifies that women survivors of sexual abuse from culturally and linguistically diverse (CALD) backgrounds face a number of specific personal and systemic barriers in accessing support. Personal barriers include:

- failure to recognise sexual violence,
- physical and emotional isolation,
- communication barriers,

- cultural barriers such as spiritual beliefs, rituals, traditions and world-views,
- fears about breaches of confidentiality, and
- residency status and access to income support.

Systemic barriers to accessing support include:

- language,
- lack of informed understanding (leading to documents being signed without awareness of the content), and
- racism and discrimination (pp. 8-10).

Breckenridge, Jan et al, *National mapping and meta-evaluation outlining key features of effective 'safe at home' programs that enhance safety and prevent homelessness for women and their children who have experienced domestic and family violence: Key findings and future direct* (ANROWS, 2016).

In most Australian jurisdictions and in other countries around the world, governments have implemented 'safe at home' programs or approaches which aim to mitigate the specific homelessness and safety impacts of domestic violence on women and their children. This report maps and evaluates key features of 'safe at home' programs.

Chisholm, Richard, *Family Courts Violence Review* (2009).

This review does not provide a comprehensive survey of the support provided by the courts to those who have experienced violence but some of the types of assistance they provide includes 'an array of pamphlets, referral service, assistance filling out forms, (p150) and where possible provide a setting for the operation of other services such as lawyers working in duty solicitor schemes, support groups for victims of violence'. The report notes that these services are of enormous importance but are constrained by resources, especially in smaller and more remote registries (p 151).

Cox, Dorinda, Mandy Young and Alison Bairnsfather-Scott, 'No justice without healing: Australian Aboriginal people and family violence' (2009) 30 *The Australian Feminist Law Journal* 151.

This article emphasises that service delivery for Aboriginal people must be tailored to the history, culture and needs of Aboriginal people in a particular location. These programs must be developed from an Aboriginal perspective and aimed at meeting the needs identified by the local Aboriginal community. Current justice initiatives in Australia: programs vary by jurisdiction but most of these programs target Aboriginal participation in the justice process and the ability of Aboriginal communities to be responsible for their communities e.g. Circle Sentencing in NSW, Koori Courts in Victoria and the Murri Courts in Queensland.

Day, Andrew, Sharon Casey, Adam Gerace, Candice Oster and Deb O'Kane, The forgotten victims: prisoner experience of victimisation and engagement with the criminal justice system – Research report (ANROWS, 2018).

The following summarises the key aspects of this research report:

Premise

Many women in prison have experienced intimate partner violence. As this form of violence is often intergenerational and entrenched, women in prison are widely considered to be at particular risk of ongoing victimisation following release from custody. And yet, their support needs often go unrecognised, and it is likely that a range of barriers exists that prevent ex-prisoners from accessing services.

Approach

This research documents data from interviews with and surveys of 22 women incarcerated in Adelaide Women's Prison, as well as interviews with 12 key South Australian agencies and service providers, to arrive at an understanding of help-seeking behaviour and how this might inform service responses. The analysis is positioned within a review of current help-seeking theories that highlight how a wide range of individual, socio-cultural and structural factors can complicate a woman's decision to seek help when concerned for her personal safety, noting that the circumstances and personal histories of women in prison increase the barriers to effective help-seeking when they face violence following release.

Key observations

- The interviews with the women prisoners revealed their:
  - lack of awareness of when they should seek external support

- lack of knowledge of available services
- pervasive sense of mistrust and under-confidence in existing services
- sense that better approaches can be developed drawing on the strengths of women, their peers and families.

- Women's experience of formal and informal support-seeking (positive and negative) often determine how they define intimate partner violence and whether they decide to seek to change their circumstances.
- Agencies and service providers expressed a range of views about the services that should be made available to women leaving prison, and these views were commonly shared by the women prisoners interviewed. It was acknowledged by both groups that services are not always visible or accessible to the women. There was also no sense that any integrated pathway for identifying and managing risk currently exists.

Conclusions

- Need identified for all jurisdictions: to clearly identify women in prison as a particularly vulnerable group who are likely to be at elevated risk of ongoing victimisation and intimate partner violence and who face significant barriers preventing them from accessing the types of services that may help them to keep safe; and take a specialised and integrated approach in addressing their needs. Successful models of reintegration are discussed.
- Need identified for people with lived experience of incarceration to be part of the service framework (design, delivery and goverance) in the community sector.
- Need identified for services and programs to reflect an understanding of the role violence in the lives of people who seek help (ie trauma-informed care)

Limitations

This research did not make conclusions about different cohorts of women prisoners having specific needs, for example women from Aboriginal and Torres Strait Islander cultural backgrounds.

Duric, Chris Jennings, 'Disclose Family Violence and Risk Homelessness' (2003) 16(1) *Parity* 24.

This article discusses service pathways for women with disabilities experiencing violence and finds they can be complex. Women with disabilities face a number of unique barriers to disclosure or help-seeking in relation

to domestic violence. Of particular importance are:

- their greater social isolation,
- the impact of previous help-seeking experiences,
- the difficulty many experience in being believed or taken seriously,
- the sheer practical obstacles they face in obtaining information or assistance,
- a lack of awareness and skills on the part of service-providers in dealing with women with disabilities who experience domestic violence, and
- a lack of coordination and cooperation across services regarding these women's needs.

In addition, those in need of crisis support accommodation are rarely confident that their needs will be met (p 24).

Fabinyi, Helen, 'Domestic Violence and Homelessness in the Northern Territory' (2014) 27(9) *Parity* 12.

This article starts with the observation that 'domestic violence is the leading cause of homelessness in Australia'. Very often it is the victim of domestic violence who has to leave an unsafe home. In many cases, perpetrators are bailed to their home address and this means victims are forced to relocate elsewhere. Even where the perpetrator is remanded in custody, victims may still be forced to leave because of violence and harassment from the perpetrator's family. The rates of homelessness among Aboriginal people in Australia are particularly high. Additionally, women who find themselves homeless as a result of domestic violence are often exposed to further physical or sexual violence (p 12). 'Homelessness or the of homelessness for victims of domestic and family violence can also act as a precursor to other issues, including child protection involvement, alcohol abuse and risk of involvement with the criminal justice system'. Hence, safe housing for victims of domestic and family violence is crucial to assisting families to live in safety and to prevent the further social, health and legal issues and risks that are associated with homelessness (p 13).

Fileborn, Bianca, *Sexual violence and gay, lesbian, bisexual, trans, intersex, and queer communities* (Australian Centre for the Study of Sexual Assault (ACSSA) Resource Sheet, 2012).

This report identifies that there is a lack of appropriate support available for Gay, Lesbian, Bisexual, Transgender, Intersex and Queer (GLBTIQ) communities. Key concerns for GLBTIQ people in accessing

services include:

- fear that they will be met with homophobic or heterosexist response from service providers;
- fear that violence in same-sex relationships will not be taken seriously;
- service provision that is not sensitive to the unique needs of GLBTIQ;
- services that are not accepting of GLBTIQ communities;
- particularly limited access in regional or rural communities;
- many GLBTIQ people do not access support facilities; and
- accessing services is gendered in nature i.e. lesbian women are more likely to access services than gay men or bisexual people (pp. 7-8).

Harman J, Joe, *Evidential Considerations in Cases Involving Family Violence.*

Harman J encourages 'all practitioners to embrace the obligations imposed upon them by the *Family Law Act* (*1975)* Cmth to provide clients with information about Family Counselling and Family Dispute Resolution Services and encourage the use of those service especially family counselling'. 'Referral to such services will provide very real assistance to vulnerable parties and assist them in engaging with the Court process and achieving an outcome that properly and adequately addresses the issues that arise in the case' (p 40).

Humphreys, Cathy and Ravi Thiara, 'Mental Health and Domestic Violence: 'I Call it Symptoms of Abuse'' (2003) 33 *British Journal of Social Work* 209.

This article identifies that research evidence now clearly shows a direct link between women's experiences of domestic violence and heightened rates of depression, trauma symptoms, and self-harm. It also notes that their experiences of mental health services were often found to be negative. The authors identify a number of practices within the medical model of mental health that are unhelpful including:

- the lack of recognition of trauma or provision of trauma services;
- making the abuser invisible through focusing on the woman's mental health reified from her experiences of abuse;
- blaming the victim;

- offering medication rather than counselling support;
- the negative, consequent efforts on child contact and child protection proceedings if the woman is labelled with mental health problems.

Alternatively, women found services, often in the voluntary sector, helpful when they provided the following interventions:

- helping women name domestic violence;
- actively asking about the abuse;
- attending to safety planning;
- responding to women's specialist needs; and
- actively working with women to recover from abuse experiences.

Support for her children was also seen as very helpful. Implications for practice include the commissioning of further services in the voluntary sector, addressing the inadequate response within the medical model, and increasing the sensitivity of responses to women's emotional distress across all sectors' (p 209).

Laing, Lesley, *'It's like this maze that you have to make your way through': Women's experiences of seeking a domestic violence protection order in NSW* (Faculty of Education and Social Work, University of Sydney, 2013).

This research specifically looks at women's experience of seeking a domestic violence protection order in NSW. Chapter 3 looks at key issues from women's perspectives. Relevantly, it examines support (its availability and importance, and in some cases its absence) as an important issue raised by all women. Many women noted the importance of support in providing them with the reassurance to continue with the legal process. Further, women underlined the particular importance of advocacy in providing information needed – discussing whether something is a breach or not, giving women the resources needed, pointing out phone numbers for refuges, providing names of good solicitors where necessary etc. (p 42). Finally, support beyond the court is noted as being essential to help women rebuild their lives. Women talked about the importance of assistance they received from specialist women's and domestic violence services (p 43).

Morgan, Anthony and Hannah Chadwick, 'Key issues in domestic violence' (Summary Paper No 7, Australian Institute of Criminology, Australian Government, 2009).

Although looking specifically at victims accessing support services, this report also identifies barriers to accessing support networks and services that are relevant to the victim's experience of the justice system. barriers include:

- a lack of available services;
- the cost or limited availability of transport;
- limited awareness of available services;
- a lack of culturally appropriate services; a perception that services will be unsympathetic or judgemental;
- shame or embarrassment; fear that they will not be believed;
- fear of the perpetrator and
- the potential for retribution; and a perception that services will not be able to offer assistance' (p 8).

Opening statement of Day 7 Victorian Royal Commission into Family Violence, Melbourne, 21 July 2015, (Mark Moshinsky).

The speaker identifies that the issue of housing and homelessness is related to family violence in three ways:

- women and children who flee a violent and abusive relationship often end up homeless due to the shortage of affordable housing and social housing.
- because of that shortage of housing, women and children are often forced to stay in violent and abusive relationships, hence the absence of affordable housing and social housing directly impacts on their experience of violence.
- where perpetrators are excluded from a home, they may end up homeless if they do not have other accommodation.

This increases the risk of reoffending and the risk that the victim will permit the perpetrator to return to the house' (pp. 890-91).

Women's Legal Services NSW, *A Long Way to Equal – An Update of 'Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women'* (2007).

This report identifies barriers to migrant and refugee women in accessing legal services. Understanding these barriers may help to identify what support services are required by such women and whether extra support in obtaining these services is needed. These barriers include: lack of knowledge among migrant and refugee women of the legal system, their legal rights and how to access legal help; the perceived cost of legal services; the absence of information available in a form that is accessible to migrant and refugee women (in terms of lack of literacy among women, the language of the available legal information, and the content of this information being too complex); poor translation and interpreting services; the lack of effective referral processes between migrant service providers and legal service providers; physical location and accessibility of community legal centres and other legal services; lack of knowledge and misconceptions among migrant and refugee women about their immigration status; fear or interaction with the Australian legal system; and the absence of a co-ordinated approach to access and equity strategies for culturally and linguistically diverse women (pages 19-30).

International

Harvey, Shannon, et al, *Barriers faced by Lesbian, Gay, Bisexual and Transgender People in Accessing Domestic Abuse, Stalking, Harassment and Sexual Violence Services* (Welsh Government Social Research, 2014).

First, this paper highlights that LGBT people face a range of barriers in accessing services that relate 'to their perception of self and the abuse (individual barriers) and the actions of people they have relationships with (interpersonal barriers)'. LGBT people may not realise they are experiencing domestic abuse and further, they may not realise they are 'covered' by domestic violence laws. They may feel shame about their sexuality and abusers may use this to exercise control e.g. they may threaten 'outing' someone to control them (p 11), and they may isolate the victim. Further, LGBT may face abuse from relatives or others in their community because of their identity (p 12).

Second, alongside these individual and interpersonal barriers, 'there are important structural and cultural issues in the way domestic and sexual violence (D/SV) services are designed and delivered that may discourage LGBT people from accessing them'. LGBT people's experience of societal discrimination may

prevent them from seeking assistance and further, service providers often do not provide information tailored LGBT people. LGBT people expose themselves to risk in physically accessing services (p 13). A number of negative stereotypes about LGBT's sexual behaviour may also discourage these victims from reporting sexual violence (p 14).

Zweig, Janine M, Kathryn A Schlichter, and Martha R Burt, 'Assisting Women Victims of Violence who Experience Multiple Barriers to Services' (2002) 8(2) *Violence Against Women* 162.

Because violence against women affects victims in different ways, most victim service programs have developed a wide array of core services with which to assist victims. However, some women victims of violence face certain additional obstacles in their lives that require unique approaches to service provision. Women victims with such multiple barriers to service provision (i.e., substance abuse issues, mental health problems, cognitive disabilities, incarceration, and/or involvement in prostitution) face greater impediments to service than those encountered by mainstream women and, as a result, are underserved by mainstream services' (p 162-163). This study interviewed staff from 20 programs focusing on service provision for women facing multiple barriers to service provision. It concludes that '[p]roblems encountered by such women include lack of services dealing with multiple barriers, uneducated service providers, and batterers using women's barriers to further control or victimise them' (p 162).

Referral to support services - Other Bench Books

Australia

WA

Western Australia Department of Justice, Equal Justice Bench Book (updated 2021).

This bench book contains a section on family and domestic violence. Relevant to referral to support services, this benchbook highlights the impact family and domestic violence can have on women victims. Health outcomes (which could be targeted in referral to support services) include:

- self-harming behaviours;
- physical injuries including bruising, lacerations or tears, and fractures;
- sexually transmitted diseases and other reproductive health issues;
- depression and anxiety; eating disorders; traumatic and post-traumatic stress symptoms; phobias, somatisation and dissociative disorders;
- harmful tobacco and alcohol use;
- illicit and licit drug use;
- chronic pain disorders gastrointestinal and digestive disorders; and
- sleep problems' [13.2.2].

Additionally, the bench book notes the impact of family violence on male victims and notes that the damage caused may be largely psychological causing:

- fear of disclosing;
- depression;
- humiliation;
- guilt;
- anger with abuser;
- fear of continued violence;
- fear of loss of male identity;
- concern about financial security; and

- changed behaviour to suit the abuser' [13.4.2].

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

Looking at perpetrator characteristics and litigation tactics, the bench book briefly touches upon the issue of referral to support services. It is noted in Section 7.2.5 that '[w]hen domestic violators have serious drug, alcohol or mental health problems, these needs associated with risk need to be addressed if domestic violence intervention is to be effective. Thus, to the extent permitted by statute or with domestic violator consent, it is important, for the health and well-being of all family members, to ensure seamless delivery of mental health, drug and alcohol, as well as domestic violence intervention (with specialized parenting services), to ensure that the services are working in unison and not at cross purposes, and to ensure monitoring matched to level of risk or danger with notification in the event of non-compliance so that appropriate protective action can be taken'.

Adjournments and timely decision making

It is acknowledged that courts across Australia have different approaches to managing domestic and family violence related proceedings. Where possible the safety and wellbeing of victims, their children and other affected people should be promoted and perpetrators/offenders should be held accountable for domestic and family violence behaviours. Expeditious trial processes are likely to contribute to achieving these outcomes; and may be used by judicial officers, where possible, in the exercise of their power to regulate the court's proceedings. Making adjournment orders is integral to this case management power and, in some cases, an adjournment may be necessary to ensure that parties are afforded fair and equal access to justice. Judicial officers should be familiar with any legislative provisions and practice directions in their jurisdiction requiring them to consider issues specific to the management of domestic and family violence related cases and to deal with these matters expeditiously.

Adjournment orders are commonly made by courts dealing with matters involving domestic and family violence for a range of reasons, including to synchronise the civil matter with an associated criminal matter, to allow police to have more detailed discussions with the victim, their children or other affected people, to clarify child and parenting arrangements, or to provide more information about the matter before the court [Gelb 2015]. Adjournments may also be granted to ensure procedural fairness where a party seeks further and better particulars about the application or where the other party requires an opportunity to fully respond [VRCFV 2016]; or where a party requires legal representation, an interpreter [Qld DFV Taskforce 2015] or other support services that are not immediately available. In some cases it may be appropriate to adjourn a matter even though, for example, the applicant or a key prosecution witness has not attended court. In such cases an adjournment will allow inquiries to be made about the safety of the relevant person before concluding the matter.

There may be cases where a party does not have a legitimate reason for seeking to delay proceedings; their motivation may be to abuse court processes as a means of continuing the perpetration of domestic and family violence against the victim (this is also known as "systems abuse" [Vic FVBB 2014]). Tactics include seeking adjournments at short notice, initiating applications or making cross-applications without proper grounds, failing to appear at mentions and hearings, and evading service of orders [VRCFV 2016]. These tactics may not be readily apparent to a particular judicial officer if used by a party in multiple courts before different judicial

officers and, as a consequence, may be difficult to scrutinise and assess [Gelb 2015]. Courts should carefully scrutinise a party's request for an adjournment. Appropriate case management may include refusing an adjournment if it appears the respondent seeks the adjournment to prolong the proceedings and maintain control over the victim [Vic FVBB 2014].

When an order for the adjournment of proceedings involving domestic and family violence is made, judicial officers should consider whether it is appropriate to make additional interim orders, directions or arrangements for the duration of the adjournment to ensure the safety and wellbeing of the victim and their children.

Adjournments and timely decision making - Key Literature

Australia

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2015) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. Gelb notes that while the most common outcome in intervention order proceedings is that the court issues an intervention order, many adjournments are still made. Adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40).

King, Michael and Becky Batagol, '*Enforcer, manager or leader? The judicial role in family violence courts*', (2010) 33 *International Journal of Law and Psychiatry* 406.

The authors note that judicial supervision of offenders is an important component of many family violence courts. Skepticism concerning the ability of offenders to reform and a desire to protect victims has led some judges to use supervision as a form of deterrence. Supervision is also used to hold offenders accountable for following court orders. Some family violence courts apply processes used in drug courts, such as rewards and sanctions, to promote offender rehabilitation. This article suggests that while protection and support of victims should be the prime concern of family violence courts, a form of judging that engages offenders in the development and implementation of solutions for their problems and supports their implementation is more likely to promote their positive behavioural change than other approaches to judicial supervision. The approach to judging proposed in this article draws from therapeutic jurisprudence, feminist theory, transformational leadership and solution-focused brief therapy principles.

Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

The report notes that where an application for a protection order indicates that an interpreter is required, 'a Magistrate will assess whether or not an arrangement should be made for the first court mention. Where the matter is brought to the attention of the court at the first mention, an adjournment will likely be necessary to obtain the services of an interpreter. This potentially creates a gap in protection for victims of domestic and family violence' (p 295).

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

Delays are discussed at p 124. It is noted that often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek 'further and better particulars' about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).

However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, perpetrators could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. These tactics – 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127.

Adjournments and timely decision making - Other Bench Books

NSW

Judicial Commission of New South Wales, *Civil Trials Bench Book* (updated 2022).

Part [2-0200] contains general discussion about a court's power of adjournment in the civil context. This general discussion is relevant to the domestic and family violence context.

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.1 discusses the court's power to make vexatious litigation restraint orders. 3.7 discusses the court's power to make a costs order where the application was frivolous, vexatious or made in bad faith.

Information sharing

The *Family Law Amendment (Information sharing) Bill 2023* (Cth) is currently before Parliament. The bill gives effect to the National Strategic Framework for Information Sharing [National Strategic Framework 2023] between the Family Law and Family Violence and Child Protection Systems by amending the *Family Law Act 1975* to expand the information sharing framework for information relating to family violence, child abuse and neglect risks in parenting proceedings before the Federal Circuit and Family Court of Australia, and the Family Court of Western Australia.

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r7009

Information-sharing provisions in domestic and family violence legislation vary in scope and detail between jurisdictions and only some provide for information sharing in the conduct of protection order proceedings (see Table 1 below). The practice of information sharing involves interagency coordination and cooperation through protocols [Taylor et al 2015] developed and regularly reviewed in collaboration between courts, the police and service agencies. These protocols have been shown to improve responses to the enforcement of protection orders, including improved approaches to the assessment and management of risk [Taylor et al 2015]. There are also differences in how jurisdictions have legislated to prevent the inappropriate sharing of information and to protect people's privacy.

In addition, all Australian jurisdictions have enacted information-sharing provisions facilitating the National Domestic Violence Orders Scheme (NDVOS), under which a domestic violence order issued on or after 25 November 2017 is automatically nationally enforceable. Every jurisdiction has enacted provisions that enable its courts or law enforcement agencies to obtain information about a DVO from a court or law enforcement agency in another jurisdiction, and use that information for the purpose of making, varying or revoking a DVO. The provisions further require courts or law enforcement agencies in one jurisdiction to provide information about a DVO to a court or law enforcement agency of another jurisdiction that the court or law enforcement agency reasonably requests for the purposes of exercising its functions.

Recent research indicates that the broader potential for sharing information between state/territory agencies

responsible for responding to domestic and family violence, such as police, courts, child welfare and health authorities and support and referral services, has become an important factor in the overall effectiveness of responses to domestic and family violence. Information sharing in this context may mean that victims of violence are more likely to engage with the agency to which they have been referred if they know they will not be required to repeatedly re-tell their experiences to other agencies [Qld Special DFV Taskforce Report 2015], and therefore avoid further trauma and distress. In addition, where the details of past violence or the risks of future violence are shared between agencies, timely action may be taken to address the risks and to ensure the safety and protection of the victim and other people at risk of harm [Taylor et al 2015].

The Commonwealth is piloting the Co-location of State and Territory child protection and other officials in Family Law Court Registries [Co-location of state and territory child protection and policing officials] in Federal Circuit and Family Court registries across Australia, to enhance information sharing and collaboration between federal family law and state and territory child protection and family violence systems. The Department of Social Sevices' National Plan to Reduce Violence against Women and their Children website describes the intended outcomes of this program as:

- a more coordinated response to family safety issues (demonstrated in part by the sharing of data relating to information or intervention requests in matters where child abuse is suspected or alleged)
- judicial officers being able to make decisions with full knowledge of prior involvement by child protection and law enforcement agencies
- strengthened judicial decision-making, with family safety risks identified and addressed earlier in family law proceedings
- improved inter-jurisdictional understanding and cooperation, leading to better information sharing practices.

Table 1:

Jurisdiction	Information sharing provisions under domestic violence legislation	Information sharing provisions under NDVOS
Australian Capital Territory	s18 *Domestic Violence Agencies Act 1986* (ACT) – if ACT/Federal police reasonably suspect domestic violence is being/has been committed/is likely, they may disclose to an approved crisis support agency (s17) any information that will help the agency to assist the victim/children.	Part 9, Div. 9.4 *Family Violence Act 2016* (ACT)
New South	**Part 13A Information Sharing**	Part 13B, Div. 4, *Crimes*

Wales	(ss 98C-98L) *Crimes (Domestic and Personal Violence) Act 2007* (NSW) – Provides for disclosure by limited agencies (government and health), court, police, designated referral/coordination points to referral/coordination points and support agencies in relation to personal and health information about the victim and (alleged) perpetrator for the purposes of arranging/providing support to the victim, and where there is a domestic violence threat. Disclosure by government/health agencies and support agencies requires the consent of (and by a court - no express objection by) the threatened person/victim (s98D, E, H). S98J Protocols may be required for this collection, use and disclosure of information. s98M A government /health agency may collect/use /disclose information if it reasonably believes the threat is serious, disclosure is necessary to prevent/lessen the threat and consent of the victim has been refused or is unreasonable/impractical to obtain. The NSW Justice Department has developed a protocol for sharing and dealing with information under Part 13A available here.	*(Domestic and Personal Violence) Act 2007* (NSW)
Northern Territory	s124A *Domestic and Family Violence Act 2007* (NT) Failure of an adult to report to the police harm (or likely harm) or serious/imminent threat because of domestic violence is an offence. S124A(4) Police must investigate such a report. s125 *Domestic and Family Violence Act 2007* (NT) Such a report made in good faith is not a breach of a professional code of conduct and cannot attract civil or criminal liability – the report/reporter may only be used in proceedings with leave of the court. Sections 3(2)(d), 4, Chapter 5A *Domestic and Family Violence Act 2007* (NT) provides for disclosure by police, government and health agencies if the entity has reasonable grounds to believe that a person is experiencing domestic violence and the information would help reduce a threat to their health or safety (s 124E). An information sharing entity should obtain the consent of the person unless it is not possible to do so. In the case of Aboriginal persons, disclosure should promote cultural safety and be culturally sensitive (s 124C).	Chapter 3A, Part 3A.4 *Domestic and Family Violence Act 2007* (NT)
Queensland	**Part 3 Domestic violence orders** s55 *Domestic and Family Violence Protection Act 2012* (Qld) If the respondent is contesting the naming of a child on the protection order or conditions relating to the child, the court	Part 6, Div. 5 *Domestic and Family Violence Protection Act 2012* (Qld)

	may request relevant information from the child protection authority. The parties must be given a copy and the opportunity to make submissions on the information received unless it would expose the victim or a child at increased risk of domestic and family violence. **Part 5A Information Sharing** ss169A – s169O *Domestic and Family Violence Protection Act 2012* (Qld) Government entities and specialist DFV service providers may give information to another government entity or specialist DFV service provider for assessing domestic violence threat or for responding to serious domestic violence threat. A support service provider (other than a specialist DFV service provider) may give information to government entity, specialist DFV service provider or other support service provider for responding to serious domestic violence threat. Whenever safe, possible and practical, a person's consent should be obtained before information sharing. However, safety and protection takes precedence over a person's consent. Government entity or specialist DFV service provider may use information given to it to assess whether there is a serious threat to a person's life, health or safety or to lessen or prevent a serious threat. A support service provider may use information given to it to lessen or prevent a serious threat to a person's life, health or safety. Guidelines for sharing and dealing with information under Part 5A have been developed pursuant to s169M and are available here.	
Tasmania	s37 *Family Violence Act 2004* (Tas) – It is not a breach of the *Personal Information Act 2004* (Tas) (which regulates the collection and use of information) for an agency under that Act, acting in good faith, to collect, use, disclose personal information for the purpose of furthering the objects of the *Family Violence Act*. s39 *Family Violence Act 2004* (Tas) Providing information (voluntarily or as required) to police based on a belief/reasonable suspicion of family violence (or likely family violence) with weapon, physical, sexual violence or where child affected, is not a breach of professional ethics/requirements and cannot, if done in good faith, incur civil or criminal liability.	Part 4, *Domestic Violence Orders (National Recognition) Act 2016* (Tas)
Victoria	s140 *Family Violence Protection Act 2008* (Vic) – Information from an interview or report relating to (respondent) court ordered counselling may be used in proceedings for a	Part 5, *National Domestic Violence Order Scheme Act 2016* (Vic)

	contravention relating to counselling orders or the underlying offence. (Power relating to court ordered counselling is limited to the Family Violence Court Division or other court specified by the Minister s126). **Part 5A Information Sharing** ss144A-144SG *Family Violence Protection Act 2008* (Vic) 'Information sharing entities' (prescribed by regulation) may share any personal, health or sensitive information relevant to assessing and/or managing family violence between each other, provided the information is not excluded; sharing it does not contravene another law; and applicable consent requirements have been met. The information may relate to a victim survivor, alleged or established perpetrator or third party. Information may be shared for a "family violence assessment purpose" or "family violence protection purpose" and the relevance and reasonable belief required to share the information varies according to the purpose. Consent requirements vary according to the party to whom the information relates. Information sharing entities must comply with requests for information meeting the requirements of Part 5A. Guidelines for sharing and dealing with information under Part 5A have been developed pursuant to s 144P and are available, alongside various other resources on the Part's operation, here.	
Western Australia	s70A *Restraining Orders Act 1997* (WA) – Limited government agencies, including police and children's services, may disclose to each other information about person protected by an order or affected child if the disclosure is necessary to ensure the safety of the person protected or the wellbeing of a child.	Part 4, *Domestic Violence Orders (National Recognition) Act 2016* (WA)
South Australia	s38 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) – A public sector agency or contractor that is bound by the State's Information Privacy Principles, must, on request, make available to a police officer information to assist in locating a person for service of a protection order.	Part 3A, Div. 4 *Intervention Orders (Prevention of Abuse) Act 2009* (SA)

Acknowledgement of (adapted) source: Taylor, A., et al, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement – State of knowledge paper* (ANROWS, 2015) – Table 3, p15 [Taylor et al 2015]

Information sharing - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, Report No 114 (2010).

Chapter 30 'Information Sharing' considers the way to improve information flow between critical elements of the family violence system (courts, government agencies and other people and institutions involved in the family violence, family law and child protection systems). These include improving the way information is collected from parties and shared between courts (including the establishment of a national register of relevant court orders), changes to confidentiality and privacy legislation, and the development of information sharing protocols and memorandums of understanding (p.1397). The aim is to 'avoid, as far as possible, victims falling into gaps between the various systems due to lack of relevant information' (p.1398).

The report covers a number of issues relating to information sharing. In particular, it examines strategies to improve information sharing. The report notes that barriers to information sharing are not always legislative and are often administrative and cultural. One strategy to remedy this is to put in place information sharing protocols and MOUs between elements in the family law, family violence and child protection systems to clarify and formalise what information can be shared, with whom, and in what circumstances (p.1443). A number of these protocols exist in the child protection area, but they are less common in the family violence context.

Breckenridge, Jan, Susan Rees, Kylie Valentine and Samantha Murray, *Meta-evaluation of existing interagency partnerships, collaboration, coordination and/or integrated interventions and service responses to violence against women: Key findings and future directions* (ANROWS, 2015).

This paper evaluates existing interagency collaboration and integrated responses to violence against women, of which the criminal justice system is an important element. It provides an overview of approaches to integration and collaboration between sectors, as well as criticisms of current approaches (pp 13-15). An overview of approaches from the US (pp 16-18) the UK (pp 19-20), and other Australian jurisdictions is provided (pp 27-35). The paper also considers the appropriateness of integrated responses for different women, highlighting that women with complex needs, such as Indigenous women, and those in remote and rural areas, may require specific, tailored approaches (pp 21-26). It highlights that integration itself should not

be the goal, but that such efforts must be client-focussed (p 14).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases'. While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality. Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help. Similarly, information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings' (pp.230-231).

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

In relation to information sharing legislation that pertains to enforcement of protection orders, this report notes that 'information sharing' is 'the sharing or disclosing of personal details between agencies that respond to domestic and family violence, such as police, child welfare authorities and support services as a referral tool, to minimise the risk of victims falling through the cracks and to support victims to more easily and quickly engage with the agency to which they have been referred. Additionally, information sharing can be an important risk management tool, where the circumstances of abuse or risk indicators are shared to ensure that swift action can be taken to address risks, including police investigation, removing a victim to safety and development of a safety plan' (p.13).

The paper looks at the practice of information sharing (pp40-43). It notes that for the effective enforcement of protection orders, 'coordinated integrated responses that are adequately resourced are important'. This

facilitates access to relevant services through inter-agency referrals and therefore fosters victim safety, and allows awareness of the risk to the victim and the behaviour and dangerousness of the perpetrator (p.40). Integrated responses are reliant on mechanisms for inter-agency collaborations, particularly through information sharing protocols.

Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Western Australia, *Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Achievement Report to 2013* (2013).

'In 2009–2010 the 'Memorandum of Understanding: Information sharing between agencies with responsibilities for preventing and responding to family and domestic violence in Western Australia' (MoU) was endorsed and signed by State and Commonwealth Government agencies. In 2010–2011 community sector agencies provided their endorsement and became signatories to the MoU. The MoU provides recognition of 'duty of care' including the commitment to share information without client consent if: the case is assessed to be high risk; a crime has been committed or is going to be committed; it is believed a child is likely to suffer significant harm; or a client is in need of urgent medical or psychiatric care. In 2013, the MoU was updated to reflect changes in multi agency case management and signature agencies were invited to provide their ongoing endorsement' (p.9). The Report provides an overview of these initiatives.

Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).

Chapter 7 discusses information sharing in relation to family and domestic violence generally. The Report notes that legislation alone will not create a culture of information sharing throughout the family violence system. Further, Chapter 16 of the report discusses court-based responses to family violence in Victoria. Of particular relevance, the report discusses the limitations on information sharing between courts and other parts of the family violence system.

Information sharing - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 18 discusses the operation of the information sharing provisions of the *Domestic and Family Violence Act 2012* (Qld).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.10 discusses the family violence information sharing regime.

Information sharing - Other Resources

Co-location of State and Territory child protection and other officials in Family Law Court Registries

Open via Department of Social Services: National Plan to Reduce Violence against Women and their Children website.

This initiative has funded the co-location of 16 child protection officials and 6 policing officials at family law court registries until 30 June 2025. It's intended outcomes include:

The intended outcomes of this program include:

- a more coordinated response to family safety issues (demonstrated in part by the sharing of data relating to information or intervention requests in matters where child abuse is suspected or alleged)
- judicial officers being able to make decisions with full knowledge of prior involvement by child protection and law enforcement agencies
- strengthened judicial decision-making, with family safety risks identified and addressed earlier in family law proceedings
- improved inter-jurisdictional understanding and cooperation, leading to better information sharing practices.

National Strategic Framework for Information Sharing between the Family Law and Family Violence Child Protection Systems. (webpage) 2023

This Framework supports the appropriate and timely two-way information exchange between the Federal Circuit and Family Court of Australia and the Family Court of Western Australia (the family law courts) on the one hand, and state and territory courts, child protection, policing, and firearms agencies on the other.

Implicit bias

It is fundamental to the proper administration of justice and to public confidence in the judicial system that all parties are, and believe they are, treated fairly and without discrimination. Judicial officers must ensure that any personal biases or prejudices, or tendencies to stereotype or make false assumptions about people do not influence their decision making [Other Bench Books]. This duty extends to ensuring transparency and particularity in their judicial reasoning [Bagaric 2015].

The legal system provides mechanisms for enabling challenges to impartiality by reasons of apprehended bias or conflict of interest. Where there is proven or even the appearance of bias, a judicial decision may be set aside. Decisions made by judicial officers in circumstances where a fair-minded lay observer might reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the question, may be set aside, unless waiver or necessity is established [Mason 2001].

In recent years, there has been significant research into how mental short cuts, known as heuristics, affect the way decisions are made. Researchers have considered how implicit bias [Greenwald et al 2006] (sometimes called unconscious or unintended bias) can affect decision-making [Implicit Association Test]. Implicit bias may affect an individual's understanding, actions and decisions in an unconscious manner, and operate without the individual's awareness or intentional control [Staats 2014]. Seminal research by psychologists, Daniel Kahneman [Kahneman 2011] and Amos Tversky, identify two systems of thinking (intuitive or fast thinking; and conscious or slow thinking) and examine the biases (or systematic errors) of intuitive thinking. Intuitive thinking suppresses doubt and ambiguity in order to quickly assemble coherent interpretations. Conscious thinking, on the other hand, accommodates doubt and incompatible possibilities in the process of deliberation.

Set out below are some of the key implicit biases identified in the literature; they can apply across all facets of decision-making. Judicial decision-making in domestic and family violence related cases frequently involves identifying factors affecting risk, assessing risk, and exercising a heightened awareness of the cautions associated with typologising, stereotyping and making false assumptions about parties, their circumstances and their motivations. In understanding the potential for bias in the context of judicial decision-making, and learning, through self-examination and reflection [Other Resources] of any particular personal biases, judicial officers can develop strategies for eliminating bias from their decision-making [Staats 2016].

Representativeness v base-rate information

When making a judgment about facts, there is a tendency to ignore base rates and doubts about the veracity of a description and favour a judgment of representativeness. Representativeness results from a focus on aligning a description with a stereotype. Base rates are relevant statistical facts. In many cases, there is some truth to the stereotypes that govern judgments of representativeness, and the predictions that follow may be accurate. In other situations the stereotypes are false and the representativeness misleading, especially if the base-rate information points in a different direction.

Availability

When estimating the likelihood of an event or outcome or the frequency or prevalence of a category (eg people, behaviours), it is likely that the estimate will be based on the instances most easily retrievable from memory; if retrieval is easy, the estimate is likely to be high. What is more obvious or more vivid will appear to be more probable.

Anchoring

When making a decision there is a common tendency to rely too heavily on the first piece of information offered. For example, information may be offered about a numerical value. This information tends to have the effect of anchoring the decision to that numerical value, even where that value may bear no reasonable relation to what the value ought to be. Once an anchor is set, there is a bias toward interpreting later information around the anchor.

Framing

Logically equivalent statements—posed or framed differently—can evoke different meanings and responses. For example, risk preferences depend on whether outcomes are framed in terms of gains or losses vis-à-vis a particular reference point, which could be the status quo or current position or, alternatively, an expectation or aspiration regarding a particular position (also known as prospect theory). There is a tendency to take more risks with losses than with gains.

Hindsight

When an unpredicted event occurs, the view of the past and future is adjusted immediately to accommodate the surprise, and there is a tendency to lose the ability to recall what was previously believed to be probable. Hindsight bias may result in the quality of a decision being assessed not by whether the beliefs on which it

was based were sound and reasonable, but by whether the outcome was good or bad. Further, a propensity to make sense of the past may lead to an illusion that the future can be predicted or controlled.

Over-confidence

Subjective confidence in personal opinions or judgments reflects a personal feeling about the coherence of a self-constructed story and the cognitive ease of processing it. The amount and quality of the evidence have little or no bearing in this context.

Small numbers

There is a tendency to exaggerate the consistency and coherence of what is witnessed, and to believe that small samples are representative of the much larger population from which they are drawn. With little evidence, conclusions are accelerated, and a bigger story is constructed based on that evidence; this is also known as narrative fallacy.

False consensus

There is a tendency to view personal behaviour and responses as typical and appropriate while viewing alternatives as odd and inappropriate.

Implicit bias - Key Literature

Australia

Bagaric, Mirko, 'Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that is the Instinctive Synthesis' (2015) 38(1) *University of New South Wales Law Journal* 76.

In this article, Bagaric argues that the instinctive synthesis approach to sentencing results in arbitrary decision making in courts. He quotes from Kirby J in *Markarian v The Queen* [2005] HCA 25:

> 'With all respect to those of the different opinion, the phrase 'instinctive synthesis' sends quite the wrong signals for the law of sentencing in Australia. Who are those who have the 'instincts' in question? Only the judges. This is therefore a formula that risks endorsement of the deployment of purely personal legal power. It runs contrary to the tendency in other areas of the law, notably administrative law, to expose to subsequent scrutiny the use of public power by public officials. It is contrary to the insistence of Australian courts, including this Court, that judicial officers must give reasons for their decisions. At this stage in the development of the Australian law of sentencing, this Court should be encouraging, not impeding, transparency and accountability of judicial decision-making. I remain of the view that '[i]t is too late (and undesirable) to return to unexplained judicial intuition'. Talk of 'instinctive synthesis' is like the breath of a bygone legal age. It resonates with a claim, effectively, to unexplainable and unreviewable power'.

Bagaric explores recent empirical research that shows that judges may be influenced by considerations of which they are unaware, including race, sex and income.

Hamilton, John P, 'Judicial Independence and Impartiality: Old Principles, New Developments' (Paper presented at South Pacific Judicial Conference, 28 June to 2 July 1999).

This paper discusses aspects of judicial independence generally. The Honourable Justice Hamilton briefly examines the modern concept of judicial independence and considers a number of recent issues concerning the independence of judicial officers. Most relevantly, this paper deals briefly with the issue of judicial dismissal and complaints made against the judiciary. In 1997-1998 the Judicial Commission of New South Wales' found that: 'The most common ground of complaint involved apprehension of bias, failure to give a fair

hearing or conduct which was said to display hostility to discourtesy towards the complainant. In the period under consideration a high proportion of complaints alleged that the judicial officer in question unfairly or improperly prevented the losing party to litigation from properly putting his or her case, or favoured the winning party' (p.10).

His Honour further notes: 'As in past years, a high proportion of complaints arose out of applications for apprehended violence orders. This is not surprising, as these proceedings usually involve emotional stress and frequently one party is not legally represented. Sometimes both parties are unrepresented. Judicial officers who deal with these applications are obliged to behave in an impartial manner, but this is sometimes construed as a failure to show appropriate concern for the situation of one of the parties. As a result, this form of litigation generates many complaints to the Commission' (p.10).

Mason, Keith, 'Unconscious Judicial Prejudice' (Paper presented at Supreme and Federal Courts Judges' Conference, January 2001).

This speech is available at pp.240-249 of the document. His Honour explores 'the impact of unconscious prejudice upon judicial decision-making in law and fact'. In the paper Justice Mason examines different types of bias and prejudice.

He considers heuristic illusions: 'The study of "cognitive heuristics" has revealed judgmental rules of thumb that we use to simplify complex and uncertain tasks. Some heuristics are demonstrably valid in some circumstances, but in many circumstances they lead to systematic error or bias. The term "cognitive illusion" is often used to describe these inferential shortcomings. Psychological studies reveal illusions such as: hindsight illusion, overconfidence concerning one's own judgments and predictions, false-consensus bias, and framing bias' (see article for a more detailed description of these) (p.7).

Compensatory bias: where a judge may have leant too far in the opposite direction to avoid the actuality or appearance of prejudice in a particular direction (p.8).

Justice Mason concludes asking 'what is to be done?' He makes the following suggestion: 'Come clean about the role that [unconscious prejudices] actually play both in the grand design and in the exquisite details of our legal structure. Get real about the hard work that it takes to redeem the promise of those concepts' (p.8).

Pagone, GT, 'Centipedes, Liars and Unconscious bias' (Speech delivered at Melbourne University Law School 'JD Guest Lecture Series', Melbourne, 7 April 2009).

Pagone writes that, '[a]n important element at play in faulty decision-making is the unconscious bias that we bring with us when making any decision…The mental process by which we 'find' new facts, knowledge or information (that is, heuristics), is affected by many illusions, preconceptions, biases and error. Often we rely upon certain facts to 'anchor' our decision, which controlled studies suggest can have greater influence than is independently justified' (p.8).

Patricia Easteal, Lorana Bartels and Reeva Mittal, 'The Importance of Understanding the Victims' 'Reality' of Domestic Violence' (2018) *Alternative Law Journal*.

The authors argue that unconscious assumptions may filter out the diverse experiences and 'realities' of domestic violence victims. This is particularly evident in the differences between the court's perceptions of domestic violence, and the victim's experiences of it. Despite legal and policy reform, these assumptions may continue to affect how relevant legislation is applied and interpreted. The authors consider a small sample of recent Queensland domestic violence order breach cases to underscore the systemic failure in recognising the seriousness and harm of psychological or mental abuses (i.e. the victims' 'reality' of domestic violence), and the lack of understanding of the long-term effects of domestic violence on its victims. The authors conclude that sentencing for domestic violence offences and breaches of protection orders should be underpinned by knowledge of the long-term effects of emotional abuse. Further, an analysis of Queensland cases indicates that the Benchbook is not always applied consistently. Consequently, the authors suggest the creation of a report that particularises the specific issues in each individual case in order to enhance the knowledge of judicial officers and other stakeholders, and to adjust their lenses so they can better understand the victim's perspective.

International

Casey, Pamela M et al, 'Helping Courts Address Implicit Bias: Resources for Education' (National Center for State Courts, 2012).

'[A]lthough courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are much more difficult to identify

and change' (pp 1-2). This report explores the content and delivery of educational programs on implicit bias for judicial and court staff.

Danziger, Shai, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences* 6889.

The authors ask: are judicial rulings based solely on laws and facts? The authors test the common caricature that justice is "what the judge ate for breakfast" by examining sequential parole decisions made by experienced judges. We record the judges' two daily food breaks, which result in segmenting the deliberations of the day into three distinct "decision sessions." We find that the percentage of favorable rulings drops gradually from ˜65% to nearly zero within each decision session and returns abruptly to ˜65% after a break. Our findings suggest that judicial rulings can be swayed by extraneous variables that should have no bearing on legal decisions.

Epstein, Deborah, and Lisa A Goodman, 'Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women' (2018) 167 *University of Pennsylvania Law Review* (forthcoming).

This article addresses the ways in which the credibility of female victims of intimate partner violence is discounted through their experiences of legal and social services (pp 3-4). The authors conclude that women's experiences are frequently discounted, which itself can have further traumatic impacts. Judges and other professionals often discount women's stories of abuse as implausible, particularly where the victims suffer from psychological trauma that may impact memory and comprehension (p 7). Women who suffer traumatic brain injuries (pp 9-11) or PTSD (pp 11-3) as a result of domestic violence are particularly susceptible to relaying inconsistent stories. The authors also find that cultural assumptions resulting in the prioritisation of physical over psychological violence causes judges and other authority figures to expect 'real' survivors to also prioritise physical harm, while in reality, victims may feel more significantly impacted by psychological abuse (pp 17-20).

Moreover, the results of the study indicate that gatekeepers often unjustly discount women's personal trustworthiness, based on perceptions of their demeanour (pp 21-5), their perceived motive (pp 25-32), and their social location (pp 32-7). Even women who are able to overcome initial scepticism often find that the

systems intended to provide assistance dismiss the importance of their experiences (p 37). In spite of meaningful progress, 'the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors' (p 38). Ultimately, 'the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse' (p 1).

These experiences of minimisation often echo women's previous experiences of abuse (p 46). The impacts of this discrediting are multifaceted: the dismissal itself constitutes its own injury, which can compound the harm such women experience directly from the abuse (pp 47-50); additionally, this instinctive devaluing of women's testimony becomes an independent obstacle to attempts to obtain safety and justice (pp 50-2). The authors conclude that credibility discounting is widespread and pervasive, and requires genuine institutional reform (p 59). Particularly, actors must be aware of these internalised assumptions, and seek to engage more openly with victims (see pp 54-6).

Greenwald, Anthony G and Linda Hamilton Krieger, 'Implicit Bias: Scientific Foundations' (2006) 94(4) *California Law Review* 945.

The article starts by contrasting implicit bias with the 'naïve' psychological conception of social behaviour, which sees human beings as guided only by their explicit beliefs and their conscious intentions to act. 'A belief is *explicit* if it is consciously endorsed. An intention to act is *conscious* if the actor is aware of taking an action for a particular reason'. By contrast, 'the science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions' (p.946).

The article notes that research began on implicit mental processes in the 1980s and this included research on implicit memory, implicit attitudes (attitude as 'an evaluative disposition'), and implicit stereotypes ('a mental association between a social group or category and a trait) (pp.947-950). It then examines response bias and implicit bias specifically in Part III. It defines implicit biases as 'discriminatory biases based on implicit attitudes or implicit stereotypes'. It continues, 'implicit biases are especially intriguing, and also especially problematic because they can produce behaviour that diverges from a person's avowed or endorsed beliefs or principles. The very existence of implicit bias poses a challenge to legal theory and practice, because

discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions'. Biases can be either favourable or unfavourable (p.951).

This article also points out that the Implicit Association Test (IAT) (see 'Other Resources' in this section) is a measure of implicit bias and it has shown that implicit biases are highly prevalent. The article notes that research has shown that implicit attitudes produce discriminatory behaviour (p.961).

Guthrie, Chris, Jeffrey J Rachlinski, Andrew J Wistrich, 'Judging by Heuristic: Cognitive Illusions in Judicial Decision Making' (2002) 86(1) *Judicature* 44.

The article notes that 'people rely on mental shortcuts or 'heuristics' to make complex decisions. Reliance on heuristics sometimes causes people to draw systematically inaccurate inferences – these heuristics can create *cognitive illusions* of judgment' (p.44). The authors gave a brief questionnaire to judges and found that a number of cognitive illusions influenced their decision-making process (p.44). The authors usefully note and explain a number of heuristics used by judges including anchoring, framing, hindsight bias, inverse fallacy, and egocentric bias.

Guthrie, Chris, Jeffrey J Rachlinski, Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 1.

In this article, the authors posit an answer to the question, 'how do judges judge?' The authors argue that key insights from both the formalist and realist models of judging provide a more accurate view of how decisions are made. This model, the 'intuitive-override' model of judging, 'posits that judges generally make intuitive decisions but sometimes override their intuition with deliberation. Less idealistic than the formalist model and less cynical than the realist model, our model is best described as "realistic formalism." The model is "realist" in the sense that it recognizes the important role of the judicial hunch and "formalist" in the sense that it recognizes the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition' (p.3).

In Part I of the Article, the authors present their intuitive-overdrive model of judging. They state that the 'proposed dual-process model of judging, which is based on a general model developed by Daniel Kahneman

(see above) and Shane Frederick, posits that judges make initial intuitive judgments (System 1), which they might (or might not) override with deliberation (System 2).

In Part II, the authors present their results that show judges commonly make judgments intuitively rather than reflectively. Thus, these results support the intuitive overdrive model.

In Part III, the authors examine the implications of these findings for the judicial system. They note that deliberative decision making is more likely to lead to just outcomes and provide some suggestions as to what the justice system can do to encourage judges to decide matters more deliberatively such as: 'the amount of time that judges have to make rulings, the potential disciplining effect of opinion writing, the amount of training and feedback judges receive, the use of scripts, checklists, and multifactor tests in judging, and the allocation of decision-making resources' (pp.35-43).

The authors relevantly note at p.5: 'Eliminating all intuition from judicial decision making is both impossible and undesirable because it is an essential part of how the human brain functions. Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so. We propose that, where feasible, judges should use deliberation to check their intuition'.

Kahneman, Daniel, *Thinking, fast and slow* (Allen Lane, 2011).

Defining 'fast' and 'slow' thinking: This book examines the biases (i.e. systematic errors made by people) of intuitive thinking. The book presents a view of how the mind works, with a particular focus on the 'marvels' and 'flaws' of intuitive thought (pp.4-10). Kahneman uses two metaphorical agents ('two systems') to explain how we think:

System 1 ('fast thinking'): 'operates automatically and quickly, with little or no effort and no sense of voluntary control' (p.20), intuitive thinking.

System 2 ('slow thinking'): 'allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice and concentration' (p.21), effortful decision-making.

Intuitive thinking as the main architect of our decisions and judgments: While we tend to identify ourselves with System 2, 'the conscious, reasoning self that has beliefs, makes choices, and decides what to think about and what to do' (p.21), it is the automatic System 1 that is responsible for many of the choices and

judgments people make.

Problems of intuitive thinking: System 1 can cause 'cognitive illusions', illusions of thought (p.27) and it is a machine for jumping to conclusions. In Chapter 7, Kahneman argues that System 1 thinking both seeks coherence in the world but it is also 'radically insensitive to both the quality and the quantity of information that gives rise to impressions and intuitions' (p.86). Thus, it produces intuitive beliefs which may be incorrect and which System 2 endorses because it is lazy much of the time. This characteristic of System 1 type thinking is so important to the book that Kahneman gives it its own acronym. 'WYSIATI, which stands for what you see is all there is' (p.86). 'WYSIATI facilitates the achievement of coherence and of the cognitive ease that causes us to accept a statement as true. It explains why we can think fast, and how we are able to make sense of partial information in a complex world. Much of the time, the coherent story we put together is close enough to reality to support reasonable action. However WYSIATI helps explain a long and diverse list of biases of judgment and choice, including the following:

- Overconfidence: neither the quantity nor the quality of the evidence counts for much in subjective confidence. The confidence that individuals have in their beliefs depends mostly on the quality of the story they can tell about what they see, even if they see little. We often fail to allow for the possibility that evidence that should be critical to our judgment is missing – what we see is all there is. Furthermore, our associative system tends to settle on a coherent pattern of activation and suppresses doubt and ambiguity' (pp.87-88).
- Framing effects: Different ways of presenting the same information often evoke different emotions. The statement that 'the odds of survival one month after surgery are 90%' is more reassuring than the equivalent statement that 'mortality within one month of surgery is 10%'. Similarly cold cuts described as '90% fat-free' are more attractive than when they are described as '10% fat'. The equivalence of the alternative formulations is transparent, but an individual normally sees only one formulation, and what she sees is all there is' (p.88).
- Base-rate neglect: Recall Steve, the meek and tidy soul who is often believed to be a librarian. The personality description is salient and vivid, and although you surely know that there are more female than male librarians, that statistical fact almost certainly did not come to your mind when you first considered the question. What you saw was all there was' (p.88).

How to overcome these?: 'What can be done about biases? How can we improve judgments and decisions, both our own and those of the intuitions that we serve and that serve us?'

'The short answer is that little can be achieved without a considerable investment of effort'. People can improve their ability to recognise situations in which errors are likely and it is easier to recognise the errors of others rather than the errors of oneself. 'The way to block errors that originate in System 1 is simple in principle: recognise the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2'. But this procedure is difficult to apply as cognitive illusions are difficult to recognise. However, Kahneman explains that it is easier to identify cognitive illusions as an observer (p.417).

Further, organisations are better than individuals at avoiding errors because they think more slowly and can impose procedures. They can enforce the application of useful checklists plus other exercises, and they can also encourage people to watch out for each other when approaching minefields (pp.417-418).

Note: the References and Notes at the back of the book contain comprehensive lists of sources reflecting the substantial academic literature in this research area.

Levinson, Justin D., Mark W. Bennett and Koichi Hioki, 'Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes' (2017) 69 *Florida Law Review* 63.

This US study tested 239 federal and state judges to examine whether they exhibit implicit bias in white-collar sentencing. The authors used the Implicit Association Test to test implicit bias and a hypothetical sentencing case study to test sentencing decisions.

It found that judges harboured strong to moderate negative implicit stereotypes against Asian-Americans and Jewish people, associating them with traits such as 'greedy', 'dishonest' and controlling', while holding favourable implicit stereotypes towards Whites and Christians, associating them with traits such as 'trustworthy', 'honest' and 'giving' (p 104). The study also found that federal district court judges sentenced Jewish defendants to marginally longer prison terms than identical Christian defendants, and the disparity was likely the result of implicit bias (p 109).

Mitchell, Gregory and Philip E Tetlock, 'Implicit Attitude Measures' in Robert Scott and Stephen Kosslyn (eds), *Emerging Trends in Social and Behavioural Sciences* (John Wiley & Sons, 2015).

- Contemporary measures of implicit attitudes such as the popular 'Implicit Association Test' 'equate

spontaneous responses to stimuli with attitudes about those stimuli.' The authors here note that while these measures have opened new and important lines of inquiry, 'they suffer from reliability and construct validity problems and administrative limitations' (p.1). These include:

- Implicit attitude measures can be difficult to implement. These measures involve considerable time and effort in laboratory settings and it is not feasible to use some of the measures outside the laboratory (p.7).
- There is evidence that participants can consciously mediate their responses. 'Participants often infer the purpose behind the task and can intentionally alter their pattern of responses and thus the attitudes ascribed to them, controlled processes contribute to responses on the implicit tasks even when those processes are beyond the awareness of participants, and reactivity biases can affect responses on these measures' (p.7).
- These new measures may be affected by factors other than attitude e.g. 'individual differences in working memory that affect the speed with which information is processed? … Factors such as the respondent's amount of practice on the task, age, general processing speed and ability to switch tasks quickly and effectively, and familiarity with the attitude-object stimuli, if not accounted for, will contaminate the results and lead to erroneous conclusions about the attitudes of respondents' (p.8).
- '[T]he new implicit measures raise basic construct validity questions concerning the meaning of an attitude and how to go about measuring attitudes…a researcher considering the use of the new implicit measures should be aware of ongoing debates about the proper definition of attitude and whether the new implicit measures actually measure anything that should be called an attitude' (pp.7-8).
- These measures 'often exhibit low split-half and test-retest reliability scores' (p.8).
- '[T]he new implicit measures often fail to outperform simple explicit measures of attitudes in the prediction of behaviour' (p.9).

- The authors argue: 'Researchers conducting basic research on attitudes may fruitfully utilize implicit measures as part of a multipronged measurement strategy, but researchers seeking to predict behaviour from attitudes should continue to rely on explicit measures of attitudes, taking care to minimize reactive bias and to formulate the attitude questions at the same level of specificity as the behaviour to be predicted' (p.1).

National Judges Association, *Domestic Violence and the Courtroom: Knowing the Issues… Understanding the Victim* (n.d.).

This resource provides practical guidance for judges in engaging with victims of domestic violence in the courtroom. It includes a checklist designed to assist judges in becoming more informed about cultural issues and the challenges culture may present in individual cases (p 9):

- Examine your own cultural heritage and identity.
- Does your cultural identity affect, limit, or enhance your work as a judge?
- What do you believe about people who are different?
- How can you become more aware of potentially blinding preferences, such as pre-existing beliefs or assumptions about other cultures?

Additionally, it is important to consider how cultural factors may impact the parties (p 10):

- How does cultural difference impact remedies to assist the victim or minimise harm to the victim?
- How does cultural difference facilitate the imposition of meaningful interventions for perpetrators?

Richardson, L. Song, 'Systemic Triage: Implicit Racial Bias in the Criminal Courtroom' (2017) 126 *Yale Law Journal* 862.

Richardson draws on social science evidence to argue that biases influence discretionary decisions, perceptions and practices in ways that are not readily observable and thrive in conditions of 'systemic triage'.

'Systemic triage' is defined as the process of allocating scarce resources in a criminal justice system overloaded with 'tough on crime' policies and policing practices, which disproportionately affect indigent, urban and minority communities (p 878). These policies and practices burden the system with more cases than it can handle. Richardson argues that defenders, prosecutors and judges are constantly subject to cognitive depletion and incomplete information, which is a typical situation in which implicit biases arise (p 881). Unconscious biases emerge for public defenders and police prosecutors in the sorting process to determine which cases are deserving of prosecution (p 880).

Staats, Cheryl, 'State of the Science: Implicit Bias Review 2014' (Kirwan Institute for the Study of Race & Ethnicity, 2014).

Chapter 1 of the text provides an introduction to the topic of implicit biases.

Defining implicit biases – Implicit biases are: 'the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favourable and unfavourable assessments, are activated involuntarily and without an individual's awareness or intentional control.' (p.16).

On p.17 the review provides a useful list of key characteristics of implicit biases namely, that they are pervasive and robust; implicit and explicit biases are generally regarded as related but distinct mental constructs; implicit associations do not necessarily align with our declared beliefs; we generally hold implicit biases that favour our own ingroup; implicit biases have real-world effects on behaviour; and implicit biases are malleable.

Staats, Cheryl et al, 'State of the Science: Implicit Bias Review, 2016 Edition' (Kirwan Institute for the Study of Race & Ethnicity, 2016).

'The 2016 State of the Science: Implicit Bias Review is the fourth edition of this annual publication. By carefully following the latest scholarly literature and public discourse on implicit bias, this document provides a snapshot of the field, both in terms of its current status and evolution as well as in the context of its relevant antecedents. As in previous editions, this publication highlights the new 2015 academic literature through the lenses of five main domain areas: criminal justice, health and health care, employment, education, and housing. Accompanying these five content areas is a discussion of the latest research-based strategies for mitigating the influence of implicit biases, as well as a recognition of major contributions that expand beyond these domain-specific boundaries'.

There is an excellent, up-to-date fact sheet on pp.14-15 which provides an introduction to implicit bias.

It defines implicit bias as: 'The attitudes or stereotypes that affect our understanding, actions and decisions in an unconscious manner. Activated involuntarily, without awareness or intentional control. Can be either positive or negative. Everyone is susceptible'.

Implicit bias matters because everyone possesses such associations and they affect our decisions,

behaviours and interactions with others.

What can be done about it? (1) Educate yourself – take the Implicit Associate Test (IAT) on implicit.harvard.edu (2) Take action (3) Be accountable.

Williams, Joan et al, 'You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession' American Bar Association, 2018.

This report details the endemic bias women and minority lawyers continue to face compared to their white male counterparts, and also provides tools to disrupt the status quo. Current efforts to advance women and minorities have largely failed, and bias and discrimination (both explicit and implicit) persist. In addition to gender bias, the report also documents sexual harassment at work and outlines four major patterns of systemic bias in the workplace. Relevant to decision-makers may be the section implementing bias interrupters at pp102-104.

Wistrich, Andrew J. and Rachlinski, Jeffrey J., *Implicit Bias in Judicial Decision Making How It Affects Judgment and What Judges Can Do About It* (March 16, 2017). Chapter 5: *American Bar Association, Enhancing Justice (2017); Cornell Legal Studies Research Paper* No. 17-16.

This paper discusses strategies that judges and judicial officers can employ to reduce excessive reliance on intuition and implicit biases. Part I (see pp 90-104) discusses research demonstrating that judges are vulnerable to errors caused by intuitive decision-making (p 92). For an example of anchoring, one study found that judges imposed shorter sentences when asked to impose a sentence in months than years: the average sentence in months was 63 months, compared to 9 years (p 94). Part B offers suggestions for judges to combat unconscious bias. For example, that judges take an Implicit Association Test to alert judges to their racial bias, because most judges (like most people) tend to rate themselves above the median judge with respect to avoiding racial bias (p 106). It also suggests auditing (pp 108-10), appointing more judges and support staff from diverse backgrounds (p 110-1), writing opinions more often (p 117-8), and making use of rules and checklists (p 119). However, there is a risk involved, because any of these solutions that require more cognitive effort from judges may make them susceptible to other types of error (p 107).

Implicit bias - Other Bench Books

Australia

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 1.2 of the bench book provides a discussion on the avoidance of bias and stereotyping. It states that, '[j]udicial officers need to ensure that they do not treat anyone as a stereotype and/or make false assumptions about a particular individual, based on what they believe most people from that individual's group value, or based on how they believe most people from that individual's group behave. Judicial officers need a reasonable understanding of the range of values, cultures, lifestyles and life experiences of people from different backgrounds, together with an understanding of the potential difficulties, barriers or inequities people from different backgrounds may face in relation to court proceedings'.

The bench book further notes that while it is important to understand which groups are most likely to experience inequity, discrimination and/or disadvantage (see the rest of the bench book for a discussion of these groups), 'every individual is the product of many different influences. Characteristics such as ethnicity, gender, religious affiliation, disability, sexuality and socio-economic background may or may not have a determining influence on any particular individual's values, life experience or behaviour'.

There is a discussion of gender bias at 10.3.1 & 10.3.2

Judicial College of Victoria, *Victorian Sentencing Manual* (2021).

[2.2.2.2.3] Apprehended bias: The bench book notes:

> At sentencing the judge or magistrate should maintain a neutral role and avoid adopting an inquisitorial position. This does not mean they cannot disclose concerns about aspects of the case. In fact there may be circumstances where the failure to do so amounts to a denial of procedural fairness. As Kirby P said in Chow v DPP, 'there is a fine line between excessive and unjudicial intervention…and candid disclosure of matters of concern to invite response'. [Chow v DPP (1992) 28 NSWLR 593, [606], cited with approval in R v Grillo [2003] VSCA 143, [17]].
>
> In informing the parties of its developing views, a court should take care not to give rise to an apprehension

of bias. That is, it should not create a perception that it may not bring an impartial and unprejudiced mind to its task. [Livesey v New South Wales Bar Association(1983) 151 CLR 288, 293-94; Clarkson v The Queen (2011) 32 VR 361, 393–94 [132] ('Clarkson')].

To that end, a judge should avoid gratuitous or intemperate remarks as they may be taken out of context and misinterpreted. [Clarkson 394 [133]. See also R v Wise [2004] VSCA 88, [16]; Gild v The Queen [2017] VSCA 367, [28] ('Gild')].

The expression of tentative views during argument on matters that the parties are then permitted to address does not manifest bias [Gild [24]]. But a greater number of judicial interjections and the degree of their intrusiveness or tone, considered within the context of the entire proceeding, may create a reasonable suspicion of prejudgment [R v Charter [2002] VSCA 214, [24]].

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

Section 1 explains the principle of equality before the law and duty of judicial officers to act fairly and without discrimination. 1.4 discusses the need for judicial officers to be conscious of any possible personal biases or prejudices about people from different backgrounds and actively seek to neutralise these. 2.3.4 cautions judicial officers not to let stereotyped views about Aboriginal people unfairly influence their assessment. 3.3.5.2 provides guidance on avoiding stereotyping people from CALD backgrounds. 4.4.5 cautions judicial officers not to let personal views about a particular religion's views or practice unfairly influence their assessment. 7.2 discusses gender bias in court. 8.5.3 and 9.6.4 respectively caution judicial officers not to let stereotyped views about lesbianism, homosexuality or bisexuality or stereotyped views about gender diverse people unfairly influence their assessment.

Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016).

In Chapter 4 'Family Diversity', the bench book states that, 'when approaching issues of family violence, stereotypes about the gender of abusers and victims should be avoided: all family members, regardless of gender/sex or age, may be affected'.

There is a general discussion in Chapter 14 'Gender Equality' on the dangers of stereotyping (see p.188).

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

The bench book provides a discussion in Chapter 3: Social Context Use and Misuse at Section 3.2.2 of whether social context education can create judicial bias. It notes that 'social context information, if misinterpreted or misused, can create bias'. Further, '[i]n the absence of evidence and proof of applicability of the social context information to the particulars of the case, it cannot be assumed that an individual has acted in accordance with a social trend or gender characteristic. In addition, the case law is clear that social context knowledge may not be used to determine individual credibility.' The bench book also provides a list of questions that can identify the proper or improper use of social context information.

In Supplementary Reference Chapter 5: Culture in a Domestic Violence Context, there is an extensive discussion of cultural bias. It notes that 'the first step in cultural awareness is appreciating the impact of dominant cultural identity on our own perception, values and self-identity. Individuals in dominant cultures commonly assume cultural education is unnecessary because they pride themselves in being 'colour-blind', just and equitable. It is important to realize, however, that this perspective may in fact be the result of lack of self-identification as a culturally or ethnically influenced being'. The bench book goes on to show that culture can affect judging in ways that we do not realise, and warns against cultural generalisation.

Implicit bias - Other Resources

Project Implicit, *Implicit Association Test (IAT)*.

Project Implicit is a non-profit US based organization developed by researchers interested in implicit social cognition - thoughts and feelings outside of conscious awareness and control. The goal of the organization is to educate the public about hidden biases and to provide a “virtual laboratory” for collecting data on the Internet.

The researchers have developed the Implicit Association Test (IAT). The IAT measures attitudes and beliefs that people may be unwilling or unable to report. The IAT may be especially interesting if it shows that you have an implicit attitude that you did not know about. Their test is available on the website: https://implicit.harvard.edu/implicit/takeatest.html

It is important to note that since the development of the Implicit Association Test in the mid-1990s, numerous studies have been conducted by researchers in a range of disciplines endeavouring to gauge the accuracy and efficacy of the test. Whilst it is widely acknowledged as a useful measure of implicit bias, researchers caution that it be used as part of a multipronged measurement strategy. [Mitchell & Tetlock 2015]

Staats, Cheryl et al, ‘State of the Science: Implicit Bias Review 2015’ (Kirwan Institute for the Study of Race & Ethnicity, 2015).

On pp.4-5, there is a fact sheet debunking myths around implicit bias.

Staats, Cheryl et al, ‘State of the Science: Implicit Bias Review, 2017 Edition’ (Kirwan Institute for the Study of Race & Ethnicity, 2017).

There is an up-to-date summary of implicit bias on p 10.

Ward, Stephanie and Jeffrey Rachlinkski, ‘How can lawyers fight implicit bias?’ (podcast 34 minutes with transcript) (American Bar Association Journal, 23 January 2017).

In this podcast Stephanie Ward interviews Professor Jeffrey Rachlinski of the Cornell Law School. He holds a JD and a PhD in Psychology from Stanford University. He studies the influence of human psychology on decision-making by courts, administrative agencies, and regulated communities. In this interview he discusses a research project involving American trial judges that analysed their decision-making and measured their implicit bias. Specifically, his research measured the implicit connection judges make between African-American faces and positive or negative imagery, and white faces and positive and negative imagery. They found that the judges, like most adults, more closely associate African-American faces with negative concepts and more closely associate white faces with positive concepts.

Trauma-informed judicial practice

An important aspect of ensuring fair hearing and safety is considering the impact that experiences of trauma may have on the experience of the court process. For some victims their engagement with law enforcement agencies and the courts may exacerbate or prolong the trauma they have experienced as a result of the domestic and family violence. For example, absence of legal representation, lack of interpreter services, giving oral evidence, being cross examined, being present in the court room or court precinct with the perpetrator, or having to repeatedly return to court for mentions, adjournments and hearings may contribute to a victim's revictimisation or secondary abuse through the court system. Judicial officers should ensure, where reasonably practicable and where resources permit, that any adverse consequences associated with court processes are addressed or at least mitigated.

Many people who are victims and perpetrators of domestic and family violence have experienced trauma. Studies have indicated that people involved with the criminal justice system have high rates of personal histories of trauma [Substance Abuse and Mental Health Service Administration 2014]. Trauma is a result of the "overwhelming of coping mechanisms in response to perception or experience of extreme threat [Kezelman et al 2016]". If underlying trauma is unresolved it may cause ongoing adverse effects which may not necessarily be apparent and may include the inability to:

- cope with the normal stresses and strains of daily living;
- trust and benefit from relationships;
- manage cognitive processes, such as memory, attention, thinking;
- regulate behaviour; or
- control the expression of emotions.

Trauma may stem from a single traumatic incident or event or be complex trauma, which is cumulative from multiple, repeated interpersonal vicitmisation, causing health problems and psychosocial challenges [Salter et al 2020]. They may develop post-traumatic stress disorder ("PTSD") or complex post-traumatic stress disorder (cPTSD). People who have experienced complex trauma often have interlinked health and safety needs and frequent contact with crisis services and police. It is important to understand the behaviours of people affected by trauma as strategies or behavioural adaptations developed to cope with the physical and

emotional impact of past trauma [Essential Components of Trauma-Informed Judicial Practice 2014]. Trauma is particularly prevalent among Australia's Aboriginal and Torres Strait Islander communities and studies have shown that culture plays a significant role in how victim/survivors manage and recount their experiences of trauma [Atkinson et al 2014].

People with complex trauma may benefit from a trauma-informed approach across all support services they have contact with, including courts. Interaction with courts may re-traumatise people who have histories of trauma [Substance Abuse and Mental Health Service Administration 2014]. Alternatively, embedding trauma-informed principles and practices in court processes may contribute to feelings of wellbeing and safety.

A United States resource identifies that, at its core, trauma-informed judicial practice includes treating individuals with dignity and respect and ensuring the physical and emotional safety of participants without sacrificing security or formality of judicial proceedings [Essential Components of Trauma-Informed Judicial Practice 2014]. This resource identifies three essential components of trauma-informed judicial practice:

- Communication: trauma can influence the way individuals perceive what judges and others in authority say and how they say it. Using language which expresses concern and is less judgemental, negative and punitive has a positive effect on those effected by trauma.
- Clarity about court processes and procedures: giving individuals clear explanations of what is going to happen may alleviate fears and decrease the possibility of disruption to proceedings. Understanding what is going to happen and why helps engender a perception of physical and emotional safety in those affected by trauma.
- Safety in the courtroom environment: many courtroom practices, including the placement of participants (including for some, the experience of being restrained), the presence of victims and perpetrators in the same physical space and practices in courtrooms, including the processes of giving evidence and/or being cross-examined, may be confronting for any individual experiencing them for the first time, let alone a person who has a history of trauma.

A trauma-informed judicial officer will [Essential Components of Trauma-Informed Judicial Practice 2014]:

- provide clear explanations about what will happen to the person in the courtroom and when;
- explain why particular orders are made;
- provide information about the scheduling of matters to the greatest extent possible - what will be

expected and when;

- explain why a conversation with legal representatives, is happening; and
- use language that is not threatening.

Those who work with people affected by trauma, including judicial officers, court staff and lawyers, may experience secondary, indirect or vicarious trauma [Kezelman et al 2016].

The effect of trauma on evidence/credibility

Memories associated with traumatic events and experiences, including the experience of domestic and family violence victimisation, are often fragmented, disorganised and lack coherence. [Bishop et al 2018]

Victims may remember only sensations or emotions rather than chronological details of events. They may be able to describe events with little evidence of distress or emotion and may not be able to describe how they felt at the time domestic and family violence was being perpetrated as details and emotions may be stored separately from each other. When intentionally recalled, as when interviewed by police or in court, recounting may be disorganised, with variability and errors in recall across time. Very intense emotional experiences may lead to distorted memories and amnesia, meaning witnesses cannot give a coherent narrative of a traumatic event or experience.

The experience of giving evidence may itself trigger a traumatic flashback, causing a witness to become confused or disorientated. They may consequently become anxious, forget where they are momentarily or be unable to understand or answer questions.

Such witnesses may be perceived to lack credibility and reliability. An understanding of the impact of trauma on memory and witness responses may ameliorate the impact of this on perceptions of witness credibility and reliability. The use of special witness provisions may also help to ameliorate the impact of trauma on witnesses, in particular by ensuring that witnesses perceive that the court prioritises their safety.

Trauma-informed judicial practice - Key Literature

Australia

Atkinson, J., Nelson, J., Brooks, R., Atkinson, C., and Ryan, K. (2014). Addressing individual and community transgenerational trauma. In P. Dudgeon, H. Milroy, & R. Walker (Eds.), Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice (2nd ed.). Canberra, ACT: *Attorney-General's Department.*

This chapter provides further insights into trauma as cause and effect, which may manifest within and across generations, resulting in physical, mental, emotional, spiritual, and social distress for the individuals involved and beyond. Although trauma not only affects members of particular racial, cultural, religious, or socio-economic groups, it is well-established that Australia's disadvantaged and isolated communities experience the most trauma-related behaviours and attitudes. The result of colonisation, combined with recent government policies and practices, have led to the traumatisation of many Aboriginal and Torres Strait Islanders. In particular, the chapter explains how culture plays a significant role in how victim/survivors manage and recount their experiences of trauma. A coordinated approach should incorporate all the services and supports necessary to help individuals, families and communities enhance their physical, social, spiritual, cultural and emotional wellbeing. Practice shows that approaches founded on Aboriginal culture and Western health and healing practices, such as neuroscience, are likely to support the healing and recovery process. Evidence also suggests that an ecological approach, which takes into account every system that adversely affects an individual and community situation, is more effective than a separation of services. The authors argue that well-resourced and appropriately-qualified trauma-specific services are critical to improve current levels of mental health and social and emotional wellbeing.

Bevis, M., Atkinson, J., McCarthy, L., and Sweet, M. (2020).Kungas' trauma experiences and effects on behaviour in Central Australia (Research report, 03/2020). Sydney, NSW: ANROWS.

Kungas' trauma experiences and effects on behaviour in Central Australia is a pilot project operating under the Kunga Stopping Violence Program (KSVP), based in Alice Springs. The project aims to encourage Aboriginal women who are clients of the KSVP to provide insights into life events that led to their incarceration. It is theorised that the majority of Aboriginal women incarcerated for violent crime have a

potential diagnosis of complex trauma. It was found that the women had experienced several life stressors, many of which involved early childhood abuse, and which contributed to the continuation of their victimisation and offending, as well as to their resilience under extreme circumstances (p 5). The causes and results of trauma were felt across generations: "the outcome of violence may be traumatic (cause), and the response to trauma may result in behaviour which continues the cycle (effect)". The women recounted frequent memories and flashbacks of being unsafe, which may lead to future alcohol and drug use and an inability to communicate fear, anxiety and despair. Many of the women also came from disrupted mother-child, family and community relationships. This included witnessing parental or community violence, bullying, homelessness and deaths of family members (p 6). The women detailed their experiences of discrimination and judgment from police, as well as in the court and prison systems. There is also a serious communication disconnect. The majority of women in the KSVP speak a local Aboriginal language, whereas most services (police, legal services, service providers and corrective services) are dominated by English speakers (p 7).

According to the women, KSVP staff and stakeholders, the KSVP plays an important role in listening to and supporting the women via an "educaring" approach in a four-week course and through the provision of support while the women were in prison and on release. Educaring is a "trauma- specific blend of Aboriginal traditional healing activities and Western therapeutic processes. It uses experiential learning to enable participants to explore their individual and community transgenerational trauma". An educaring and relational approach facilitates listening to the women’s experiences and needs, working with them after prison, and advocating for them. Furthermore, local Aboriginal women are employed as the KSVP case managers (p 8).

Douglas, Heather, ‘Domestic and Family Violence, Mental Health and Well-Being, and Legal Engagement’ (2018) 25(3) Psychiatry, Psychology and Law 341-356.

This article draws from interviews with a group of diverse women who have engaged with the legal system after experiencing domestic and family violence (DFV). The study sought to investigate how women’s experiences of legal processes ‘affected their mental health and well-being’ (p 1). Almost all the women experienced some type of mental health issue directly attributable to DFV (p 5). Many women engaged preventative measures prior to attending court, including pre-court counselling, contacting mental health practitioners, and taking prescribed medication (p 2). Other women self-medicated and avoided seeking help fearing that proof of mental health concerns may lead to negative court outcomes (p 2). Many women

highlighted attending court (pp 5-6), having to face the perpetrator in court (pp 6-8), and giving evidence (pp 8-9) as negatively affecting their mental health (p 10). A number of suggestions are made for improving women's experiences in court, including:

- minimising the frequency with which victims are required to attend court (p 10);
- allowing women to give evidence remotely (p 10);
- minimising contact between the victim and abuser, through ensuring there are safe waiting spaces (p 10), and staggering attendance and departure times of the parties (p 11);
- providing effective training to court personnel regarding the dynamics of DFV (p 11); and
- ensuring cross-examination, and legal proceedings in general, are not misused by the abuser (p 11).

Kezelman, C, and Stavropoulos, P, Trauma and the Law: Applying Trauma-informed Practice to Legal and Judicial Contexts (2016, Blue Knot Foundation)

There is evidence that demonstrates that "more effective, fair, intelligent, and just legal responses must work from a perspective which is trauma-informed". The paper identifies the following principles of trauma-informed practice:

1. Basic understanding of how stress affects the brain and body;
2. Consistently focussing on "safety, trustworthiness, choice, collaboration and empowerment", how a service is delivered, and the client's experience rather than trying to identify any fault in them;
3. Recognising that adverse behaviour may be the result of an ability or inability to deal with, and to try to protect oneself against, negative experiences. If the effects of trauma are not considered, behaviour is frequently and incorrectly seen as 'pathological', rather than personal adjustments to deal with the vagaries of life;
4. A 'strengths-based' approach which takes into account people's capabilities, despite the fact that they may be hard-pressed to cope with extremely difficult circumstances.

Implementing these principles has many advantages. Positive experiences with other people have been found to help restore the disruption which trauma causes to the human nervous system, and to improve overall wellbeing. Trauma-informed practice also assists in lessening arousal and minimising stress for

victims, witnesses, defendants and legal personnel who engage with them. Trauma-informed principles recognise the disruptive effects that stress has on a traumatised person's ability to recount their experience coherently such that their testimony can often appear unreliable, and further, they facilitate formulation of policies and development of strategies designed to help people interact with others in a manner which is both stable and safe. Therefore, testimony can be given in an environment which minimises further stress, the risk of re-traumatisation can be reduced and a person's account may be more consistent and perceived as more reliable.

Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K., "A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence (Research report, 12/2020). Sydney: ANROWS.

Complex trauma refers to multiple, repeated forms of interpersonal victimisation and the resulting health problems and psychosocial challenges. Women with experiences of complex trauma are a significant but overlooked group of victims and survivors of gender-based violence in Australia. They often have interlinked health and safety needs, and are frequently in contact with crisis services and police. This research identifies the core principles of trauma-informed care (p27 Report):

- Ensuring a safe environment for clients and service providers;
- Promoting interpersonal relationships;
- Cultural awareness and knowledge;
- Supporting consumer control, choice, and autonomy;
- Understanding trauma and its impact;
- Sharing power, inspiring hope, and supporting recovery;
- Integrating different healthcare services;
- Sharing power and governance.

International

Bishop, C and Bettinson, V, Evidencing domestic violence, including behaviour that falls under the new offence of "Controlling or coercive behaviour" (2018) 22(1) The International Journal of Evidence & Proof 2-29

Memories associated with traumatic events and experiences, including the experience of domestic and family violence victimisation, are fragmented, disorganised and lack coherence.

Victims may remember only sensations or emotions rather than chronological details of events. They may be able to describe events with little evidence of distress or emotion and may not be able to describe how they felt at the time of the attack as details and emotions may be stored separately from each other. When intentionally recalled, as when interviewed by police or in court, recount may be disorganised, with variability and errors in recall across time. Very intense emotional experiences may lead to distorted memories and amnesia, meaning witnesses cannot give a coherent narrative of a traumatic event or experience.

The experience of giving evidence may itself trigger a traumatic flashback, causing a witness to become confused or disorientated. They may consequently become anxious, forget where they are momentarily or be unable to understand or answer questions.

Such witnesses may be perceived to lack witness credibility and reliability. An understanding of the impact of trauma on memory and witness responses may ameliorate the impact of this on perceptions of witness credibility and reliability.

Elliott, D. E., Bjelajac, P., Fallot, R. D., Markoff, L. S., and Reed, B. G., 'Trauma-informed or trauma-denied: Principles and implementation of trauma-informed services for women' (2005) 33(4) Journal of Community Psychology 461-477.

The article highlights the importance of providing trauma-informed services, namely, "those in which service delivery is influenced by an understanding of the impact of interpersonal violence and victimisation on an individual's life and development". The authors argue that trauma-informed services are more effective for and accessible to survivors. Effective trauma-informed service delivery requires a coordinated approach, where all staff (from receptionists to direct care workers) understand how violence affects people's lives, so

that each interaction is consistent with the advancement of the recovery process and minimises potential re-traumatisation. Ten principles are identified, reflecting the values and practices that define a trauma-informed service organisation. The authors submit that trauma-informed services:

1. Recognise the impact of violence and victimisation on development and coping strategies (p 465);
2. Identify trauma recovery as a main goal (p 465);
3. Use an empowerment model by facilitating a client's ability to take control over her actions (p 465);
4. Aim to maximise a woman's choices and control over her recovery (p 466);
5. Are founded in a relational collaboration (p 466);
6. Create an environment that is mindful of survivors' need for safety, respect and acceptance (p 467);
7. Emphasise women's strengths and recognise symptoms as deriving from adaptations to traumatic events, which, in turn, reduces a client's guilt and shame, increases self-esteem and provides guidance for developing new skills (p 467);
8. Aim to minimise potential re-traumatisation (p 467);
9. Aim to be culturally aware and to understand every woman in light of her life experiences and cultural upbringing (p 468);
10. Encourage women to be involved in designing treatment services and the ongoing evaluation of those services (p 469).

Epstein, Deborah, and Lisa A Goodman, 'Discounting Credibility: Doubting the Testimony and Dismissing the Experiences of Domestic Violence Survivors and Other Women' (2018) 167 (2) University of Pennsylvania Law Review 399-461

This article addresses the ways in which the credibility of female victims of intimate partner violence is discounted through their experiences of legal and social services (pp 3-4). The authors conclude that women's experiences are frequently discounted, which itself can have further traumatic impacts.

Judges and other professionals often discount women's stories of abuse as implausible, particularly where the victims suffer from psychological trauma that may impact memory and comprehension (p 7). Women who

suffer traumatic brain injuries (pp 9-11) or PTSD (pp 11-3) as a result of domestic violence are particularly susceptible to relaying inconsistent stories. The authors also find that cultural assumptions resulting in the prioritisation of physical over psychological violence causes judges and other authority figures to expect 'real' survivors to also prioritise physical harm, while in reality, victims may feel more significantly impacted by psychological abuse (pp 17-20).

Moreover, the results of the study indicate that gatekeepers often unjustly discount women's personal trustworthiness, based on perceptions of their demeanour (pp 21-5), their perceived motive (pp 25-32), and their social location (pp 32-7). Even women who are able to overcome initial scepticism often find that the systems intended to provide assistance dismiss the importance of their experiences (p 37). In spite of meaningful progress, 'the criminal justice system continues to discount important aspects of women's experiences and to trivialize some of the harmful consequences that policies focused primarily on offender accountability often impose on survivors' (p 38). Ultimately, 'the arbiters of justice and social welfare adopt and enforce legal and social policies and practices with little regard for how they perpetuate patterns of abuse' (p 1).

These experiences of minimisation often echo women's previous experiences of abuse (p 46). The impacts of this discrediting are multifaceted: the dismissal itself constitutes its own injury, which can compound the harm such women experience directly from the abuse (pp 47-50); additionally, this instinctive devaluing of women's testimony becomes an independent obstacle to attempts to obtain safety and justice (pp 50-2). The authors conclude that credibility discounting is widespread and pervasive, and requires genuine institutional reform (p 59). Particularly, actors must be aware of these internalised assumptions, and seek to engage more openly with victims (see pp 54-6).

Franklin, C. A., Garza, A. D., Goodson, A., & Bouffard, L. A., Trauma Informed Training & Police Perceptions of Victim Behaviors (2019) Crime Victims Institute and Texas State University.

This paper considers previous research which has shown that as a consequence of PTSD, survivors may present with restricted affect, emotional numbing, and avoidance of eye contact. Disjointed recollection has also been a common consequence of PTSD. Oftentimes, the memory encoding process is disrupted during traumatic experiences, which can result in amnesia or fragmented memories. This can be contrasted to stereotypical understandings of trauma response, such as emotional expressiveness, hysteria, timely

reporting, and linear recollections.

This study compared responses of police who have not received trauma-informed training with those who had. Police personnel in this study who had not received training endorsed attributions that support stereotypical trauma response. Endorsing these attributions has the potential to exacerbate secondary victimization among survivors and aggravate case attrition.

Police officers who had participated in the trauma-informed training reported significantly decreased levels of trauma misperceptions as compared to police officers in the pre-training sample.

Katirai, N 2020, 'Retraumatized in Court', *Arizona Law Review*, vol. 62, no. 1, pp. 81–124.

US based research. Abstract: In addition to the indignities associated with the violence itself, intimate partner violence survivors very often risk being retraumatized when trying to access the justice system. While the "me too" movement has shed light on how survivors of sexual assault and harassment often experience victim-blaming and other types of retraumatization when they try to tell their stories, few legal scholars have written about the retraumatization that occurs when survivors of intimate partner violence attempt to seek help through the courts. This retraumatization risk presents a barrier to effective justice: it has a chilling effect on the criminal prosecutions of domestic violence crimes; and it deters civil domestic relations and dependency actions, including child custody trials. This Article details how courts are implicated in retraumatization and is the first to propose cross-cultural communication to improve the quality of justice for survivors of intimate partner violence. Adequate justice requires combatting an institutional culture that all too frequently trivializes the impacts of intimate partner violence. While adapting the legal process to address this problem is a long-term task, the focus of this Article is to lay out more immediate strategies for advocates of survivors of intimate partner violence to improve the experience of their clients. Key to this urgent endeavour are: (1) employing "habits" of cross-cultural communication to better prepare our clients for how retraumatizing the legal system can be and (2) expanding the services provided by legal services organizations, including law school clinics, to include supportive services such as case management and counseling.

Reeves, E., 'A Synthesis of the Literature on Trauma-Informed Care' (2015) 36(9) Issues in Mental Health Nursing 698-709.

This literature review provides an overview of the existing research on trauma-informed care for survivors of physical and sexual abuse, and closely examines concepts including, inter alia, trauma screening, patient disclosure, provider-patient relationships, minimising distress and maximising autonomy, and trauma-informed care in diverse settings. The development and widespread implementation of trauma-informed care that is sensitive to a patient's individual needs is crucially important, given that the healthcare system may re-traumatise those with a history of traumatic life events. Patients who present at Emergency Departments are often not asked whether they have experienced traumatic life events by service providers. This highlights a missed opportunity to provide trauma-informed care and referrals to women at a high risk for past and present abuse and for whom the hospital is an entry-point into the healthcare system. Current trauma screening methods may also impede patient disclosure, and some victims have reported being dismissed or belittled by healthcare providers or made to feel that they were not believed.

Trauma-informed care requires that providers identify and work against power imbalances in provider-patient relationships (p 701). Minimising patient distress and maximising patient autonomy may guide healthcare decision-making. Patient distress can be appropriately managed or minimised if providers have a strong knowledge of trauma symptoms, limit unnecessary procedures, obtain patient consent to perform or continue procedures, and are flexible in service delivery by checking that patients feel comfortable and pausing or stopping procedures when they feel overwhelmed. Patients may feel more autonomous and empowered when service providers acknowledge and respect their agency in making healthcare decisions and their willingness to participate. Female survivors also felt more comfortable when they were allowed to bring a support person to medical appointments (p 702). Further, trauma survivors can benefit from appropriate referrals to other necessary services, such as addiction counselling or trauma-specific therapy (p 703).

Substance Abuse and Mental Health Service Administration, Concept of Trauma and Guidance for a Trauma-Informed Approach. 2014 (US)

This resource provides general guidance for a trauma-informed response. It describes individual trauma as resulting from an event, series of events or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.

It identifies three Es of trauma:

- Events (actual or threat of harm- physical/ psychological), single or repeated occurrence.
- Experience: ‘The individual’s experience of these events or circumstances helps to determine whether it is a traumatic event. A particular event may be experienced as traumatic for one individual and not for another.’
- Effects: short or long lasting / adverse effects. Connection between effect and trauma may not be clear, or understood by the person who is traumatised. ‘[A]dverse effects include an inability to cope with the normal stresses and strains of daily living; to trust and benefit from relationships; to manage cognitive processes, such as memory, attention, thinking; to regulate behavior; or to control the expression of emotions. In addition to these more visible effects, there may be an altering of one’s neurobiological make-up and ongoing health and well-being.’

This paper then outlines six principles fundamental to trauma-informed approaches:

- Safety – prioritise safety as defined by those the organisation serve; all staff and the people they serve feel physically and psychologically safe;
- Trustworthiness and transparency – transparent operations and decisions with the aim of building and maintaining trust with all participants;
- Peer support and mutual self-help – "key vehicles for establishing safety and hope, building trust, enhancing collaboration, and utilizing their stories and lived experience to promote recovery and healing";
- Collaboration and mutuality – recognition that everyone has a role to play, "healing happens in relationships and in the meaningful sharing of power and decision-making;
- Empowerment, voice, and choice – "workforce development and services are organised to foster empowerment for staff and clients alike"; "staff are facilitators of recovery rather than controllers of recovery";
- Cultural, historical, and gender issues – "The organization actively moves past cultural stereotypes and biases (e.g. based on race, ethnicity, sexual orientation, age, religion, gender-identity, geography, etc.); offers, access to gender responsive services; leverages the healing value of traditional cultural connections; incorporates policies, protocols, and processes that are responsive to the racial, ethnic and cultural needs of individuals served; and recognizes and addresses historical trauma". (p11)

Guidance is provided for implementing a trauma-informed approach, with specific attention drawn to ten implementation domains:

- Governance and leadership – support and investment in implementing and sustaining a trauma-informed approach, an identified point of responsibility for this and inclusion of the peer voice;
- Policy – written policies and protocols reflecting trauma-informed principles;
- Physical environment – promotes a sense of safety and collaboration, experienced as safe, inviting, not a risk to physical or psychological safety; supports collaboration through openness, transparency and shared spaces;
- Engagement and involvement – of people in recovery, trauma survivors, people receiving services and family members receiving services;
- Cross-sector collaboration – people with significant trauma histories often have complex needs;
- Screening, assessment, treatment services – practitioners use and are trained in interventions based on best available evidence and science, culturally appropriate and reflect principles of a trauma-informed approach; referrals connect individuals with appropriate trauma treatment;
- Training and workforce development – ongoing training and peer support, procedures to support staff with trauma histories and/or significant secondary traumatic stress or vicarious trauma;
- Progress monitoring and quality assurance – ongoing assessment, tracking and monitoring and effective use of evidence-based trauma specific screening, assessments and treatment;
- Financing – including resources for staff training on trauma and trauma-informed approach, appropriate and safe facilities, peer support, evidence-supported trauma screening, assessment, treatment and recovery supports, development of cross-agency collaborations;
- Evaluation – evaluation design reflects an understanding of trauma and appropriate research instruments.

Communities that respond to individual trauma with understanding and self-determination may facilitate healing and recovery for traumatised individuals. Communities as a whole may experience trauma, which may be transmitted from generation to generation in a pattern of historical, community or intergenerational trauma. Telling the story of the trauma experience using the language and framework of the community is an important step towards healing community trauma.

Substance Abuse and Mental Health Service Administration, Essential Components of Trauma-Informed Judicial Practice (2014).

This paper provides information, specific strategies, and resources that many treatment court judges have found beneficial (in US). It provides a list of physical court environment 'triggers' that may cause certain responses in trauma survivors. It suggests a series of communication and court management strategies (p8) to help reduce the traumatic experiences often associated with going to court. Strategies include:

- Providing clear explanations about what will happen to the person in the courtroom and when.
- Explaining why particular orders are made.
- Providing information about the scheduling of matters to the greatest extent possible - what will be expected and when.
- Where the court has conversation with legal representatives, explain why this is happening.

This paper also provides helpful suggestions about how to use language that does not retraumatise (p4).

Swanson Ernst, Joy and Tina Maschi, 'Trauma-informed care and elder abuse: a synergistic alliance' (2018) 30(5) Journal of Elder Abuse & Neglect 354-367.

This article provides a comprehensive analysis of elder abuse - a problem in which one or more traumatic or stressful life experience directly affect older adults, their families and communities. The authors detail the principles and practices of trauma-informed care and how it can form a synergistic alliance with the prevention and intervention efforts across the life course. The authors identify six guiding principles for trauma-informed care (TIC). These principles are:

1. Safety: throughout the organization staff and the people they service feel physically and psychologically safe;
2. Trustworthiness and transparency: organizational operations and decisions are conducted with openness and the goal of building and maintaining trust among staff, clients, and family members of those receiving services.
3. Peer support and mutual self-help: Empowering older adults to help one another when feasible may be

an important ingredient moving them from victim to survivor status.

4. Collaboration and mutuality: recognizing that healing happens in relationships and in the meaningful sharing of power and decision making and everyone has a role to play in the healing process.
5. Empowerment, voice, and choice: organization recognizes, builds on, and validates individuals' strengths and assists in development of new skills as necessary.
6. Cultural, historical, and gender issues: incorporation of cultural, historical, and gender issues into an organization's practice means that the agency moves beyond cultural stereotypes and biases.

Trauma-informed judicial practice - Other Resources

Australia

Merrin Wake, Understanding the impact of trauma (Webinar).

This webinar explains trauma informed care and practice for judicial officers.

International

Antonia Porter, In their words: domestic abuse support workers reflect on criminal justice and supporting survivors to thrive, Scriberia on Vimeo (2020)

This short animation outlines some of the findings in relation to encouraging trauma informed lawyering from Chapter 6 of Antonia Porter's book *Prosecuting Domestic Abuse in Neoliberal Times: Amplifying the Survivor's Voice, Palgrave Socio-Legal Studies*, Palgrave Macmillan (2020).

Trauma-informed judicial practice - Cases

James v James No 3 **[2020] NSWDC 797 (16 November 2020) – New South Wales District Court**

The court noted that the plaintiff's ongoing psychiatric problems would have a continuing impact on her (including her earning capacity) and that the avoidance of a trial would minimise trauma to the plaintiff (at [29]):

> "When this case is finished no doubt she can try to put the events of the past behind her and try to get on with her life. Not having to relive the events by coming to Court and telling the Court of them will no doubt assist in her recovery".

R v Ney **[2011] QSC Indictment No 597 of 2008 (8 March 2011) sentence - unreported – Queensland Supreme Court**

In sentencing Ney, Dick AJ referred to the reports of a psychologist (Dr Sundin) and a psychiatrist (Associate Professor Carolyn Quadrio):

'As you know, I have been given a number of psychiatric and psychological reports. The prosecution tendered the report of Dr Josephine Sundin. Dr Sundin has come to the opinion that as a result of the multiple traumas you have suffered in your life since your young teenage years and the series of violent intimate relationships that you have endured since that time, and the fact that you have suffered physical, sexual and psychological abuse over a long period of time, you suffer chronic post-traumatic stress disorder and borderline personality disorder.

The connection between those two matters is explained in her report and in other reports. Associate Professor Carolyn Quadrio, spells it out in her addendum report. She said, "Trauma and abuse have profound effects on mental processes and on psycho-social and psychological functions so that a disorganisation of personality occurs and leads to lasting disorder. Similarly, substance abuse which commonly develops in the context of adolescent trauma, also has a profound effect on mental and psycho-social processes and secondly, incapacitates the person so they are rendered highly vulnerable to further traumas and abuse thus creating a vicious cycle…

I have been assisted by the addendum report of Associate Professor Quadrio where she says that, "At times,

however, she returned when she may have been able to escape because she experienced him as someone who loved her. This is explained as traumatic attachment relationship. Further it is also the case that in chronic or complex post-traumatic stress disorder there is both paralysis of initiative whereby the person is greatly compromised in her capacity to take action and there are alterations in perception so they have difficulty perceiving themselves accurately or others and thus in perceiving the true nature of the relationship with an abuser."

Later on she says, "If this psycho physiological disturbance is sustained over time and especially when it occurs in the crucial development years of childhood and adolescence, it eventually leads to disorganisation of personality, sustained hyper vigilance and hyper reactivity become chronic and irreversible."

Further on, "The inability to leave can be explained, partly, as a manifestation of personality disturbance but it is also the case that in domestic violence a woman feels trapped and unable to leave and knows it is not safe to leave so she remains captive and experiences more abuse and trauma and undergoes more personality disorganisation."

I have also noted from the report of Associate Professor Quadrio that those matters which are described as chronic or complex PTSD personality disorder with poly substance dependence or abuse, she says, "These disturbances reflected a lifetime of trauma, a highly chaotic and unsustainable lifestyle and both past and present intimate partner violence."

***R v RT (No 2)* [2020] QDC 158 (13 July 2020) – Queensland District Court**

The defendant argued that there were:

> [39] a constellation of features inconsistent with [the complainant's] account being truthful. These included her demeanour when speaking to police that night, her failure to immediately mention being choked and her preparedness to remain living at the house and tell the Doctor she felt safe.

The judge held that:

> [39] The first and last of these matters do not in my view undermine the credit of the complainant. We are far past the days where the law expected an immediate and uncontrolled emotional reaction to an assault, and adversely viewed the credit of those who did not behave as expected. And, as noted above, staying in

the house is understandable for other reasons.

***Tatnell v Tasmania* [2020] TASCCA 13 (7 August 2020) – Tasmanian Court of Criminal Appeal**

On the inconsistency between the complainant's evidence and prior statements made to police, at [29]-[32]:

> "When challenged about various inconsistencies between her evidence and her police statement in cross-examination, the complainant's response was, in summary, that when she made her statement to police, she was still traumatised as a result of the events at the house. She noted that she had been assaulted by the appellant, and found the whole process of giving the statement stressful. She agreed that she had signed the statutory declaration but said that "it was just quite late at night and I just wanted to go home". When counsel challenged her about having had the chance to read the document through before signing it, she said: "Well, I assumed the things that I put across were correctly documented. I'd just been through a horrible ordeal. I just wanted to get out of there and get home".
>
> When asked why she purported to have a better memory now than at the relevant time, she said that she had had time to refocus and she has "remembered a lot more".
>
> In my opinion, there is nothing improbable or unreasonable about the complainant's explanation of the inconsistencies when challenged in cross examination about them. In respect of the police statement, her answers were consistent with the objective evidence, that is her statement was made within hours of what she claimed was a traumatic and violent attack on her. She is not a trained witness and it is entirely understandable that, when interviewed by the police, she may not have been capable of describing the events which had just taken place, sequentially and with precision, particularly when she was likely to be emotionally and psychologically affected by the relevant events. Further, although the statement was made in the form of a statutory declaration, the circumstances in which it was made can be distinguished from the formal and dispassionate environment of the court. It can be more readily accepted that a witness giving a version to police may not exercise the same care as to accuracy of detail as can be expected from sworn evidence in court. Finally, evidence in court is given after an opportunity for reflection, and hence can be expected to differ, particularly in respect of matters of detail and sequence, from a version given at an earlier time. This does not necessarily mean that the evidence in court is less reliable. Of course, it is possible that the reliability of the testimony in court might be adversely affected by innocent or deliberate

> reconstruction, but it can also be expected that dispassionate and honest reflection will bring to mind details overlooked in the initial statement and clarify aspects of the witness's recollection of the relevant events."

R v Margolis **[2021] VSC 341 (15 June 2021) – Victorian Supreme Court**

As to Verdins principles, Beale J stated:

[54] Dr Zimmerman found that you have a borderline personality disorder and long-term PTSD. Associate Professor Carroll found that you have a severe personality disorder and long-term PTSD, both conditions commencing in your teens and likely to be permanent.

[55] I accept the findings of Associate Professor Carroll that you have a severe personality disorder and long-term PTSD. Neither diagnosis was disputed by the prosecution. I find that your mental health problems enliven principles 1, 3, 4, 5 and 6 of the well-known case of R v Verdins. In other words, your moral culpability is somewhat reduced by your mental health issues, which I find contributed causally to the commission of the offence. Because of your entrenched mental health issues, you are not an appropriate medium for giving full effect to general and specific deterrence. Although it seems you are currently feeling well supported by the prison mental health services, it is also likely that the substantial prison term which I must impose on you will exacerbate your mental health issues and make jail harder for you than for prisoners who do not have such issues.

Evidence issues

The following sections of this bench book consider some evidence related issues in certain contexts:

Chapter 5 Fair hearing and safety

- 5.2. Victim experience of court processes
- 5.4. Legal representation and self-represented litigants

Chapter 7 Protection orders

- 7.2.1. Cross-examination

Chapter 9 Responses in criminal proceedings

- 9.2.1. Relationship, context, tendency and coincidence evidence
- 9.2.2. Expert or opinion evidence
- 9.2.3. Vulnerable or special witnesses

Chapter 10 Family law proceedings

- 10.3. Court and case management
  - 10.3.1. Child-related proceedings
  - 10.3.2. Cross-examination
  - 10.3.3. Self-represented litigants
- 10.4. Family consultants and expert witnesses
- 10.5. Information sharing
- 10.6. Unacceptable risk and best interests

Protection orders

Note: a general list of sources relevant to protection orders is included in the Key Literature and Other Resources tabs for subsections 7.1, 7.2, 7.4, 7.6, 7.7 and 7.10 as there is significant overlap.

Protection orders - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

LawAccess NSW and Legal Aid NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence

- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Protection orders - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Angelina

Anna

Barbara

Ben

Bianca

Brenda

Carol

Cassy

Celia

Celina

Erin

Faith

Felicity

Fiona

Francis

Gillian

Hilary

Ingrid

Jennifer

Julia

Leah

Leyla

Lisa

Melissa

Rosa

Sally

Sandra

Sara

Trisha

Yvonne

Purpose

Under the National Domestic Violence Order Scheme, protection orders made in any Australian jurisdiction on or after 25 November 2017 are automatically recognised and enforceable nationally.

Protection orders made before 25 November 2017 (except Victorian protection orders and New Zealand protection orders registered in Victoria, which are recognised retrospectively) are not automatically recognised and enforceable in other jurisdictions. All jurisdictions have legislation to enable protection orders made before 25 November 2017 to become nationally recognised by being 'declared' as a protection order recognised under the scheme. The protected person may apply to any local court in Australia for such a declaration.

Key points:

- Civil protection orders can supplement criminal justice interventions or provide a remedy where criminal law may not apply, including where the risk is of future abuse or where abusive behaviour does not include physical violence.
- Victims may struggle to adequately present clear written narrative or oral evidence of abuse, particularly where applications are not made on their behalf by police.
- The paramount consideration should be the safety and protection of the victim and other protected people.

All Australian states and territories have a statutory regime [FLC 2015] that provides for the making of civil protection orders to protect victims and other protected people [Jeffries et al 2013] from further domestic and family violence, and to promote the accountability of perpetrators for their actions (see table below). Protection orders are available in a range of situations, including emergencies; and they can supplement criminal justice interventions or provide a remedy where the criminal law does not apply, for example in the event of the future likelihood of domestic and family violence [Dowling et al 2018] or where the abusive behaviour experienced by the victim has not included physical violence and is coercive and controlling in nature [Fitzgerald & Douglas 2019]. All protection order legislation in Australia has some provision for the making of a protection order in circumstances where the abusive behaviour experienced by the victim has not included physical violence

(see s8 *Family Violence Act 2016* (ACT), ss 7 and 8 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 5 *Domestic and Family Violence Act 2007* (NT), s 8 *Domestic and Family Violence Protection Act 2012* (Qld); s 8 *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*; s 7 *Family Violence Act 2004* (Tas); s 5 *Family Violence Protection Act 2008* (Vic); *Family Violence Protection Act 2008* (Vic); s 5A *Restraining Orders Act 1997* (WA)).

A person may be subject to a protection order in a number of ways, depending on the legislation applicable in the particular jurisdiction: a victim may apply to the court for an order; the police may apply to the court for an order on the victim's behalf; and in some jurisdictions the police may issue an order in their own right without court approval [ALRC/NSWLRC 2010]. Increasingly, after a shift in policing practices under policy reforms, in a number of Australian jurisdictions most protection orders are now initiated by police rather than an individual victim. In Queensland in 2016-17 73.4% of DVO applications were lodged by police and Queensland research has shown that where a protection order applicant is a police officer 90% of applications are successful (as opposed to 26-56% of applications where the aggrieved is the applicant) [Fitzgerald & Douglas 2019].

Section 3.1 and Section 3.2 of this bench book set out examples of behaviour or threatened behaviour that may be understood as domestic and family violence, and section 4 sets out a range of factors that may be relevant in making protection orders in a particular case. These include factors affecting risk and the vulnerabilities of the parties to the proceedings. The paramount consideration should be the safety and protection of the victim and other protected people. As a protection order is a civil order, the court must apply the civil standard of proof in considering the evidence, although the more serious the allegation the more cogent the evidence should be.

A protection order will have implications for the perpetrator and, depending on the circumstances and the jurisdiction, it may affect contact time and arrangements to see their children, family law proceedings, access to or licensing of firearms and/or explosives, and employment (eg where it involves children or the use of a firearm and/or explosives).

Jurisdiction	Relevant legislation	Commonly-issued orders
Australian Capital Territory	*Family Violence Act 2016* (ACT)	family violence order
New South Wales	*Crimes (Domestic and Personal Violence) Act 2007* (NSW)	apprehended domestic violence order
Northern Territory	*Domestic and Family Violence Act 2007* (NT)	domestic violence order

Queensland	*Domestic and Family Violence Protection Act 2012* (Qld)	domestic violence order
South Australia	*Intervention Orders (Prevention of Abuse) Act 2009 (SA)*	intervention order
Tasmania	*Family Violence Act 2004* (Tas)	family violence order
Victoria	*Family Violence Protection Act 2008* (Vic)	family violence intervention order
Western Australia	*Restraining Orders Act 1997* (WA)	family violence restraining order

Purpose - Key Literature

Australia

Attorney General Department (Cth) (2015) Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report – June 2015 (Terms 1 & 2).

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Dowling, Christopher, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong, *Protection orders for domestic violence: A systematic review* (Australian Institute of Criminology Report No. 551 June 2018).

Report abstract:

Protection orders are a common legal response to domestic violence which aim to prevent further re-victimisation by the perpetrator.

The current study systematically reviews research into the use and impact of protection orders, using the EMMIE framework (Effectiveness, Mechanisms, Moderators, Implementation and Economy).

Meta-analysis is used to examine the overall effect of protection orders, while narrative synthesis is used to

examine the underlying mechanisms and moderators of their effectiveness, their implementation and economic viability.

Protection orders are associated with a small but significant reduction in domestic violence. They appear to be more effective under certain circumstances, including when the victim has fewer ties to the perpetrator and a greater capacity for independence, and less effective for offenders with a history of crime, violence and mental health issues.

Fitzgerald ,Robin and Heather Douglas, *The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative*, The British Journal of Criminology, Volume 60, Issue 1, January 2020, Pages 180–197, https://doi.org/10.1093/bjc/azz043.

This article examines the role the quality of narratives of victim experiences of domestic and family violence prepared in support of applications for protection orders plays in the success of protection order applications. It found that where victims prepare their own narrative accounts of their experiences of domestic and family violence in support of their applications for protection orders a lack of structure and quality is correlated with a lack of success in obtaining a protection order:

“Our study shows that the way the narrative is constructed influences the results of the application, with success much more strongly associated with applications prepared by police.”

Gelb, Karen, ‘Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates’ Court of Victoria’ (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates’ Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, ‘to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident’ (p 40). Gelb notes that, ‘The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring

additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators' comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

Reeves, E. 'I'm Not at All Protected and I Think Other Women Should Know That, That They're Not Protected Either': Victim–Survivors' Experiences of 'Misidentification' in Victoria's Family Violence System. (2021) 10 (4) International Journal for Crime, Justice and Social Democracy 39-51.

This article explores the impacts of misidentification on the lives of women victim–survivors of family violence in Victoria (Australia. Using data from interviews with 32 system stakeholders and survey responses from 11 women who have experienced misidentification in Victoria, this study explores misidentification within the family violence intervention order system. It demonstrates that being misidentified as a predominant aggressor on a family violence intervention order can have a significant impact on women's lives and their access to safety, highlighting the need for improved policing and court responses to the issue beyond existing reforms.

Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland* (2015).

Several sections in this report consider issues relevant to protection orders made in Queensland. The report noted that in considering whether to make or vary a domestic violence order, magistrates have power under s 78 of the *Domestic and Family Violence Protection Act 2012* (Qld) to 'revive, vary, discharge or suspend a family law order allowing contact between a respondent and child that may be restricted under the proposed Domestic Violence Order' (p 270). Of particular relevance, the report considers the use of ouster conditions at pp 297-298. Ouster conditions in domestic violence orders prohibit the respondent from remaining, entering or being within a stated distances of stated premises.

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the

implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention

order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness

– exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

International

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – 'A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. '(pp 373-374).

Goldfarb, Sally F, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties' relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, 'The Denial of Emergency Protection: Factors Associated with Court Decision Making' (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied

by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, 'Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women' (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women's use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order' (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a 'helpful strategy' (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Purpose - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Purpose - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW and Legal Aid NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

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- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Queensland Courts, *Domestic violence videos* (last reviewed 2018).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Purpose - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Jennifer

Management of application proceedings

Key points:

- A protection order application can indicate a victim's recognition that they face immediate danger and require immediate protection.
- Dealing with applications expeditiously can benefit all parties: The restrictions imposed by interim orders can cause frustration to respondents.
- Applications for adjournments, delays, cross-applications and other interim applications by respondents can indicate an intention to further harass, control or abuse the victim.
- Withdrawal of applications or consent to dismissal may indicate protective behaviour in response to victim fear of retaliation.

Where possible, judicial officers should endeavour to dispose of protection order application proceedings in a timely manner, as these proceedings are frequently stressful [Vic FVBB 2014]. A victim's application (or an application by police that a victim is willing to support) for a protection order may signify their recognition that they are in danger and be a definitive step towards ending their relationship with the perpetrator. The application period may therefore be a time of heightened risk for the victim, and the victim may require immediate protection [VRCFV 2016]. Interim orders can also be a source of frustration to perpetrators; these orders are usually made on limited evidence and may impose significant restrictions on their liberty until the application is finally determined [Vic FVBB 2014]. Adjournments may be necessary to ensure that parties are afforded fair and equal access to justice. However, there may be some cases where a party delays proceedings, fails to appear, evades service, initiates applications or makes cross-applications with the intention of further harassing, controlling and abusing the victim and may be a form of systems abuse. Whether there are legitimate or questionable reasons for an adjournment, judicial officers may need to make additional interim orders or arrangements for the duration of the adjournment to ensure the safety and wellbeing of the victim and other protected people.

In some cases, a victim may withdraw their application for a protection order or consent to the dismissal of the proceedings. Sometimes the reason for this may be the victim's fear of retaliation by the perpetrator [Jordan et al 2008]. A study found that the higher the threat and the closer the victim's attachment to the perpetrator, the

less likely the victim was to complete the application process [Zoellner et al 2000]. This may be alleviated if the police make the application on the victim's behalf. Another reason for the victim not completing the application process may be a perception by the victim of positive changes in the perpetrator's behaviour [Roberts et al 2008]. Courts may consider it appropriate in these circumstances to adjourn rather than dismiss the application proceedings to give the perpetrator the opportunity to sustain positive behavioural changes. Where an application has been withdrawn or dismissed, the parties should be made aware that this does not preclude a subsequent fresh application in the event that a party requires protection from further domestic and family violence. In some jurisdictions there may be a mechanism available for parties to revive and amend an earlier application rather than having to make a fresh application.

Where a victim makes an application for a protection order (rather than the police on the victim's behalf), and particularly in cases where the victim is self-represented, judicial officers should be aware of how the victim may be adversely impacted by the proceedings if, for example, they feel a responsibility to prosecute their own case, or if they feel at risk of further harm or abuse, or if they feel the abuse they've experienced is being denied or minimised or is somehow their fault. Judicial officers should, where possible, be proactive in taking steps to improve the victim's experience of court processes and minimise the risk of secondary abuse.

Management of application proceedings - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Fitzgerald ,Robin and Heather Douglas, *The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative*, The British Journal of Criminology, Volume 60, Issue 1, January 2020, Pages 180–197, https://doi.org/10.1093/bjc/azz043.

This article examines the role the quality of narratives of victim experiences of domestic and family violence prepared in support of applications for protection orders plays in the success of protection order applications. It found that where victims prepare their own narrative accounts of their experiences of domestic and family violence in support of their applications for protection orders a lack of structure and quality is correlated with a lack of success in obtaining a protection order:

"Our study shows that the way the narrative is constructed influences the results of the application, with success much more strongly associated with applications prepared by police."

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Katzen, Hayley, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 (2) *Australian Journal of Family Law* 119-141.

This article considers police responses to breaches of protection orders that occur in the context of contact hand-overs. The study, upon which the article is based, found that officers rarely prosecute offenders for a violation of an order when it occurs during contact hand-overs. The article draws on data collected in the late 1990s: police reports of breaches of protections orders (n186); interviews with women (n32), focus groups with police (n33 police).

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing

and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators' comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland* (2015).

Several sections in this report consider issues relevant to protection orders made in Queensland. The report noted that in considering whether to make or vary a domestic violence order, magistrates have power under s 78 of the *Domestic and Family Violence Protection Act 2012* (Qld) to 'revive, vary, discharge or suspend a family law order allowing contact between a respondent and child that may be restricted under the proposed Domestic Violence Order' (p 270). Of particular relevance, the report considers the use of ouster conditions at pp 297-298. Ouster conditions in domestic violence orders prohibit the respondent from remaining, entering or being within a stated distances of stated premises.

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed

non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a

cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

International

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – 'A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. '(pp 373-374).

Goldfarb, Sally F, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties' relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, 'The Denial of Emergency Protection: Factors Associated with Court Decision Making' (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, 'Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women' (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women's use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order' (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a 'helpful strategy' (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are

issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Management of application proceedings - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Management of application proceedings - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW and Legal Aid NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

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'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

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Management of application proceedings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Susan

Cross-examination

Where a self-represented perpetrator wishes to cross-examine the victim, the victim's capacity to give evidence or the quality of the victim's evidence in these circumstances may be compromised by the victim's fear of the perpetrator and, as a consequence, the probative value of the evidence may be diminished or negated.

In some cases a perpetrator may even choose to be self-represented hoping to secure the opportunity to directly cross-examine the victim.

These scenarios should be understood in the context of the complex dynamics of domestic and family violence characterised by a pattern of abusive behaviour involving a perpetrator's exercise of control over the victim, often for an extended period. Where a self-represented perpetrator uses direct cross-examination to further abuse the victim through court processes, the victim may experience a form of secondary abuse. Recent changes to state and territory legislation address this issue, by, in certain circumstances, restricting a perpetrator's right to directly cross-examine the victim in domestic and family violence related court proceedings. The nature and extent of these restrictions vary across the state and territory jurisdictions, as summarised below.

State/Territory	Legislation	Section	Restriction on cross-examination
Australian Capital Territory	Family Violence Act 2016	63	Under s 63(2), a self-represented respondent cannot examine an affected person personally in a proceeding for a family violence order. An affected person includes any child who hears, witnesses or is otherwise exposed to family violence committed against another person. Under s 63(4)(a), the court may appoint a person to examine an affected person on the respondent's behalf.
New South Wales	Crimes (Domestic and Personal Violence) Act 2007	41A	Under s 41A (1), a child witness in apprehended domestic violence order proceedings cannot be questioned directly by the defendant. The child can only be questioned by a legal practitioner or a suitable person appointed by the court.
	Criminal	289VA	In circumstances where a person accused of a domestic violence

	Procedure Act 1986	and 289T	offence is not represented by a legal practitioner a complainant cannot be directly examined by the accused. The court may appoint another person to carry out the examination. This applies to apprehended violence order proceedings but only when the defendant in the proceedings is charged with a domestic violence offence.
Northern Territory	Domestic and Family Violence Act 2007	114	Under s 114(2) a self-represented defendant is not entitled to question a witness who is in a domestic relationship with the defendant unless the court grants leave. The court will not grant leave if the witness is a child or has a cognitive impairment (s 114(3)). Per s 114(4), leave will not be granted unless the court is satisfied that the witness's ability to testify will not be adversely affected. In making this assessment, the court will have regard to any trauma or distress that could be caused (s 114(5)). Under s 114A(3)(b), the Court may determine to appoint a legal practitioner to cross-examine the witness for the defendant.
Queensland	Domestic and Family Violence Protection Act 2012	151	Under s 151(2), the court may order that an unrepresented respondent may not cross-examine a protected witness in person if the court is satisfied that the cross-examination is likely to cause the protected witness to- (a) Suffer emotional harm or distress; (b) Be so intimidated as to be disadvantaged as a witness. Under s 151(3), if the protected witness is a child, the court must make an order that the unrepresented respondent may not cross-examine the child in person.
South Australia	Intervention Orders (Prevention of Abuse) Act 2009	29	Under s 29(4)(b), the defendant cannot directly cross-examine a person against whom it is alleged they have committed, or might commit, an act of abuse or a child exposed to the effects of an alleged act of abuse by the defendant. Cross-examination is to be by the defendant's counsel, or if unrepresented, the defendant must submit their proposed questions of the witness to the Court, and the Court will ask the witness such questions as the Court determines allowable. See also section 13B *Evidence Act 1929* (SA).
Tasmania	Family Violence Act 2004	31	S 31(2B) provides that s 8A of the Evidence (Children and Special Witnesses) Act 2001 applies to the cross-examination of an alleged victim in a proceeding for a family violence offence. Under s 8A, an unrepresented defendant cannot cross-examine an alleged victim in these circumstances.
Victoria	Family Violence Protection Act 2008	70	Under s 70(3) a protected witness cannot be personally cross-examined by the respondent unless (a) The protected witness is an adult; and

			(b) The protected witness consents to being cross-examined by the respondent; and (c) If the protective witness has a cognitive impairment, the court is satisfied the protected witness understands the nature and consequences of giving consent; and (d) The court decides that it would not have a harmful impact on the protected witness.
Western Australia	Restraining Orders Act 1997	44C and 53D	Under s 44C, an unrepresented respondent cannot directly cross-examine a person with whom they are in a family relationship or imagined personal relationship. The unrepresented respondent may put the question to a judicial officer or a person approved by the Court who is to repeat the question to the person being cross-examined. Under s 53D, an unrepresented person cannot directly cross-examine a child who has given oral evidence. The unrepresented person may put the question to a judicial officer or a person approved by the Court who is to repeat the question to the child.

Cross-examination - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring

additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland* (2015).

Several sections in this report consider issues relevant to protection orders made in Queensland. The report noted that in considering whether to make or vary a domestic violence order, magistrates have power under s 78 of the *Domestic and Family Violence Protection Act 2012* (Qld) to 'revive, vary, discharge or suspend a family law order allowing contact between a respondent and child that may be restricted under the proposed Domestic Violence Order' (p 270). Of particular relevance, the report considers the use of ouster conditions at pp 297-298. Ouster conditions in domestic violence orders prohibit the respondent from remaining, entering

or being within a stated distances of stated premises.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125).

Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

International

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – ‘A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. ‘(pp 373-374).

Goldfarb, Sally F, ‘Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?’ (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties’ relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, ‘The Denial of Emergency Protection: Factors Associated with Court Decision Making’ (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, ‘Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women’ (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women’s use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order’ (p 511). Also, it was noted that a substantial

sample of women surveyed considered filing for a civil protection order a 'helpful strategy' (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are

discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Cross-examination - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Cross-examination - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Queensland Courts, *Domestic violence videos* (2016).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Information sharing

Information-sharing provisions in domestic and family violence legislation vary in scope and detail between jurisdictions; and only some provide for information sharing in the conduct of protection order proceedings (see table below). The practice of information sharing involves interagency coordination and cooperation through protocols [Taylor et al 2015] developed and regularly reviewed in collaboration between courts, the police and service agencies. These protocols have been shown to improve responses to the enforcement of protection orders, including improved approaches to the assessment and management of risk [Taylor et al 2015]. There are also differences in how jurisdictions have legislated to prevent the inappropriate sharing of information and to protect people's privacy.

In addition, all Australian jurisdictions have enacted information-sharing provisions facilitating the National Domestic Violence Orders Scheme (NDVOS), under which a domestic violence order issued on or after 25 November 2017 is automatically nationally enforceable. Every jurisdiction has enacted provisions that enable its courts or law enforcement agencies to obtain information about a DVO from a court or law enforcement agency in another jurisdiction, and use that information for the purpose of making, varying or revoking a DVO. The provisions further require courts or law enforcement agencies in one jurisdiction to provide information about a DVO to a court or law enforcement agency of another jurisdiction that the court or law enforcement agency reasonably requests for the purposes of exercising its functions.

The table below also identifies the provisions in each jurisdiction's domestic violence legislation that provide for information-sharing in the conduct of protection order proceedings, and the information-sharing provisions in each jurisdiction that give effect to the NDVOS.

Recent research indicates that the broader potential for sharing information between state/territory agencies responsible for responding to domestic and family violence, such as police, courts, child welfare and health authorities and support and referral services, has become an important factor in the overall effectiveness of responses to domestic and family violence. Information sharing in this context may mean that victims of violence are more likely to engage with the agency to which they have been referred if they know they will not be required to repeatedly re-tell their experiences to other agencies [Qld Special DFV Taskforce Report 2015], and therefore avoid further trauma and distress. In addition, where the details of past violence or the risks of future

violence are shared between agencies, timely action may be taken to address the risks and to ensure the safety and protection of the victim and other people at risk of harm [Taylor et al 2015].

Jurisdiction	Information sharing provisions under domestic violence legislation	Information sharing provisions relevant to the National Domestic Violence Orders Scheme (NDVOS)
Australian Capital Territory	s18 *Domestic Violence Agencies Act 1986* (ACT) – if ACT/Federal police reasonably suspect domestic violence is being/has been committed/is likely, they may disclose to an approved crisis support agency (s17) any information that will help the agency to assist the victim/children.	Part 9, Div. 9.4 *Family Violence Act 2016* (ACT)
New South Wales	**Part 13A Information Sharing** (ss 98C-98L) *Crimes (Domestic and Personal Violence) Act 2007* (NSW) – Provides for disclosure by limited agencies (government and health), court, police, designated referral/coordination points to referral/coordination points and support agencies in relation to personal and health information about the victim and (alleged) perpetrator for the purposes of arranging/providing support to the victim, and where there is a domestic violence threat. Disclosure by government/health agencies and support agencies requires the consent of (and by a court - no express objection by) the threatened person/victim (s98D, E, H). S98J Protocols may be required for this collection, use and disclosure of information. s98M A government /health agency may collect/use /disclose information if it reasonably believes the threat is serious, disclosure is necessary to prevent/lessen the threat and consent of the victim has been refused or is unreasonable/impractical to obtain. The NSW Justice Department has developed a protocol for sharing and dealing with information under Part 13A available here.	Part 13B, Div. 4, *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
Northern Territory	s124A *Domestic and Family Violence Act 2007* (NT) Failure of an adult to report to the police harm (or likely harm) or serious/imminent threat because of domestic violence is an offence. S124A(4) Police must investigate such a report. s125 *Domestic and Family Violence Act 2007* (NT) Such a report made in good faith is not a breach of a professional code of conduct and cannot attract civil or criminal liability – the report/reporter may only be used in proceedings with leave of the court.	Chapter 3A, Part 3A.4 *Domestic and Family Violence Act 2007* (NT)

	Chapter 5A provides for disclosure by police, government and health agencies if the entity has reasonable grounds to believe that a person is experiencing domestic violence and the information would help reduce a threat to their health or safety (s 124E). An information sharing entity should obtain the consent of the person unless it is not possible to do so. In the case of Aboriginal persons, disclosure should promote cultural safety and be culturally sensitive (s 124C).	
Queensland	**Part 3 Domestic violence orders** s55 *Domestic and Family Violence Protection Act 2012* (Qld) If the respondent is contesting the naming of a child on the protection order or conditions relating to the child, the court may request relevant information from the child protection authority. The parties must be given a copy and the opportunity to make submissions on the information received unless it would expose the victim or a child at increased risk of domestic and family violence. **Part 5A Information Sharing** ss169A – s169O *Domestic and Family Violence Protection Act 2012* (Qld) Government entities and specialist DFV service providers may give information to another government entity or specialist DFV service provider for assessing domestic violence threat or for responding to serious domestic violence threat. A support service provider (other than a specialist DFV service provider) may give information to government entity, specialist DFV service provider or other support service provider for responding to serious domestic violence threat. Whenever safe, possible and practical, a person's consent should be obtained before information sharing. However, safety and protection takes precedence over a person's consent. Government entity or specialist DFV service provider may use information given to it to assess whether there is a serious threat to a person's life, health or safety or to lessen or prevent a serious threat. A support service provider may use information given to it to lessen or prevent a serious threat to a person's life, health or safety. Guidelines for sharing and dealing with information under Part 5A have been developed pursuant to s169M and are available here.	Part 6, Div. 5 *Domestic and Family Violence Protection Act 2012* (Qld)
Tasmania	s37 *Family Violence Act 2004* (Tas) – It is not a breach of the *Personal Information Act 2004* (Tas) (which regulates the collection and use of information) for an agency under that	Part 4, *Domestic Violence Orders (National Recognition) Act 2016* (Tas)

	Act, acting in good faith, to collect, use, disclose personal information for the purpose of furthering the objects of the *Family Violence Act*. s39 *Family Violence Act 2004* (Tas) Providing information (voluntarily or as required) to police based on a belief/reasonable suspicion of family violence (or likely family violence) with weapon, physical, sexual violence or where child affected, is not a breach of professional ethics/requirements and cannot, if done in good faith, incur civil or criminal liability.	
Victoria	s140 *Family Violence Protection Act 2008* (Vic) – Information from an interview or report relating to (respondent) court ordered counselling may be used in proceedings for a contravention relating to counselling orders or the underlying offence. (Power relating to court ordered counselling is limited to the Family Violence Court Division or other court specified by the Minister s126). **Part 5A Information Sharing** ss144A-144SG *Family Violence Protection Act 2008* (Vic) 'Information sharing entities' (prescribed by regulation) may share any personal, health or sensitive information relevant to assessing and/or managing family violence between each other, provided the information is not excluded; sharing it does not contravene another law; and applicable consent requirements have been met. The information may relate to a victim survivor, alleged or established perpetrator or third party. Information may be shared for a "family violence assessment purpose" or "family violence protection purpose" and the relevance and reasonable belief required to share the information varies according to the purpose. Consent requirements vary according to the party to whom the information relates. Information sharing entities must comply with requests for information meeting the requirements of Part 5A. Guidelines for sharing and dealing with information under Part 5A have been developed pursuant to s 144P and are available, alongside various other resources on the Part's operation, here.	Part 5, *National Domestic Violence Order Scheme Act 2016* (Vic)
Western Australia	s70A *Restraining Orders Act 1997* (WA) – Limited government agencies, including police and children's services, may disclose to each other information about person protected by an order or affected child if the disclosure is necessary to ensure the safety of the person protected or the wellbeing of a child.	Part 4, *Domestic Violence Orders (National Recognition) Act 2016* (WA)

South Australia	s38 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) – A public sector agency or contractor that is bound by the State's Information Privacy Principles, must, on request, make available to a police officer information to assist in locating a person for service of a protection order.	Part 3A, Div. 4 *Intervention Orders (Prevention of Abuse) Act 2009* (SA)

Acknowledgement of (adapted) source: Taylor, A., et al, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement – State of knowledge paper* (ANROWS, 2015) – Table 3, p15 [Taylor et al 2015]

Information sharing - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, Report No 114 (2010).

Chapter 30 'Information Sharing' considers the way to improve information flow between critical elements of the family violence system (courts, government agencies and other people and institutions involved in the family violence, family law and child protection systems). These include improving the way information is collected from parties and shared between courts (including the establishment of a national register of relevant court orders), changes to confidentiality and privacy legislation, and the development of information sharing protocols and memorandums of understanding (p.1397). The aim is to 'avoid, as far as possible, victims falling into gaps between the various systems due to lack of relevant information' (p.1398).

The report covers a number of issues relating to information sharing. In particular, it examines strategies to improve information sharing. The report notes that barriers to information sharing are not always legislative and are often administrative and cultural. One strategy to remedy this is to put in place information sharing protocols and MOUs between elements in the family law, family violence and child protection systems to clarify and formalise what information can be shared, with whom, and in what circumstances (p.1443). A number of these protocols exist in the child protection area, but they are less common in the family violence context.

Mulroney, Jane. 2003. 'Trends in Interagency Work'. *Australian Domestic and Family Violence Clearinghouse.*

The report provides an examination of integrated service provision in the context of family violence. The report notes that integrated responses may stall in a number of circumstances, including where there is a lack of appropriate judicial responses (p.13).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Taylor, A., et al *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

In relation to information sharing legislation that pertains to enforcement of protection orders, this report notes that 'information sharing' is 'the sharing or disclosing of personal details between agencies that respond to domestic and family violence, such as police, child welfare authorities and support services as a referral tool, to minimise the risk of victims falling through the cracks and to support victims to more easily and quickly engage with the agency to which they have been referred. Additionally, information sharing can be an important risk management tool, where the circumstances of abuse or risk indicators are shared to ensure that swift action can be taken to address risks, including police investigation, removing a victim to safety and development of a safety plan' (p.13).

The paper looks at the practice of information sharing (pp40-43). It notes that for the effective enforcement of protection orders, 'coordinated integrated responses that are adequately resourced are important'. This facilitates access to relevant services through inter-agency referrals and therefore fosters victim safety, and allows awareness of the risk to the victim and the behaviour and dangerousness of the perpetrator (p.40). Integrated responses are reliant on mechanisms for inter-agency collaborations, particularly through

information sharing protocols.

Western Australia, *Western Australia's Family and Domestic Violence Prevention Strategy to 2022: Achievement Report to 2013* (2013).

'In 2009–2010 the 'Memorandum of Understanding: Information sharing between agencies with responsibilities for preventing and responding to family and domestic violence in Western Australia' (MoU) was endorsed and signed by State and Commonwealth Government agencies. In 2010–2011 community sector agencies provided their endorsement and became signatories to the MoU. The MoU provides recognition of 'duty of care' including the commitment to share information without client consent if: the case is assessed to be high risk; a crime has been committed or is going to be committed; it is believed a child is likely to suffer significant harm; or a client is in need of urgent medical or psychiatric care. In 2013, the MoU was updated to reflect changes in multi agency case management and signature agencies were invited to provide their ongoing endorsement' (p.9). The Report provides an overview of these initiatives.

Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).

Chapter 7 discusses information sharing in relation to family and domestic violence generally. The Report notes that legislation alone will not create a culture of information sharing throughout the family violence system. Further, Chapter 16 of the report discusses court-based responses to family violence in Victoria. Of particular relevance, the report discusses the limitations on information sharing between courts and other parts of the family violence system.

Information sharing - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 18 discusses the operation of the information sharing provisions of the *Domestic and Family Violence Act 2012* (Qld).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.10 discusses the family violence information sharing regime.

Conditions

Key points:

- It can be important to tailor orders to the particular abusive behaviour, and otherwise address the specific needs of the parties.
- Dealing with related criminal proceedings contemporaneously in the same court can ensure bail conditions are consistent with protection order conditions.
- It is important parties are able to readily understand protection order conditions and sufficient time is allocated to proceedings to ensure the conditions address the parties' specific needs.

The types of conditions a judicial officer can impose in a protection order (whether interim or final) vary to some extent across Australian state and territory jurisdictions. Typically, the protection order will prohibit the perpetrator from committing domestic and family violence against the victim and other protected people (such as children). In addition, there may be conditions necessary to specifically address the needs and circumstances of the parties to the particular case, for example, conditions that prohibit the perpetrator from: committing certain forms of domestic and family violence; entering the victim's residence, workplace or other specified premises; being within a specified distance of the victim or a specified location; telephoning or otherwise contacting the victim; interfering with the victim's property; locating or attempting to locate the victim; or possessing firearms or prohibited weapons [ALRC/NSWLRC 2010]. A protection order may also be an appropriate means of ensuring that children are not exposed to ongoing domestic and family violence [WA Equal Justice Bench Book 2021].

In some jurisdictions, where it is necessary to ensure the safety of the victim and other protected people, a court may also be empowered to prohibit a perpetrator from entering and remaining in a residence shared with the victim (whether as co-owner or co-tenant) or to terminate an existing tenancy agreement and replace it with one for the benefit of the victim; these are commonly referred to as exclusion or ouster orders [ALRC/NSWLRC 2010]. It may be important to consider whether orders need to provide for a party to have or relinquish control of camera or other electronic systems in relation to a property which may be used to stalk, monitor or harass a party or to desist from use of, or desist from engaging in, particular activities involving use of digital /online systems which may also be used to stalk, monitor or harass a party. Other appropriate

conditions may need to be included to keep family pets, companion and other animals safe to ensure they are not used to enact further abuse against the victim. Conditions in protection orders may also overlap with general prohibitions or requirements imposed by the criminal law; bail conditions; pre-sentencing orders; or orders made on sentencing [ALRC/NSWLRC 2010]. It is desirable that criminal charges, including breach charges, relating to matters that are also the subject of a protection order application be dealt with contemporaneously in the same court to ensure that any bail conditions are consistent with protection order conditions. Where this is not possible, it is important that judicial officers are made aware of bail or protection orders issued by other courts (by tendering or by annexing to the application) to ensure consistency of orders.

Australian research has shown that where insufficient time is allowed in application proceedings for judicial officers to give particularised attention to the conditions of protection orders, conditions may not be tailored to the particular circumstances. This outcome may also occur where the victim and other protected people are not present at the hearing to explain their protection needs, or have limited language skills to do so. In tailoring conditions, a judicial officer may need to consider the potential for breaches of a protection order in the context of, for example, child contact hand-over arrangements [Katzen 2000], other court orders or remote communities [ALRC/NSWLRC 2010]. It also important that protection order conditions are consistent and readily understood by the parties [NSWLC DV Trends & Issues 2012].

Consent orders are a common outcome of protection order application proceedings. Research demonstrates no observable relationship between the nature of the conditions sought and the willingness of the perpetrator to consent to the order. It is likely that these matters will be the subject of negotiations between the parties outside the courtroom [Gelb 2016].

Conditions - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 367-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-481). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Dowling, Christopher, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong, *Protection orders for domestic violence: A systematic review* (Australian Institute of Criminology Report No. 551 June 2018).

Report abstract:

Protection orders are a common legal response to domestic violence which aim to prevent further re-victimisation by the perpetrator.

The current study systematically reviews research into the use and impact of protection orders, using the EMMIE framework (Effectiveness, Mechanisms, Moderators, Implementation and Economy).

Meta-analysis is used to examine the overall effect of protection orders, while narrative synthesis is used to

examine the underlying mechanisms and moderators of their effectiveness, their implementation and economic viability.

Protection orders are associated with a small but significant reduction in domestic violence. They appear to be more effective under certain circumstances, including when the victim has fewer ties to the perpetrator and a greater capacity for independence, and less effective for offenders with a history of crime, violence and mental health issues.

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the

protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Katzen, Hayley, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 (2) *Australian Journal of Family Law* 119-141.

This article considers police responses to breaches of protection orders that occur in the context of contact hand-overs. The study, upon which the article is based, found that officers rarely prosecute offenders for a violation of an order when it occurs during contact hand-overs. The article draws on data collected in the late 1990s: police reports of breaches of protections orders (n186); interviews with women (n32), focus groups with police (n33 police).

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated

legislation since this resource was published.

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators' comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of

ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided by using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Queensland Police Service, *Australian Journal of Family Law* The Domestic and Family Violence GPS-Enabled Electronic monitoring Technology, Evaluation Report, April 2019, Government of Queensland.

This report presents the findings of a trial of GPS tracking for family violence offenders and victims in Queensland. The trial assessed the effectiveness, reliability and responsiveness of GPS-enabled technology to track an individual accurately and activate an alert in the event of a pre-programmed zone being breached. The GPS-enabled technology was tested in different geographical areas and with police personnel rather than actual offenders and victims. Thirty-five tests were carried out, with the technology failing to respond in 26% of cases. The technical issues are discussed in more detail. Overall, the findings demonstrate that

electronic monitoring does not provide an effective risk-mitigating solution for high-risk perpetrators and is not a reliable substitute for perpetrator case management. However, it may be of use in some lower-risk cases, in conjunction with other measures. This trial was a suggestion of the 2015 Queensland Special Taskforce on Domestic and Family Violence, which noted how little was known about electronic monitoring programs.

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

International

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in

relation to specific types of domestic and family violence behaviours. The article concludes – ‘A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. ‘(pp 373-374).

Goldfarb, Sally F, ‘Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?’ (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties’ relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, ‘The Denial of Emergency Protection: Factors Associated with Court Decision Making’ (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, ‘Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women’ (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women’s use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order’ (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a ‘helpful strategy’ (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Speed, A., & Richardson, K. (2022). 'Should I Stay or Should I Go Now? If I Go There will be Trouble and if I Stay it will be Double': An Examination into the Present and Future of Protective Orders Regulating the Family Home in England and Wales. The Journal of Criminal Law, 86(3), 179–205. 10.1177/00220183211073639

Occupation orders are the dedicated legal remedy through which victims of domestic abuse can be supported to remain in the family home following a relationship breakdown. Case law indicates, however, that victims experience barriers to securing orders due to the high threshold criteria and because concerns about protecting the rights of perpetrators has led to judicial reluctance to grant extensive protection to victims. The options for providing protection to victims of abuse in respect of the family home are shortly set to be reformed by the Domestic Abuse Act 2021, which creates a new Domestic Abuse Protection Order (DAPO). It is anticipated that DAPOs will be easier to secure because they will have a lower threshold criteria, they will be available in family, civil and criminal proceedings, and both victims and third parties will be able to make an application thereby alleviating the burden on victims who feel unable to take any action. Whilst there is no intention at this point to repeal occupation orders, the Home Office has acknowledged that 'DAPOs will become the 'go to' protective order in cases of domestic abuse' suggesting that occupation orders will be

replaced by DAPOs in most cases.

By drawing on data obtained from an analysis of court statistics, a questionnaire of legal practitioners and domestic abuse specialists, and in-depth interviews with victims of domestic abuse, this paper offers original empirical insights into where the current law fails victims of domestic abuse. The analysis reveals three key barriers to securing occupation orders. Firstly, despite the Legal Aid, Sentencing and Punishment of Offenders Act 2012 making efforts to preserve legal aid for victims of domestic abuse, the means test is difficult for victims to satisfy, resulting in increases both to the number of victims taking no action to pursue protection and who act as litigants in person in occupation order proceedings. Secondly, the prospects of a victim securing protection can be adversely affected by their unrepresented status. Thirdly, despite case law indicating a less restrictive approach to granting occupation orders, many victims continue to struggle to satisfy the strict threshold criteria. Some judges are seemingly willing to bypass this by granting alternative remedies which may offer victims a weaker form of protection in respect of the family home. Where orders are granted, the data suggest this is on restricted terms and for limited durations which reduce their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation. These empirical findings are then situated within a discussion of the Domestic Abuse Act 2021. The authors analyse whether forthcoming DAPOs are likely to offer a more accessible and effective form of protection than occupation orders. The analysis suggests that by increasing the scope of applicants, the breadth and flexibility of available protection and the sanctions for breach, DAPOs have the potential to remedy many of the existing barriers to securing protection over the family home. As is always the case with new legislation however, the key will be in its implementation, to ensure that existing issues are not simply transferred across to the new regime. The findings are novel because academic commentaries on protective injunctions typically focus on ‘personal protection’ offered by non-molestation orders, domestic violence protection orders, and restraining orders, meaning that both occupation orders and protection for victims in respect of the family home are under-researched areas of domestic abuse.

Topliffe, Elizabeth, ‘Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not’ (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective.

Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Conditions - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Conditions - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Queensland Courts, *Domestic violence videos* (2016).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Property

Key points:

- It may be important to include conditions in relation to access to property.
- Conditions may be inconsistent with existing family court orders or be relied upon in future proceedings in relation to property matters.
- Conditions may need to provide for a party to have or relinquish control of camera and other electronic systems in relation to a property.

A protection order may provide that a party is excluded from a named residence or that the party is entitled to limited access to the residence to recover specified items of personal property, or may otherwise impose conditions about the parties' property. In some cases, these conditions may be inconsistent with the terms of an existing property order made under the *Family Law Act*, or may be sought to be relied upon in support of a claim for ownership or possession of particular property in future property proceedings under the *Family Law Act* [ALRC FV – Improving legal frameworks 2010]. Some jurisdictions require the consideration of the accommodation needs of victims and children. It may be important to consider whether orders need to provide for a party to have or relinquish control of camera or other electronic systems in relation to a property which may be used to stalk, monitor or harass a party.

When determining the appropriate conditions of a protection order, a judicial officer should where possible inquire as to the existence and substance of any property orders made or pending under the *Family Law Act*. In making the protection order, the judicial officer should consider whether it is appropriate to expressly state in the order that the conditions do not alter or affect the parties' ownership rights to any property and are subject to the terms of any property order made under the *Family Law Act* [ALRC/NSWLRC FV – National Legal Response 2010].

Property - Key Literature

Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation Paper No 1 (2010).

The ALRC has examined property conditions in protection orders. The paper notes that family violence legislation in each of the states and territories allows the court to issue protection orders to prohibit a person entering or approaching the protected person's residence. 'With the exception of the ACT, this legislation states that the orders may cover a property in which the person against whom the order was made has a legal or equitable interest (exclusion orders). Most family violence laws provide for a court to make orders permitting an excluded person or victim of violence to gain access to the premises for the purpose of taking personal possessions, usually by an arrangement or in the company of police'. These are referred to as 'personal property directions' by the paper. The paper notes that personal property directions can interact with property proceedings where they:

- influence future property proceedings under pt VIII of the Family Law Act—for example, where a party gains possession of property pursuant to a personal property direction and no longer needs or wants to contest ownership in the family courts;
- are directly inconsistent with existing property orders made under the Family Law Act; and
- are used as an indication of possessory or ownership rights by a federal family court and thereby impact on the outcome of future property proceedings under the Family Law Act (p.430).

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

The final report notes that '[m]ost state and territory family violence legislation provides for the recovery of personal property. This is usually achieved by giving a court the discretion to include specific conditions in the protection order to deal with property recovery' (p 738). These conditions or orders made to enable a person to recover property in protection orders are referred to as 'personal property directions' here.

The report discusses strategies to prevent inconsistencies between personal property orders under state and territory family violence legislation and ownership or possessory rights declared under *Family Law Act*

property proceedings. In the Consultation Paper above, the Commission set out two proposals to assist state and territory courts making protection orders to obtain information about, and consider, property orders made under the Family Law Act—thus avoiding inconsistencies between orders.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. The legislative context of protection order enforcement, including impact on property rights, is considered at p7. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Property - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

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- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
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- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Duration

Key points:

- Interim/temporary orders may be made pending a final hearing of the matter.
- Final protection orders may be made for a fixed period or until further order.

The court may make a final protection order for a fixed period of time or until further order; or the court may make an interim or temporary order to ensure the protection of the victim and other protected people pending a final hearing of the matter [FLC 2015]. This is on the basis that the need for protection is urgent and it would be inconsistent with the principle of safety to defer the granting of protection until the perpetrator has been served with an application. There is a variety of circumstances that may delay the finalisation of an application, for example interim orders may be made or extended to allow proper preparation for a final hearing, monitoring of safety arrangements and other concurrent family law related proceedings.

Most jurisdictions do not prescribe a maximum duration for a final protection order, instead allowing the court to specify an appropriate period of time, or to provide for no expiration date [FLC 2015]. US research indicates that flexibility is necessary to tailor the order to the totality of the circumstances of the particular case with regard to any aggravating factors such as increased risk of harm or recidivism, rather than adopting a one-size-fits-all approach [Conner 2015].

Duration - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Dowling, Christopher, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong, *Protection orders for domestic violence: A systematic review* (Australian Institute of Criminology Report No. 551 June 2018).

Report abstract:

Protection orders are a common legal response to domestic violence which aim to prevent further re-victimisation by the perpetrator.

The current study systematically reviews research into the use and impact of protection orders, using the EMMIE framework (Effectiveness, Mechanisms, Moderators, Implementation and Economy).

Meta-analysis is used to examine the overall effect of protection orders, while narrative synthesis is used to

examine the underlying mechanisms and moderators of their effectiveness, their implementation and economic viability.

Protection orders are associated with a small but significant reduction in domestic violence. They appear to be more effective under certain circumstances, including when the victim has fewer ties to the perpetrator and a greater capacity for independence, and less effective for offenders with a history of crime, violence and mental health issues.

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the

protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may

have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-

applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen, 'Recent Innovations in Australian Protection Order Law – A Comparative Discussion: Topic Paper 19' (Australian Domestic and Family Violence Clearinghouse, Sydney, 2010).

This paper provides an overview of the state of domestic violence legislation in Australia at 2010, focusing particularly on the law relating to protection orders. See from p 18, where 'key features' in protection order law from each state/territory which promote 'good practice' are summarised. Inconsistency between family law orders and protection orders are also considered (p 20).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

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Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in

relation to specific types of domestic and family violence behaviours. The article concludes – ‘A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. ‘(pp 373-374).

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Part II (p 503) of this article discusses battered women’s use of civil protection orders, drawing on a prior American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order’ (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a ‘helpful strategy’ (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Duration - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Duration - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Queensland Courts, *Domestic violence videos* (2016).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Related family law proceedings

Key points:

- Protection order conditions may vary existing parenting or other orders made in the family courts.
- Protection orders which alter the status quo of parenting arrangements for children may have a significant impact on the final outcome of family court proceedings.
- Family courts must take into account any inferences which may be drawn from the making of a protection order in parenting proceedings.
- Protection order applications withdrawn on the basis of undertakings by parties, orders made by consent without admission and mutual orders made following cross-applications may not allow family courts to draw inferences from protection order proceedings.

Where the parties to protection order application proceedings are also engaged, or likely to be engaged, in family law proceedings, tensions or inconsistencies may arise between the purpose and effect of a protection order made by a court of summary jurisdiction and a parenting order made by the Family Court of Australia or Federal Circuit Court of Australia (called here 'the Family Court'). On the one hand, the protection order may direct the perpetrator [Croucher 2014] to keep away from the victim and any protected children. On the other hand, the parenting order may stipulate that the protected children spend time with or live with the perpetrator. In some circumstances it may be appropriate for magistrates to vary existing parenting or other orders under the Family Law Act.

There may also be circumstances where, for example, in the absence of parenting orders, a victim obtains a protection order naming her children as protected people, and the perpetrator (the father of the children) subsequently applies to the Family Court for parenting orders so that he may have contact with his children otherwise disallowed under the protection order. Judicial officers should be aware when making protection orders naming children as protected people in these circumstances that there may be a considerable delay before parenting matters, including contact, can be dealt with by the Family Court, and that the new status quo established by the protection order may impact on the outcome of any subsequent parenting proceedings. Where the protection order is made with the consent of the parties (which is often the case [Gelb 2016]) judicial officers should ensure the parties are made aware of this potential impact, in particular where

one or both parties are self-represented. In some Australian jurisdictions, judicial officers are required to include children as protected people on protection orders.

Parties are required to ensure that a copy of any protection order is filed with the Family Court when making an application for parenting orders; and if a protection order is in force the court must consider any relevant inferences that can be drawn from the protection order by taking into account the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made in the protection order proceedings and any other relevant matter. Where, however, a party withdraws their protection order application on the basis of undertakings given by the other party to the court; or a protection order is made by consent without admission; or the responding party makes a cross application resulting in mutual orders [ALRC/NSWLRC 2010], there may be no admission of fact capable of being relied upon by the Family Court in making a determination regarding the perpetration of domestic and family violence.

Related family law proceedings - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring

additional court resources when matters are relisted) and for the parties (especially the affected family member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators' comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders

(ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the 'applicant experience'. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant's safety – 'To the extent that applying for an FVIO might signify a victim's recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services' (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – 'Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek "further and better particulars" about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request' (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics 'are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-

applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

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Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – 'A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. '(pp 373-374).

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See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women

were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Related family law proceedings - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.6 discusses the interaction between family violence orders and parenting orders, recovery orders and other orders under the Family Law Act. 5.14 discusses the relationship between family violence and family law.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Related family law proceedings - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

LawAccess NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

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- the application process
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Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Parenting orders

Key points:

- Where parties to a protection order application have children Part VII, Division 11 of the *Family Law Act 1975* (Cth) and Part 5, Division 10 of the *Family Court Act 1997* (WA) should be considered.
- Where domestic or family violence has commenced or escalated since the making of parenting orders courts of summary jurisdiction considering protection order applications may revive, vary, discharge or suspend an existing parenting order.
- When varying an existing parenting order in the context of making or varying a final protection order, the judicial officer should be aware of the consequences of making variations to the parenting order that may not be sustainable or that the parties may not be capable of complying with in the longer term.
- If the protection order is made or varied on an interim basis, the court of summary jurisdiction must not discharge the parenting order.

In making a protection order where the parties have children the applicability of Part VII, Division 11 of the *Family Law Act 1975* (Cth) and Part 5, Division 10 of the *Family Court Act 1997* (WA) should (and in some jurisdictions, must) be considered. The term, 'family violence order', is used in this statement to reflect the relevant provisions of the family law legislation; the equivalent term, 'protection order', is used elsewhere in this chapter.

The stated purposes (Section 68N *FLA*; Section 173 *FCA*) of part VII, Division 11 of the *Family Law Act 1975* (Cth) and Part 5, Division 10 of the *Family Court Act 1997* (WA) are: to resolve inconsistencies between family violence orders and orders that provide for a child to spend time with a person (here called parenting orders); to ensure that parenting orders do not expose people to domestic and family violence; and to ensure the best interests of the child. Family violence orders collectively describe orders generally made by state and territory courts of summary jurisdiction. Parenting orders are generally made by a family court, however it is important to note that proceedings for a parenting order can be instituted in a state or territory court of summary jurisdiction subject to the limitations set out in Section 69N *FLA* and Section 43 *FCA*.

Section 68R *FLA* and Section 176 *FCA* permit a court of summary jurisdiction (on its own initiative or on

application), when making or varying a family violence order, to revive, vary, discharge or suspend an existing parenting order (or family law injunction for personal protection, parenting plan, or recovery order) where the court has before it material that was not before a family court when the parenting order was made. These provisions are a mechanism for ensuring the safety of the victim and their children in domestic and family violence matters where there are parenting orders already in place that provide for contact between the children and the perpetrator [FLC 2015]. This mechanism is relevant in cases where domestic and family violence has commenced or escalated since the parenting orders were made. For example, where a parenting order is made by a family court in the absence of the victim of family violence and the other party (the perpetrator) has failed to disclose the violence to the court, or violence commences or escalates in the context of child changeover arrangements stipulated in the parenting order. If the provisions of Section 68R *FLA* or Section 176 *FCA* are used effectively, a victim in these circumstances, having obtained a final family violence order [ALRC/NSWLRC 2010], would not face potential contravention proceedings for breaching a parenting order, and would not be required to make application to a family court for a variation of the parenting order.

When a court of summary jurisdiction exercises its power to vary an existing parenting order in the context of making or varying a final family violence order, the judicial officer should be aware of the consequences of making variations to the parenting order that may not be sustainable or that the parties may not be capable of complying with in the longer term. For example, a variation that requires a party to have supervised contact with their children at a designated contact centre. It is unlikely that a contact centre would agree to a long term commitment of this nature; it is far more likely to be an interim measure only. The judicial officer should be satisfied that they have sufficient evidence and information about the particular matter, including any relevant details arising from the parenting proceedings, before varying the parenting order.

If the family violence order is made or varied on an interim basis, the court of summary jurisdiction must not discharge the parenting order. Any revival, variation or suspension of a parenting order made by a court of summary jurisdiction in Western Australian ceases to have effect either when the interim order ends or 21 days from the date of the interim order, whichever time is earlier (Section 178 *FCA*). It is important to note however that in any other state or territory, any revival, variation or suspension of a parenting order made in proceedings to make or vary an interim family violence order by a court of summary jurisdiction ceases to have effect at the earliest of: the time the interim family violence order stops being in force; the time specified in the interim family violence order as the time at which the revival, variation or suspension ceases to have effect; and the time the parenting order is affected by any another court order made after the revival, variation or suspension (Section 68T *FLA*).

It has been observed that the Part VII Division 11 *FLA*/Part 5 *FCA* provisions are rarely applied by courts of summary jurisdiction. Reasons in individual cases may include:

- In some instances the judicial officer may determine that parenting orders are sufficient to protect children without naming the children on the family violence order [FLC 2015].
- In interim family violence order proceedings, the judicial officer may be concerned that the period prescribed in Section 178 *FCA* (and previously in Section 68T *FLA*) does not allow the victim sufficient time to bring an application before a family court to have the allegations of violence considered, and if substantiated, the parenting order varied, so elects instead to preserve the parenting order and name only the victim in the family violence order [FLC 2015].
- A party or parties to the family violence order proceedings may not have access to appropriate legal advice and other support before seeking to vary a parenting order [ALRC/NSWLRC 2010]. A judicial officer may be reluctant to disturb existing orders in these circumstances.
- Judicial officers may also be concerned about disturbing a parenting order where they believe they may not be apprised of all of the information and evidence that supported the making of the parenting order [FLC 2015].

It is important to note that judicial officers can elect to suspend the parenting order for the prescribed period, and set repeating return dates at the expiration of each period until the parties are able to have their application heard by a family court. Judicial officers should also be aware that parties who are self-represented may not be equipped to establish the grounds required by Section 68R *FLA* or Section 176 *FCA* on which the court may revive, vary, discharge or suspend an existing parenting order.

Judicial officers considering a family violence order application may decide that it is appropriate in a particular case (and in some Australian jurisdictions, they are required) to name the children in the (interim or final) family violence order and to specify the conditions governing contact between the children and perpetrator. In this way, the victim and children have immediate protection that remains in effect if or until parenting orders are made by a family court. Given that there may be a considerable delay before parenting matters, including contact, can be dealt with by a family court, the new status quo established by the family violence order may impact on the outcome of any subsequent parenting proceedings.

In cases where the family violence order is made prior to parenting order proceedings, Section 68P *FLA* and Section 174 *FCA* permit a family court to make a parenting order (or make a recovery order or grant an

injunction) that is inconsistent with the family violence order, however the court must ensure the parties fully understand the nature and effect of the parenting order. This may occur in cases where information or evidence comes before the court that was not available to the court of summary jurisdiction that made the family violence order. In circumstances of ongoing violence, where a protected person is having difficulty with enforcement of a family violence order as a result of the operation of a parenting order made by a family court, the protected person may need to return to the court of summary jurisdiction and make application under Section 68R *FLA* or Section 176 *FCA* to ensure consistency and enforceability of orders.

Parenting orders - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

Chapter 16 of the Report examines 'the way in which state and territory courts exercise jurisdiction under family violence legislation and the *Family Law Act 1975* (Cth)'. The Commission notes that s 68R is rarely used to revive, vary, discharge or suspend a parenting order because (p.702):

- Judicial officers, lawyers, police and others involved in protection order proceedings may not be sufficiently aware of the existence, or understand the nature, of s 68R.
- Some judicial officers, lawyers and police appear to consider that issues in relation to parenting orders should be a matter for federal family courts;
- Judicial officers may not have the information or evidence necessary to amend a parenting order; and
- Parties to proceedings may not have access to appropriate legal advice and other support before seeking to amend a parenting order.

The Commission concluded that 'increasing and improving the use of s 68R in state and territory magistrates courts is necessary to fill a gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation. In particular, s 68R is necessary to protect victims of family violence where violence arises or escalates after parenting orders have been made—for example, during handover arrangements. In such cases, if s 68R is not used to amend the parenting order, a victim of violence may need to go to a federal family court to seek an amendment to the parenting order as well as a state or territory magistrates court to seek a protection order' (p 702).

Bryant, Diana, 'The Family Courts and Family Violence' (Paper presented at the Judicial Conference of Australia Colloquium, Adelaide, 9-11 October 2015).

The paper focuses on the issue of family violence in parenting proceedings (not in property proceedings). Her Honour notes that the family courts are widely criticised for making orders which are inconsistent with family violence orders (see Victorian Royal Commission into Family Violence, South Australian Social Development Committee) but identifies that these criticisms overlook the complexity of the task posed to the family courts

and the reasons why ss 68R and 68T of the *Family Law Act* are drafted the way they are (p.4).

She identifies that under federal legislation, a federal court can make orders for contact with are inconsistent with an existing family violence order and, if they do so, the family violence order is invalid to the extent of its inconsistency (s 68Q). If the parenting order is inconsistent with the family violence order, s 68P imposes a number of obligations as to what must be included in the judgment that accompanies the parenting order. Her Honour notes that, '[w]hile s 68P is relied upon from time to time, family violence orders in the majority of cases that come to the family courts either do not include the children as affected family members or, more frequently, include an exception for any orders made by the family courts' (p.5).

Courts making or varying family violence orders may discharge or suspend existing orders made under the *Family Law Act* (s 68R). In interim family violence proceedings, the court can only vary or suspend, but cannot discharge, an order made under the *Family Law Act* (s 68T). Again, there are considerations that must be taken into account before making this order (s 68R(5)).

The justification for ss 68R and 68T are elaborated upon by Her Honour at p.5:

'Although the subject of criticism, there are reasons for permitting courts to make inconsistent orders. The clue to this is in s 68R(3), which limits the power of a court making a family violence order to vary, discharge or suspend a family court order unless it has material before it that was not before the court that made that order or injunction. That is perfectly sensible — when a violent incident occurs involving a family which has had parenting orders in place, then the state court making the family violence orders is, of course, going to have information available to it that was not available to the judge when the original order was made.

Similarly, when family violence orders are made, often on an interim basis, the family courts subsequently considering making parenting orders may well have evidence that was not before the court making the family violence order. This would often be the case, for example, where there is an order made by consent without an admission of the allegations upon which it is based'.

Family Law Council, *Interim Report to the Attorney-General: In response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015).

The Family Law Council report provides an excellent summary of the issues that arise in practice relating to

ss 68R and 68T. First, in relation to s 68R, they note that several stakeholders reported that some magistrates rarely apply s 68R in family violence hearings, or are reluctant to make family violence protection orders naming children where there are parenting orders in place. It cites a case study from Legal Aid Western Australia and concerns raised in a Victorian report. Second, in relation to s 68T, the Council also notes that concerns were raised as to the time limits imposed. It notes the report of the Australian and New South Wales Law Reform Commission's consideration of these issues and their recommendations (pp.40-42).

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities

and ensure child and adult victims' safety and wellbeing.

Parenting orders - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 9.11 discusses the interaction between domestic violence orders and family law orders, including parenting orders, an applicant's obligation to inform the court about any family law orders, and the matters the court must consider before deciding to make or vary a domestic violence order. Chapter 20.9.2.10 discusses the situation where parties have ongoing contact due to Family Court parenting orders.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.6 discusses the interaction between family violence orders and parenting orders, recovery orders and other orders under the Family Law Act. 5.14 discusses the relationship between family violence and family law.

Parenting orders - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

LawAccess NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

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- immigration issues
- protection of children
- defending an AVO
- family law issues

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Recognition of interstate orders

Key points:

- All protection orders made in any Australian jurisdiction on or after 25 November 2017 are automatically recognised and enforceable nationally, without any further action by the protected person.

All Australian states and territories have passed legislation giving effect to the National Domestic Violence Order (DVO) Scheme [NDVOS]. Under the scheme, all protection orders made in any Australian jurisdiction on or after 25 November 2017 are automatically recognised and enforceable nationally. without any further action by the protected person.

Prior to the commencement of the scheme, protection orders were only enforceable in the state or territory in which they were issued. For the order to be enforceable in another state or territory, the protected person had to manually apply to have the order registered in that individual state or territory.

In all jurisdictions except Victoria, protection orders issued prior to 25 November 2017 are not automatically nationally recognised, but can be 'declared' as a recognised order by a court to ensure the order is enforceable and applicant is protected nationwide, rather than just in the state or territory in which the order was issued (and any additional jurisdiction in which the order was previously registered). The protected person may apply to any local court in Australia for such a declaration.

Protection orders which were issued in Victoria prior to 25 November 2017 and which were still active at 25 November 2017 are automatically nationally recognised, without the need for the protected person to obtain a declaration. However, interstate orders that were registered in Victoria prior to 25 November 2017, rather than issued there, are not automatically nationally recognised and require declaration.

Protection orders issued in New Zealand on or after 25 November 2017 are not automatically nationally recognised in Australia, but can be registered in any Australian local court. Once registered, the New Zealand protection order is recognised and enforceable throughout Australian jurisdictions in the same way as Australian protection orders issued on or after 25 November 2017, or which have been declared.

Below is a table identifying the legislation in each state or territory that gives effect to the scheme, and under

which an application to have a protection order issued before 25 November 2017 'declared' may be made.

For an overview click here.

National recognition of protection orders: provisions under state/territory domestic and family violence legislation

Jurisdiction	Protection order issued on or after 25 November 2017 recognised under:	Protection order issued prior to 25 November 2017 may be declared under:
Australian Capital Territory (ACT)	Part 9 *Family Violence Act 2016* (ACT)	Part 9 (Div 9.6) *Family Violence Act 2016* (ACT)
New South Wales (NSW)	Part 13B *Crimes (Domestic and Personal Violence) Act 2007* (NSW)	Part 13B (Div. 6) *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
Northern Territory (NT)	Chapter 3A *Domestic and Family Violence Act 2007* (NT)	Chapter 3A (Part 3A.6) *Domestic and Family Violence Act 2007* (NT)
Queensland (Qld)	Part 6 *Domestic and Family Violence Protection Act 2012* (Qld)	Part 10 (Div. 3) *Domestic and Family Violence Protection Act 2012* (Qld)
South Australia (SA)	Part 3A *Intervention Orders (Prevention of Abuse) Act 2009* (SA)	Part 3A (Div. 6) *Intervention Orders (Prevention of Abuse) Act 2009* (SA)
Tasmania (Tas)	*Domestic Violence Orders (National Recognition) Act 2016* (Tas)	Part 6 *Domestic Violence Orders (National Recognition) Act 2016* (Tas)
Victoria (Vic)	*National Domestic Violence Order Scheme Act 2016* (Vic)	Part 7 *National Domestic Violence Order Scheme Act 2016* (Vic) Note: Victorian courts may still declare orders issued in other jurisdictions prior to 25 Nov 2017 as "recognised" in Victoria. Orders issued prior to 25 Nov 2017 in Victoria are automatically nationally recognised.
Western Australia (WA)	*Domestic Violence Orders (National Recognition) Act 2017* (WA)	Part 6 (Div. 3) *Domestic Violence Orders (National Recognition) Act 2017* (WA)

Further Resources:

National	https://familyviolencelaw.gov.au/domestic-violence-orders/what-if-i-move-interstate/
Australian Capital Territory	https://www.courts.act.gov.au/magistrates/o/courts/protection/How-to-register-an-order-from-another-State,-Territory-or-New-Zealand-in-the-ACT
New South Wales	https://legalanswers.sl.nsw.gov.au/hot-topics-domestic-violence/avos-other-states-and-territories
Northern Territory	https://nt.gov.au/law/courts-and-tribunals/domestic-violence-orders/dvo-now-enforced-nationally
Queensland	https://www.courts.qld.gov.au/going-to-court/domestic-violence/national-domestic-violence-order-scheme
South Australia	https://www.courts.sa.gov.au/going-to-court/representing-yourself/intervention-orders/
Tasmania	https://www.justice.tas.gov.au/national-domestic-violence-order-scheme
Victoria	https://www.mcv.vic.gov.au/intervention-orders/family-violence-intervention-orders/interstate-intervention-orders-fvio
Western Australia	https://www.magistratescourt.wa.gov.au/_files/Civil_Factsheet_46.pdf

Recognition of interstate orders - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 19 discusses the National Domestic Violence Order Scheme and its implementation in the *Domestic and Family Violence Act 2012* (Qld) for the mutual recognition and enforcement of orders.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

3.3 discusses the enforceability of interstate (and New Zealand) orders in Victoria.

Recognition of interstate orders - Other Resources

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Breach

Key points:

- Breach of a protection order attracts criminal penalties and the breach behaviour may also constitute an additional criminal offence and further penalties may be imposed.
- Undertakings given to courts are not enforceable (although may be considered an act of contempt).
- Mutual orders can minimise serious domestic and family violence by the predominant perpetrator as one party may be at greater risk of violence than the other.

Where a perpetrator breaches the conditions of an interim or final protection order, criminal penalties apply in all Australian state and territory jurisdictions. The breach behaviour may also constitute another criminal offence in the relevant jurisdiction (for example, assault or stalking) for which further criminal penalties may be imposed [Mackay et al 2015].

A breach of an undertaking given to the court is not enforceable (although it may be considered by the court an act of contempt), and should a person require protection in the event of further domestic and family violence, fresh application proceedings or an application to reinstate proceedings must be initiated. Mutual orders [Douglas & Fitzgerald 2013] may have the effect of minimising or neutralising serious domestic and family violence by one party on the basis that both parties are considered to be at fault, notwithstanding that one party is likely to be at greater risk of violence than the other.

Breach - Key Literature

Australia

Attorney-General's Department (Cth), 'Interim report to the Attorney-General in response to the first two terms of reference on families with complex needs and the intersection of the family law and child protection systems' (2015) Family Law Council.

See especially chapter 5 which considers 'integrated multi-jurisdiction family violence courts'. It provides an overview of the protection order system as well as the application process for obtaining a protection order in each state and territory. Appendix C contains a table of relevant legislation and terminology in each jurisdiction.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

Many aspects of this report contain material relevant to domestic violence protection orders. Chapter 5 discusses the need for a 'common interpretative framework', in relation to definitions in family violence legislation with a view to increasing victim safety. Chapter 9 entitled 'Police and Family Violence' discusses police-issued protection orders (pp 368-371). Concerns with police-issued orders are discussed. Police duties to investigate/apply for a protection order are considered from pp 381-386. At p 420 consideration of 'bail conditions and protection order conditions'. The Report notes that bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. Chapter 11 considers protection orders and the criminal law. The Report notes that conditions prohibiting a respondent from locating or attempting to locate the victim are particularly important where victims are fleeing family violence, will not be appropriate in all cases (p 470-471) and notes that 'no contact' conditions ought to be minimised unless absolutely necessary, particularly in remote communities, so as to reduce the risk of unintentional breaches (p 471). Exclusion orders are considered from p 472. It was noted that exclusion orders are likely to be more effective and victims' safety would also be increased if reasonable steps are taken to secure temporary accommodation for perpetrators (p 479-480). Issues relating to the method and quality of evidence given in protection order proceedings are considered from p 843-864. The use of undertakings is considered from p 864-869. Protection orders made by consent are considered from p

869.

Cordier, Reinie, Donna Chung, Sarah Wilkes-Gillan and Renée Speyer, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) *Trauma, Violence & Abuse* (advance)

This article reviews the Australian and international literature on the effectiveness of protection orders in domestic violence cases. It presents a systematic review and meta-analysis, and identifies the factors associated with an increased risk of reoffending following a protection order being issued. It also compares differences in violation rates reported by victims and police and discusses issues in how the effectiveness of a protection order is defined and measured across various studies, beyond simple recidivism. The article finds mixed evidence on their effectiveness: protection orders were not effective in completely preventing violence toward the victim but some groups do report reduced subsequent violence.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Alan Hayes and Daryl Higgins *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 207.

This essay discusses (among other things) the interaction between state and territory-based civil protection orders and the *Family Law Act 1975* (Cth), particularly in relation to children and child protection issues. See especially from p 209.

Douglas, Heather and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

This article gives extensive consideration to the issue of cross-applications for domestic violence protection orders. It firstly considers feminist jurisprudence in the context of the development of the civil protection order system, particularly focusing on the issue of cross-applications. The complexities around the use of cross-orders are noted – 'a cross-order means much more than that the parties simply have a protective order. It has implications for the residence of children, engagement with the criminal justice system and most importantly victim safety' (p 86).

Dowling, Christopher, Anthony Morgan, Shann Hulme, Matthew Manning and Gabriel Wong, *Protection orders for domestic violence: A systematic review* (Australian Institute of Criminology Report No. 551 June 2018).

Report abstract:

Protection orders are a common legal response to domestic violence which aim to prevent further re-victimisation by the perpetrator.

The current study systematically reviews research into the use and impact of protection orders, using the EMMIE framework (Effectiveness, Mechanisms, Moderators, Implementation and Economy).

Meta-analysis is used to examine the overall effect of protection orders, while narrative synthesis is used to examine the underlying mechanisms and moderators of their effectiveness, their implementation and economic viability.

Protection orders are associated with a small but significant reduction in domestic violence. They appear to be more effective under certain circumstances, including when the victim has fewer ties to the perpetrator and a greater capacity for independence, and less effective for offenders with a history of crime, violence and mental health issues.

Gelb, Karen, 'Understanding Family Violence Court Proceedings: The Impact of Family Violence on the Magistrates' Court of Victoria' (2016) Karen Gelb Consulting.

This report prepared for the Victorian Royal Commission into Family Violence contains data from family violence matters arising out of a study conducted in various Magistrates' Courts in Victoria. See especially from p 38, which summarises and discusses the data. Gelb notes that while the most common outcome is that the court issues an intervention order, many adjournments are still made. Gelb identifies that adjournments are often made to synchronise the civil matter with an associated criminal matter or, 'to allow police to undertake further discussions with the affected family member, to find out about related custody matters, or to provide more information on the precise circumstances of the incident' (p 40). Gelb notes that, 'The use of adjournments for either purpose may be problematic, both for the court (in terms of requiring additional court resources when matters are relisted) and for the parties (especially the affected family

member, who must return to court time and again)' (p 40). Gelb observed that most orders where respondents were present in court were finalised by consent (p 38).

Jeffries, Samantha et al, 'Protecting Australia's Children: A Cross Jurisdictional Review of Domestic Violence Protection Order Legislation' (2015) 22(6) *Psychiatry, Psychology and Law,* 800-813.

This article argues that domestic violence protection order legislation may offer an important legal option for the protection of children affected by domestic violence. The article reviews the provisions of State and Territory domestic violence protection order legislation to consider the focus on the protection of children and concludes that 'protection depends on the jurisdiction in which the child lives' (p 812).

See in particular at p 804 – 'Domestic violence protection orders offer a critical civil legal remedy for the protection of children at risk due to domestic violence. Protection orders have the potential to impact positively on the safety and welfare of children by providing non-violent caregivers and in some instances, other concerned parties (such as police and child protection workers), as well as the children themselves, a means of seeking legally enforceable protection'.

Jeffries, Samantha et al., 'Australian Domestic Violence Protection Order Legislation: A Comparative Quantitative Content Analysis of Victim Safety Provisions' (2013) 25(2) *Current Issues in Criminal Justice* 627.

This article uses comparative quantitative content analysis to assess the victim safety focus of domestic violence protection order legislation in each Australian state and territory. The authors consider four 'dimensions' of victim safety: protective scope of the legislation; specified matters to be considered by the court; procedural mechanisms and order options. The authors note that emergency orders of short duration with a limited range of conditions provides victims with less protection than orders in force for extended periods with unrestricted conditions that can be better suited to the individual circumstances of the case (p 634). The findings of the study are discussed at pp 637-638.

Katzen, Hayley, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 (2) *Australian Journal of Family Law* 119-141.

This article considers police responses to breaches of protection orders that occur in the context of contact hand-overs. The study, upon which the article is based, found that officers rarely prosecute offenders for a violation of an order when it occurs during contact hand-overs. The article draws on data collected in the late 1990s: police reports of breaches of protections orders (n186); interviews with women (n32), focus groups with police (n33 police).

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This paper provides detailed discussion on perpetrator pathways in every state and territory in Australia. Civil protection orders are discussed at pp 3-4. Care should be taken as some jurisdictions have updated legislation since this resource was published.

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators' comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with

perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

New South Wales Legislative Council Standing Committee on Social Issues, *Domestic Violence Trends and Issues in NSW* (Report 46, 2012).

Chapter 9 extensively considers protection orders (known as apprehended domestic violence orders (ADVOs)). ADVO conditions are considered from pp 250-260. It was noted that some ADVO conditions are unworkable and exclusion orders are often problematic. Moreover, where an ADVO is accompanied by an associated criminal charge there are often delays before the order is finalised, in which time the parties may have reconciled and it may not be appropriate to make the conditions of the final order the same as the interim order. Exclusion orders are considered from pp 254-256. Strategies to improve the effectiveness of ADVO conditions are considered at p256-257. These strategies include tailoring conditions to suit individual circumstances. The report notes that the response to domestic violence should be victim-centric, while at the same time ensuring that ADVO conditions are workable (p 258). It notes that impracticable ADVO conditions could be avoided using greater consultation with the respondent. Even a short conversation with the respondent may be sufficient (p 259).

Queensland Government, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Information sharing is a critical part of an integrated response to domestic and family violence. The report notes that '[t]he ability for different agencies to discuss cases and share relevant details on an ongoing basis is at the core of coordinating a tailored response to a person's individual circumstances. Effective and efficient information sharing ensures that victims of domestic and family violence do not have to re-tell their stories repeatedly to different service providers and enables service providers to provide timely responses, particularly in high-risk cases' (p 230). While there are clear benefits to information sharing, there is a need to ensure sufficient safeguards are in place to protect confidentiality (p 231). Unnecessary or inappropriate sharing of information could have negative consequences including: 'destroying relationships of trust between a service provider and a client, leading to disengagement of a client, becoming a barrier to victims' willingness to seek help (p 231). Similarly, "information can be untested or based on service provider opinion and could be highly prejudicial to one or both of the parties if used inappropriately in legal proceedings (p 231).

Stambe, R.-M., & Meyer, S. (2022). Police and Duty Lawyer Perceptions of Domestic Violence Protection Order Proceedings Involving Parents: Towards Greater System Accountability and Family-Centred Decision-Making. *Journal of Family Violence*. https://doi.org/10.1007/s10896-022-00449-8.

Abstract

Purpose: Domestic violence (DV) is a problem of global significance and remains a gendered issue that disproportionately affects women and children. Prevalence studies on women's experiences of DV suggest that around 50% of victims identify as mothers. The effects of DV on mothers and children are well documented, raising implications for their protection. Civil protection orders are a legal tool used to reduce and prevent experiences of DV. Research on protection order effectiveness is mixed with research suggesting that the ongoing relationship between a respondent and aggrieved parent around child contact presents ongoing opportunities for re-victimization. This study contributes to the scant literature on the implications of protection orders on parental responsibilities.

Method: The study draws on surveys with duty lawyers and focus groups with police officers. A thematic analysis was used to examine perceptions and experiences of 'no contact' protection orders and respondent parent non-compliance where mutual children are involved.

Results: Findings suggest that ambiguous 'no contact' conditions and a lack of clarity around their implications for child contact play a key role in respondent parent non-compliance, ranging from uninformed non-compliance to the strategic use of children as a form of coercive control in non-compliance.

Conclusion: Findings raise implications for specialist legal advice and support for parents affected by DV to sit alongside protection order court proceedings. Findings highlight the need for greater system accountability to ensure court-issued protection orders take a family-centred approach that align with parental responsibilities and ensure child and adult victims' safety and wellbeing.

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of knowledge paper* (ANROWS, 2015).

Various tables summarising the position in each jurisdiction in relation to weapons, enforcement and information sharing, penalties and aiding and abetting are provided. See at pp 9, 11, 12, 15, 17 & 18. Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced.

The authors note: “The penalties for breaches of protection orders vary across states and territories which can be expected given that each respective domestic violence law has had its own history of development and amendments. The maximum penalties for a breach of an order vary between 1 year and 5 years’ imprisonment with some variation for first or subsequent breach-related offences or other circumstances of aggravation. In almost all states (except South Australia) varying amounts of penalty units (or fines) may be applied instead of or in addition to the term of imprisonment”. There is an overview of available monetary penalties for breach of protection order in Australian jurisdictions as at 2015 on pages 16-17.

Victorian Royal Commission into Family Violence, (Volume 3, 2016).

This report contains extensive discussion of protection orders. See in particular from p 120 which discusses the ‘applicant experience’. Relevantly, delays in the protection order application process, particularly for interim orders, are considered from p 122. It was noted that initial delays in applications for interim orders can have detrimental effects on applicants such as an immediate and serious risk to the applicant’s safety – ‘To the extent that applying for an FVIO might signify a victim’s recognition that they are in danger and be a definitive step towards ending or altering a violent relationship, the application period will be a time of heightened risk for the applicant. During this period the victim does not have the protection of an intervention order and might not have had contact with police or specialist services’ (p 123). Delays caused by respondents are discussed at p 124. Often, there are legitimate reasons for delays caused by respondents to protection order applications – ‘Delays can be caused by the perpetrators lawful assertion of procedural rights; for example, it is not uncommon for the respondent to seek “further and better particulars” about the application and to be given the opportunity to consider those particulars. There may need to be an adjournment to allow the applicant to respond to that request’ (p 124).However, sometimes respondents abuse processes and cause delays without legitimate reasons. For example, respondents could make a cross-application without legitimate reasons (p 124). Other tactics include failing to appear at hearings, evading service of orders and seeking adjournments at short notice. The report observed that these tactics ‘are part of the violence perpetrated against the victim and are calculated to terrorise, disempower, humiliate

and undermine the victim's attempts to protect herself (or himself) and other family members' (p 125). Furthermore, delays associated with parallel criminal proceedings are discussed from pp 126-127. Police applications for intervention orders are discussed at pp 128-129.

Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945.

This article considers the issue of gender and its importance in understanding intimate partner violence (IPV) through an examination of the differences in men's and women's complaints for civil protection orders in New South Wales (known as Apprehended Domestic Violence Orders or ADVOs). This research focused on cross applications, that is, cases where the male and the female partner to a relationship are both making allegations that the other has used violence or abuse against them' (p 947). The case study of cross-applications in New South Wales at the problems with seeing domestic violence as discrete incidents, rather than the context of such acts of violence or abuse' (p 947).

Wilcox, Karen and Ludo McFerran, 'Staying Home, Staying Safe: the Value of Domestic Violence Protection Order Provisions in Homelessness Strategies' (2009) 294 *Australian Law Reform Commission Journal* 24.

This article considers the legal framework and broader relationship between homelessness and domestic violence. In doing so, it considers two provisions in protection order legislation which impact on homelessness – exclusion/ouster orders and court-ordered changes to residential tenancy agreements. Notes the concern about the property rights and accommodation needs of the defendant as well as 'deferral of occupancy issues to property settlements under family law, or a belief that exclusion is only warranted when the violence was physical…Community beliefs about 'rights' to real property has complicated the issue further' (p 25). The authors note that if exclusion orders are to be effective in safeguarding victims' safety and preventing homelessness, there is a need for a supportive service system, including funding for practical security measures in houses (p 26).

International

Conner, Dana Harrington, 'Civil Protection Order Duration: Proof, Procedural Issues and Policy Considerations' (2015) 24:2 *Temple Political and Civil Rights Law Review* 343.

This article gives extensive consideration to the debate around the duration of civil protection orders in the American context. See also from p 369, where the author discusses the appropriate duration of orders in relation to specific types of domestic and family violence behaviours. The article concludes – 'A "one size fits all" solution to duration is enticing because it avoids many complicated issues related to enacting laws that both define duration and provide guidelines that judges will follow when fixing order length. '(pp 373-374).

Goldfarb, Sally F, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

This American article extensively considers the nature and efficacy of civil protection orders in preventing domestic violence. It contains an overview and critique of civil protection orders. It then considers expanding the role of civil protection orders by offering protection orders that do not terminate the parties' relationship. The article considers the use of protection orders in ongoing relationships (p 1551).

Jordan, Carol et al, 'The Denial of Emergency Protection: Factors Associated with Court Decision Making' (2008) 23 *Violence and Victims* 603.

This American study examines cases where victims of intimate partner violence are denied access to temporary orders of protection. The study sample included a review of 2,205 petitions that had been denied by a Kentucky court during the 2003 fiscal year. The study offers important insights into the characteristics of petitioners and respondents to denied orders and outlines individual, contextual, structural, qualitative/perceptual, and procedural factors associated with the denial of temporary or emergency protective orders.

Murphy, Jane C, 'Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women' (2003) 11(2) *American University Journal of Gender, Social Policy and Law* 499-521.

Part II (p 503) of this article discusses battered women's use of civil protection orders, drawing on a prior

American study into the use of protection orders. The authors found that having an attorney substantially increased the rate of success in obtaining a protection order' (p 511). Also, it was noted that a substantial sample of women surveyed considered filing for a civil protection order a 'helpful strategy' (p 509).

Roberts, James C, Loreen Wolfer and Marie Mele, 'Why Victims of Intimate Partner Violence Withdraw Protection Orders' (2008) *Journal of Family Violence* 23(5) 369-375.

In this American study fifty-five women who were in the process of withdrawing a protection order against a male intimate partner were surveyed. Recognizing that reasons given for withdrawing a protection order often follow common themes, individual responses were organized into several "domains," or groupings of such reasons. The most commonly cited domain involved a "concrete change" on behalf of the victim or defendant, which made the protection order less necessary in the victim's view. This was closely followed by the domain addressing emotional attachment to the abuser. Implications for future research and policy are discussed. See in particular at p 373 – 'Taken together, these findings suggest that, among this sample of women, concrete change (especially the defendant actually attending counseling or rehabilitation) and emotional attachment (especially no longer fearing the defendant) interacted to create a push/pull relationship between the offender and victim where the victim's faith in programs aimed at helping batterers overcome their abusive behavior and the victim's emotional attachment to the offender lead the victim to no longer feel that the (protection order) was necessary.'

Topliffe, Elizabeth, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders Are Not' (1991-1992) 67 *Indiana Law Journal* 1039.

This American article firstly considers the advantages and disadvantages of civil protection orders. It then discusses mutual orders (orders made against both the perpetrator and the victim of domestic violence). It concludes that mutual orders harm women, in contrast to ordinary protection orders which are effective. Concerns about mutual protection orders include due process issues, in particular where mutual orders are issued without hearing any evidence or only hearing evidence about the violent behaviour of one party (p 1056-1060). There are also concerns about the accountability of the perpetrator – 'The issuance of a mutual order can reinforce the batterer's belief that the problem is not his but is the result of external factors. He could easily understand a mutual protection order to mean that the court blames the victim as much as the

batterer. The implication is that there is no accountability by the batterer' (p 1060-1061). The victim could also recognise this message and blame themselves for the abuse. Other concerns with mutual orders are discussed at pp 1061-1064.

Zoellner, Lori et al, 'Factors Associated With the Completion of the Restraining order Process in Female Victims of Partner Violence' (2000) 15(10) *Journal of Interpersonal Violence* 1081.

This American study examined factors associated with completion of this process. Sixty-five women who initiated the process of securing a restraining order against a male partner participated in the study. Participants completed an interview, self-report measures, and were followed up to determine final restraining order status. Less than half of the women who initiated the process obtained final orders. Women who indicated an attachment to the abusive partner were less likely to complete the process. "Perceived threat to the women facilitated persistence with the process; however, when the threat involved her children, women were less likely to persist. Understanding factors influencing persistence in help seeking, especially attachment and threat, is a crucial step toward enhancing interventions to facilitate efforts toward violence-free lives" (p 1081).

Breach - Other Bench Books

NSW

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [22-000] discusses the procedures for dealing with applications for Apprehended Violence Orders, hearing applications, the making and variation of orders, consent orders, duration and conditions, and the National Domestic Violence Order recognition scheme.

QLD

Magistrates Court, Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

This bench book discusses in detail the legislation, case law and procedural issues relating to application proceedings for protection orders under the *Domestic and Family Violence Act 2012* (Qld),including the jurisdiction of Magistrates and Judicial Registrars (Chapter 2); police, private and cross applications (Chapter 3); service of applications (Chapter 4); hearing of applications (Chapter 5); making a temporary protection order (Chapter 6); making a protection order (Chapter 7); consent orders (Chapter 8); naming of parties and standard/other conditions in orders (Chapter 9); duration of orders (Chapter 10); explanation of orders (Chapter 11); service of orders (Chapter 12); variation of orders (Chapter 13); and breach of an order (Chapter 20.1).

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

2.1 discusses the intervention order process. 2.2 discusses making interim and final intervention orders, and conditions of orders. 2.3 discusses changing orders.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Section 13.9.3 entitled ‘Restraining Orders’, contains practical points for judicial officers to consider in restraining order applications (particularly in relation to children). For example,

- ‘When considering whether to make a violence restraining order, you should have regard to the need to ensure that children are not exposed to acts of family and domestic violence.
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence…
- Be aware that restraining orders may be used by perpetrators of domestic violence as a way to control and punish the primary victim…
- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available. A list of agencies and organisations which help people who are at risk of family and domestic violence can be found at the end of this chapter.’

Breach - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

LawAccess NSW and Legal Aid NSW, Apprehended Violence Orders.

An online resource with clear and comprehensive information about Apprehended Violence Orders in NSW, including:

- types of AVO
- the application process
- going to court
- after court
- Victims Support Scheme
- immigration issues
- protection of children
- defending an AVO
- family law issues

LawInfo Northern Territory, Domestic Violence.

LawInfoNT is an open access website with plain language information about the law, including domestic violence. The information is presented in a variety of formats for easy comprehension. The domestic violence section sets out a series of commonly asked questions and answers relating to: the nature of DV, types of DVOs, applications for DVOs, protection of children, property damage, breach of DVO, other support services.

Legal Aid ACT, Domestic and Family Violence.

Legal Aid ACT's Domestic Violence and Personal Protection Order Unit offers a service to assist with:

- applications for DVOs
- understanding and responding to DVOs
- non-legal solutions and support services

Legal Aid Queensland, Domestic and Family Violence.

This section of the Legal Aid Qld website provides information about: the nature of DFV, applying for a DFV protection order, the types of protection orders, children and protection orders, complying with a protection order, DFV duty lawyer services, and useful factsheets to help applicants and respondents navigate the legal system.

Legal Aid Western Australia, Family violence and your safety.

This section of the website helps users to understand the nature of family violence, the help available including protection orders, and how the family law deals with cases involving family violence.

Legal Services Commission of South Australia, Domestic Violence Advice.

The Commission provides services free of charge to assist with domestic violence matters, including:

- intervention orders
- the victim's role and rights in the criminal justice process
- family law matters
- child welfare matters
- credit, debt and housing matters
- immigration matters arising as a result of domestic violence
- application for legal aid or referrals to other services.

National Legal Aid, Family Violence Law Help.

A national online resource to: assist people affected by domestic and family violence; promote State and Territory advocacy and support services; and clearly explain the operation of Australia's various laws and courts in domestic and family violence matters.

Queensland Courts, *Domestic violence videos* (2016).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Victoria Legal Aid, Violence, abuse and personal safety.

This webpage provides information about violent behaviour, abuse and personal safety, including Family violence intervention orders and the Commonwealth Family Violence and Cross-Examination of Parties Scheme.

Breach - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Susan

Breach - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Suksa-Ngacharoen v Regina **[2018] NSWCCA 142 (10 August 2018) – New South Wales Court of Criminal Appeal**

Wilson J said at [132]:

> *'The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship… Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in Pearce v The Queen (1989) 194 CLR 610.'*

Director of Public Prosecutions (Victoria) v Turner **[2017] VSC 358 (23 June 2017) – Victorian Supreme Court**

Bell J at [18]: That you committed this contravention in circumstances associated with the crime of manslaughter is a very serious matter. Family violence intervention orders are not worthless pieces of paper. The general purpose of a family violence intervention order is to provide legally enforceable protection for the safety of the individual, usually a woman at risk of violence from a man.

Queensland Police Service v KBH **[2023] QDC 26 (16 February 2023) – Queensland District Court**

In holding that the sentences were manifestly inadequate Coker DCJ observed:

[30] With the greatest of respect to the learned Magistrate, these were not minor breaches by any stretch of the imagination. Rather, they were repeat instances of exactly the behaviour which had previously led to periods of imprisonment being imposed in relation to this matter.

[31] I set out at some length those particular issues in relation to this matter because, in my assessment, it is important that they be detailed so as to explain the reason why, in my assessment, this appeal must be upheld. It was not simply a situation where the penalty imposed was more lenient than might have been expected or, more particularly, more lenient than I might have imposed in relation to this matter. Rather, it was manifestly inadequate and, as indicated within the cases, an imposition in relation to the matter which simply indicates that it was unreasonable and inadequate in all of the circumstances; noting particularly, as I do, the acknowledgement on the part of the respondent himself, that imprisonment was well within range.

[32] I am satisfied, that, therefore, the imposition of a fine of a very lenient character in itself is simply outside the range of what might have been appropriate in relation to this matter. In that regard, I note particularly the more recent developments in relation to the domestic violence legislation, and of the very real need to accept that domestic violence is something far more than simply the imposition of physical force by one party to an intimate relationship upon another. There are a multitude of means by which there can be control exercised upon another and it is important, in fact, in my view, overwhelmingly so, that penalties imposed reflect the recognition of the importance of ensuring that such behaviours do not continue.

[33] As was indicated by President McMurdo, as her Honour then was. In *R v Fairbrother; ex parte the Attorney-General* [2005] QCA 105 the following was said:

> *Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment ... Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the Courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders, but also others who might otherwise think they can commit such acts with near impunity.*

[34] I would hasten to add here that this is not a serious act of domestic violence but it is a repeat act of domestic violence in circumstances where, clearly, the respondent to this appeal has failed to accept the opportunities previously given and, as such, more significant penalties are appropriately required to be imposed in relation to this matter. It is not a situation where the offending is minor or trivial, lacking in real

impact. It has continued to impact upon the aggrieved and, as identified by President McMurdo in *R v Fairbrother*, is a situation where it is a crime against the State warranting salutary punishment.

[35] Here it is clear, in circumstances where the respondent had prior convictions, 10 it is submitted, - for domestic violence offences, all against this same aggrieved, and had previously been sentenced to various penalties, including terms of imprisonment subject to operational periods for suspended sentences, that it was a significant consideration, as well as the fact that the reoffending occurred only 21 days after the most recent sentence, prior to coming before the Court.

[36] In my view the imposition of a fine was unreasonable and unjust. It fell below what could even be considered the most lenient of penalties that might be imposed in relation to the matter and, as I have indicated, it is my view, therefore, that the appeal must be successful.

In accepting the appellant's submission that the sentence imposed was so lenient that it should be considered an erroneous exercise of the court's jurisdiction, and it amounts to a manifestly inadequate sentence that ought to be corrected on appeal, citing *JRB v Bird* [2009] QDC 277, *TZL v QPS* [2015] QDC 171, *PFM v QPS* [2017] QDC 210 and *Queensland Police Service v JSB* [2018] QDC 120, Coker DCJ observed:

[38] What those particular cases show is that there are significantly greater penalties warranted in relation to offending, even where there are not direct indications of domestic violence of a physical character. As was clear in each of those cases, penalties can and should be imposed which reflect the continued and repetitive nature of offending and of the very real need to ensure that there is a clear indication, not only to the individual offender but also to the community at large, that such offending will be met with significant penalties.

Undertakings

Key points:

- Accepting an undertaking may compromise the safety of a victim.
- Breach of undertakings given to courts are not enforceable (although may be considered an act of contempt).
- Victim fear of the perpetrator may cause them to feel pressure or intimidation to accept an undertaking and not proceed with their application for a protection order.
- Family court proceedings may give little or no weight to an undertaking.
- It is important that a victim understands the implications of accepting an undertaking before agreeing to withdraw their application.

A victim of domestic and family violence seeking a protection order may agree to withdraw their application on the basis that the perpetrator provides an undertaking to the court to do, or refrain from doing, certain things. The undertaking may include the same types of conditions and prohibitions as may be included in a protection order. Undertakings may be given orally or in writing and signed. There may be cases where both parties provide undertakings to the court [ALRC/NSWLRC 2010].

Concerns have been raised about the use of undertakings in domestic and family violence proceedings, including:

- An undertaking is no more than a promise (made to the court) by the perpetrator to refrain from further domestic and family violence. The perpetrator may have previously broken similar promises made to the victim and others [Vic FVBB 2014].
- A victim may feel pressured or intimidated by the perpetrator into accepting an undertaking rather than proceeding with their application for a protection order. This may be due to the victim's ongoing fear of the perpetrator who may use the court process to continue to exercise control over the victim [Vic FVBB 2014]; or, if the victim is self-represented, a lack of understanding of the process. There may also be pressures on the judicial officer to expedite the resolution of the matter [LRCWA 2014].
- Unlike a breach of a protection order, a breach of an undertaking is not a criminal offence and is

unenforceable (although it may be considered by the court an act of contempt). Accepting an undertaking may therefore compromise the safety of a victim. If an undertaking is breached, and the victim still requires protection, they must return to the court and make a fresh application for a protection order [ALRC/NSWLRC 2010].

- In proceedings before the Family Court of Australia or the Federal Circuit Court of Australia, the court may give an undertaking little or no weight as it is not considered an order of the court [ALRC/NSWLRC 2010].

It is however also acknowledged that there may be circumstances where an undertaking is the most appropriate outcome in a particular case. For example:

- Accepting an undertaking may be the first step a victim is prepared to take in seeking protection against domestic and family violence. Should the violence continue, it may encourage the victim to seek a protection order.
- Where there is insufficient evidence to support the making of a protection order. A breach of the undertaking may however be evidentiary support in a subsequent protection order application [Vic FVBB 2014].

Where a judicial officer decides that an undertaking is the most appropriate outcome in a particular case, it is important that the victim understands the consequences of accepting an undertaking, especially where they are self-represented [ALRC/NSWLRC 2010].

Undertakings - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (Report 114, 2010).

Undertakings – Chapter 18

18.153 A person seeking a protection order may agree to withdraw his or her application on the basis that the person against whom the protection order is sought (the respondent) provides an undertaking. An undertaking is a promise to the court that a person will do, or refrain from doing, certain things. Usually, the undertaking will include the same types of conditions and prohibitions which could have been included in the protection order had it been issued. Undertakings may either be given orally by the respondent or the respondent's lawyer, or given in writing and signed. It is also possible for both the applicant and respondent to give undertakings to the court.

18.156 …unlike breach of a protection order, breach of an undertaking is not a criminal offence and cannot be enforced. Agreeing to an undertaking instead of pursuing an application for a protection order may, therefore, compromise the protection and safety of a victim of family violence…Stakeholders noted that victims of family violence who have accepted an undertaking often return to court to seek a protection order because the undertaking has been breached. In such cases, both the undertaking and the breach may be used as evidence in support of an application for a protection order.

18.157 …there is a concern that victims of family violence may be pressured into withdrawing an application for a protection order and accepting an undertaking, particularly where that party is unrepresented.

18.158 …the *Initiating Application (Family Law)* form, which must be completed by a person wishing to commence proceedings in a federal family court, asks if there are any existing undertakings to a court about family violence issues concerning any of the parties or children in the application. There is, however, no obligation on parties to inform a court exercising jurisdiction under the *Family Law Act* about undertakings in relation to family violence, nor is the existence of an undertaking a specified factor to be considered when determining the best interests of a child. A number of stakeholders expressed the view that while information about undertakings is sometimes included in affidavits, federal family courts give them little weight because undertakings are not orders of a court.

Recommendation 18–4 State and territory courts should require that undertakings by a person against whom a protection order is sought should be in writing on a standard form. The form should require each party to sign an acknowledgment that he or she understands that:

(a) breach of an undertaking is not a criminal offence nor can it be otherwise enforced;

(b) the court's acceptance of an undertaking does not preclude further action by the applicant to address family violence; and

(c) evidence of breach of an undertaking may be used in later proceedings.

Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws* (Final Report 2014).

Undertakings

In its Discussion Paper (at pp121-123) the Commission referred to a number of concerns among stakeholders in relation to undertakings. Undertakings are promises by one party (or sometimes both parties) not to behave in a particular manner and are sometimes entered into by parties in lieu of a final violence restraining order. An undertaking may contain the same types of conditions as would ordinarily be included in a violence restraining order. There is nothing in the *Restraining Orders Act* that deals with undertakings and, although they can be made orally or in writing, the Commission understands that, generally, undertakings in Western Australia are made in writing. There is no sanction for failing to comply with this type of undertaking and they are not enforceable by the police. However, a breach of an undertaking may be evidence to support a future application for a violence restraining order.

There was significant concern expressed during consultations that victims of family and domestic violence are being pressured into accepting undertakings instead of proceeding with their application for a violence restraining order. This pressure may arise because of a fear of or lack of understanding of the process or because the applicant is unrepresented. It was suggested that pressure to enter into undertakings is sometimes applied by the magistrate because of workload and court listing demands.

Victorian Law Reform Commission, *Review of Family Violence Laws* (Report 2005).

This report reviews the Victorian justice system's response to family violence—particularly the intervention order system—and provides detailed recommendations for improvement. Undertakings are dealt with at pp296-303 of the report.

Undertakings

8.126 Under the current intervention order system, applicants for intervention orders are sometimes persuaded by the magistrate, the respondent's lawyer or their own lawyer to accept an undertaking from the perpetrator rather than go ahead with an application for an intervention order. When respondents make an undertaking to the court, they agree to refrain from behaving in a certain way, such as assaulting, harassing, or threatening the protected person. The Act does not provide for the respondent to give an undertaking as an alternative to the court making an intervention order. If respondents breach an undertaking, they have not committed an offence and the police cannot take any action unless another criminal offence has been committed.

8.127 Under the Magistrates' Court Family Violence and Stalking Protocols, the giving of an undertaking results in the applicant withdrawing the intervention order application. If the respondent fails to adhere to the undertaking, the applicant can complete a 'Notice of Reinstatement' which reinstates the application. The protocols also state: It is preferable that any undertaking document used NOT look like a Court order to avoid confusion. It should also have a statement on it 'This is not an intervention order'.

8.128 In 2004–05, approximately 1000 applications for intervention orders were withdrawn, with the respondent accepting an undertaking rather than an intervention order. This represents 5% of all applications for family violence intervention orders.

Recommendations

99. The Magistrates' Court Protocols should state that an undertaking should only be accepted by the court where the court is satisfied that:

- the applicant fully understands the consequences of accepting an undertaking (eg if the applicant has received legal advice or is legally represented);
- in all the circumstances of the case, it is more appropriate to accept an undertaking rather than make an

intervention order.

100. The Magistrates' Court Protocols should state that when deciding whether it is appropriate to accept an undertaking, the court should have regard to:

- the respondent's age (ie that an undertaking may be more appropriate where the respondent is aged under 18 years);
- the nature of the violence perpetrated by the respondent, as disclosed in the application; and
- whether making an intervention order with a condition that the respondent not assault or harass the applicant as the only condition is more appropriate in all the circumstances of the case, rather than accepting an undertaking.

101. The Magistrates' Court Protocols should make it clear that an undertaking has the legal effect of suspending the intervention order application for the period of the undertaking. If an undertaking is breached, the applicant has a right of reinstatement of the original application or may make a new application for an interim order.

Undertakings - Other Bench Books

Australia

Judicial College of Victoria, Family Violence Bench Book (2014).

2.2.4 discusses the advantages and limitations of undertakings when deciding whether to accept an undertaking instead of making an interim or a final order, with safety being the paramount consideration.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2021).

In Section 16.10.11.5: Concerns about undertakings: Domestic violence context, the bench book raises these questions in the context of Hague Convention matters:

- ‘Are undertakings from a parent who has engaged in domestic violence or who has demonstrated disrespect for law or who has a history of non-compliance with court orders likely to be reliable?’
- ‘What happens to the safety of the custodial parent and child if the undertaking parent decides to ignore or to retract the undertakings upon the child’s return in the other jurisdiction?’

Undertakings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Susan

Summary of considerations

The following table sets out a range of issues for consideration by judicial officers in protection order application proceedings. It is not an exhaustive list. There may be other issues requiring specific attention depending on the facts and circumstances of the particular case.

Issue	Consider
Safety of individuals	Who requires protection – applicant/victim, children, others (including extended family)
	Who is/not in attendance
	Protection necessary/available in courtroom and court precinct
	Appropriateness of remote witness facilities
Risk	Nature and extent of domestic and family violence behaviours alleged
	Respondent/perpetrator's use of/access to/location of/licences for firearms or other weapons
	Living and work/school/study arrangements of all affected parties
	Risk factors – general, and specific to particular case incl parties' vulnerabilities (eg health, disability, cultural and linguistic)
	Need for assessment of risk of future domestic and family violence
Consent/disclosure	Whether applicant/victim's capacity to consent or disclose may be affected
	Consent in the context of applicant/victim agreeing to consent orders (see below)
	Consent in the context of applicant/victim agreeing to withdraw application (see below)
Existing orders – Children/parenting	Family law or child protection orders – availability of/access to copies, specific conditions
	Whether child contact with respondent/perpetrator is safe for child, applicant/victim
Existing orders – Respondent/perpetrator	Bail or sentencing orders – availability of/access to copies, specific conditions

	Availability of/access to police records
Practical issues affecting ongoing parenting & family law matters	Proximate timing of listed Family Court/Federal Circuit Court hearing re parenting matters and whether safe and appropriate to defer protection order application proceedings pending outcome of hearing
	Where no current application for parenting orders, whether naming children as protected parties on protection order will unduly impact on outcome of any subsequent parenting proceedings
	How parties will communicate re safe changeover arrangements, joint parenting decisions, ongoing joint financial/business and family law matters if one or both are self-represented
Procedure	Matters affecting fair hearing – conduct of proceedings, availability and use of remote witness facilities, legal representation, interpreters/translators, support person in court, referral to support services
	Need for/length of adjournment/s – timely decision making
Protection order conditions	Naming protected parties – applicant/victim, children, others
	Tailoring conditions to reflect particular circumstances of the case
	Prohibition of certain domestic and family violence behaviours against protected parties
	Prohibition on respondent/perpetrator from contacting or being within a certain distance of protected parties or their residence, workplace, or other location/s
	Prohibition on respondent/perpetrator's possession/use of firearms or other weapons
	Prohibition on respondent/perpetrator from causing another person to engage in conduct prohibited by the order
	Exclusion of respondent/perpetrator from protected person's residence
	If child contact with respondent/perpetrator is not safe for child or other protected parties – consider no contact or alternative safe contact arrangements (eg contact centre)
	If family law order inconsistent with proposed protection order – vary family law order to ensure consistency (s 68R *Family Law Act 1975* (Cth))
	If no family law order and child contact with respondent/perpetrator is safe for child and other protected parties – consider specific conditions dealing with contact arrangements (and negotiation of) consistent with protection order

	If child protection order – consider whether consistent/need for consistency
	If bail or sentencing orders – consider whether consistent/need for consistency
	Duration – proportionate to risk and protected parties' need for protection, observe any legislative prescriptions
Cross application – Mutual protection orders	Whether the cross application by the respondent/perpetrator may be intended to further harass, control or abuse the applicant/victim
	Whether the risk of further domestic and family violence to each party is equivalent or one is at greater risk than the other
	Whether the mutual orders may have the effect of minimising the domestic and family violence experienced by one party
Protection orders by consent	Whether applicant/victim's agreement to accept consent order may not be voluntary
	Whether order made with or without admission of matters of fact
	Possible effects of consent orders without admission of matters of fact
Undertakings – single/mutual	Whether protection order a more appropriate response
	Whether applicant/victim's agreement to accept undertaking may not be voluntary
	Recording and notifying the parties of the limitations of undertaking: unenforceable; breach not a criminal offence
Withdrawal of application	Whether applicant/victim's withdrawal/agreement to withdraw may not be voluntary
Explanation of protection orders	Protected parties – how the order protects, specific conditions relating to children/contact arrangements, rights in the event of breach, query personal safety plans, available victim support programs
	Respondent/perpetrator – consequences of breach, denounce domestic and family violence, encourage compliance and participation in any behavioural change programs, recommend seeking legal advice

Sample conditions

Overview

In many jurisdictions there are standard directions and conditions included in a protection order; these vary to some extent between jurisdictions due to differences in legislation and practice. The following sections provide examples of plain English directions and conditions that may, where appropriate, be adapted by judicial officers to the particular case and jurisdiction. In addition to ensuring the protection of people and belongings, it may also be necessary in particular cases to impose conditions for the protection of pets and other animals. 'You' refers to the person against whom the protected person/people is/are protected. These examples are drawn from the documents referenced in 'Other resources'.

General Directions

(a) You must follow all of the directions and conditions of this court order. It is a criminal offence not to follow this court order, even if you only attempt to, and no matter what reason you may have. If you are convicted, you could go to prison or be fined. You could also be charged with other criminal offences. If you are convicted of these offences, you could receive a longer prison sentence or higher fine.

(b) You must follow this court order even if the Protected Person/People doesn't/don't want you to, or tells/tell you that you don't need to, or make/makes contact with you first.

(c) You must not cause, allow or encourage another person to do anything forbidden by this court order.

(d) You will be personally responsible whether you act or speak or publish pictures, photos or recordings in person or through another person or through any other means, including electronic communication and devices, for example, by post, facsimile, phone, text messages, emails, skype, Facebook or other social networking site or internet platform, or GPS tracking.

(e) When the child of Protected Person, […] is born, that child will also be a Protected Person protected by this court order.

(f) You must follow this court order until […] *OR* You must always follow this court order.

(g) You have consented to this court order without admitting any facts about what has happened

previously.

Conditions About Behaviour

1. You must be of good behaviour towards the Protected Person/People and you must not commit domestic and family violence against the Protected Person/People.
2. You must not do any of the following to the Protected Person/People:
   (a) assault or threaten;
   (b) stalk, harass or intimidate;
   (c) intentionally or recklessly destroy or damage any property or pet that belongs to them (even if it belongs only partly to the protected person/people) or is in their possession.

Conditions About Contact

3. You must not approach the Protected Person/People within […] metres.
4. You must not contact the Protected Person/People in any way, unless through a lawyer/this person […].
5. You must not approach within […] metres of the boundary of:
   (a) any place the Protected Person/People might go to for work;
   (b) the school or any other place the Protected Person/People might go to for study or training;
   (c) any place the Protected Person/People might go to for childcare;
   (d) any other place listed here: […]
6. You must not approach within […] metres or be in the company of the Protected Person/People for at least 12 hours after drinking alcohol or taking illicit drugs.
7. You must not try to find the Protected Person/People, unless ordered by a court.

Conditions About Family Law and Parenting

8. You must not approach within […] metres or contact the Protected Person/People in any way, unless:

(a) through a lawyer; or

(b) to attend legally accredited or court-approved counselling, mediation or conciliation; or

(c) as ordered by this or another court to enable contact with any children; or

(d) as agreed in writing between you and the parent/s and/or the person with parental responsibility to enable contact with any children.

9. You must follow the conditions of the Order made by Justice […] of the FCCA/FCA on […], which is revived/varied/discharged/suspended by this court order as follows: […].

Conditions About Where You Cannot Go

10. You must not live at:
    (a) the same address as the Protected Person/People; or
    (b) any address listed here: […].

11. You must not go within the boundary of:
    (a) any place where the Protected Person/People lives/live;
    (b) any place where the Protected Person/People works/work;
    (c) any place where the Protected Person/People studies or trains/study or train;
    (d) any place listed here: […].

12. You must not go within […] metres of the boundary of:
    (a) any place where the Protected Person/People lives/live;
    (b) any place where the Protected Person/People works/work;
    (c) any place where the Protected Person/People studies or trains/study or train;
    (d) any place listed here: […].

Conditions About Belongings

13. You are allowed to collect these belongings […] from this address […] between these times […] on this date […], but only if a police officer/this person […] attends with you.
14. You are allowed to collect these belongings […] from this address […] between these times […] on this date […].
15. You must return these belongings […] to this address […] between these times […] on this date […], and you must have a police officer/this person […] attend with you.
16. You must return these belongings […] to this address […] between these times […] on this date […].
17. You must allow the Protected Person/People attended by a police officer/this person […] to collect these belongings […] from this address […] between these times […] on this date […].
18. You must allow the Protected Person/People to collect these belongings […] from this address […] between these times […] on this date […].

Conditions About Weapons

19. You must not possess any firearms, ammunition or any of these weapons or articles: […].
20. You must immediately surrender your licence/permit […] to the relevant authority.
21. You must use this firearm/weapon: […] only on these conditions: […].

Conditions About Intervention Programs

22. You must contact […] and make and attend an appointment for assessment, and if assessed as suitable, undertake any intervention program advised as appropriate and comply with any direction given by your case manager.

Sample conditions - Other Resources

Australian Government: Attorney-General's Department, National Domestic Violence Order Scheme.

An online resource with information on the national recognition and enforcement of protection orders throughout Australia. It contains links to information in numerous languages, as well as links to state and territory courts.

- **Cannon, A and AIJA, Draft recommendations for standard national intervention orders.**
- **Judicial College of Victoria, Decision making in family violence intervention order matters: prescriptive requirements and limitations.**
- **NSW Final apprehended domestic violence order (pdf).**
- **SA intervention order proforma (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 1) (pdf).**
- **Queensland Courts, Southport Domestic and Family Violence Specialist Court (orders 2) (pdf).**

Queensland Courts, *Domestic violence videos* (2016).

'This series of videos explain the court process for domestic and family violence to provide [people] with the information [needed] to take part in the legal process'. Whilst these videos were developed in Queensland, they offer some general observations that may provide assistance for those in other jurisdictions. These videos include:

- What is domestic and family violence?
- What is a Domestic Violence Order?
- How to apply for a Protection Order.
- What happens in court?
- What if I'm served?
- Understanding the conditions of a Domestic Violence Order.

Perpetrator interventions

Information in this section focuses on perpetrator intervention programs that work intensively with men who perpetrate domestic and family violence; these programs are generally referred to as Men's Behaviour Change Programs (MBCPs). Importantly, the need for integrated responses to domestic and family violence including the integration of perpetrator programs within the wider system is increasingly recognised including within the Council of Australian Government's (COAG) National Outcome Standards for Perpetrator Interventions (NOSPI) [Perpetrator Interventions National Standards 2015], and is "crucial in terms of holding men accountable for their behaviour" and increasing the safety of victims [Mackay et al 2015 Part 1]. When considering referral to a MCBP, the priority should be the safety of the victim and children. Where appropriate, judicial officers should seek evidence of behaviour change following program completion and prior to consideration of further orders.

Evaluating the effectiveness of MBCPs is costly and complex, with little research [Urbis 2013] conducted in Australia to date [Chung et al 2014]. Recent research [Bloomfield & Dixon 2015] of Domestic Violence Perpetrator Program effectiveness in the UK [Kelly & Westmarland 2015] has suggested some positive outcomes. However evidence from the US [Eckhardt et al 2013] concerning Batterer Intervention Programs [Buzawa et al 1999] (which have less in common with most Australian programs than their UK counterparts) are more mixed and subject to significant methodological limitations [Centre for Innovative Justice Report 2015]. Most evaluations, for example, have failed to consider the multiple ways in which these programs contribute towards the safety of women and children, and operate as part of an integrated service system rather than as stand-alone interventions.

Options for referral of those perpetrating domestic and family violence to an intervention program vary between jurisdictions. As a general principle, earlier intervention is preferable in order to minimise further offending and costs to the community [Centre for Innovative Justice Report 2015]. In civil proceedings within some jurisdictions a respondent may be ordered to attend an intervention program either as a condition of a protection order, or in some states through specific provisions (Vic - Counselling Orders; Qld - Intervention Orders; cf NSW – Apprehended Domestic Violence Orders can only prohibit behaviours not compel participation in programs [Mackay et al 2015 Part 2]). In criminal matters options include bail conditions, probation or parole order conditions, with the latter having the advantage of being overseen by corrections officers. The

consent of the offender is preferable (ideally supported through informal court support processes) and assists in engagement and compliance, but is not necessarily a prerequisite for successful intervention.

While generally referred to as Men's Behaviour Change Programs (MBCPs) in Australia, other jurisdictions may refer to these programs as Stopping Violence Programs (New Zealand), Domestic Violence Perpetrator Programs (United Kingdom), or Batterer Intervention Programs (United States). MBCPs are run by community-sector or government organisations and should have demonstrated experience, understanding and skill in specialist domestic and family violence work. In some states (WA, Qld, Vic & NSW) these programs operate according to minimum standards or professional practice guidelines, with movement in other states and territories and at a national level to similarly adopt agreed minimums of practice [Other Resources].

Programs for women who perpetrate domestic and family violence are different in a number of ways, including that for most participants, prior experience of violence is a significant factor in their offending. Where available, due to the relatively lower numbers of referrals, they are almost exclusively provided as individual counselling rather than group programs. Notably, a significant proportion of female offenders not only have a prior history of experiencing violence, but they also experience violence by their current or former partner against whom they have offended [Fanslow et al 2015].

MBCP work is highly specialised, and quite distinct from other types of intervention. Anger management programs or generalist counselling [Harne & Radford 2008] are contra-indicated [Klein 2009] for assisting perpetrators to stop their use of domestic and family violence for a number of reasons including lack of consideration of power and control dynamics or gender socialisation, an absence of partner contact, an absence of safeguards against collusion and absence of risk assessment or risk management framework. Relationship counselling and family therapy are generally contra-indicated for similar reasons and because the basis for safe communication between the parties usually does not exist without prior specialist intervention over a period of time [Harne & Radford 2008].

Where alcohol or other drug use, mental health issues, including post-traumatic stress disorder, brain injury and cognitive disabilities, are also a concern, MBCP programs may not be suitable unless they are appropriately designed and delivered. Substance misuse or mental health interventions can complement MBCP work and are effective with concurrent participation in an MBCP [Klein 2009]. In the most severe cases, the MBCP assessment process may identify the need for substance misuse or mental health intervention prior to and in preparation for MBCP participation.

MBCPs have the fundamental aim of working towards the safety, wellbeing, and agency of women, children and men affected by domestic and family violence. As well as teaching behaviour change strategies, ideally these programs:

- directly address women's needs through partner support work conducted separately and alongside the work with men
- directly address children's needs through support for their mother and work with their father or male guardian
- achieve at least short-term behavioural and attitudinal changes regarding at least some of the tactics and ways in which the man uses violent and controlling behaviour
- reduce the likelihood that he will perpetrate violence in the medium and long term, and in some cases, achieve comprehensive, sustained desistance from all forms of violence in the long-term
- help monitor the use of violence by male participants, in collaboration with courts, police, corrections or child protection,
- work with the criminal justice system to support processes that lead to appropriate sanctions for men who continue to use criminal violence, and/or who contravene protection order conditions
- help manage high-risk situations involving the safety of any person [Juodis et al 2014]
- contribute to the achievement of coordinated community responses to domestic and family violence, and stronger integration between government and non-government agencies involved in the local or regional family violence service system, towards information sharing, assessing and managing risk.

MBCP practitioners work consciously towards avoiding the potential for harm during men's behaviour change work, given the risks that some men might use their participation in the program mainly or solely to attempt to minimise sanctions for their behaviour, or to misrepresent what occurs in the program to their partner as a means of increasing their control over them [Other Resources].

Men who are referred to a MBCP typically engage in an initial intake and assessment phase to determine their suitability and eligibility for participation in the program. At that early stage, most men have only limited understanding or acceptance of responsibility for their perpetration of violence, and limited empathy regarding its effects. MBCPs are indicated for the majority of male domestic and family violence perpetrators aged 18 and over. There is currently no conclusive research demonstrating that particular cohorts or 'types' of male adult perpetrators are more suited to these programs than others. A relatively small percentage of

perpetrators referred are assessed as not suitable, or not suitable at that particular time, for reasons including:

- High levels of chronic, trait-based psychopathy (e.g. men with severe personality disorders)
- Acute mental illness
- Severe substance misuse problems [Juodis et al 2014]
- Significant cognitive impairment
- The absence of any self-recognition of their perpetration of domestic and family violence.

Generally, manageable mental illness or substance misuse issues, and others such as housing insecurity and problem gambling can be addressed concurrently with the man's participation in the MBCP, either by the same organisation/provider, or by working in collaboration with specialist providers in these fields.

There is only a small number of specialist MBCPs focusing exclusively on particular cultural or identity-based contexts. In Victoria for example, there are MBCPs conducted in Vietnamese and Arabic, a program for South Asian men, and one for gay and bisexual men. However, these are rare instances, and in general, mainstream MBCP providers are expected to adapt their interventions to take into account the cultural and identity characteristics of particular participants. A small but growing number of programs are being developed to work with Aboriginal and Torres Strait Islander perpetrators of domestic and family violence, often within a holistic family and community context, and with a significant component focusing on cultural dispossession, intergenerational trauma and the effects of colonisation [Mackay et al 2015 Part 1].

After intake and assessment—generally conducted through one or more individual interviews with the man—most MBCPs then work with men in a group-based format. While the structure and nature of MBCP group work varies, including open, closed and modular formats, group work provides participants with an opportunity to assist one another to develop attitudes, language and a mutually supportive culture consistent with non-violence. For most programs, intervention intensity consists of one group work session per week, over a period of three to six months. Most programs adopt a blended approach within these sessions, drawing upon feminist and gender-based psychoeducational techniques to address men's perception of entitlement and use of power and control, cognitive-behavioural strategies targeting violence-supporting attitudes and behaviours, and narrative approaches supporting the development of non-violent ways of being [Mackay et al 2015 Part 1].

Support (including risk assessment, safety planning, and recovery counselling) is offered to the man's current

and/or former partner alongside the work conducted with him, either by the MBCP provider or by a women's service working in collaboration with the provider. This work can also include a focus on how children are affected by the violence, even if the provider does not work with the children directly [Harne & Radford 2008].

In Australia, MBCPs are part of a renewed focus on building 'webs of accountability' for those perpetrating domestic and family violence [No to Violence 2017]. These broader strategies include case management and supplementary individual work with participants [Vlais 2014]; longer and, where appropriate, more intense interventions to bring Australian programs in line with international best practice; strengthened partner support work; support for participants once they complete a program; and working with perpetrators on how their domestic and family violence affects children and harms the mother-child bond.

Perpetrator interventions - Key Literature

Australia

Australia's National Research Organisation for Women's Safety. (2021). Interventions for perpetrators of domestic, family and sexual violence in Australia (ANROWS Insights, 02/2021). ANROWS.

Extract: This ANROWS research explores how human services agencies (particularly mental health, alcohol and other drugs, and child protection services) could be recognised as essential parts of broader perpetrator intervention systems. Human services agencies could play a pivotal role in linking men into behaviour change interventions, and could work together with the legal system and men's family violence interventions to keep perpetrators' use of violence in view. This means having agencies monitor perpetrators' risk over time, sharing information and working collaboratively to manage risk.

Improving services and systems to better respond to men's use of violence will require:

- addressing trauma and inequality
- providing early and holistic support for associated issues
- supporting community-led approaches
- integrating service systems
- building workforce capacity.

Much work remains to be done to evaluate the effectiveness of perpetrator interventions. In undertaking this evaluation work, it is essential that the safety and wellbeing of victims and survivors remain the central focus.

The research makes 9 key policy recommendations (see p1) including the need for guidance to be developed for courts on trauma-informed ways of working, including recognising how trauma affects the capacity to give evidence.

Blagg, H et al., Understanding the role of law and culture in Aboriginal and/or Torres Strait Islander communities in responding to and preventing family violence (2020) Sydney: ANROWS

The project explored the roles Aboriginal and Torres Strait Islander Law and Culture play in prevention, intervention and healing in family violence and how they can be supported using a strengths-based approach.

It was grounded in an understanding shaped by the impact of colonisation and took place in six communities which retain strong connections to Law and Culture.

It found that Aboriginal and Torres Strait Islander Law and Culture are features of everyday life in many Aboriginal and Torres Strait Islander communities, although the mainstream legal system and forms of governance undermine their practice. Responses to family violence in Aboriginal and Torres Strait Islander communities should move away from the mainstream legal system and be grounded in Law and Culture, including Aboriginal and Torres Strait Islander dispute resolution processes. Healing (including addressing trauma and restoring wellbeing) is fundamental to addressing family violence. Participants recommended interventions that worked at the family, rather than individual, level.

Recommendations include: a greater focus on prevention, healing and diversion from the criminal legal system; involvement of men and women in the design and implementation of local family violence strategies; acknowledging the link between violence and issues that stem from colonisation such as alcohol misuse and intergenerational trauma, rather than focusing solely on gender inequality and male power increases the effectiveness of policy and service responses; and an improved understanding within mainstream systems and services of the nature of Aboriginal and Torres Strait Islander family obligations and interconnections.

Boxall H *et al.* 2020. Responding to adolescent family violence: Findings from an impact evaluation. *Trends & issues in crime and criminal justice* no. 601. Canberra: Australian Institute of Criminology.

Abstract: Despite growing recognition of the prevalence of and harms associated with adolescent family violence, our knowledge of how best to respond remains underdeveloped.

This paper describes the findings from the outcome evaluation of the Adolescent Family Violence Program. The results show that the program had a positive impact on young people and their families, leading to improved parenting capacity and parent–adolescent attachment. However, there was mixed evidence of its impact on the prevalence, frequency and severity of violent behaviours.

The evaluation reaffirms the importance of dedicated responses for young people who use family violence, and the potential benefits, and limits, of community-based programs.

Centre for Innovative Justice report, Opportunities for Early Intervention : Bringing Perpetrators of Family Violence into View , (2015, RMIT University).

While this report is focussed on early interventions for perpetrators of domestic and family violence in a very broad sense chapter two of this report titled 'Perpetrator Programs' provides a detailed literature review of current debates and evidence about the effectiveness of programs.

Chung, Donna, Damian Green, Gary Smith, and Nicole Leggett, *Breaching safety: Improving the effectiveness of Violence Restraining Orders for victims of family and domestic violence* (2014, Curtin University).

This Western Australian draws on interviews with ten men recruited from a Western Australian men's behaviour change program. The interviews were complemented with a focus group of service providers including representatives from men's and women's domestic violence services, Family Violence Court, Family Court, Legal Aid and the Department for Child Protection and Family Support. This study provides useful insights for Magistrates regarding perpetrator views of protection orders and what might be needed to increase their effectiveness. Key study findings include participants' lack of empathy or regard for the safety and wellbeing of their current or former partners. Men often perceived court processes as unfair (including protection order processes and decision making around child contact). Participants' explanations for breaches of violence restraining orders could be grouped into three categories: men who took responsibility for the breach and related consequences; describing the partner as being responsible and 'accidental breachers' where the breach occurred because the protected person and respondent were 'accidentally' in the same physical location. The issue of partner initiated contact does raise an important issue for the women who require flexibility to their protection order to enable them to remain safe and legally protected from unwanted partner contact, but allow communication and face to face contact if necessary (p3).

Chung, D., et al., *Improved accountability: The role of perpetrator intervention systems* (2020). Sydney: ANROWS.

The aim of this research was to develop a detailed understanding of Australian perpetrator intervention (PI) systems upon which the range and breadth of responses to DFV could be mapped; to ascertain the most common pathways of identification, assessment and intervention for DFV perpetrators; and to identify

opportunities to further strengthen PI systems and perpetrator accountability. In developing an understanding of PI systems, it was important to acknowledge that perpetrators come into contact with government and non-government services in various capacities that may or may not address their violence, while most perpetrators do not come to the attention of any services. This research has highlighted the extent to which multiple systems are involved in responding to perpetrators, areas where there are strong and frequently used pathways, and areas where there are weak or no linkages to respond to perpetrators.

Chung, Donna et al (2020). *Prioritising women's safety in Australian perpetrator interventions: Mapping the purpose and practices of partner contact* (2020). Sydney: ANROWS.

This project documents the practices of men's behaviour change programmes (MBCPs) in contacting victims/survivors and children of participants. The project considers how partner contact is operating in Australia, its strengths and challenges, and the experiences of victim/survivors who received partner contact support.

Key findings of the report include:

- Lack of partner contact as part of an MBCP can lead to some perpetrators using their participation in the program to perpetrate abuse towards the victim/survivor and/or other family members.
- Partner contact is labour-intensive, under-resourced, and often a secondary priority.
- There is currently a lack of consistency in partner contact practices and interventions, and limited awareness about existing guidelines and standards.
- Perpetrator accountability has been a growing focus of work in Australia since the launch of the National Plan to Reduce Violence against Women and their Children 2010–2022 and the subsequent National Outcome Standards for Perpetrator Interventions.
- Men's behaviour change programs (MBCPs) are a key site of perpetrator accountability that aim to improve safety for women and children.
- Partner contact is known and understood to be a critical element of MBCPs, however a review of literature shows that little has been documented in Australia about safety practices in this context.

The report's key recommendations are:

- Partner contact support should be offered to all women (either directly or through organisational

partnerships) through all MBCPs.

- National minimum practice standards for partner support as a component of MBCPs should be developed, and these standards should be formally recognised within contractual arrangements and funding service agreements.
- Partner contact services should be resourced and funded in ways that enable those national minimum practice standards to be met, and that ensure women have ongoing access to support irrespective of a perpetrator's MBCP attendance.

Fitz-Gibbon, K., Maher, J., Thomas, K., McGowan, J., McCulloch, J., Burley, J., & Pfitzner, N., *The views of Australian judicial officers on domestic and family violence perpetrator interventions* (Research report, 13/2020), Sydney: ANROWS.

Despite increasing acknowledgement of the importance of perpetrator interventions in the delivery of integrated responses to domestic and family violence (DFV) and promoting perpetrator accountability, there remains very little understanding of how Magistrates and other judicial officers view, manage and use perpetrator interventions. This research project aimed to address this gap in evidence.

IN BRIEF

- Judicial officers hold mixed views on the effectiveness of perpetrator interventions, in particular men's behaviour change programs, in DFV matters.
- When a DFV case is before them, judicial officers have limited access to information about which (if any) perpetrator interventions have been previously used with a perpetrator.
- Judicial officers across Australia express a lack of knowledge about perpetrator program referral options, in relation to both the availability and nature of the programs.
- A central register of perpetrator program referral options, where information about referrals (and perpetrators who return to court after completion of a specific program) could be recorded would build evidence on the effectiveness of specific interventions.
- The role of judicial officers in holding perpetrators to account remains unclear, as does the place of judicial officers within the system of perpetrator interventions itself.

Key recommendations:

- To assist in judicial decision-making, consideration should be given to developing guidance on seeking and making use of a perpetrator's history of interventions (e.g. FVIOs, prior sentences, and program attendance) in all DFV matters, including in sentencing.
- All states and territories should consider contributing to the development and maintenance of a centralised online register of perpetrator intervention programs, to be coordinated through the relevant government departments, to ensure that information is readily available to support judicial decision-making and referral in DFV matters.
- Courts and judicial educational bodies should consider exploring and developing guidance on the role of judicial officers in creating system accountability regarding perpetrators of DFV. Clarity on the parameters of this role will allow for the development of more consistent sentencing and other outcomes for DFV perpetrators across jurisdictions.

Fisher, C. et al. (2020). ***Best practice principles for interventions with domestic and family violence perpetrators from refugee backgrounds (2020).*** **Sydney: ANROWS.**

This Western Australian project involved: literature review; in-depth interviews with 20 men and 20 women from refugee backgrounds, including men who had perpetrated and women who had experienced domestic and family violence (countries of birth were Burma, Afghanistan, Sudan, Iraq and Iran); and two focus groups with service providers working in men's behaviour change programs, women's services, women's health, refugee services and domestic and family violence services.

It developed a set of best practice principles for interventions with men from refugee backgrounds who use domestic and family violence.

Healey, Lucy, et al., ***Invisible Practices: Intervention with fathers who use violence—Final Report*** **(ANROWS, 2018).**

This project sought to develop the workforce capacity of practitioners to intervene with fathers who use domestic and family violence (DFV).

The report argues that working with a whole-of-family approach can help to bridge the contradiction between

DFV and child protection services, who encourage or expect women to leave violent partners, and the family law system, which values contact (even in cases with known DFV). It argues that a whole-of-family approach also acknowledges the well-known facts that separation is not an end to the abuse, or that non-offending parents may not be in a position to separate from an abusive partner. In this way, they may lessen the chances of mothers being held accountable for "failing to protect" their children.

From the findings of the report, the authors developed a practice guide, which can be found at https://www.anrows.org.au/project/invisible-practices-intervention-with-fathers-who-use-violence/. It steps through techniques and considerations when working with fathers who use violence.

Hine, L. et al. Intervention programme for fathers who use domestic and family violence: Results from an evaluation of Caring Dads. Online 2022 Child, Family and Social work, https://onlinelibrary.wiley.com/doi/full/10.1111/cfs.12919

This article presents findings from an evaluation of a trial of the Caring Dads programme in an Australian jurisdiction. Caring Dads is a non-mandated group-based programme for fathers who have been physically and/or emotionally abusive towards their children, their children's mothers or both. The programme aims to engage men around their fathering and is ultimately vested in and focused on children's safety, well-being and the intrinsic link this has with the safety of the mother. Fathers undertaking the programme (n = 40), and associated mothers (n = 17), participated in a mixed-methods self-report questionnaire administered at programme commencement and conclusion. Results show overall positive outcomes for mother experiences of violence, psychological well-being and safety, along with fathers' increased awareness and understanding of what constitutes abusive behaviour.

Hulme, Shann, Anthony Morgan and Hayley Boxall, *Domestic Violence Offenders, Prior Offending and Reoffending in Australia*, Research Report No 580, September 2019, Australian Institute of Criminology.

Developing effective strategies to reduce domestic violence offending requires an understanding of perpetrator characteristics, offending patterns and recidivism. This study consolidates the Australian evidence base through a systematic review of 39 quantitative studies that examined domestic violence offending and

reoffending. Despite the wide range of data sources, samples and measures of violence, findings are remarkably consistent across studies. The findings further reinforce the importance of targeting male perpetrated violence, and reducing violence in Indigenous communities. Alcohol featured in a significant proportion of domestic violence incidents. Finally, the study demonstrates the importance of reducing repeat offending, particularly among prolific offenders, to reduce overall rates of violence.

Humphreys, Cathy and Monica Campo, *Fathers who use violence: Options for safe practice where there is ongoing contact with children* (CFCA Paper No. 43 – June 2017, Australian Institute of Family Studies).

The following summarises the key aspects of this paper:

Background

This paper responds to a challenge that has continued to frustrate workers attempting to intervene to support women and children living with DFV – that the DFV intervention system (in the specialist women's DFV sector and statutory child protection) is structured around women and their children separating from men who use violence. However, many women and children may not be in a position to separate from their abusive and violent partners, and some women and children's wellbeing and safety may not be enhanced by separation.

Inquiry

The paper explored these questions by conducting a review of exisitng literature:

- What is the practice or evidence base for working with families where the perpetrator remains in the home?
- Are there safe ways to work with women and children living with a perpetrator of DFV, or for women and children who still have significant contact with a perpetrator post-separation?
- In particular, whether there are strategies for working with fathers who use violence, that engage and address the issues for children, women and men who are continuing to live with DFV.

Observations

This review demonstrates that there is a paucity of evidence for effective approaches for responding to DFV in families where the perpetrator remains in the home or in regular contact with women and children. There

are, however, a number of practices developing in these areas: nurse home visits; restorative justice approaches; couple counselling; statutory child protection investigations; and interventions with vulnerable families/whole of family approaches. All urge caution and all recommend a priority on training workers, and only ever bringing men and women together under certain circumstances and with strict caveats. This is necessary if work is to be effective and not inadvertently escalate danger and/or collude with the power and controlling tactics of the perpetrator of violence.

Conclusions

There is some experimentation with interventions in these complex family situations, and some early signs of success. The challenges of working with the diverse nature of fathers who use violence are significant. Nevertheless, this may prove to be an important practice development for future DFV intervention.

Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K., … Dunstan, J. *Domestic and family violence and parenting: Mixed method insights into impact and support needs* (ANROWS, 2017).

The Domestic and Family Violence and Parenting Research program examined the impact of domestic and family violence (DFV) on parenting capacity and parent–child relationships in Australia. It focused on three main issues:

- parental conflict in families and impacts on the emotional health and parenting behaviours of mothers and fathers and child functioning;
- how DFV experienced before separation, after separation, or both affects parents' emotional health and parent–child relationships; and
- mothers' experiences of engagement with services in the domestic and family violence, child protection, and family law systems in the context of DFV.

A mixed method approach involved: literature review; analysis of the Longitudinal Study of Australian Children; analysis of two (Australian Institute of Family Studies) datasets of over 16,000 separated parents; qualitative in-depth interviews with 50 women who had experienced DFV and engaged with services in the DFV sector, the child protection system, or the family law system.

The *Key findings and future directions research summary* related to this report identifies specific implications

for practitioners engaging with mothers, fathers, and children against a background of DFV:

- Women who engage with services against a background of DFV have a number of complex material and psycho-social needs.
- If women are not already engaged with a specialist DFV service, then such a referral is usually necessary.
- It is likely that women and their children are experiencing ongoing abuse unless contact with the perpetrator has ceased and other safety measures to prevent abuse are available (e.g. being legally permitted to live at an undisclosed address to prevent stalking).
- Women may need assistance and referral in relation to financial and housing needs, including being informed about the availability of Financial Wellbeing and Capability services and Financial Counselling.
- Women and their children may be experiencing physical and emotional consequences from DFV and abuse and may need long-term therapeutic assistance.
- Mothers may need referrals to programs and services that will support the restoration of parenting capacity from a perspective of understanding the dynamics of DFV, including programs that offer services to mothers and children together. Children may also need assistance separately.
- Where relationships between fathers and children are being maintained, fathers may need referral to services in relation to parenting. Where this is occurring, the wellbeing and safety of children need to be monitored.
- Service providers should be alert to the fact that their services and other types of services and agencies may be used in a pattern of systems abuse. Staff, including legal professionals, should be trained to recognise this and provide appropriate advice and referrals wherethis is occurring.

Liang, Lesley, *Risk Assessment in Domestic Violence* (Australian Domestic and Family Violence Clearinghouse, 2004).

This article presents insights into the characteristics of perpetrators and the risk factors which influence abuse and explains why they may be useful considerations for judges. The author identifies that risk assessment is an important aspect of sentencing as it can help to identifythe amount and types of treatment. For example, abuse of alcohol appears in many risk assessment lists. Screening for alcohol problems may identify the need to provide treatment for alcohol abuse, in addition to perpetrator treatment. It can also help the criminal justice

system to identify which offenders need closer supervision), particularly given the rise in number of domestic violence perpetrators now before the courts in jurisdictions with strong arrest and prosecution policies. (p2)

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part one – Literature review* (ANROWS, 2015).

This extensive literature review examines both domestic violence and sexual assault perpetrator programs, including the types available and their effectiveness. This review identifies that perpetrator programs are just one form of perpetrator intervention. It notes that the majority of perpetrator programs in Australia are voluntary and often use group work and counselling (p 10).

The review identifies a number of different program approaches:

- Psychoeducational (p11): views violence against women as a deliberate and intentional tactic used by men to control and dominate women. Psychoeducational programs require men to accept responsibility for their actions and then attempt to educate men about power, social constructions of gender and the patriarchal nature of society. The psychoeducational approach has been criticised for lacking empirical support, being ineffective at promoting authentic and self-directed change, andadopting a ‘one size fits all’ approach.
- Psychotherapeutic (p11): operate on the understanding that factors such as behavioural deficits, trauma or psychopathology are the causes of family/ domestic violence. This approach is criticised for not adequately addressing the more personal and embedded aspects relating to men’s use of violence and its connections with wider structural inequalities. Cognitive behaviour therapy / CBT programs maybe a subset and focus on the idea that violence is learned and so can be unlearned.
- Families and couples counselling (p12): family therapists or couples counsellors tend to approach the issue of family/domestic violence from the perspective that domestic and family violence is a consequence of a dysfunctional relationship and that it is the role of the therapist to address this underlying dysfunction or discord in the relationship. It has been critiqued over concerns for women’s safety, and the implication that the victim/survivor also bears responsibility for the violence.
- Combined approaches (p12): A mix of psychoeducational and CBT approaches.
- Matched interventions (p12): These programs are based on the understanding that a range of psychological, psychiatric, bio-physiological and sociological factors explain men’s use of violence

towards women. Because of this, matched intervention programs should be individualised to the particular perpetrator. Research has shown that matched interventions are not well established in the domestic violence sector.

The report also outlines programs for specific populations, such as:

- Programs for Indigenous men (pp 14-15): such programs need to acknowledge Indigenous views of family/domestic violence, and the different causes of family violence in Indigenous communities (such as the impact of colonialism, loss of culture and kinship relationship, substance abuse, or geographical isolation). They must have a strong cultural foundation and be delivered as part of a holistic approach that encompasses the social, emotional, spiritual and cultural wellbeing of individuals and the community as a whole. They must also operate with recognition of the fear and impact of involving external agencies.
- Programs for men from CALD backgrounds (culturally and linguistically diverse) (pp 16-17): specific programs are needed, but there can be difficulty in accurately defining a cultural group.

The report covers emerging/evolving approaches to family/domestic violence, including restorative justice (which is sometimes preferred by Indigenous victims), and narrative therapy, a form of psychotherapy that sees family/domestic violence as manifesting from dominant narratives within society. Consequently, the narrative therapist tries to explore alternative narratives or stories, for example, inviting perpetrators to consider the effects of their violence or explore alternative ways of being within relationships..

The report also discusses the Risk Needs and Responsivity (RNR) Model (p18), which requires the intensity of the program to be tailored to the level of risk of re-offending posed by the offender, the nature of the intervention to respond to the offender's rehabilitative needs, and the delivery of the intervention to conform to suit the offender's ability and way of learning. The authors note that the RNR model may help reduce dropout rates as it is tailored to be responsive to the particular perpetrator.

Mackay, Erin, Althea Gibson, Huette Lam, David Beecham, *Perpetrator interventions in Australia: Part two – Perpetrator pathways and mapping* (ANROWS, 2015).

Summary at page 43: "There are … subtle differences between jurisdictions in terms of domestic violence orders mandating perpetrators to attend a specific perpetrator intervention program. For example, in South Australia a man issued with a domestic violence order can be mandated to attend a specific program and

non-attendance is considered a contravention of the order. Conversely, in some jurisdictions such as Victoria, courts can mandate a perpetrator to attend an eligibility interview under a domestic violence order; but need to issue a counselling order in order to mandate eligible perpetrators to attend programs.

“Within many jurisdictions there are few pre-sentence perpetrator intervention programs delivered by community correctional services or other government organisations[and] there are limited programs available for perpetrators on remand. Access to specific perpetrator intervention programs in custodial settings is also limited, as many perpetrators are given short sentences and programs in custody are often only available to those on sentences of more than 12 months. It is also the case that there is a shortage of programs specifically designed for Indigenous and CALD perpetrators in custody or on community-based orders in many jurisdictions.

“Perpetrators generally do have the opportunity to avail themselves of help and support from non-governmental organisations, although there is a disparity between jurisdictions in terms of the number of organisations available, with Victoria and New South Wales having more program providers than other jurisdictions… Support can also be limited for those perpetrators residing in rural and remote areas in Tasmania, South Australia, Northern Territory and Queensland.”

Meyer, Silke & Rose Stambe (2022) Increasing compliance with domestic violence protection orders: investing in perpetrator education and support as an investment in victim and family safety, Policing and Society, 32:9, 1071-1086, DOI:10.1080/10439463.2021.2016756

Abstract: Domestic Violence (DV) is a persistent public health issue of global proportions affecting an estimated one in four women worldwide. Civil protection orders or domestic violence orders (DVO) are a legal tool used in many jurisdictions, including Australia, to hold the alleged perpetrators accountable and improve the safety of victims. However, the research on the effectiveness of these orders are mixed and perpetrator non-compliance with such orders continues to be a concern. Few studies examine the situational factors that impact compliance with orders, especially in relation to service engagement and support needs of perpetrators of DV during and beyond the protection order court process. Our study uses focus group data to explore the perceptions of police officers (n = 16) and prosecutors (n = 3) involved in policing and prosecuting DV and the compliance with relevant protection orders in two court districts in Queensland, Australia. Alleged perpetrators’ comprehension of their order conditions and intersecting experiences of social disadvantage and complex needs emerged as key factors influencing compliance, along with the role of timely engagement

with alleged perpetrators during the court process to maximise respondent comprehension of order conditions and engagement with available and relevant support services. In concluding, we highlight the importance of protective and preventive aspects of the DVO process that combine holistic wraparound support with perpetrator accountability in order to maximise perpetrator compliance and thus victim and family safety.

Morgan, Anthony, Hayley Boxall and Rick Brown, *Targeting repeat domestic violence: Assessing short term risk of reoffending* (Australian Institute of Criminology Report No. 552 June 2018).

Report abstract:

Drawing on repeat victimisation studies, and analysing police data on domestic violence incidents, the current study examined the prevalence and correlates of short-term reoffending.

The results showed that a significant proportion of offenders reoffended in the weeks and months following a domestic violence incident. Individuals who reoffended more quickly were more likely to be involved in multiple incidents in a short period of time. Offenders with a history of domestic violence—particularly more frequent offending—and of breaching violence orders were more likely to reoffend. Most importantly, the risk of reoffending was cumulative, increasing with each subsequent incident.

The findings have important implications for police and other frontline agencies responding to domestic violence, demonstrating the importance of targeted, timely and graduated responses.

Morgan, A, Boxall, H, Dowling, C & Brown, R 2020, 'Policing repeat domestic violence: Would focused deterrence work in Australia?', *Trends & issues in crime and criminal justice* no. 593. Canberra: Australian Institute of Criminology.

Abstract: Focused deterrence approaches to domestic violence have been developed in the US to increase offender accountability and ensure appropriately targeted responses to victims. While innovative, the model has strong theoretical and empirical foundations. It is based on a set of fundamental principles and detailed analysis of domestic violence patterns and responses. This paper uses recent Australian research to explore the feasibility of adapting this model to an Australian context. Arguments in favour of the model, and possible barriers to implementation, are described. Based on an extensive body of Australian research on patterns of

domestic violence offending and reoffending, and in light of recent developments in responses to domestic violence, this paper recommends trialling focused deterrence and 'pulling levers' to reduce domestic violence reoffending in an Australian pilot site.

No to Violence, Men's Behaviour Change: Minimum Standards and Quality Practice (2017).

This paper discusses the notion of the 'web of accountability' that has been influential in policy circles. A web of accountability around a man potentially comprises strands based on:

- attempts to hold him accountable through the formal criminal justice, civil justice and child protection systems (involving informed, consistent and coordinated actions by police, courts, corrections and child protection, where appropriate)
- the actions of non-mandated service systems that attempt to engage him through proactive, assertive outreach (for example, at court through a Respondent Worker, or telephone-based via men's enhanced intake or the MRS After Hours Service)
- women's (and in some cases, a community's) own informal attempts to 'draw a line in the sand' about his behaviour, and to hold him accountable to the promises he might have made to change his behaviour, and to her and her children's needs for safety and dignity. (p5)

Urbis, *Literature Review on Domestic Violence Perpetrators* (Urbis 2013).

This commissioned literature review into domestic violence perpetrators covers a wide range of topics. With regard to sentencing, predominately the efficacy of perpetrator programs is addressed. In discussing this, the review mainly considers international sources and research, noting Australian research on the topic is scarce. The review makes a number of general conclusions: Treatment conducted in a group format is limited in its capacity to respond to individual needs, and group dynamics may reduce the willingness to self-disclose and engage among perpetrators who are less motivated to change (p 11). Individual or individualised interventions increase the likelihood of program completion, which in turn reduces recidivism (p 11). There is no clear positive impact of court-mandated interventions (p 12). The effectiveness of intervention programs has been found to vary as a function of characteristics associated with the evaluation methodology as well as the perpetrators (p 12). Programs should be matched to offender characteristics (p 12). Court-monitoring of

program attendance can improve program completion (and therefore recidivism) (p 14)

Vlais, Rodney, *Domestic violence perpetrator programs: Education, therapy, support, accountability 'or' struggle* (No to Violence, Male Family Violence Prevention Association, 2014).

This article was written on behalf of No to Violence (the peak body for those working with male perpetrators of family violence in Victoria) and presents a literature review. The article focuses on the ways in which men's attitudes and behaviour can be changed. As such, it does not primarily refer to court-ordered programs however the programs and models discussed are ones the court could consider utilising when sentencing.

The report discusses and recommends education, therapy (provided it is tailored for the individual) and 'support' (which includes programs and counselling).

The report recommends that all five 'elements' of DV perpetrator programs listed (education, therapy, support, accountability and 'solidarity and struggle' – i.e. standing in solidarity with victims and perpetrators and recognising the struggle to change) are woven together to provide the best and most effective system.

Vlais, Rodney, Sophie Ridley, Damian Green & Donna Chung, *'Family and domestic violence perpetrator programs'* (2017) Stopping Family Violence Inc.

This report provides a national perspective on trends and developments to encourage discussion and action about the steps needed to build perpetrator intervention systems which will improve existing family and domestic violence (FDV) efforts, and MBCPs (men's behaviour change programs) within that system. The report also comprehensively considers recent national and international research and innovative practice to inform and challenge ideas about the future of MBCPs in Australia. The report is divided into a discussion of several topics, such as philosophical debates, funding, the place and role of perpetrator programs within integrated/coordinated community responses, research and program evaluation, adapting interventions for different cohorts of perpetrators, responding to risk vs changing men, program provider accountabilities, supporting program providers to become compliance-ready, practice issues in a range of areas, developing a sufficiently skilled, diverse and sized workforce, and the relevance of broader community responses and primary prevention to program provision (p 8). There is a call for more diverse approaches to meet the needs of rural, Indigenous and culturally and linguistically diverse communities, as well as communities living in

LGBTIQ and non-nuclear family settings. The report identifies some key questions and challenges on p 6.

Wendt, S. et al. for Women's Safety. (2019). *Engaging men who use violence: Invitational narrative approaches* (2019). Sydney: ANROWS.

This project conducted a literature review and interviews with 'invitational narrative' practitioners in South Australia and engaged with men who use violence, their invitational narrative practitioners and where consent was able to be obtained, each man's partner/ex-partner. 'The aim of narrative practice is to enable people to "re-author" their stories and, in doing so, enhance their sense of agency and capacity for change.' This research explores how invitational narrative approaches work and how this approach may contribute to change.

International

Bloomfield, Sinead and Louise Dixon, 'An outcome evaluation of the integrated domestic abuse programme (IDAP) and community domestic violence programme' (National Offender Management Service, UK Gov. 2015).

This paper reports on reviews of two perpetrator programmes in the UK. Among other findings- it found that the programmes were effective in reducing domestic violence and reoffending in the two year follow up period.

Boots, Denise et al. 'A Comparison of the Batterer Intervention and Prevention Program with Alternative Court Dispositions on 12-Month Recidivism' (2015) *Violence Against Women* 1-24.

The purpose of this study was to examine the effectiveness of a 20 week Batterer Intervention and Prevention Program (BIPP) for cases assigned to a misdemeanour family court. This study focused on determining whether BIPP cases, compared with alternative sanctions, had significantly lower recidivism rates 12 months after program involvement. The study was undertaken by randomly sampling cases appearing before two county courts in Texas in 2007. The BIPP was a 20 week program with state mandated programming (Psychoeducational and psychotherapeutic combined model- includes both group work and individual counselling).

The study found that the general recidivism / arrest was significantly related to being non-White, younger in age, younger at time of first official arrest, more counts of prior arrests, having a female victim, not cohabitating with the victim, being under the influence of substances during intimate partner violence offense, receiving jail time, and living in neighbourhoods with higher disadvantage and residential mobility. Findings indicated that BIPP was more effective than jail or regular dismissal in reducing the likelihood of future arrests, but not plea deferred adjudication and conditional dismissal. Results argue toward the efficacy of some form of treatment versus simply receiving jail time.

Buzawa, E., G. Hotaling, A. Klein, and J. Byrnes. *Response to Domestic Violence in a Pro-Active Court Setting*. Final report for National Institute of Justice, Washington, DC: U.S. Department of Justice, National Institute of Justice, 1999.

This study draws on a sample of 353 cases of male-to-female domestic violence cases heard during a 7 month data collection period at a US court. Drawing on a range of data this study draws on recidivism data, police reports and perpetrator / victim perspectives to determine likelihood of reabuse. (Summary of findings from p154)

The study found that the type of program does not affect re-abuse (p 65); those who complete batterer programs are less likely to re-abuse than those who fail to attend, are non-compliant or drop out (p 68); court monitoring can enhance program attendance (p 69); most victims are satisfied with their abuser's referral to a program (p 73); anger management programs on their own were found to not be effective (p 66); suggests that alcohol and drug treatment: generally effective in reducing re-abuse and should be incorporated as a standard component of batterer intervention programs (p 67)

California State Association of Counties, Support Hub for Criminal Justice Programming, Legislative Report Year 1: Applying evidence based practices to batterers for intervention programs. (2021)

In 2019, six counties in California endeavored to pilot alternative programming and supervision for people both convicted of domestic violence offenses and mandated to batterer intervention programming. This report identifies program participant demography, social-economics, and criminal history. This data is included in the appendix of the report. This initial report does not look at program outcomes but does lay out the framework

for measuring recidivism. Key findings of those entering the program on July 1, 2019 to June 30, 2020 include:

- 1,156 people were placed on DV caseloads in the first year of the pilot
- 89 percent identified as male
- 38 percent were unemployed
- 44 percent had previously served 30 days or more in county jail
- 51 percent had a prior domestic violence assault reported to the police
- 49 percent were considered to be low risk to reoffend
- 33 percent were considered at high risk of committing future acts of intimate partner violence

Cissner et al., A National Portrait of Restorative Approaches to Intimate Partner Violence: Pathways to Safety, Accountability, Healing, and Well-Being (2019).

This study seeks to document how these restorative approaches are being applied to intimate partner violence across the USA. It draws on a national survey of programs along with five in-depth cases studies based on follow-up site visits. The survey results suggest a wide variation in how restorative approaches are being used, some overarching themes emerge: programs that responded prioritize survivor agency and safety, focus on active accountability for those who have caused harm, and emphasize voluntary participation.

Cordier, Reinie, Donna Chung, Sarah Wilkes-Gillan and Renée Speyer, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) *Trauma, Violence & Abuse* (advance)

This article reviews the Australian and international literature on the effectiveness of protection orders in domestic violence cases. It presents a systematic review and meta-analysis, and identifies the factors associated with an increased risk of reoffending following a protection order being issued. It also compares differences in violation rates reported by victims and police and discusses issues in how the effectiveness of a protection order is defined and measured across various studies, beyond simple recidivism. The article finds mixed evidence on their effectiveness: protection orders were not effective in completely preventing violence

toward the victim but some groups do report reduced subsequent violence.

Eckhardt, Christopher et al, 'The Effectiveness of Intervention Programs for Perpetrators and Victims of Intimate Partner Violence' (2013) 4(2) *Partner Abuse* 196 – 231.

This article presents a review of studies of perpetrator programs undertaken since 1990. The article reviews:

- 20 studies investigating the effectiveness of "traditional" forms of batterer intervention programs (BIPs) aimed at perpetrators of IPV
- 10 studies that investigated the effectiveness of alternative formats of BIPs
- 16 studies of brief intervention programs for IPV victim-survivors,
- 15 studies of more extended intervention programs for IPV victim-survivors
- Based on the results reported for all of the studies examined the authors conclude: Interventions for perpetrators showed equivocal results regarding their ability to lower the risk of IPV; available studies had many methodological flaws; among interventions for victim-survivors of IPV, a range of therapeutic approaches have been shown to produce enhancements in emotional functioning, with the strongest support for cognitive-behavioral therapy (CBT) approaches in reducing negative symptomatic effects of IPV.

Fanslow, Janet, Pauline Gulliver, Robin Dixon and Irene Ayallo, 'Women's initiation of physical violence against an abusive partner outside of a violent episode' (2015) 30(15) *Journal of Interpersonal Violence 2659*.

This article explores women's use of physical violence against an abusive male partner, outside of a violent episode. Data were drawn from the New Zealand Violence Against Women Study, a cross-sectional household survey. Factors associated with women initiating physical violence against their male partners were identified. Of the 845 women who had experienced physical violence perpetrated by their intimate partner, 19% reported physically mistreating their partner at least once outside of a male initiated violent episode, while 81% never initiated violence against their partner. Analyses showed that women's initiation of violence under these circumstances was strongly associated with either or both partners having alcohol problems, her recreational drug use, her number of violent partners, and her mother being hit or beaten by

her father when she was a child.

Gondolf, Edward W., 'Evaluating batterer counseling programs: A difficult task showing some effects and implications' (2004) 9 *Aggression and Violent Behaviour* 605.

A US study. Abstract: Over 40 published program evaluations have attempted to address the effectiveness of ''batterer programs'' in preventing reassaults. Summaries and meta-analysis of these evaluations suggest little or no ''program effect.'' Methodological shortcomings, however, compromise most of these quasi experimental evaluations. Three recent experimental studies appear to confirm little or no effect, but implementation problems, intention-to-treat design, and sample attrition limit these results. A longitudinal 4-year follow-up evaluation in four cities poses additional considerations and evidence of at least a moderate program effect. There is a clear deescalation of reassault and other abuse, the vast majority of men do reach sustained nonviolence, and about 20% continuously reassault. The prevailing cognitive–behavioral approach appears appropriate for most of the men, but the following enhancements are warranted: swift and certain court response for violations, intensive programming for high-risk men, and ongoing monitoring of risk. Program effectiveness depends substantially on the intervention system of which the program is a part.

Harne, Lynne and Jill Radford, *Tackling Domestic Violence: theories, policies and practice* (Open University Press, 2008).

See chapter 4 (Policing, prosecution and the courts) and 5 (Preventing domestic violence). In relation to perpetrator programs the authors critique three types: (p 156)

- Psycho-therapy models: tend to reinforce the 'poor me syndrome', where violent men redefine themselves as the main 'victims' and as the ones who need help and the focus moves away from their responsibility and the impact of their violence on women and children
- Couples counselling: poses risks to survivors – it has almost ceased to be used in the US.
- Social learning approaches and anger management programs: Anger management courses do not recognise domestic violence as being connected to male dominance on women in intimate relationships. May feed excuse that men have 'uncontrollable tempers.' Although they may reduce violence in the short term, they do not deal with the control element.
- Authors observe that many women express fears of further violence once the program had ended and

felt that being referred to a program was a soft option – the program was only effective when combined with the sanction of imprisonment for further violence.

Hyman, Hon. Eugene M. And Liberty Aldrich, 'Rethinking access to justice: the need for a holistic response to victims of domestic violence' (2012) 33 *Women's Rights Law Reporter* 449.

Writing in the USA context the authors emphasise that a judge who has information that a particular offender previously failed to complete a mandated batterer program may be less likely to simply re-order attendance at that program (at 11).

Juodis, Marcus et al. 'What Can be Done About High-Risk Perpetrators of Domestic Violence?' (2014) 29 *Journal of Family Violence* 381-390.

This article presents a useful literature review about how perpetrators who present as high risk should be dealt with. See pp2-3 where the concurrent need for safety planning for women while perpetrators attend programs must be considered. Notes that some perpetrators assessed as high-risk maybe particularly resistant to treatment and so particular efforts may need to be made to ensure they remain in program. Pre-treatment is suggested. Includes a discussion of appropriate risk assessment and treatment programs for psychopathic perpetrators.

Kelly, Liz and Nicole Westmarland, *Domestic Violence Perpetrator Programmes: Steps Towards Change* (Project Mirabal: Final report, London Metropolitan University and Durham University, 2015).

This important UK study examines whether domestic violence perpetrator programs (DVPP) work in reducing men's violence and abuse and in increasing the freedom of women and children. The study is longitudinal (see p6) and includes program data from 11 UK base sites; 64 interviews with DVPP staff and stakeholders across four locations; survey with 100 women DVPP intervention group, 62 women comparison group (5 interviews over 6 time points); interviews 64 men on programmes (the programmes all followed the *RESPECT guidelines*) and 48 women (ex) partners at time 1 (near start) and time 2 (near end). Interviews and surveys were also undertaken with children and staff about the impact on children and there was further

analysis associated with program integrity.

Results: As a result of participation in a Domestic Violence Perpetrator Program, there was found to be positive change with regard to:

- Respectful communication (p11)
- Space for action (p14) “This measure draws explicitly on the understanding that safety is insufficient to undo the harms of abuse, women need to have the freedom restored that abuse restricts.”
- Safety and freedom from violence and abuse for women and children (p18)
- Shared parenting (p23) “safe, positive and shared parenting.”
- Awareness of self and others (p25) “enhanced awareness of self and others for men on programmes, including an understanding of the impact that domestic violence has had on their partner and children.”
- Safer, healthier childhoods (p30)

Identified a different way of thinking about change: “Change is better understood as a series of sparks, different for each man, and not all of which are activated.” (p34)

Klein, Andrew *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice, U.S. Department of justice Programs: 2009).

This is a comprehensive review of US based research on issues relevant to domestic violence and law enforcement. The recommendations are made in the US context.

See 8.3 for a discussion of couples counselling and anger management programs as a response to domestic and family violence: ‘There is no evidence that couples counselling or anger management programs effectively prevent court-referred batterers from reabusing or committing new offenses after treatment. (Research basis: The limited research conducted thus far has been, at best, inconclusive regarding the effectiveness of these programs. One large state study found that court-referred batterers are less apt to commit new offenses [including both domestic and nondomestic violence offenses] if they completed batterer programs rather than anger management programs. The difference, however, may be because the batterer programs were twice as long as the anger control programs.)’ (p67)

See 8.4 for a discussion of Drug and alcohol programs as a response to domestic and family violence. ‘Incorporating alcohol and/or drug treatment as a standard component of batterer intervention programs adds

to the likelihood of reductions in reabuse among batterers, many of whom abuse alcohol and drugs. Effective treatment should include abstinence testing to assure sobriety and no drug use. (Research basis: Extensive research in both clinical and court settings confirms the correlation between substance abuse and the increased likelihood of reabuse as well as the reduction in reabuse among offenders successfully treated for drug abuse.)' (p67)

In relation to failure to comply with conditions of perpetrator programs: 'Judges should respond to noncompliant abusers immediately to safeguard victims. (Research basis: Multiple studies have found that doing nothing with regard to noncompliant, court-referred abusers results in significantly higher rates of reabuse.)' (p72)

Mach, Jami, et al., The Impact of Perpetrator Characteristics on the Completion of a Partner Abuse Intervention Program (2020) 35 (22-24) Journal of Interpersonal Violence 5228-5254 doi: 10.1177/0886260517719904

Data were collected from 192 male perpetrators of intimate partner violence (IPV) who were court mandated to attend a perpetrator abuse intervention program. Participants were categorized as family only violent or generally violent based on a combination of their self-report and official records of violence. Stake in conformity has been defined as the degree to which an individual is invested in the values and institutions of a society. A composite stake in conformity score was computed for each participant based on his education level, and marital and employment status. Each participant was also assigned a stage of change score based on his responses on a validated measure of stage of change for domestic violence perpetrators. Analyses indicated that stage of change was not related to program completion or attendance. Type of perpetrator and stake in conformity composite score were significantly related to program completion. Perpetrators with higher stake in conformity scores and individuals categorized as family only attended more perpetrator abuse intervention program sessions and were more likely to complete the program. When both predictors were examined together, only stake in conformity composite score uniquely predicted program attendance and completion.

Mazurek, L. et al., Comparing recidivism rates among domestically violent men enrolled in ACTV versus Duluth/CBT. (2021) 89(5), Journal of Consulting and Clinical Psychology, 469–475 doi:

10.1037/ccp0000649

The goal of the study was to replicate and extend published preliminary evidence demonstrating that a relatively new treatment (Achieving Change through Value-Based Behavior [ACTV]) for men convicted of domestic violence significantly reduces recidivism compared to the standard treatment offered across the United States (the Duluth Model and/or cognitive-behavioral approaches). Men convicted of domestic assault and court-mandated to a Batterers Intervention Program [N = 725] were assigned to attend ACTV or treatment-as-usual (TAU). Recidivism, defined as any new convictions, any violent convictions, and any domestic assault convictions, was examined up to 5 years posttreatment. Only men classified as medium or high risk were included. The study found that men in TAU were more likely to receive any conviction, a violent conviction, and a domestic assault conviction compared to men in ACTV. Time to new conviction posttreatment was shorter for men in TAU versus ACTV. Finally, the risk of receiving any new conviction (95% CI [1.46, 7.11]) was more strongly associated with noncompletion for TAU than ACTV participants. The study concluded that ACTV shows great promise for reducing recidivism compared to TAU.

Miller, M; E., Drake, and M. Nafziger, *What works to reduce recidivism by domestic violence offenders?* (Document No. 13-01-1201). (Olympia: Washington State Institute for Public Policy: 2013).

The authors present a literature review particularly examining the effectiveness of perpetrator programs from the perspective of whether they reduce recidivism. The authors found no effect on DV recidivism with the 6 Duluth like interventions reviewed although they note there may be other reasons for referring perpetrators to such programs. The authors observe that their review indicates that there may be other group based treatments for male domestic violence offenders that effectively reduce domestic violence recidivism.

See p 2 which states that the Duluth model: ‘approach assumes that domestic violence “…is a gender-specific behaviour which is socially and historically constructed. Men are socialized to take control and to use physical force when necessary to maintain dominance… the model assumes that DV does not result from mental illness, substance abuse, anger, stress or dysfunctional relationships.”

Rempel, Michael *Evidence based strategies for working with offenders. Centre for Court Innovation.* (2014), Bureau of Justice Assistance, US Department of Justice.

This American resource presents a succinct summary of some fundamental issues in promoting court-based perpetrator accountability.

Renehan, N. & Fitz-Gibbon, K. (2022) Domestic Violence perpetrator programmes and neurodiversity. Durham University.

Based on research conducted in UK and Australia (through surveys with programme providers and interviews with international experts, practitioners and organisation representatives working in the field of domestic abuse, the authors found there was a broad consensus amongst practitioners that understanding the experiences of neurodivergent men was important when working with perpetrators, but they were clear that domestic abuse and the drivers of violence should not be medicalised as autism and/or ADHD. Practitioners were concerned that ADHD in particular could be mislabelled as and/ or mask childhood trauma and neglect. (p8)

Practitioners relayed that autistic/ADHD men face many challenges. Firstly, screening and diagnosis are often not available which sometimes led programme practitioners with limited, if any, training on neurodiversity to mistakenly view neurodivergent men as 'belligerent and disruptive' or disengaged. Secondly, sensory sensitivities, programme structure, and comprehension of programme content presented challenges. However, practitioners also recognised that these men had individual strengths to support their own engagement, and that of neurotypical men in groupwork. A tailored and flexible approach to programme delivery was viewed as important. (p8)

Travers, A., et al (2021) The effectiveness of interventions to prevent recidivism in perpetrators of intimate partner violence: A systematic review and meta-analysis. *Clinical Psychology Review*, 84: 101974.

This systematic review and meta-analysis assesses evidence for interventions situated in a risk-need-responsivity framework, in comparison with the more traditional 'one-size-fits-all' intervention approach. It reviewed 31 studies.

It explains the 'risk-need – responsivity (RNR) model. The risk principle requires targeting treatment intensity based on an individual's risk- the higher risk perpetrators receive the highest-intensity treatment. The RNR

model focuses on eight central risk factors that have been empirically associated with general criminal offending. These are: 1) history of antisocial behaviour, 2) antisocial personality pattern, 3) antisocial cognition, 4) antisocial associates, 5) family/marital circumstances, 6) school/work, 7) leisure/recreation problems and 8) substance abuse. The ‘need’ principle entails attending to what are termed ‘criminogenic needs’ which are needs that the perpetrator presents with that are potentially related to the maintenance of their offending behaviours. Finally, the ‘responsivity’ principle necessitates taking factors into account that may impact an individual's adherence to treatment, such as their level of motivation, abilities, learning styles etc.

The review concludes: Risk-need-responsivity treatments showed promise in the short-to-medium term, but the challenge of sustaining effects into the longer term remains.

Perpetrator interventions - Other Bench Books

Australia

Judicial College of Victoria, Family Violence Bench Book (2014).

5.4.2 discusses the preferred approach to men's behaviour change programs. 5.4.4 discusses judicial responses to men's behaviour. 3.6 discusses the court's power to order a respondent to attend counselling.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2021).

Section 7.2.3: Stress and anger rationalization

'While stress and anger often accompany domestic violence, they do not explain it. Most people who experience stress and anger do not engage in DV. Moreover … stress and anger do not explain the cumulative, patterned nature of domestic violence, the associated pattern of coercion and control, nor why the violence is often employed strategically – in the privacy of the home.

While debate continues as to whether or not there is value in teaching anger management as a component of specialized domestic violence intervention programs, anger management by itself is not considered useful for the following reasons:

Anger management does not focus on the underlying causes of DV; worse, anger management programs can serve to enhance skills of coercion and control.

More particularly such programs:

- Have no proven lasting effect on domestic violence;
- Lack standards to ensure those offering such programs have specialized DV expertise;
- Offer a false sense of hope and safety when, in fact, there is little evidence such programs help;
- Focus attention on intimate partner behaviours that trigger anger instead of focusing attention on violator perceptions and actions that give rise to domestic violence;
- Imply that it is the targeted party's behaviour that causes the violator to engage in domestic violence;

- Shifts responsibility for the domestic violence onto the targeted partner by implying it is the latter's behavior that causes the violator to engage in domestic violence; and,
- Teach new control skills when the goal is eradication of the need to control.'

Section 20.9.4: What if the domestic violator has mental health, alcohol or drug abuse problems?

'A domestic violator's mental health problems and alcohol or drug abuse increases the risk of serious injury for all family members. Consequently, these issues, and access to services, should be addressed in any agreement or order together with reporting mechanisms and review processes to ensure accountability and provisions to ensure notification in the event of non-compliance.

Some violators will require mental health or substance abuse treatment in order to benefit from domestic violence intervention.'

Perpetrator interventions - Other Resources

Australia

ANROWS Perpetrator Interventions Research.

Research funded by ANROWS on perpetrator interventions to improve systems and service effectiveness, as well as the responsiveness to the diversity of perpetrators.

National Outcome Standards for Perpetrator Interventions (21 November 2015).

The National Outcome Standards for Perpetrator Interventions (national outcome standards) were endorsed by the Council of Australian Government (COAG) on 11 December 2015. The standards are based on extensive consultation with government and non-government sector experts, and designed to guide and measure the outcomes achieved by perpetrator interventions across Australia.

NSW

> **Department of Attorney General and Justice, Towards Safe Families: A Practice Guide For Men's Domestic Violence Behaviour Change Programs, (2017).**

QLD

> **Department of Justice and Attorney General, Practice principles, standards and guidance (2021).**

SA

Domestic and Family Violence Intervention program

> **Domestic and Family Violence Intervention program (2020, Government of South Australia)**

VIC

No To Violence, Interventions for People Who use Violence, (2019: Victorian Government)

No to Violence (2021) Tips for engaging men on their use of family violence (fact sheet) Domestic Violence Resource Centre Victoria.

This resource gives five tips for engaging men on their use of family violence:

1. Safety – do not engage in a way likely to increase risk to the safety of vicitms;
2. Identify invitations by men to collude in their behaviour - when responding to a man's attempts to minimise, excuse or justify their use of violence, it is important to encourage them to re-evaluate their behaviour and self-exploration;
3. Open the conversation - being curious and asking questions can help put his behaviour on the table;
4. Experience of ex/partners and kids - encourage empathy for how his partner/kids are experiencing his behaviour, rather than his intentions or identity; and
5. Change and support - identifying what a desirable future looks like can help reflection around what needs to change.

WA

Department for Child Protection and Family Support, Practice Standards for Perpetrator Intervention: Engaging and Responding to Men who are Perpetrators of Family and Domestic Violence, 2015.

International

Freyd, J et al., What is DARVO? Website: https://dynamic.uoregon.edu/jjf/defineDARVO.html.

DARVO refers to a reaction perpetrators of wrong doing, particularly sexual offenders, may display in

response to being held accountable for their behaviour. DARVO stands for "Deny, Attack, and Reverse Victim and Offender." The perpetrator or offender may Deny the behaviour, Attack the individual doing the confronting, and Reverse the roles of Victim and Offender such that the perpetrator assumes the victim role and turns the true victim -- or the whistle blower -- into an alleged offender. This occurs, for instance, when an actually guilty perpetrator assumes the role of "falsely accused" and attacks the accuser's credibility and blames the accuser of being the perpetrator of a false accusation. This website includes links to empirical research about the concept and discussions about its impact on victims and others. It also includes podcasts and other materials.

Respect (2022) ***The Respect Standard, 4th edition: Accreditation framework for safe, effective and survivor-focused work with perpetrators of domestic abuse in the UK*****.**

CAFCASS (Childrens and Family Court Advisory and Support Service). This organisation represents children in family court cases. It is independent of the courts, social services, education and health authorities and all similar agencies. They offer a Domestic Violence Perpetrator Programme for parties involved in family court cases.

Perpetrator interventions - Cases

Attorney-General (SA) v Pennington [2019] SASC 180 (25 October 2019) – South Australian Supreme Court

At [45], the Court noted:

> *'Traditional western psychological therapy is better equipped than therapy from traditional healers to address some of the respondent's specific issues that might lead to reoffending such as control of aggression, anger and avoiding alcohol.'*

Responses in criminal proceedings

Responses in criminal proceedings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Celia

Bail

The approach to bail in domestic and family violence related cases varies between Australian jurisdictions (see table below). In a number of jurisdictions, bail laws have incorporated special provisions that either displace or reverse the general presumption in favour of bail (see table below). In all Australian jurisdictions the safety and protection of the victim and any children or other people at risk is a key consideration in the decision to grant bail.

Where a judicial officer considers that a grant of bail is appropriate in a case where a domestic and family violence related offence is alleged, bail conditions may be imposed to minimise the risk of further harm to the victim and any children or other people at risk. For example the accused may be monitored by GPS. If GPS monitoring is used, consider imposing a significant exclusion zone (eg several kilometres) around the victim's home so that once police are alerted to the accused's breach they have sufficient time to attend directly at the victim's address. Further conditions may include prohibiting the accused from contacting, harassing, threatening or intimidating the victim or others; or conditions requiring the accused to vacate the family home (exclusion/ouster), or to not go within a certain distance of the victim's home, or to undergo treatment or counselling (perpetrator interventions). Bail conditions should be carefully balanced having regard, along with other relevant matters, to the circumstances of the accused and the victim, the accused's history of violence towards the victim, and the fact that the conditions are imposed in a context where there is not yet a finding of guilt. For example, a condition forcing an unwilling accused to participate in a perpetrator intervention program may increase the risk of breaching bail and the later imposition of a custodial sentence [Ng & Douglas 2016]. When determining the most appropriate bail conditions in a particular case, judicial officers should ensure where possible that they have access to all available information regarding, for example, existing orders and prior convictions; and, if necessary, make enquiries of the prosecution.

There may be particular considerations relevant to bail where the victim or accused is from a vulnerable group.

Aboriginal and Torres Strait Islander people may experience particular difficulties in obtaining bail or meeting bail conditions. For example, an accused may be denied bail because of lack of legal of representation, insufficient assets to provide a surety, no stable address, or absence of a responsible person to care for

children; and yet being remanded in custody may cause further disadvantage and harm to an accused who is detained far from community and family or has problems with drug or alcohol addiction [WA Aboriginal BB 2008]. In ordering bail conditions in these circumstances, it may be appropriate for the judicial officer to consider an accused's kinship and family ties with a particular location and the availability of community or family-based support that may be engaged to ensure that bail conditions are observed [Judicial Commission of NSW Equality before Law BB 2022]. The safety and protection of the victim and other people may override these considerations.

Bail may be imposed alongside a protection order. It is important that bail conditions and protection order conditions are consistent (or, if different, not inconsistent) as inconsistency may increase confusion and the likelihood of breach [WALRC 2014]. Bail conditions may also be imposed when there are also child protection orders or family law orders in place [Vic Family Violence BB 2014]. Such orders should also be considered in determining appropriate bail conditions and inconsistency should be avoided where possible.

A bail condition may require an accused to comply with the conditions of a protection order, with the consequence that a breach of the protection order amounts to a breach of bail. Where there is no protection order in place, and the bail conditions alone may not protect a victim adequately, it may be appropriate for the judicial officer, where legislation permits, to also issue a protection order [ALRC/NSWLRC 2010].

Where an accused applies for bail upon being charged with a breach of a protection order, the judicial officer should consider the risk of breach of bail in light of the alleged breach of the protection order. Where an accused's conduct amounts to a breach of both a bail order and a protection order, and the accused applies for bail, the judicial officer should consider the possibility of heightened risk of harm to the victim and any children or other people at risk.

It is important that those affected by the bail conditions understand the nature and effect of the bail decision [ALRC/NSWLRC 2010], and that any order, or any condition of an order, can only be varied or revoked by the court, not by agreement between the accused and victim or other individuals. The victim and those affected by bail conditions should be made aware of the grant of bail and the conditions of the bail granted to the accused.

Jurisdiction	Relevant legislation
Australian Capital Territory	*Bail Act 1992* ss 9B(b)(iv)-(vi); 25(4) (f)(i)-(vi)
New South Wales	*Bail Act 2013* ss 16A, 16B, 17
Northern Territory	*Bail Act 1982* ss 7A(1)(dd), (dh); 27A(1)
Queensland	*Bail Act 1980* s 16(2)(f)
South Australia	*Bail Act 1985* s 10A(2)(ba); 11(2)(a)(ii)
Tasmania	*Family Violence Act 2004* s 12
Victoria	*Bail Act 1977* s 5AAAA
Western Australia	*Bail Act 1982* Sch1, Part D (2); (2a); (2AB); (2AC)

Bail - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, 'Family Violence – A National Legal Response', ALRC Report 114; NSWLRC Report 1280 (2010).

Chapter 10 deals with 'Bail and Family violence'. The interaction between bail conditions and protection order conditions is considered from p 420. The Commissions note that bail conditions can be imposed in parallel to protection order conditions. Bail conditions and protection order conditions should be consistent because inconsistency increases confusion which increases the likelihood of breach. This compromises victim safety and could also have serious consequences for accused persons.

The report notes that while bail conditions simply requiring an accused to abide by existing protection order conditions avoids inconsistencies, this formula should not be used at the expense of victim safety (p 422).

The Commissions commented that upon granting bail, judicial officers should consider whether to also grant a protection order because bail conditions do not serve the same purpose as protection order conditions and may not be able to adequately protect the victim (p 422 & 424-425).

The issue of informing victims about bail decisions is considered from p 425.

Cussen, Tracey and Mathew Lyneham, 'ACT Family Intervention Program Review' (Technical and Background Paper No 52, Australian Institute of Criminology, 2012).

This report evaluated the approach to bail in the context of domestic and family violence in the Australian Capital Territory. This approach (under the *Family Violence Intervention Program*) imposes presumptions against bail for domestic violence offences. The threshold for police bail is extremely high, with a police officer unable to grant bail unless satisfied that the accused person would pose no danger to the victim while released on bail. It was found that this approach increased victim safety (see at p 109).

Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws, Report No 104* (2014).

Chapter 4 discusses bail from p 134. In family violence matters, the court will often impose 'protective bail conditions'. The report notes that an accused may be subject to protective bail conditions and a protection order concurrently. The Commission's view was that protection order conditions should be considered in addition to protective bail conditions and pointed out that once a charge is dismissed or otherwise dealt with, bail conditions will lapse. This leaves no ongoing legal protection for the victim (p 134). The Commission emphasised the importance of thorough risk assessment when determining bail in the domestic and family violence context, noting 'In cases where an accused seeks a relaxation of protective bail conditions in order to enable contact to occur between the accused and the victim, it is necessary for the court to properly assess the risk to the safety of the victim before making a decision'. This may involve attaining a bail risk assessment report (p 137). Therefore, it is clear that the imposition of appropriate bail conditions can reduce the risk of harm to victims. The Commission also noted that it is important that protective bail conditions and protection order conditions are consistent so as to avoid confusion and unintended breaches (p 135).

Ng, Emily and Heather Douglas, 'Domestic and Family Violence and the Approach to Bail' (2016) 34(2) *Law in Context* 36-57.

This article examines the different approaches taken to bail in domestic violence legislation and cases across Australia.

The authors note there is a 'patchwork' approach to bail and family violence between jurisdictions. Some jurisdictions specifically define domestic violence offences for the purposes of bail, while other jurisdictions do not give domestic and family violence special status. Bail conditions are considered from p 51. The authors note that it is important to avoid conflict between bail and protection order conditions because conflict increases the likelihood of breach (p 51). Two common types of bail conditions in domestic and family violence matters (exclusion conditions and perpetrator programs) are discussed.

Exclusion conditions are problematic when the accused has no alternative accommodation. An integrated response is required. This 'can be achieved through police training and the establishment of collaborative relationships between police and support services, rather than by imposing a legislative duty on the police to

take reasonable steps to secure accommodation' (p 53).

The authors note that 'in cases concerning family violence, the safety of women and children should always be a key consideration in the bail response.' (p 57).

Queensland Police Service, 'The Domestic and Family Violence GPS-Enabled Electronic monitoring Technology, Evaluation Report, April 2019, Government of Queensland.

This report presents the findings of a trial of GPS tracking for family violence offenders and victims in Queensland. The trial assessed the effectiveness, reliability and responsiveness of GPS-enabled technology to track an individual accurately and activate an alert in the event of a pre-programmed zone being breached. The GPS-enabled technology was tested in different geographical areas and with police personnel rather than actual offenders and victims. Thirty-five tests were carried out, with the technology failing to respond in 26% of cases. The technical issues are discussed in more detail. Overall, the findings demonstrate that electronic monitoring does not provide an effective risk-mitigating solution for high-risk perpetrators and is not a reliable substitute for perpetrator case management. However, it may be of use in some lower-risk cases, in conjunction with other measures. This trial was a suggestion of the 2015 Queensland Special Taskforce on Domestic and Family Violence, which noted how little was known about electronic monitoring programs.

Richards, Kelly and Lauren Renshaw, 'Bail and Remand for Young People in Australia: A National Research Project' (2013) (Research and Public Policy Series No 125, Australian Institute of Criminology).

This report, which deals extensively with bail, discusses domestic violence offences from p 64. 'In this study, domestic violence emerged as one offence in particular that may impact on rates of young people on custodial remand.

Victorian Law Reform Commission (VLRC), *Review of the Bail Act: Final Report* (2007) 120.

See at p 74 which discusses 'Victims' Views on Safety and Welfare'. It notes, 'if the offence is one of family

violence, police should set bail conditions that ensure the safety of victims'. See also from p 120 where the report discusses how appropriate bail conditions can reduce the risk of further harm to victims.

However, the Commission was concerned (particularly in relation to police bail) about 'reports of police imposing inappropriate and unnecessarily onerous bail conditions. Such conditions include blanket restrictions on travel by public transport, broad geographic exclusion zones, and abstinence conditions without referral to any support services. Anecdotally, it appears that many of the most inappropriate bail conditions are imposed by police. Accused people may feel pressured to accept overly onerous conditions to be released, putting them at increased risk of breach. Breach may ultimately lead to remand, which might have been avoided if more appropriate conditions were initially imposed, together with referral to support services' (p 62).

International

Sadusky, Jane M, 'Pretrial Release Conditions in Domestic Violence Cases: Issues and Context' (2006) *Battered Women's Justice Project*.

While this paper discusses the American context, some of the commentary has broad relevance to the Australian context.

'This paper explores the issues related to pretrial release, highlights the experiences of several communities, and provides guidelines to communities for examining this aspect of criminal case processing in domestic assault cases' (p 5).

The authors note: 'The question of pretrial conditions in domestic violence cases is one of balance, balance between constitutional rights of the accused and protection of victims of crime, between safety and accountability, between ensuring appearance at trial and protecting others from harm, between a consistent response and the unique aspects of each case, each person, and sometimes the balance between space in the jail and the goal of safety' (p 5).

See also at p 11 – 'While the general standards of pretrial release set a foundation that permits close attention to the safety of any person or the public, a judicial officer may be reluctant to invoke processes or conditions that account for the specific context of domestic violence crimes. Yet domestic violence is a pattern crime and research has increasingly identified key factors associated with dangerousness, including prior

history of domestic violence; estrangement, separation or divorce; obsessive, extreme jealously, escalating violence; access to guns; use of or threats with weapons; serious injury in prior incidents of abuse; threats of homicide and suicide; forced sex; stalking; prior police involvement; and, drug or alcohol use…Satisfying the second prong of the purpose of bail – "protect the community, victims, witness or any other persons" – is difficult without some level of inquiry into these aspects of dangerousness'.

Bail - Other Bench Books

Australia

Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australia Courts* (2nd ed, 2008).

See generally chapter 6 (6.1) which deals with bail issues in relation to Aboriginal people.

Judicial College of Victoria, Family Violence Bench Book (2014).

4.1.4 discusses bail and family violence offences.

Judicial Commission of NSW, Equality before the Law: Bench Book (updated 2022).

2.3.2 discusses considerations in determining the appropriateness of bail and bail conditions for Aboriginal alleged offenders, however it does not deal specifically with domestic and family violence related offences.

Judicial Commission of NSW, Local Court Bench Book (updated 2022).

Section [20-000] discusses the range of issues relevant to the granting, refusal, enforcement, and variation of bail.

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 7.6 discusses the situation where bail conditions mean that a domestic violence order is neither necessary or desirable. Chapter 22 discusses a range of issues relating to bail, including rebuttable presumption, conditions, and the definition of a domestic violence offence.

International

Brigner, Mike, *The Ohio Domestic Violence Benchbook – A Practical Guide to Competence for Judges & Magistrates* (2003) Family Violence Prevention Center (at the Ohio Office of Criminal Justice Services).

The chapter dealing with courts having criminal jurisdiction discusses considerations relating to bonds and pretrial release.

Bail - Other Resources

New South Wales Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* (2018).

See pg 43: 'The victim, offender and witnesses (if applicable) are to be interviewed, statements taken and physical evidence is to be gathered and a determination made as to whether sufficient evidence exists to commence criminal proceedings. If sufficient evidence is present, the offender is charged with appropriate criminal offence/s and/or police apply for a Provisional/ urgent ADVO. Ensure that appropriate ADVO and/or bail conditions are placed on the offender to ensure victim's safety.'

Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (at March 2021).

See Chapter 5.4 :- Information about bail.

The victim must be:

- notified whenever the accused applies for bail, including any application to vary the conditions of bail
- consulted about any need for protection they may have prior to the hearing of the bail application
- promptly informed of the outcome of any bail application, including any special bail conditions designed to protect the victim or the victim's family.

Information about the date, time and location of court listings:

- The prosecutor must inform the victim about the date, time and location of any mention or hearing of the case, including bail, committal, trial, sentence, appeal and breach of sentence hearing.

Information about the outcome of hearings:

- The prosecutor must inform the victim about the outcome of any part of the proceedings, including bail, criminal case conference, committal, trial, sentence, appeals and breach of sentence.

Victoria Police, *Code of Practice for the Investigation of Family Violence, 3rd ed*, version 4 (2019) 1-77.

Section 4.3.4 discusses charge and bail –

'Bail does not replace the need to seek a (protection order). In any situations where the accused person is to be charged and bailed and a (protection order) is also to be sought, bail conditions should seek to protect AFMs (Affected Family Members) and witnesses, as with any other serious criminal offence. Bail conditions are to ensure the attendance of the respondent at court and to protect AFMs and witnesses so should include any condition/s sought in the (protection order) relevant to (non) contact with the AFM.

If conditions are imposed when granting bail, the bail decision maker must make sure they are consistent with each condition of an (protection order), Family Violence Safety Notice or recognised DVO. When a bail decision maker imposes conditions that are inconsistent with an (protection order), they must be satisfied that the bail condition better protects the victim. Should such conditions be made, the informant must apply to vary the original order to ensure the civil action is consistent with the bail conditions.'

Bail - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***R v Saedam* [2015] ACTSC 85 (1 April 2015) – Australian Capital Territory Supreme Court**

Refshauge J at [30]-[34]: 'In a somewhat similar case, R v Laipato (No 2) [2014] ACTSC 363, I said (at [1]): *'Despite some laypeople thinking otherwise, bail is not intended to punish people for offences with which they have been charged. Indeed, to the lawyer such a notion is offensive, for it must be recognised that persons who have been charged but not found guilty of offences are, by law, presumed to be innocent'.*

'It is also important to state clearly that the Bail Act, as a whole, evinces an intention that real regard must be had by those charged with the grant of bail to the safety of complainants, especially those involved in allegations of domestic violence. It is well known that those who complain of domestic violence are particularly vulnerable, hence s 9F of the Act provides a restriction on the grant of bail by authorised officers, unless they are satisfied that the applicant poses no danger to the complainant.

'Similarly, s 23A of the Bail Act requires a court to consider the concerns of the complainant to be taken into account when considering, inter alia, whether the applicant, while on bail, might commit further offences, which would clearly include domestic violence against the complainant. This does not mean, however, that a person charged with a domestic violence offence must be denied bail.

'The court, in granting such a person bail, may be required to have a keen appreciation of the need to ensure that the vulnerability of such complainants is carefully and properly considered when the likelihood of reoffending is being taken into account. Bail to applicants charged with such offences is not, of course, a minimisation of such charges, much less an endorsement of the behaviour said to constitute that offence.

'That, of course, applies to all bail applications. It is regrettable that it is sometimes necessary to say this. Nevertheless, it is worth recalling what Giles J said in Dunstan v Director of Public Prosecutions [1999] FCA 921; (1999) 92 FCR 168 at 184; [56]: *'It should be borne in mind, when considering this topic, that refusal of bail upon the basis of s 22(1)(c) alone is tantamount to preventative detention. In my view, this is a cogent reason for not permitting a finding to be made on this issue on the basis of suspicion and speculation.*

Discussion of the matter in terms of risk is calculated to encourage that basis".

***R v Saunders* [2017] SASCFC 86 (27 July 2017) – South Australia Supreme Court (Full Court)**

'Parliament has enacted laws designed to provide protection to those subjected to domestic violence. The making of intervention orders is intended to provide this protection. If that protection is to be effective and orders of the court or conditions in bail agreements not to be mere scraps of paper, the court must impose punishments for the breach of those orders or agreements which will deter those who contravene the orders or agreements and others who might be minded to do so from offending in that way' (per Stanley J at [27]).

***R v Fox* [2017] SASC 5 (3 February 2017) – South Australia Supreme Court**

The applicant was charged with two counts of contravening a term of an intervention order and these involved threats to use violence. This enlivened s 10A of the *Bail Act* namely, that the applicant was not to be granted bail unless he established the existence of special circumstances justifying his release on bail. Hinton J at [16]-[17]: 'Thus Parliament's approach reflects the response that it considers must be made, the ordinary response, to an alleged act of defiance to a protective order allegedly perpetrated in circumstances involving violence. It is a response that only tolerates release into the community on bail if special circumstances can be established. Such response pays no heed to whether the accused is a flight risk. Its implementation will also, ordinarily, result in the loss of employment, the fracturing of relationships, the discontinuation of education, financial hardship and hardship to dependents.

'One further point should be made here. Parliament's response may be accepted as in no small part reflecting the growing awareness in the community of the prevalence of domestic violence. For intervention orders to fulfil their protective purpose, strict compliance must be insisted upon. This approach informs the inclusion of the breach of an intervention order in circumstances of violence within s 10A and explains why specific reference is made to the *Intervention Orders (Prevention of Abuse) Act 2009*(SA) in s 10(1)(b)(iv)'.

Hinton J continued at [19]: '[S]pecial circumstances will only exist where the applicant can demonstrate that he or she does not pose the risk which Parliament had in contemplation in reversing the presumption and in relation to whom the denial of bail would result in consequences beyond the contemplation of Parliament'. Here, the 'relevant risk contemplated is of further defiance of an order and violence threatened or perpetrated

in doing so, hence incapacitation in the form of the refusal of bail is appropriate to prevent the offender further offending and to protect the victim'.

***Re S* [2005] TASSC 89 (19 September 2005) – Tasmanian Supreme Court**

Slicer J at [2]: 'Bail is a form of conditional, not absolute, liberty (see generally *Griffiths v R* [1977] HCA 44; (1977) 137 CLR 293) and has long been a method of accommodating the presumption of innocence, the impact of prolonged detention before trial with the ensuring of receiving attendance at trial and potential risk to the community or the State (see distinctions made in the Statute of Westminster I, "A History of the English Law", Holdsworth, Vol IV, 525-528)'.

At [26]: 'It is neither appropriate nor possible for a court to determine the "merits" of a complaint concerning domestic violence at first instance. That remains an issue for trial. A court is responsible for "future risk" and in making that decision must have confidence in the primary material. The community at large must have confidence in the application of the legislative scheme. The administration of the legislation as required by the Act, s14, is central to that confidence. Application of policy, irrespective of the circumstances of each case, will not enhance the process. The Statute of Westminster (supra) permitted a grant of bail in enumerated cases according to the nature of the crime or offence alleged, and prohibited it in others. That is not the model here used by the Parliament. The tensions created by the understandable need for future protection of a family and the traditional concepts of presumption of innocence and liberty of the suspect, make it more important that the primary material can be relied upon. In this case the applicant was afforded bail upon the provision of a reliable surety and the imposition of residential, geographical and contact provisions'.

***Re Williams* [2018] VSC 76 (23 February 2018) – Victorian Supreme Court**

Justice Champion at [57]-[59] discussed the applicant's contention that the prosecution case is weak because it relies on the complainant's evidence:

> … the prosecution points out that cases involving family violence frequently involve 'word on word' evidence and that this is often the very nature of these types of cases. The prosecution submits that this circumstance does not of itself warrant the prosecution case as being regarded as weak, or without merit.

> It is clear enough that the case will be strongly defended, and that there are arguable issues to be decided. That said, it was not submitted to me that the case should be regarded as inherently weak.
>
> From what I have been able to glean in this application I cannot conclude that the prosecution case is weak.

Dickerson v The State of Western Australia **[2020] WASC 425 (18 November 2020) – Western Australia Supreme Court**

It was significant that the applicant had refused to have contact with the complainant while remanded in custody, even though she was permitted to do so. The court noted at [96]:

> "It is an irony in matters of this kind that a person who is remanded in custody for having breached a condition that prevented contact with a complainant is not prohibited from having contact with the complainant once they are in custody".

And continued at [97]:

> "Of course, in circumstances in which the applicant is well aware that she may put her prospects of being released on bail at risk if she were to have contact with the complainant, one might understand that she would exercise caution in that regard. However, the applicant has gone further. She has made an application and been granted the FVRO to prevent the complainant, Mr N, from having contact with her or approaching her. In other words, she has taken positive steps to give effect to the purpose to which cl 2(c) and (d) of sch 1 pt D of the Act are directed. That, it seems to me, is an unusual situation which, in combination with the applicant's steps towards rehabilitation and the hardship that she will be required to endure if she remains in custody in the metropolitan area while her mother and her young child remain in Carnarvon, does amount to exceptional reasons why the applicant should not be kept in custody".

Evidence

In this chapter the following evidence issues are considered:

See also chapter 5 Fair hearing and safety:

Relationship, context, tendency and coincidence evidence

Evidence which demonstrates that allegations of domestic and family violence do not occur in a vacuum can be valuable in establishing victim credibility and perpetrator propensity to engage in abusive behaviour. Relationship, context, tendency (propensity) and coincidence (similar fact) evidence can all be invaluable in establishing a case against an accused perpetrator, however if used to infer guilt such evidence is also inherently prejudicial.

In most Australian jurisdictions the law of evidence is codified in evidence acts collectively referred to as the Uniform Evidence Law ("UEL"). The UEL is comprised of *Evidence Act 1995* (Cth), *Evidence Act 2011* (ACT), *Evidence Act* 1995 (NSW), *Evidence (National Uniform Legislation) Act 2011* (NT), *Evidence Act 2001* (Tas) and *Evidence Act 2008* (Vic).

While not identical in each jurisdiction, the UEL provides a cohesive approach to evidence issues across much of Australia. Queensland, South Australia and Western Australia each retain a unique combination of common law and statute (Evidence Act 1977 (Qld), Evidence Act 1929 (SA) and Evidence Act 1906 (WA). In Queensland s 132B of the Evidence Act 1977 specifically provides that evidence of the history of the domestic relationship between the defendant and the complainant is admissible evidence in criminal proceedings.

In UEL jurisdictions a number of judicial bench books provide assistance in directing a finder of fact where tendency or coincidence evidence is relevant:

New South Wales

Judicial Commission of New South Wales, *Civil Trials Bench Book*.

- Tendency and coincidence - *Evidence Act* 1995 (NSW) - Pt 3.6 (ss 94–101); *Criminal Procedure Act* 1986 (NSW), s 161A

Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*.

- Tendency, coincidence and background evidence – *Evidence Act 1995* (NSW), Pt 3.6 (ss94-101)

Victoria

Judicial College of Victoria, *Uniform Evidence Manual*.

- *Part 3.6 Tendency and coincidence*- *Evidence Act 2008* (Vic)

In other jurisdictions the following bench books may be helpful:

Queensland

Magistrates Court of Queensland (2022) *Domestic and Family Violence Protection Act 2012 Bench Book* 10th ed.

- 15.5 Use of evidence from other proceedings (r33)
- 15.8 Use of similar fact evidence

Queensland Courts (2020) *Supreme and District Courts Criminal Directions Benchbook*.

- Similar fact evidence
- Evidence of other sexual or discreditable conduct of the defendant

South Australia

Courts Administration Authority of South Australia (2021) *South Australian Criminal Trials Bench Book*.

- 4.12 Discreditable conduct evidence
- 4.12.2 Admissibility of evidence for non-propensity uses (including context/relationship evidence)
- 4.12.3 - Admissibility of evidence for particular kinds of propensity uses
- 4.12.4 - Assessing probative value and prejudicial effect
- 4.12.5 - Directions on discreditable conduct evidence
- 4.12.6 - Directions on non-propensity uses
- 4.12.7 - Directions on propensity uses

- 4.12.8 - Jury directions – Discreditable conduct evidence

Relationship, context, tendency and coincidence evidence - Cases

Some cases that have considered *relationship, context, tendency and coincidence evidence* in the context of domestic and family violence include:

***Queen v Pamkal* [2019] NTSC 80 (15 October 2019) – Northern Territory Supreme Court**

'Evidence' – 'Probative value' – 'Relationship evidence' – 'Sexual and reproductive violence' – 'Tendency purposes'

Relationship evidence:

"[4] Defence counsel has conceded that the evidence of past assaults is relevant for this "relationship" or "context" purpose but contends that it should be excluded under Evidence (National Uniform Legislation) Act 2011 (NT) ("UEA") s 137 because its probative value is outweighed by the danger of unfair prejudice to the defendant. The unfair prejudice identified is that the jury may be emotionally repelled by the horrific details of the violence the accused committed against the complainant in the past and so be diverted from a rational consideration of the issues in the case. At the very least, counsel submitted, if evidence of past violent conduct by the accused against the complainant is let in, it should be by way of agreed facts that simply refer to past assaults and do not reveal the details. I disagree with that. That would not be to explain the nature of the relationship but to conceal it. He did what he did. It was the things he did to her that caused her to fear the consequences of displeasing him by refusing his demand for sex.

[5] Nor do I agree that the evidence should be excluded under UEA s 137. Its probative value – in conjunction with other evidence in the case (ie her evidence that he demanded sex and threatened her if she did not comply and her evidence in the interview with police that ever since she met him he threatened her, "Oh you gotta do this, do that … otherwise I'll get bashed") is high. It explains something that may otherwise be inexplicable – namely why she would physically comply with his demands even though she told him she didn't want to have sex.

[6] In my view it is also high on the issue of whether he knew she was not consenting or was reckless about that fact. Given his history of controlling violence towards her he would have been aware that she would be likely to give in to his threats to avoid being bashed.

[7] The jury will be warned against rank propensity reasoning and I consider the risk that they will engage in it is not high. As to the risk that they will be emotionally repelled by the accused and diverted from their task of

rationally considering the facts, I agree that there is such a risk. The jury will also be warned against that sort of approach both in the opening (before they hear this evidence) and in the summing up (after they have heard it) and in my experience jurors tend to take such warnings seriously. I agree that there is no guarantee that such a warning will be 100% effective with all jurors. However, I do not think that the risk that the jurors may misuse the evidence in this way outweighs the probative value of the evidence which I consider to be high.

[8] The evidence of prior assaults (and the assault the subject of count 2) will be admitted as relationship evidence."

Tendency evidence:

" [18] The first question is the extent to which the evidence sought to be adduced tends to establish that the accused had the tendency to act in the way asserted in the notice. In my view the evidence does support proof of a tendency in the accused to engage in violent behaviour towards his domestic partner, especially after consuming alcohol, for the purpose of controlling her behaviour and/or punishing her for perceived failings – in fact for displeasing him.

[19] The next question for consideration is whether, if the jury accepts that the accused had this tendency (or tendencies) that "strongly supports proof of a fact that makes up the offence charged". In my view it does, for the same reason that its probative value as relationship evidence is high. It explains what might otherwise be inexplicable and strongly supports proof of a fact in issue – namely whether the complainant consented to have sex with the accused and also, to perhaps a slightly lesser extent, proof that he knew of or was reckless as to her lack of consent.

[20] I am therefore satisfied that the threshold test in UEA s 97 has been met. The evidence sought to be adduced as tendency evidence does in conjunction with other evidence which will be adduced have significant probative value."

"[24] In this case, the potential prejudice identified by the defence is a possibility that the jury may engage in rank propensity reasoning and the possibility that the jury may be so emotionally repelled by the accused's conduct that they are diverted from their function of rationally considering the evidence against him and become motivated by a desire to punish him for his past conduct.

[25] While I concede that there is a potential for the jury to be misled in both of these respects, I consider that

this can largely be mitigated by appropriate warnings. Further, I consider the probative value of the evidence to be high and that its probative value does substantially outweigh the risk of prejudice. The use of this kind of tendency evidence of course involves a kind of permissible propensity reasoning. As the plurality said in Hughes:[6]

The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue.

[26] Defence counsel submitted, relying on McPhillamy v The Queen,[7] that the tendency sought to be proved is not specific and that the more general the tendency, the greater should be the caution with which it is approached. The more general the alleged tendency, the more its probative value is decreased and its potential prejudice increased. When the tendency is nothing more than a tendency to engage in violence, the only use that could be made of the evidence is to all intents and purposes rank tendency reasoning.

[27] While there is force on that submission in general terms, it is necessary in each case to look at the precise tendency alleged to be established by the evidence and to assess what probative value that has on the particular issues in the case. For the reasons outlined above, in my view, this particular evidence strongly supports proof of the alleged tendency and the existence of the alleged tendency is highly probative of the issue of whether the complainant consented to sexual intercourse and whether the accused knew of or was reckless as to that lack of consent."

***Roach v The Queen* [2011] HCA 12 (4 May 2011) – High Court of Australia (appeal from Queensland Court of Appeal)**

'Assault occasioning bodily harm' – 'Directions and warnings for/to jury' – 'Probative value' – 'Propensity evidence' – 'Relationship evidence'

Charge/s: Assault occasioning bodily harm.

Appeal Type: Appeal against conviction.

Facts: Mr Roach was convicted of assault occasioning bodily harm of his female partner. At trial, Howell DCJ admitted evidence of previous (uncharged) assaults that Mr Roach committed on the complainant during their relationship. The relevant Queensland provision—s 132B of the *Evidence Act 1977*—applies to proceedings

for assault occasioning bodily harm and provides that '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding'. However, s 130 of the *Evidence Act 1977* gives the judge power to exclude otherwise admissible evidence if it is deemed unfair to the accused to admit.

Issue/s: Whether the trial judge should have applied the test in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 and whether 'viewed in the context of the prosecution case, there is a reasonable view of [the relationship evidence] which is consistent with innocence'. Only if there is no reasonable view, can the evidence be admissible because its probative value outweighs its prejudicial effect on the accused.

The appellant argued that in considering whether to admit evidence under s 132B, the trial judge ought not to admit that evidence if there was a reasonable view of that evidence consistent with innocence ('the rule in *Pfennig*'). The appellant argued that the rule in *Pfennig* recognises the prejudicial effect of evidence used to prove a propensity of the accused ("propensity evidence"), and applies at common law to propensity evidence as a measure of the probative force of that evidence. (see *Roach v The Queen* [2010] HCATrans288 (5 November 2010)).

Decision and Reasoning: The appeal was dismissed. French CJ, Hayne, Crennan and Kiefel JJ of the High Court held firstly that s 132B has a 'potentially wide operation'. Section 132B contemplates evidence of other acts of domestic violence throughout the relationship being admitted. The section could also be used to admit similar fact evidence to prove the accused's propensity to commit similar crimes. The Court found it could also be used to admit other types of evidence including evidence of a person's state of mind, evidence of the circumstances of the crime or to provide context to the history the relationship. It could also be used as evidence in a provocation or self-defence case, or where the offender is a victim of domestic violence. (See at [30]-[31]). The Court then held that the *Pfennig* test has no application to the common law residual discretion enshrined in s 130. As such, the test of admissibility under s 132B is whether the evidence is relevant, which is subject to the exercise of the discretion preserved in s 130.

The purpose of admitting the evidence here was not to show a propensity of the accused (re the rule in *Pfennig*); rather, the evidence:

'was tendered to explain the circumstance of the offence charged. It was tendered so that she could give a full account and so that her statement of the appellant's conduct on the day of the offence would not appear "out of the blue" to the jury and inexplicable on that account, which may readily occur where there is only one

charge. It allowed the prosecution, and the complainant, to meet a question which would naturally arise in the minds of the jury' at [42].

The High Court noted the permissible ambit of 'relationship evidence', and the need for clear directions for juries about the use of such evidence and the purpose for which it is tendered:

[45] In the present case the evidence, if accepted, was capable of showing that the relationship between the appellant and the complainant was a violent one, punctuated as it was with acts of violence on the part of the appellant when affected by alcohol. Without this inference being drawn, the jury would most likely have misunderstood the complainant's account of the alleged offence and what was said by the appellant and the complainant in the course of it. To an extent Holmes JA acknowledged this in the conclusions to her reasons. Whilst her Honour identified the relevance of the evidence as showing the particular propensity of the appellant, she also concluded that it made the appellant's conduct in relation to the alleged offence intelligible and not out of the blue.

[47] The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true.

[48] The directions in this case were sufficient. At the conclusion of the evidence the trial judge directed the jury of the need to exercise care and that it would be dangerous to convict on the complainant's evidence alone unless they were convinced of its accuracy. His Honour told the jury that the history of the relationship between the complainant and the appellant had been led "for a very specific purpose" and that they must be "very, very careful in relation to the limited use that [they] may make of such evidence." He explained how evidence could be used as evidence of propensity and directed them that they were not to use the evidence in that way. His Honour informed the jury that the evidence was led so that the incident charged was not considered in isolation or in a vacuum but "to give [them] a true and proper context to properly understand what the complainant said happened on the 13th of April 2006."

***Norman v The Queen* [2012] NSWCCA 230 (9 November 2012) – New South Wales Court of Criminal Appeal**

'Evidence' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape x 3.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: During the course of the complainant's 13 year marriage to the appellant, the complainant and the appellant had anal intercourse five times but only twice with her consent. At trial, the Crown sought to tender evidence of non-sexual domestic violence (see [22]). They argued that the evidence was not being admitted as evidence indicating a propensity on the part of the appellant which rendered it more likely that he had committed the crimes with which he was charged (therefore ss 97 and 101 of the *Evidence Act* and the test in *Pfennig v R* [1995] HCA 7; 182 CLR 461 did not apply). The trial judge accepted this argument and ruled that evidence of non-sexual domestic violence could be admitted for the purpose of showing the relationship between the appellant and the complainant. The appellant was found guilty.

Issue/s: One of the grounds of appeal was that 'relationship' evidence should not have been admitted.

Decision and Reasoning: The appeal was dismissed. MacFarlane J noted the relevant law, stating that: *'As pointed out in Roach v R* [2011] HCA 12; 242 CLR 610, *evidence which incidentally shows propensity but which is otherwise relevant will not be excluded provided that the jury is properly warned against its use as propensity evidence (see also BBH v R [2012] HCA 9 at [146] - [149])'.*

Relationship evidence may be relevant if it assists in the evaluation of other evidence such as that of a complainant. His Honour continued at [26]: *'In other words, relationship evidence may be admitted on the basis that, without it, the jury would be faced with a seemingly inexplicable or fanciful isolated incident. To enable complainants to give their account of events comprehensively, they must be permitted to place the incidents of which they complain in a meaningful context'.*

However, the Courts have emphasised that it is necessary to consider carefully the basis upon which 'relationship' evidence is relevant in a particular case (see *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 463 at [112]; *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 at [28] - [30] and *RG v R* [2010] NSWCCA 173 at [36] - [37]) (at [29]).

Here, MacFarlane J held that evidence of two isolated incidents of non-sexual domestic violence was

irrelevant and should have been excluded. While the Crown submitted that the evidence was relevant to demonstrate 'the nature of the relationship,' MacFarlane J noted:

'[C]onsistently with the approach taken by this Court in Qualtieri and DJV, it is insufficient to rely solely upon such a proposition. Evidence "is not relevant merely because it discloses aspects of the relationship between an accused and a complainant. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context": DJV per McClellan CJ at CL at [29]. Particularly because of its potentially prejudicial character, the precise basis upon which the evidence is relevant must be closely analysed'.

The evidence was also not relevant to demonstrate why the alleged sexual assaults were not reported earlier, and nor could it be said that the evidence would have assisted the jury, in any permissible way, in evaluating the complainant's evidence (see [32]-[34]).

Therefore, His Honour concluded at [35]-[36]:

'[E]vidence of the two isolated incidents of non-sexual domestic violence was not necessary to place the sexual assaults within a meaningful context… [I]t is difficult to see what, if any, use the jury could have made of the evidence other than to engage in impermissible propensity reasoning that the appellant was the type of man who might have sexual intercourse with a woman without her consent. Whilst the trial judge directed the jury not to reason in that way, there was unfairness to the appellant in the evidence being before the jury when it was not relevant on any basis'.

Despite this, on the facts, there was no substantial miscarriage of justice. The Crown case against the appellant was so overwhelming there was no significant possibility that a jury would have acquitted the appellant (See [38]).

***Pasoski v The Queen* [2014] NSWCCA 309 (15 December 2014) – New South Wales Court of Criminal Appeal**

'Admissibility' – 'Assault occasioning actual bodily harm' – 'Context evidence' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Sexual assault' – 'Tendency evidence'

Charges: Assault occasioning bodily harm x 2, sexual assault x 5.

Appeal type: Application for leave to appeal against conviction and sentence.

Facts: The applicant and complainant lived together with their daughters and were in a relationship since 2003. In November 2010, the applicant physically assaulted the complainant in their home on two occasions, by kicking her in the legs, and slapping her face, causing her to fall (see [13]). The sexual assault charges were alleged to have occurred on one night, where the applicant had vaginal penile intercourse five times without her consent (see [13]).

At a *voir dire* during trial, the applicant's trial counsel successfully objected to the admission of other evidence of previous penile vaginal penetration without consent (see [27]). That evidence was not admitted because the trial judge found that the '*evidence is more in the nature of tendency evidence than contextual evidence'* (see [31]). However, evidence of the applicant's controlling behaviour was admitted, and was relied upon at trial (see [12]).

In summing up, the trial judge gave directions as to the use of the evidence of controlling behaviour, stating that '*the Crown relies upon this evidence only for one purpose… to put the complainant's allegations concerning the offences in November 2010 into a realistic context'* (see [42]). Her Honour also stated: '*if that evidence was not there, you would be asking yourselves, well, why would the accused throw his weight around in this horrible manner with the complainant completely out of the blue, when they had been in an apparently normal relationship for the previous six years?*' (see [42]).

Issues: Two of the grounds of appeal concerned 'context evidence' (see [6], [44]):

1. 'A miscarriage of justice was occasioned by the admission of the so-called context evidence' because it was not relevant and was prejudicial, and
2. The trial judge erred by failing to identify the precise issues to which the evidence was directed.

Decision and Reasoning: Leave to appeal was refused on both the 'context evidence' grounds.

In relation to the first ground, Meagher JA referred to the use of context evidence as being admissible if it is used to 'remove implausibility that might attach to a complainant's account of what otherwise would be seen as isolated incidents' (see [24]). His Honour referred to *HML v The Queen* [2008] HCA 16; 235 CLR 334 [6] to observe that '*by doing so, it bears upon the assessment of the probability of the existence of facts directly in issue (Evidence Act 1995 (NSW), s 55) …* Similar observations were made in *Roach v The Queen* [2011] HCA 12; 242 CLR 610 at [42] and *BBH v The Queen* [2012] HCA 9; 245 CLR 499 at [146]-[150].'

Meagher JA held that the evidence was properly admitted (see [45]). His Honour found that from the conduct of the trial, *'it was apparent that the Crown was relying upon it only as showing that the relationship was an unhappy one from the complainant's perspective so as to make more plausible her evidence that she did not consent to having sexual intercourse with the applicant on the five occasions in question'* (see [33]). Furthermore, the fact that trial counsel had not objected to the evidence at the *voir dire*, despite having objected to the evidence of the other sexual assaults on the grounds that it might invite propensity reasoning, indicated that '*the parties and the Court were conscious that evidence tendered to explain the context in which the alleged offences occurred might, depending on its content, be relied on or used for a tendency purpose*' (see [30]).

In relation to the second ground, regarding the directions given by the trial judge to the jury, Meagher JA held that the directions did not give rise to a real risk that the jury might employ propensity reasoning, and thus did not occasion a miscarriage of justice (see [49]). His Honour found that the direction regarding the applicant 'throwing his weight around' did verge on an invitation to the jury to employ propensity reasoning (see [47]). However, his Honour held that, assessed in context, the other directions made clear to the jury that the evidence of controlling behaviour was not being relied upon to suggest a 'propensity of the applicant physically or sexually to impose his will on the complainant' (see [48]).

The other issues concerned two failures of the trial judge. First, the trial judge failed to properly comply with s 55F(2)(b) of the *Jury Act 1977* (NSW), and therefore two counts of sexual assault were quashed (see [8]-[11]). Second, the trial judge erred in taking into account as an aggravating factor in sentencing that the offences were committed in the complainant's home: *EK v R* [2010] NSWCCA 199; 79 NSWLR 740 at [79] (see [54]). Accordingly, the aggregate sentence of imprisonment was reduced from five years and six months with a non-parole period of two years and nine months to four years and eleven months with a non-parole period of two years and five and a half months.

***R v Grant* [2016] NTSC 54 (31 October 2016) – Northern Territory Supreme Court**

'Relationship evidence' – 'Tendency evidence' – 'Unlawfully causing harm' – 'Unlawfully causing serious harm'

Charge/s: Unlawfully causing serious harm or unlawfully causing harm.

Hearing: *Voir dire* hearing.

Facts: The accused was charged with the offence of unlawfully causing serious harm to his female partner,

the complainant, or, in the alternative, unlawfully causing harm to the complainant. The Crown sought the admission of tendency evidence related to the following fact in issue: whether the accused applied physical violence to the complainant in the early morning of 26 January 2016 and/or caused injuries to the complainant. The tendency sought to be proved was the tendency of the accused:

(a) To act in a particular way, namely engaging in verbal abuse and physically violent behaviour towards the complainant; and/or

(b) To have a particular state of mind, namely a violent and controlling disposition towards the complainant which he sometimes acted upon when he had been consuming alcohol.

If the evidence (detailed at [5]) was not admissible as tendency evidence, the Crown sought to have it admitted as relationship evidence.

Decision and Reasoning: The rulings on the *voir dire* hearing were –

1. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible in the trial as tendency evidence (see [61]-[72]).

   In order to be admitted for tendency purposes, the evidence had to satisfy the requirements in ss 97 and 101 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA'). Two questions arose in determining the admissibility of the evidence: (1) did the evidence have significant probative value? The relevant test is whether 'the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in question': *CEG v The Queen* [2012] VSCA 55 (see [30]-[60]); (2) did the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused? As per the Court, '[t]he test of a danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of unfair prejudice by reason of the admission of the evidence' *R v Lisoff* [1999] NSWCCA 364.

2. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible as 'relationship' or 'context evidence' (see [73]-[82]).

   Evidence may also be admitted for non-tendency purposes. One example of non-tendency purpose is 'relationship' or 'context' evidence that is not relied on for a tendency inference. The High Court in *HML*

v The Queen is authority for the proposition that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including the following purposes (see [75]):

(a) as affecting the plausibility of other evidence or to assess the credibility and coherence of the complainant's evidence (at [6], [155]–[156]);

(b) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]);

(c) to overcome a false impression that the event was an isolated one, that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence (at [500], [513]);

(d) to ensure that the jury are not required to decide issues in a vacuum (at [428], [498]); and

(e) as negativing issues raised such as accident or mistake (at [430]).

Although *HML* was a case involving sexual offences, relationship evidence may also be admissible in cases involving violence, including assault-type offences (see examples at [76]).

The admissibility of relationship evidence is governed by the general test of relevance in s 55 of the ENULA and the directions and obligations contained in Part 3.11 (especially ss 135 and 137). The Crown contended that the evidence was relevant and admissible as relationship or context evidence because it was necessary to:

(a) Avoid the circumstances of the alleged offence appearing inexplicable or being misunderstood in isolation; see *Roach v The Queen* [2011] HCA 12 at [45]

(b) Negative the defence case of self-inflicted injury; *R v Quach* [2002] NSWCCA 519; (2002) 137 A Crim R 345 at [15], [22]-[45]; *Bryant v The Queen* [2011] NSWCCA 26 at [92]; *McDonald v The Queen* [2014] VSCA 80 at [28]- [29]

(c) Show the state of mind of the accused at the time of the alleged offence. *R v Atroushi* [2001] NSWCCA 406 at [33], [45], [47]; *Boney v The Queen* [2008] NSWCCA 165 at [29]

The relationship evidence here was both relevant ([79]-[80]) and not excluded (its probative value was

neither outweighed by the danger of unfair prejudice to the accused nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused) ([81]-[82]).

***Tasmania v Finnegan (No 2)* [2012] TASSC 1 (19 January 2012) – Tasmanian Supreme Court**

'Admissibility' – 'Evidence - relationship' – 'Evidence - tendency' – 'Motive' – 'Physical violence and harm' – 'Probative value' – 'Unlawful wounding'

Charge: Unlawful wounding

Proceeding: Ruling as to the admissibility of evidence

Facts: The accused was charged with unlawfully wounding the complainant (his partner) by striking her to the face with a glass. He pleaded not guilty. The Crown sought to lead evidence from the complainant given on a *voir dire* about the accused's conduct towards her on other occasions, both before and after the alleged wounding. The accused objected to the admission of some of the evidence ([6]).

Issues: Whether some of the evidence given by the complainant should be ruled inadmissible on at least one of the following bases:

1. Irrelevance;
2. Failure to satisfy the common law rule established in *Pfennig v R* whereby propensity or similar fact evidence is not admissible if, viewed in the context of the prosecution case, there is a reasonable view of that evidence that is consistent with innocence;
3. The danger of unfair prejudice to the accused outweighing the probative value of the evidence: s 137 *Evidence Act 2001 (Tas)*; or
4. The probative value of the tendency evidence not substantially outweighing any prejudicial effect that it may have on the accused: s 101(2) *Evidence Act 2001 (Tas)*

Decision and Reasoning: The appeal was dismissed. The evidence led from the complainant as to the conduct of the accused was admissible. It was relevant on a number of bases: as 'relationship evidence', enabling the jury to assess the evidence as to what occurred at the time of the alleged wounding; as evidence of motive (jealousy); as evidence explaining why the complainant asserted she was injured because of a fall and why there was delay in her reporting what occurred; and as tendency evidence, showing that the

accused had a tendency to be jealous of anyone who had a friendship/relationship with the complainant and to be generally violent towards her ([11]-[15]).

Further, the probative value of all the evidence under consideration substantially outweighed the prejudicial effect and danger of unfair prejudice to the accused. In this regard, Blow J noted at [30]-[31]:

'In my view the danger of unfair prejudice to the accused is not great… [A] properly instructed jury, having heard all the evidence of jealousy and violence, is unlikely to be distracted from its duty of impartiality and its duty to give a true verdict in accordance with the evidence.

'In my view the evidence of jealousy has substantial probative value. Without that evidence the jury might well take the view that the accused had not given any indication of jealousy on any other occasion. If the only evidence available for the jury as to violence on other occasions was the evidence of the three charged assaults, two of which shortly preceded the first report to the police of the accused wounding the complainant with the glass, that could result in the jury overestimating the likelihood of the complainant having fabricated the critical allegations. Having regard to that factor, and to the various bases on which the evidence of violence is relevant, I consider that all the evidence of violence also has substantial probative value'.

Here, there was nothing about the facts that made it one where s101(2) or s137 [Evidence Act 2001 (Tas)] required the *Pfennig* test to be applied (at [32]).

Note: this decision has been overtaken by legislative changes effective 12 December 2017. See section 13B Family Violence Act 2004.

***Benson v The Queen* [2014] VSCA 51 (28 March 2014) – Victorian Court of Appeal**

'Exposing children' – 'Miscarriage of justice' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape.

Appeal Type: Appeal against conviction and sentence.

Facts: The male appellant and the female complainant had been in a relationship for 13 years. The complainant alleged that in April 2011 the appellant hit her after she refused to have sex with him. She described this as the 'last straw' and told the appellant she was leaving him. They remained living in the same house. One month later, the intoxicated appellant forced her into bed and penetrated her with his penis. Their

son saw the incident and called the police.

At trial, the Crown sought to admit evidence of physical assaults by the appellant against the complainant that occurred between 1999 and 2003 (none of these assaults happened after the complainant refused to have intercourse with the appellant). The Crown argued that this evidence explained the context in which the alleged rape occurred, and was relevant to whether the complainant had freely agreed to have intercourse with the appellant and whether the appellant was aware that the complainant was not consenting or might not be consenting on the night of the alleged offence. The trial judge took account of the highly prejudicial nature of the evidence but considered that it was both relevant to and probative of the facts in issue and should be admitted for the limited purpose described in her ruling (see [19]-[23]).

Issue/s: The trial judge erred in admitting evidence of past conduct by the appellant because the evidence was not relevant.

Decision and Reasoning: The appeal was allowed. Neave JA held (Bongiorno and Coghlan JJA agreeing) that the evidence was inadmissible. Bongiorno and Coghlan JJA also held that there was a miscarriage of justice (Neave JA in dissent). Neave JA first considered whether the 'relationship evidence' (evidence of physical assaults) was relevant. Her Honour stated generally at [29]:

'Evidence of the relationship between an accused and the alleged victim of an offence may be relevant and admissible for the purpose of placing the event which is the subject matter of the offence in context, where such evidence may assist the jury to evaluate the conduct of the complainant and the applicant on the occasion which gave rise to the charge. Where the evidence is of criminal or other disreputable acts committed by the accused, so that there is a danger that the jury will treat it as evidence that the accused has a propensity to commit acts of the kind charged, the judge must warn the jury of the limited purpose for which the evidence can be used. In particular the jury must be told that the relationship evidence cannot be regarded as a substitute for the evidence that the accused committed the charged acts, or for the purpose of showing that the accused is 'the kind of person' likely to have committed that offence (R v Grech (1997) 2 VR 609)'.

Neave JA went on to consider the circumstances in which relationship evidence may be relevant. At [31], Her Honour noted that relationship evidence of prior violence by the accused towards the complainant may be admissible in sexual offence cases 'because it assists the jury to evaluate whether the complainant had freely agreed to sexual activity on the occasion to which the charge relates, or whether the accused knew that the

complainant had not consented or might not have consented to having sex on that occasion': see, for example, *R v Loguancio* [2000] VSCA 33; (2000) 1 VR 235, 23 (Callaway JA).

At [33], Her Honour noted that relationship evidence of prior acts of violence by the accused 'may also be admissible where a person is charged with homicide or an offence arising out of the infliction of injury on a victim, because such evidence is relevant in evaluating the accused person's claim that he or she had an amicable relationship with the victim, or that he or she acted in self-defence': see, for example, *Wilson v The Queen* [1970] HCA 17; (1970) 123 CLR 334 and *R v Mala* (Unreported, Court of Appeal, Brooking, Ormiston, Batt JJA, 27 November 1997).

In this case, the appellant correctly conceded that evidence of the April 2011 assault when she refused to have sexual intercourse with him only a month before the alleged rape was relevant in assessing the likelihood that she had in fact voluntarily agreed to have intercourse with him or he believed that she had done so (see [35]). However, Neave JA held at [36]-[37] that:

'[D]espite the appalling nature of the earlier assaults, I consider that the evidence of those assaults was not sufficiently relevant to the nature of the relationship which existed at the time of the alleged rape to the admission of that evidence. There was a lengthy time lapse between the earlier assaults and the alleged rape. Of itself, that time lapse might not have made the evidence irrelevant…'

'However in this case there was not only a significant time delay between the alleged rape and the earlier assaults, but the complainant remained with the applicant despite the assaults and bore him children after those assaults had occurred. It may be that she did not leave him earlier because she was afraid of him, but there was no evidence that he had assaulted her because she refused to have sex with him, prior to April 2011'.

Bongiorno and Neave JJA agreed with the reasons set out by Neave JA as to why the evidence was inadmissible. However, they also held that there was a substantial miscarriage of justice as a conviction in this case was not inevitable: see *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469. Neave JA in dissent at [52]-[61].

***Lewis (a pseudonym) v The Queen* [2018] VSCA 40 (27 February 2018) – Victorian Court of Appeal**

'Admissibility of evidence' – 'Hearsay rule' – 'Interlocutory appeal' – 'Physical violence and harm' – 'Tendency evidence'

Charges: Aggravated burglary x 1; Intentionally cause injury x 2; Recklessly cause injury x 2; Intentionally damage property x 1; Extortion with a threat to kill x 1; False imprisonment x 1; Making threat to kill x 1; Contravening family violence intervention order x 1; Attempt to pervert the course of justice x 2.

Case type: Application for leave to appeal against interlocutory decisions.

Facts: The charges related to an incident of violence committed by the applicant against the aggrieved, his partner. The aggrieved was to be the central witness for the prosecution ([5]-[7]). The aggrieved invoked s 18 *Evidence Act 2008* (Vic), which provides that a person can avoid giving evidence against their partner if there is a sufficient likelihood that harm would be caused to the person ([9]-[11]). The prosecution then gave notice under s 65 *Evidence Act 2008* that they would rely on statements that the aggrieved had made to the police as tendency evidence as an exception to the hearsay rule ([16]).

Issues: The applicant appealed against 3 main interlocutory decisions made by the judge. First, admitting the statements the aggrieved made to the police. Second, refusing to certify the appeal, which is a precondition to appeal against an interlocutory decision under s 295(3) of the *Criminal Procedure Act 2009* (Vic). Third, refusing to sever the proceedings for each of the applicant's charges.

Decision and Reasoning: The Court dismissed all grounds of the appeal. On the first ground, it was reasonably open for the judge to admit the evidence as an exception to the hearsay rule. The applicant argued that admitting the evidence might lead to prejudice because the aggrieved could not be cross-examined (since she had invoked the protection against giving evidence against a de facto partner) ([58]). The Court held that there were sufficient protections available to ensure a fair trial, including directions against giving too much weight to untested statements ([59]). Accordingly, in relation to the second ground, it was reasonably open for the judge to refuse to certify ([64]). On the third ground, the Court held that many charges stemmed from the same factual basis, so there was no basis to sever the charges ([68]).

The Court observed that the applicant did not seek to challenge the judge's ruling that the tendency evidence satisfies the requirements of ss 97 and 101, 'presumably' because 'he regards a submission of that kind as foredoomed to fail, based upon the recent decision of the High Court in *Hughes v The Queen*' [2017] HCA 20 (14 June 2017). [72] The Court stated at [73] that:

> It is, however, worthy of note that the general evidence of the history of domestic violence, which forms the basis of the tendency notice, may not have quite the probative force in relation to the allegation of the

threat to kill and extortion, as it does in relation to the other charges brought against the applicant.

The Court concluded by cautioning trial judges about the use of tendency evidence: '[if the tendency] evidence were led, the judge would have to give a careful direction as to how it could be used and, more importantly, how it could not be used' ([75]).

DPP (Victoria) v Paulino **(Ruling No 1) [2017] VSC 343 (17 June 2017) – Victorian Supreme Court**

'Admissibility' – 'Relationship evidence'

Charges: Murder.

Case type: Pre-trial hearing.

Facts: The defendant and deceased had been in a relationship, and had two children ([3]). They separated acrimoniously in 2010 ([3]). The defendant was accused of murdering the deceased. The prosecution wished to lead evidence relating to the relationship between the accused and deceased ([4]) in order to establish that the accused's enmity and hatred towards the deceased was the motive for the murder ([5]). The evidence included: threats made by the defendant; relationship evidence; the fact that the accused had an intervention order taken out against him by the deceased; and the accused's actions in relation to a pornographic video allegedly depicting the deceased.

Issues: Whether the 'relationship evidence' should be admitted.

Decision and Reasoning: Justice Bell set out the relevant principles in relation to the Court's mandatory duty to exclude evidence where the probative value is outweighed by the danger of unfair prejudice to the accused (see [33]-[36]). In this context, evidence of a poor relationship between the accused and deceased has been admitted where that evidence may be relevant to whether the accused killed the deceased and whether the accused had a motive to do so ([37]).

Threats

The deceased's statements about her fear of the accused (for example, that if something happened to her, it would be because of the accused) were not admissible. In deciding the admissibility of a victim's fear of the accused perpetrator, the issue is 'whether the evidence of the deceased's fear of the accused was relevant to the probability of the existence of a fact in issue, usually whether the accused had a motive for killing, and

actually did kill, the deceased' ([57]). However, the statements were merely evidence of her subjective state of mind, not the accused's ([70]). Further, the content and volume of evidence would be highly prejudicial to the accused ([71]).

By contrast, evidence of threats made by the accused to kill the deceased and her family were admissible, because it was relevant to the accused's state of mind towards the deceased ([76]).

Relationship evidence

Evidence of the defendant's feelings of hatred and enmity towards the deceased was admissible ([42]-[43]). However, most the evidence of the state of their marriage before 2010 was not relevant ([41], [51]). Bell J held that the jury should be told generally that the marriage was unhappy ([85]-[87]), but not the precise details of the aggressive behaviour of the accused ([88]).

Intervention order

Evidence of the intervention order was admissible as a feature of the relationship leading up to the death of the deceased ([91]). There was a danger of unfair prejudice to the accused, but that could be mitigated by proper instruction ([92]).

Pornographic video

The accused had alleged that the deceased had participated in a pornographic video, and had shown his colleagues and the deceased's family ([94]). Evidence of the video and the accused's actions were admissible to demonstrate the extremely negative attitude of the accused towards the deceased ([96]).

***R v De Beyer* [2017] NSWSC 752 (13 June 2017) – New South Wales Supreme Court**

'Children's evidence' – 'Murder' – 'Relationship evidence'

Charges: Murder x 1.

Case type: Judgement on the admissibility of relationship evidence.

Facts: The accused and deceased were married. The accused was on trial for her murder. It was the Crown case that the accused had stabbed his wife. He gave evidence that she stabbed herself. The prosecution case was circumstantial ([1]).

Issues: Whether evidence of the accused and deceased's relationship was admissible ([2]).

Decision and Reasoning:

Evidence that was admitted without objection:

- Eyewitness evidence from the accused and deceased's son and daughter, including witnessing the accused punching and kicking the deceased, throwing things at the deceased and threatening to kill her ([3], [17]).
- Statements made to the police by one child, the deceased and police officers after police attendance at a violent incident ([9]-[10], [15]).
- Parts of recordings made by the deceased of arguments between her and the deceased ([13], [25]).

Evidence that was objected to, and admitted:

- A conversation between the deceased and her sister, including statements that the accused would not let the deceased out of the house or have a phone "because he was scared she would call the police", and that she would not leave him "because if he found her he would kill her" [23]. The statements were objected to on the basis that they were representations of the accused state of mind ([23]). The Court held that they were expressions of fear, and were admissible as an exception to the hearsay rule ([24]).
- Notes and diary entries made by the deceased, which included assertions of fact about episodes of abuse, and statements about the deceased's state of mind about the relationship ([31]). Only general statements of fact were admitted, because they were not hearsay evidence ([30]).

Evidence that was not admitted:

- Statements made by the deceased to her daughter that the accused attempted to drown her. The daughter only recollected these statements once she was shown the deceased's diary. The daughter's recollection did not appear to be firm. Therefore, Hidden AJ held that evidence was not highly probable to be reliable ([20]-[22]-[22]).

Expert or opinion evidence

Note: S64 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) provides for a new Part 6A, Division 1A of the *Evidence Act 1977* (Qld) which will commence on a date to be fixed by proclamation. It will include:

- s103CC which permits expert evidence about domestic violence in criminal proceedings (which may include evidence about the nature and effects of domestic violence on persons generally and about the effect of domestic violence on a particular person); and
- s103CD which abrogates the ultimate issue and common knowledge rules in relation to expert evidence of domestic violence.

In some cases domestic and family violence has been considered an area of specialised knowledge and opinion or expert evidence has been admitted. This type of evidence may include evidence about so-called 'battered woman syndrome' (a subset of post-traumatic stress disorder - although evidence as to victim post-traumatic stress disorder is more common); the general dynamics of violent relationships; the cycle of violence; and the complex reasons some people stay in violent relationships, or do not report violence, or behave in certain ways to protect themselves. Expert witnesses qualified to give such evidence have included psychiatrists, psychologists, social workers, and academics.

Some jurisdictions have specific provisions in relation to the admission of expert evidence on the subject of domestic and family violence.

S38 of the *Evidence Act 1906* (WA) defines evidence of family violence very broadly (including ways in which social, cultural, economic or personal factors have affected any help-seeking behaviour undertaken by the person, or the safety options realistically available to the person, in response to family violence). S39 *Evidence Act 1906* (WA) permits relevant expert evidence about domestic violence in criminal proceedings (which may include evidence about the nature and effects of domestic violence on persons generally and about the effect of family violence on a particular person) and defines an expert on the subject of family violence to include a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of family violence. The *Evidence Act 1906* (WA) also

contains a provision (s39B) relating to the relevance of evidence of family violence to the defence of self-defence.

S322J of the *Crimes Act 1958* (Vic) defines evidence of family violence broadly (including the social, cultural and economic factors which impact on a person affected by family violence and the psychological effect of relationships affected by family violence. The *Crimes Act 1958 (Vic)* also contains specific provisions relating to the relevance of evidence of family violence to defences of self-defence (s322M(2)) and duress (s322P).

Part 3 Division 4 (sections 34U-34Z) of the Evidence Act 1929 (SA) provides that where a defendant claims an offence occurred in circumstances of family violence a court may receive evidence of family violence (s34W), including expert evidence consisting of 'social framework evidence' about family violence where the defendant asserts the offence occurred in circumstances of family violence, and for which any of the defences of self-defence, duress and/or sudden or extraordinary emergency are raised. Where such evidence is received the judge must identify and explain the purpose for which the evidence may and may not be used (s 34Y).

The following cases have admitted opinion or expert evidence about the context of domestic and family violence in relevant criminal proceedings.

Evidence of Psychiatrists and Psychologists - Examples

Osland v R [1998] HCA 75; 197 CLR 316 (10 December 1998) – High Court of Australia

'Battered woman syndrome' – 'Directions and warnings for/to jury' – 'Evidence' – 'Expert testimony - psychologist' – 'History of abuse' – 'Murder' – 'Physical violence and harm' – 'Provocation' – 'Self-defence'

Charge/s: Murder

Appeal Type: Appeal against conviction.

Facts: The appellant and her son were jointly tried in the Supreme Court of Victoria for the murder of her husband Mr Osland (the appellant's son's step-father). The jury convicted the appellant but was unable to reach a verdict with respect to her son. Her son was later retried and acquitted. The prosecution case was that the appellant and her son planned to murder her husband. The appellant mixed sedatives with her husband's dinner in sufficient quantity to induce sleep within an hour. The appellant's son later completed the plan by hitting Mr Osland on the head with an iron pipe while he was asleep. He and the appellant then buried

Mr Osland in a grave they had earlier prepared. At trial, the appellant and her son relied on self-defence and provocation raised against ‘an evidentiary background of tyrannical and violent behaviour by Mr Osland over many years’ which had allegedly been ‘escalating in the days prior to his death’ (at [4]). The prosecution accepted that Mr Osland had been violent in the past but maintained that this behaviour had ceased well before he was murdered. The appellant raised expert evidence of the ‘battered woman syndrome’ (BWS) in support of her case. A psychologist’s evidence indicated that the appellant’s relationship with her husband was ‘consistent with it being a battering relationship’ (at [50]).

The psychologist outlined the general characteristics of battered women as follows (at [51]):

1. they are ashamed, fear telling others of their predicament and keep it secret.
2. they tend to relive their experiences and, if frightened or intimidated, their thinking may be cloudy and unfocussed.
3. they have an increased arousal and become acutely aware of any signal of danger from their partner.
4. they may stay in an abusive relationship because they believe that, if they leave, the other person will find them or take revenge on other members of the family.
5. in severe cases, they may live with the belief that one day they will be killed by the other person.

Issue/s: Some of the issues concerned –

1. Provocation - Whether the trial judge erred in ‘failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of provocation’ (see at [155]).
2. Self-defence – Whether the trial judge erred in ‘failing to make clear the connection between the evidence of "battered woman syndrome", admitted at the trial, and the law of self-defence’ (see at [155]).

Decision and Reasoning: The appeal was dismissed by majority (Gaudron and Gummow JJ dissenting). However, all members of the Court were unanimous in holding that the trial judge’s directions with respect to ‘battered woman syndrome’ (BWS) were appropriate.

Gaudron and Gummow JJ:

“Expert evidence is admissible with respect to a relevant matter about which ordinary persons are "[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in

the area" and which is the subject "of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"" (at [53])

"…there may be cases in which a matter of apparently slight significance is properly to be regarded as evidence of provocation when considered in light of expert evidence as to the battered woman's heightened arousal or awareness of danger. And evidence of that may also be relevant to the gravity of the provocation, as may the history of the abusive relationship." (at [55])

"So, too, expert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk. And, of course, the history of the particular relationship may bear on the reasonableness of that belief." (at [56])

"…there is an obligation on counsel to make clear to the jury and the trial judge the precise manner in which they seek to rely on expert evidence of battered wife syndrome and to relate it to the other evidence and the issues in the case. In circumstances where evidence of battered wife syndrome is given in general terms, is not directly linked to the other evidence in the case or the issues and no application is made for any specific direction with respect to that evidence, it cannot be concluded that the trial judge erred in not giving precise directions as to the use to which that evidence might be put." (at [60])

Callinan J (while agreeing that the directions with respect to BWS were appropriate) held that to adopt a new and separate defence of BWS 'goes too far for the laws of this country' (see at [239]). His Honour also noted that these issues could be matters for expert evidence as well as matters of common sense for a jury to decide with the assistance from the trial judge.

McHugh J did not make any comments on BWS.

Kirby J:

His Honour discussed the relevance of the BWS defence in abusive relationships. His Honour was of the opinion that the term should not be restricted to women because there may be situations where men are the victims such as similarly abusive same-sex relationships, and 'unlike conception and childbirth, there is no inherent reason why a battering relationship should be confined to women as victims' (at [159]).

His Honour was broadly supportive of BWS evidence but did note some controversies around it and was somewhat critical of it: *"…it appears to be an "advocacy driven construct" designed to "medicalise" the*

evidence in a particular case in order to avoid the difficulties which might arise in the context of a criminal trial from a conclusion that the accused's motivations are complex and individual: arising from personal pathology and social conditions rather than a universal or typical pattern of conduct sustained by scientific data' (at [161]).

Further, he was critical of the term itself and stated it should not be used. He was also aware that the syndrome was 'based largely on the experiences of Caucasian women of a particular social background' (whose) '"passive" responses may be different from those of women with different economic or ethnic backgrounds' (at [161]).

Ultimately however, his Honour was supportive – '*Although BWS does not enjoy universal support, there is considerable agreement that expert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of "traumatic bonding" which may occur in abusive relationships'* (at [167]).

***R v Lorenz* [1998] ACTSC 275 (14 August 1998) – Australian Capital Territory Supreme Court**

'Assault occasioning bodily harm' – 'Battered woman syndrome' – 'Emotional and psychological abuse' – 'Exposing children' – 'General deterrence' – 'People with mental illness' – 'Physical violence and harm' – 'Sentencing' – 'Unlawful confinement' – 'Where the offender is also a victim'

Charge/s: Robbery with an offensive weapon.

Trial: Judge only trial.

Facts: On 20 November 1996, Ms Lorenz ('the accused') entered a supermarket and attempted to purchase some cigarettes with her EFTPOS card from the complainant. The transaction could not be completed because there were insufficient funds in the account. The accused maintained she was sure there were funds in the account and re-tried the card but it was again declined. She then left the store. Ten minutes later, the accused returned to the store with a pen knife. She approached the complainant, held the knife out in front of her and said, 'give me all your fucking money or I'll slit your throat'. The complainant gave the accused $360 in cash and the accused left the store. While initially denying any involvement, the accused made admissions to the police.

Counsel for the accused argued that the accused was acting out of duress on the basis of a threat made by Ms Lorenz's partner on the night before the robbery and repeated the following morning to the effect that if she did not obtain enough money to enable him to re-register his car he would kill her. This threat followed a pattern of violent and threatening behaviour towards the accused over a number of years (See [11]). On the morning of the robbery, the accused, who was pregnant with the couple's third child, found out that she was unable to get the immediate payment of an advance payment from the Department of Social Security to pay the re-registration.

Decision and Reasoning: There was some discussion in this case of 'battered woman syndrome' (See [26]-[31]). Crispin J accepted that upon failing to receive advance payment from the Department of Social Security, the accused became frightened and confused and the robbery was an impulsive act due to her fear that her partner would kill her. His Honour stated: 'In my view her failure to attempt to extricate herself from the situation whether by leaving him or otherwise is largely explicable by her fear and confusion. Furthermore, she may have thought that any escape would have been only temporary and that sooner or later [her partner] would have been bound to have caught up with her and carried out his threat' at [30].

However, 'a diagnosis of battered woman syndrome does not of itself give rise to any defence. The law does not recognise any general principle that people should be absolved from criminal conduct because they had been beaten or abused or because a psychological condition caused by such treatment may have led them to commit the offences with which they are charged. Nonetheless, evidence that such a person may have had a psychological condition of this kind may be relevant to several defences known to the law' at [31].

Here, counsel for the appellant unsuccessfully attempted to rely on the defence of duress. In the accused's favour, His Honour found that the threat was effective at the time of the offence, the accused did not fail to take advantage of a reasonable opportunity to render the threat ineffective, and, in light of the extremity of the actual and threatened violence displayed by the accused's partner, a person of ordinary firmness of mind may have acted in the way the accused did (See [35]-[37]). However, the accused's partner did not direct the accused to commit the offence and accordingly the defence of duress failed (See [38]-[41]). In the alternative, counsel for the accused attempted to rely on the defence of necessity. However, His Honour held that the imminence of danger fell well short of the required standard for the successful proof of the defence (See [42]-[45]). She was accordingly found guilty.

The accused left her partner shortly after the robbery and had formed a relationship with another man. She had just turned 23, had three children and was pregnant to her new partner. The new relationship was

apparently a happy one. In these circumstances, and to give her the opportunity to start a new life for herself and her children, Crispin J found it appropriate to defer passing sentence on the condition that she enter into recognisance to be of good behaviour for a period of three years.

***R v Silva* [2015] NSWSC 148 (6 March 2015) – New South Wales Supreme Court**

'Battered woman syndrome' – 'Expert evidence - psychiatrist' – 'Manslaughter by excessive self-defence' – 'Physical violence and harm' – 'Post-traumatic stress disorder' – 'Sentence'

Charge/s: Manslaughter by excessive self-defence.

Hearing: Sentencing.

Facts: The offender stabbed and killed her partner, James Polkinghorne. The relationship had been characterised by escalating physical and verbal abuse from the deceased towards the offender. On the 13 May 2012, the deceased made increasingly threatening and abusive telephone calls and messages to the offender. That night, he went to the home of the offender's parents, where the offender was present. He was highly aggressive and high on methylamphetamine. The facts of what followed were confused and confusing (see [29]-[36]). In summary, the deceased threatened to kill the offender, he assaulted the offender, and the offender's brother and father intervened. They began fighting with the deceased. The offender retrieved a knife from inside and, while the offender was on top of her brother, stabbed and killed the deceased. The offender was found not guilty of murder but guilty of manslaughter.

Decision and Reasoning: A sentence of 18 months imprisonment, wholly suspended was imposed. Hoeben CJ first made a number of factual findings. At [38] His Honour found that:

'the offender stabbed the deceased with an intention to inflict grievous bodily harm because she believed her act was necessary to defend not only herself but her brother and father. However, in accordance with the jury's verdict, the offender's conduct was not a reasonable response in the circumstances as she perceived them, thereby rendering her guilty of the crime of manslaughter by way of excessive self-defence'.

His Honour also had regard, with some qualifications, to the evidence of Associate Professor Quadrio, a consultant psychiatrist. In her report, Professor Quadrio concluded that during her relationship with the deceased, the offender developed chronic and complex Post Traumatic Stress Disorder (PTSD) with particular features which were described as 'Battered Woman Syndrome'. She also concluded that the

offender continued to suffer from PTSD. Hoeben CJ found at [40]:

'In the absence of any psychiatric opinion to the contrary, I would normally accept such a diagnosis. In this case I am not prepared to do so. This is because the diagnosis is based upon significant pieces of history from the offender which are different to the evidence at trial and to what the offender said in her ERISP. I am prepared to accept that the offender currently suffers from PTSD. The events of the night of 13 May 2012 would of themselves be sufficient to bring about such a condition and there is no reason to doubt the existence of the symptoms which the offender described following the deceased's death. What I am not prepared to accept is that the Post Traumatic Stress Disorder was due to the offender's relationship with the deceased and was in existence before the deceased's death'.

However, His Honour did accept that the offender stabbed the deceased when she was in a highly emotional and hysterical state (see [41]-[43]).

In reaching an appropriate sentence, Hoeben CJ took into account a number of considerations. These included that specific deterrence were not relevant in light of the offender's rehabilitation and the unlikelihood of re-offending (see [58]). General deterrence was not accorded substantial weight in light of exceptional factual circumstances (the deceased had made escalating threats of violence approaching the offender's home and the offender's state of mind was affected by being already brutally assaulted and witnessing the struggle between her family members and the deceased) (see [59]). The objective seriousness was at the lower end of the range as was the offender's culpability (see [60]-[61]).

As against these matters, Hoeben CJ had regard to the sanctity of human life, the need to denounce the conduct of the offender and hold her accountable for her actions (see [62]).

The offender successfully appealed against her conviction to the Court of Appeal. See *Silva v The Queen* [2016] NSWCCA 284 (7 December 2016).

***Inkamala v An Assessor under s 24 of the Victims of Crime Act* [2022] NTCAT 20 (8 December 2022) – Northern Territory Civil and Administrative Tribunal**

'Battered woman syndrome' – 'Coercive control' – 'Complex post traumatic stress disorder' – 'Consultant psychiatrist evidence' – 'Contributory negligence' – 'Financial assistance' – 'Learned helplessness' – 'People with mental illness' – 'Physical violence' – 'Post traumatic stress disorder' – 'Victims of crime'

Matter: Application for review of a decision to award the applicant financial assistance of $13,170.99 under the Victims of Crime Assistance Act 2006 (NT) arising from injuries sustained by the applicant as a result of violent acts committed by her sometime domestic partner.

Facts: The applicant is a Western Arrarnta woman who is a “deeply traumatised survivor of sustained, repeated and brutal intimate partner violence” which resulted in two children (now teenagers) and numerous incidents of violence resulting in medical or hospital treatment, numerous protection orders to protect the applicant from the offender and numerous sentences of imprisonment imposed on the offender. Many of the documented offences occurred when either or both of the offender and applicant were intoxicated. In 2010 the applicant was awarded $18,750 for physical injuries (partial loss of vision, fractured forearm, scarring to the right arm) caused by the offender between 2006 and 2009.

A second application was received on 18 December 2014 in relation to physical injuries from assaults by the offender on about 3 occasions, which was amended on 15 January 2015 to include a claim for psychological or psychiatric injuries. The claim took seven years to process, and the offender continued to assault the applicant causing the claim to continue to increase. A consultant psychiatrist provided reports and it was not in dispute that the applicant has sustained a Complex Post Traumatic Stress Disorder (CPTSD) and a Major Depressive Disorder “as a direct result of domestic violence perpetrated buy the offender between 2006 and 2020”, attributing 30 per cent of the CPTSD to the assaults between 2006 and 2009 and 70 per cent to the assaults between 2009 and 2020 [12]. The initial assessment awarded the applicant $13,170.99, with the amount awarded for her physical and psychological injuries reduced by 50 per cent due to the applicant’s contribution to the injuries.

Grounds:

1. The initial assessment of $35,000 for psychiatric or psychological disorder is inadequate;
2. the award of $110.99 for financial loss is inadequate; and
3. the reduction of 50% of the compensation for injuries is excessive.

Decision and reasoning:

1. The decision of the respondent to award the applicant $13,170.99 be set aside.
2. An award of $21,006.99 to the applicant be substituted.

[63] The Victorian Court of Appeal has recently described battered wife syndrome as “a learned helplessness process in which women who have been abused repeatedly within a relationship they believe they cannot escape from, learn ‘good coping skills as a trade-off for escape.’

Battered woman syndrome is a subset of PTSD. The label “battered wife syndrome” has not been applied to the applicant in this case. However, in my view the evidence supports a finding that the applicant, who has sustained CPTSD as a result of violence perpetrated against her by a coercively controlling partner over many years, is likely a person whose behaviour in repeatedly returning to live with the offender is in large part due to learned helplessness. Accordingly, this case is to be distinguished on its facts from Lankin v Northern Territory of Australia [(Local Court of the Northern Territory, unreported case number 21337307, 1 September 2015].

[64] In her written submissions on behalf of the respondent and the intervener, Ms Thompson submits that the applicant “willingly recommenced her relationship with the offender at various times”. I reject that submission. I am satisfied that the applicant recommenced her relationship with the offender reluctantly and unwillingly, and that her decisions to do so were to a significant extent a consequence of the psychological injury the offender had inflicted on her.

[65] In my opinion, a reduction of 50% of the award to which the applicant is entitled would be unfair and inequitable. The offender and the applicant are not equally culpable or responsible for the injuries she sustained. I consider that the applicant’s behaviour in resuming her relationship with the victim and engaging in the harmful consumption of liquor contributed indirectly to her injuries. In my view, a fair and equitable apportionment of responsibility for the applicant’s injuries is to attribute the offender’s responsibility as being 80%, and the applicant’s as 20%. I find accordingly.”

***R v Falls, Coupe, Cummings-Creed & Hoare* [2010] QSC (3 June 2010) summing up - unreported – Queensland Supreme Court**

‘Abused person’ – ‘Battered woman syndrome’ – ‘Expert evidence - psychiatrist’ – ‘Murder’ – ‘Self defence’

Charge: Murder.

Result: Acquitted.

Facts: In May 2006, the accused, Susan Falls, shot and killed her husband, Rodney Falls. Throughout their

relationship, Susan Falls was subject to significant physical and emotional abuse. This included: numerous incidents of physical violence, beating one of the family's dogs to death; numerous incidents of sexual violence and rape; threatening to kill her or harm the couple's children. Susan Falls drugged the deceased and shot him twice as he dozed in a chair. She was charged with murder. Both self-defence, ss 271(2), 273 *Criminal Code 1899* (Qld) and the defence of killing for preservation in an abusive domestic relationship, s 304B Criminal Code 1899 (Qld) were raised at trial. Two forensic psychiatrists (Dr Lawrence and Associate Professor Quadrio) were called by the defence and gave evidence about the history of violence and its effect on the offender. (Note *Coupe, Cumming-Creed and Hoare* were charged with being accessories to the murder but were also acquitted).

Applegarth J, summing up (3 June 2010):

'Evidence of what, for want of a better expression, is referred to as "battered woman syndrome", is admitted, not because battered woman syndrome is a disorder, or because battered woman syndrome is a defence. Battered woman syndrome isn't a defence. The fact that someone is battered for years doesn't automatically give them a defence. Whether they have a defence depends on whether they acted as they did in circumstances that the law provides is a defence.

However, what is conveniently, and perhaps somewhat inaccurately, described as "battered woman syndrome" is relevant to legal defences.

It doesn't have to be a psychological disorder to be relevant to behaviour and to the defences in this case. It's relevant to the mental state of Ms Falls, and whether she exhibited hyperarousal and other symptoms that are recognised in such cases.

I won't repeat it. You will remember the evidence of Dr Lawrence and Associate Professor Quadrio about the mental state of persons who are subjected to prolonged abuse, their vigilance and so on. Associate Professor Quadrio summed it up pretty simply in saying they're "revved up all the time".

The behaviour of people, be they soldiers or civilians who are subjected to trauma, has been the subject of organised study. It's not every form of behaviour that is or needs to be the subject of expert evidence. Someone's grief reaction when a loved one dies, or the anxiety that most of us feel when we talk in public, or the anxiety that most people experience when they sit exams, these are things that are familiar to us because we might remember sitting exams or we've had children who sit exams. So we don't need expert evidence to tell us about how people become anxious in certain circumstances, when they're going for an exam or a

driver's licence or something of that kind, that we all know about or most of us know about. But because battered wife syndrome is relatively rare it is a legitimate matter for expert evidence and it is the proper subject for expert evidence because, without the assistance of expert evidence, ordinary people who don't know or study these things, might find the behaviour perplexing, counterintuitive or unreasonable.

It might seem odd why there would be a bond between the abuser and the abused. Why there might be, what Dr Lawrence referred to as, an ambivalent relationship, or what Associate Professor Quadrio referred to as a traumatic attachment. The behaviour of someone with a vulnerability because of past abuse who remains with their abuser.

Dr Lawrence and Associate Professor Quadrio, who are experts in their field, were able to address what was described as the "cycle of violence". How, over time the situation worsens. How often it's the case that the abuser isolates the partner. The common symptoms of a variation in mental state. The loss of self-esteem. The belief that the person who is being abused is somehow at fault. The shame they feel when they return, contrary to the advice of police. The belief that in those circumstances the police won't help them again. The reasons they don't leave: children; lack of support; lack of financial support; threats to the woman; threats to people they love; threats over the custody of children.

And apart from giving you evidence about those characteristics and observed behaviours, Dr Lawrence and Associate Professor Quadrio gave you evidence about the fact that victims of prolonged abuse can have quite correct perceptions as to the risks that are posed to them if they try to leave….

Battered wife syndrome isn't a psychological disorder. As Dr Lawrence and Dr Quadrio explained it's a pattern of behaviours. It's been the subject of research, and it's a field of study by practitioners and scholars whose research and reports are open to contest, as you'd expect scientific inquiry and research to be in a proper field of scientific study.

Dr Quadrio described how there is what she described as a "learned helplessness". How abused women are afraid to leave because they correctly assess that they're at risk. That there may have been past attempts to leave. She referred to the triggers that occur for a violent response. That the level of risk is perceived to increase or has in fact increased. Often there are threats to harm children, and the threats become specific in terms of how, when and where they will be carried out.

***R v Ney* [2011] QSC Indictment No 597 of 2008 (8 March 2011) sentence - unreported – Queensland Supreme Court**

'Diminished responsibility' – 'Expert evidence - psychiatrist - psychologist' – 'Manslaughter' – 'Post traumatic stress disorder'

Charge: Manslaughter

Proceeding: Sentencing

Facts: Ney killed her partner, Haynes, striking him in the head and face with an axe. Haynes was hospitalised and died two days later. Initially charged with murder she pleaded guilty to manslaughter. She was sentenced to nine years imprisonment - eligible for release on parole after serving three years. In sentencing Ney, Dick AJ referred to the reports of a psychologist (Dr Sundin) and a psychiatrist (Associate Professor Carolyn Quadrio):

'As you know, I have been given a number of psychiatric and psychological reports. The prosecution tendered the report of Dr Josephine Sundin. Dr Sundin has come to the opinion that as a result of the multiple traumas you have suffered in your life since your young teenage years and the series of violent intimate relationships that you have endured since that time, and the fact that you have suffered physical, sexual and psychological abuse over a long period of time, you suffer chronic post-traumatic stress disorder and borderline personality disorder.

The connection between those two matters is explained in her report and in other reports. Associate Professor Carolyn Quadrio, spells it out in her addendum report. She said, "Trauma and abuse have profound effects on mental processes and on psycho-social and psychological functions so that a disorganisation of personality occurs and leads to lasting disorder. Similarly, substance abuse which commonly develops in the context of adolescent trauma, also has a profound effect on mental and psycho-social processes and secondly, incapacitates the person so they are rendered highly vulnerable to further traumas and abuse thus creating a vicious cycle…

I have been assisted by the addendum report of Associate Professor Quadrio where she says that, "At times, however, she returned when she may have been able to escape because she experienced him as someone who loved her. This is explained as traumatic attachment relationship. Further it is also the case that in chronic or complex post-traumatic stress disorder there is both paralysis of initiative whereby the person is

greatly compromised in her capacity to take action and there are alterations in perception so they have difficulty perceiving themselves accurately or others and thus in perceiving the true nature of the relationship with an abuser."

Later on she says, "If this psycho physiological disturbance is sustained over time and especially when it occurs in the crucial development years of childhood and adolescence, it eventually leads to disorganisation of personality, sustained hyper vigilance and hyper reactivity become chronic and irreversible."

Further on, "The inability to leave can be explained, partly, as a manifestation of personality disturbance but it is also the case that in domestic violence a woman feels trapped and unable to leave and knows it is not safe to leave so she remains captive and experiences more abuse and trauma and undergoes more personality disorganisation."

I have also noted from the report of Associate Professor Quadrio that those matters which are described as chronic or complex PTSD personality disorder with poly substance dependence or abuse, she says, "These disturbances reflected a lifetime of trauma, a highly chaotic and unsustainable lifestyle and both past and present intimate partner violence."

R v Runjanjic and Kontinnen **(1991) 53 A Crim R 362; (1992) 56 SASR 114; [1991] SASC 2951 (28 June 1991) – South Australia Supreme Court (Full Court)**

'Battered woman syndrome' – 'Expert evidence - psychologist' – 'False imprisonment' – 'Grievous bodily harm'

Charge/s: False imprisonment, grievous bodily harm.

Appeal Type: Appeal against conviction.

Facts: The two female appellants were in a relationship with a man named Hill. There was a consistent pattern of domineering and violent conduct by Hill towards both appellants. The appellants were part of a plan to help Hill forcibly confine the complainant and cause her injury. At trial, they sought to admit expert evidence of 'battered woman syndrome' to support a claim of duress. The trial judge ruled that the evidence was inadmissible on the ground that the test for duress was objective and expert evidence of the state of mind of the appellants was therefore irrelevant.

Issue/s: Whether the expert evidence of battered woman syndrome ought to have been admissible to support

a claim of duress.

Decision and Reasoning: King CJ (with whom Bollen and Legoe JJ agreed) held that the evidence ought to have been admissible and a re-trial was ordered. In reaching this decision, King CJ first held that the trial judge's reason did not provide a sound basis for excluding the evidence. It ignored the subjective aspect of the test for duress and it also misunderstood the main thrust of the proffered evidence. While the expert might have been in a position to comment on the state of mind of the appellants, the primary thrust of such evidence was to establish a pattern of responses commonly exhibited by battered women. At [23]:

'The proffered evidence is concerned not so much with the particular responses of these appellants as with what would be expected of women generally, that is to say women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity. As such it is relevant'.

Second, King CJ considered whether expert evidence of battered woman syndrome met the essential pre-requisite that it had been accepted by experts in the field of psychology or psychiatry as a scientifically accepted facet of psychology. Following significant consideration of scientific literature, at [24] and [26], King CJ held that the evidence was admissible:

'It is not sufficient, in order to justify the admission of expert evidence of the battered woman syndrome, as was argued by counsel for the appellant, that the ordinary juror would have no experience of the situation of a battered woman. Jurors are constantly expected to judge of situations, and of the behaviour of people in situations, which are outside their experience. Much conduct which occupies the attention of the criminal courts occurs in the criminal underworld, or in sordid conditions and situations, of which jurors would generally have no experience. It is not considered to be beyond the capacity of juries, or of the Court if it is the trier of the facts, to judge of the reactions and behaviour of people in those situations. Expert evidence of how life in criminal or sordid conditions might affect a person's responses to situations, would not be admitted.

'This is an area in which the courts must move with great caution. The admission of expert evidence of patterns of behaviour of normal human beings, even in abnormal situations or relations, is fraught with danger for the integrity of the trial process. The risk that, by degrees, trials, especially criminal trials, will become battle grounds for experts and that the capacity of juries and courts to discharge their fact-finding functions

will be thereby impaired is to be taken seriously. I have considered anxiously whether the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations. In the end, I have been impressed by what I have read of the insights which have been gained by special study of the subject, insights which I am sure would not be shared or shared fully by ordinary jurors. It seems to me that a just judgment of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained'.

***Rowan (a pseudonym) v The King* [2022] VSCA 236 (28 October 2022) – Victorian Court of Appeal**

'Appeal against conviction' – 'Battered wife syndrome' – 'Bestiality' – 'Common law duress' – 'Continuing or ever-present threats sufficient' – 'Criminal law' – 'Defence of duress' – 'Duress of circumstances' – 'Expert evidence' – 'Incest' – 'Indecent act with child under 16' – 'Inferred threat' – 'People with an intellectual disability' – 'People with mental illness' – 'Post-traumatic stress disorder' – 'Psychologist evidence' – 'Rape' – 'Relationship evidence' – 'Sexual abuse' – 'Specific, overt threat' – 'Threat by implication' – 'Threat of physical and sexual abuse' – 'Victim as (alleged) perpetrator'

Note: a Crown special leave application to appeal to the High Court of Australia was granted on 16 June 2023 and the matter has been listed for hearing in October 2023. The Crown argues that the Court of Appeal "committed an error in principle by extending the law of duress as it applies to both common law and by operation of statute, to cover what is known as duress of circumstances".

Charges: Incest x 11; indecent act with a child under 16 x 1.

Proceedings: Application for leave to appeal against conviction and sentence.

Facts: The applicant was convicted following trial of 11 counts of incest (s 44(1) and one count of indecent act with a child under 16 (s 47(1)) contrary to the *Crimes Act 1958* (Vic). Her partner, JR, was the father of the two complainant daughters and had previously been convicted of sexual offences against them. At the applicant's trial it was argued that JR had directed the applicant to commit the offences, and she had complied due to an ever-present threat of physical and sexual violence by JR if she did not do what he demanded of her. It was submitted that this constituted duress. The judge, however, ruled that this did not constitute duress, as duress required there to have been a specific or overt threat, not just an ever-present threat. Consequently, duress was not left to the jury and the applicant was convicted of the offences on the

basis that she was present and encouraged the daughters to comply with his abuse.

The applicant and JR's relationship commenced when the appellant was 18 years old. They lived on a rural property owned by JR's father and had 4 children. The applicant had a mild intellectual disability and was financially and socially dependent on JR. There was evidence that JR was physically, emotionally and sexually violent to the applicant, he isolated her on the farm, was highly controlling of her movements and had a bad temper. The prosecution accepted that JR's violence towards the applicant was 'severe' [57]. It was reported that the applicant had tried to leave in the past but had returned because she 'would struggle with the kids' and that she had not reported the violence to the police because 'noone would believe her because she was nothing.' [107] A psychologist gave evidence that the applicant suffered from learned helplessness and low self-esteem characteristic of 'battered women's syndrome', a subset of post-traumatic stress disorder. The applicant's counsel submitted that 'JR's conduct created and maintained a serious, standing threat of significant, ongoing harm, namely, angry subjection to the domineering, violent, rape-embracing regime of life imposed by a brute upon a traumatised, vulnerable person. Under that regime, refusal was said to always have its consequences and this had the effect of overbearing the applicant's will so that she always submitted to the will of JR.' [132]

Grounds: The trial judge erred in ruling that the defence of duress was not open on the evidence and thereby caused a substantial miscarriage of justice.

Decision and Reasoning: Leave to appeal granted; appeal against conviction upheld; new trial ordered; unnecessary to consider appeal against sentence.

Kyrou & McLeish JJA:

Their Honours found there was 'considerable overlap' in the elements of each form of the defence [188].

They made the following remarks regarding element (i) of common law duress in the context of the case:

[155] We accept that no previous case has expressly accepted the proposition that a continuing or ever present threat — whether overt or tacit — as distinct from a specific, overt threat, is sufficient. However, no case has expressly considered that proposition and rejected it. …. Further, the analysis of the Full Court of the Supreme Court of South Australia in *Runjanjic* [(1992) 56 SASR 114] is consistent with the proposition that a continuing or ever present threat may be sufficient.

[156] In our opinion, a continuing or ever present threat which is subsisting at the time an accused committed

the charged offence can suffice if, in all other respects, the defence of duress can be made out. We cannot think of any reason in principle or policy that requires exclusion of a continuing or ever present threat where, due to the threat, the accused has lost his or her freedom to choose to refrain from committing the charged offence. In this context, it is relevant to note the additional limiting factors identified in element (iii) [common law duress above] which requires that the threat be present and continuing, imminent and impending at the time each offence is committed.

[169] Having regard to the above features of the relationship between JR and the applicant … it would have been open to the jury to conclude that it was reasonably possible that the applicant understood that there was a continuing or ever present threat of physical and sexual violence (including rape) by JR if she did not do what he demanded of her. If the jury reached this conclusion, it would have been open to them to find that it was reasonably possible that, when JR requested the applicant to be involved in each of the sexual offences against the complainants, she understood that, if she did not comply, he would physically and sexually harm her, including by raping her.

[174] We are also of the opinion that it is not fatal in this case that there is no direct evidence that JR told the applicant shortly prior to each offence that, unless she performed the acts that constitute each of the charged offences, he would physically and sexually abuse her. That is because it would be open to the jury to infer that this was a reasonable possibility based upon the history of the relationship between JR and the applicant as set out in the …[evidence].

Their Honours made the following remarks regarding element (ii) of common law duress in the context of the case:

[180] A person of 'ordinary firmness of mind' in the present case would be a female domestic partner of JR who was of the applicant's age and who has lived with JR in the same circumstances as the applicant and has endured the physical and sexual abuse that she has experienced. That person would also have the same isolated lifestyle as the applicant and possess her knowledge of JR's personality and behaviour. However, that person would not have the applicant's history of sexual abuse as an adolescent or her mild intellectual disability.

There was evidence that the AR suffered 'battered woman syndrome':

[181] In our opinion, upon the basis of the [evidence], it would have been open to the jury to conclude that there was a reasonable possibility that a person of ordinary firmness of mind having the characteristics

described… above would have been likely to:

(a) develop a battered woman syndrome with the consequence of learned helplessness, and yield to JR's continuing or ever present threat in the way the applicant did; and

(b) not seek to escape the situation.

Their Honours then briefly considered elements (iv), (v), (vii) and (viii) of Common Law duress in turn but did not consider element (vi) because the accused was not charged with murder, or any other crime excepted from common law duress:

[184] In relation to element (iv), the jury could find that there was a reasonable possibility that the applicant reasonably apprehended that the threat would be carried out based upon JR's history of punishing her if she sought to disobey him.

[185] In relation to element (v), the jury could find that there was a reasonable possibility that the applicant was induced by the continuing or ever present threat to commit the charged offences based upon our previous analysis regarding her will being overborne by that threat.

[186] In relation to element (vii), the jury could find that there was a reasonable possibility that the applicant did not, by fault on her part when free from the duress, expose herself to its application. That is because the threat was a continuing or ever present threat and the jury could conclude that there was a reasonable possibility that the applicant was not free of the threat at any time during the period of the offending.

[187] In relation to element (viii), the jury could find that there was a reasonable possibility that the applicant did not have the means, with safety to herself, of preventing the execution of the threat. That is because the jury could conclude that there was a reasonable possibility that the applicant's battered woman syndrome rendered her incapable of escaping from her abusive relationship with JR.

McLeish JA agreed with the reasons given by Kyrou and Niall JJA in respect of elements of the defence of duress' both under common law and under 32O.' [228] McLeish JA also observed:

[208] It is not necessary that the threat which underpins a defence of duress be the subject of direct evidence of the accused. There is no reason in principle why the requisite threat might not be found by a process of inference from other evidence. That inference may, in principle, be drawn from evidence about an ongoing course of conduct. The threat may also be conveyed to the accused by implication rather than express words.

Naturally, the defence may very well be weaker in the absence of direct evidence from the accused; but that is not the only way it may be raised.

Evidence of a Social Worker - Examples

R v Kina [1993] QCA 480 (29 November 1993) – Queensland Court of Appeal

'Aboriginal and Torres Strait Islander people' – 'Battered woman syndrome' – 'Expert evidence - social worker' – 'Fresh evidence' – 'Murder' – 'Physical violence and harm'

Charge/s: Murder.

Appeal Type: Appeal against conviction.

Facts: In September 1988, after a trial which lasted less than a day, the female appellant, an Aboriginal woman, was convicted of murder for killing her abusive male partner of three years and was sentenced to life imprisonment. The appellant did not give or call evidence at her trial. It was only five years later, after the appellant had spent years speaking to a particular social worker (Mr Berry) in prison, that evidence of the abuse she suffered emerged. Kina applied to the Governor in Council for the exercise in her favour of the royal prerogative of mercy. Section 672A of the *Criminal Code* preserves the pardoning power of the Governor, adding in para. (a) 'that the Crown Law Officer may refer the whole case to the Court of Appeal, to be heard and determined as in the case of an appeal by a person convicted.' Under this provision on 24 May 1993 the Attorney General referred to the Court of Appeal 'the whole case with respect to the conviction of … Robyn Bella Kina on the charge of murder …' of Anthony David Black.

Issue/s:

1. The appellant did not receive a fair trial and a miscarriage of justice occurred because of problems of communication between the appellant and her lawyers which led to fundamental errors at trial.
2. There was fresh evidence of such a nature that, had it been placed before the jury who decided the case, there was a substantial possibility of acquittal.
3. The fresh evidence was of such a nature that refusal of it would lead to a miscarriage of justice.

Decision and Reasoning: The appeal was allowed, the conviction and verdict set aside and a new trial ordered. Evidence of Mr Berry, the social worker, was important in this case. Mr Berry first saw the appellant

before her trial in April 1988. Over the following months, the appellant slowly disclosed her story to Mr Berry – that the deceased had continually beaten her up, forced her to have anal sex with him and that he tied her up. Mr Berry tried to communicate with the appellant's lawyers before the trial but was advised that her legal representatives wished that he 'would not interfere with proceedings'. After the trial, the social worker saw the appellant in a counselling capacity. The appellant's self-esteem improved and in 1991 she was able to give evidence about the deceased's threat to anally rape her 14 year old niece.

In finding there was a miscarriage of justice, Fitzgerald P and Davis JA held that:

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice".

***R v Yeoman* [2003] NSWSC 194 (21 March 2003) – New South Wales Supreme Court**

'Battered woman syndrome' – 'Difficulty leaving an abusive relationship' – 'Expert evidence - psychosocial report - specific experience in drug and alcohol related domestic violence issues' – 'Manslaughter' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Where the victim is an offender' – 'Women'

Charge/s: Manslaughter.

Hearing: Sentencing.

Facts: The female offender had lived with her male de facto partner, the deceased, for 25 years (since she was 17 years old). The deceased had been violent towards the offender throughout their relationship, including hitting her in the eye with a baseball bat, but she did not have the means to leave the relationship. The deceased would often taunt the offender and dare her to stab him. They both suffered from alcoholism. One evening, the offender was heavily intoxicated and stabbed the deceased in the chest, killing him. At the time, she did not intend to kill him nor did she realise he was dead and she went to bed. The next morning she called the police and made full admissions. The offender's recollection of events was imperfect because of her intoxication.

Decision and Reasoning: Buddin J had extensive regard to a psychological report prepared by Ms Danielle Castles, who had 17 years' experience working in the social welfare field, with particular expertise about drug and alcohol issues and domestic violence (See [32]-[35]). Ms Castles commenced her report by explaining the nature of domestic violence and stated at [32] that:

'domestic violence is the term used to describe the violence and abuse perpetrated upon a partner in a marriage or marriage like relationship. It is essentially the misuse of power and the exercise of control by one person, usually the man, over another, usually the woman. "Women experiencing domestic violence are often subjected to physical, sexual, emotional/psychological, social and economic abuse. Abuse may be overt (physical violence) or it might be deceptively subtle (emotional abuse). It is the interplay between making the woman fearful and reducing her self-esteem which results in the abuse having significant and prolonged effects on the woman."

The effects of domestic violence are such that women in violent relationships are convinced they are hopeless, that they need to be dependent upon the abuser and could not possibly survive without him. The most significant aspect of prolonged abuse is the gradual breaking down of a woman's autonomy'.

Ms Castles then set out the ways in which domestic violence impacted upon the offender here (See [33]-[34]).

Buddin J ultimately found that the offender's criminality was at the lower end of the scale of culpability of an offence of this kind i.e. non-intentional homicide in circumstances of tragic misadventure. Her intention was no more and no less than to engage in a desperate and objectively dangerous gesture, without intending any real harm or worse to the deceased. This, in conjunction with the very powerful subjective case advanced on behalf of the offender, meant that an exceptional sentence of a good behaviour bond for four years was appropriate, notwithstanding the fact that a life was taken (See [50]). The subjective factors that mitigated sentence included that 'the offence took place against the background of continuing domestic violence over a prolonged period of time, the impact upon her of which cannot, for the reasons advanced by Ms Castles and others, be underestimated' (See [45]). Buddin J also derived assistance from cases involving 'battered spouse or partner syndrome' (See [48]).

***Liyanage v Western Australia* [2017] WASCA 112 (22 June 2017) – Western Australia Supreme Court (Court of Appeal)**

'Expert evidence' – 'Risk' – 'Social context evidence' – 'Social worker'

Charges: Manslaughter x 1.

Appeal type: Appeal against conviction and sentence.

Facts: The appellant and the deceased were married. The appellant killed the deceased by striking him with a mallet [1]. The appellant gave evidence that the deceased was violent and controlling, and regularly sexually assaulted her [2]. She had no memory of the night on which she killed the deceased [47]. At trial, she was found not guilty of murder, but guilty of manslaughter [4]. She was sentenced to 4 years' imprisonment [5].

Issues: The appellant appealed on several grounds including that the trial judge should not have excluded evidence from a social worker about domestic violence [7].

Decision and Reasoning:

All grounds of appeal were dismissed.

Social worker's risk assessment evidence

The social worker's risk assessment evidence was in relation to the psychological impact of prolonged exposure to domestic violence (popularly known as 'battered women's syndrome'). The evidence was based on a risk assessment which used actuarial risk assessment tools and clinical guides, including the 'Power and Control Wheel' (see Chapter 4 Context Statement) ([108]). The Court held that: the evidence did not explain the appellant's state of mind ([123]-[129]); that the evidence did not quantify the extent of the risk, and did not specifically address the question of the risk of homicide ([130]-[148]); and the actuarial tools had not 'been accepted by the relevant scientific community' as defining the risk of homicide ([149]-[154]).

Social context evidence

The Court remarked that there is a body of academic literature that is supportive of 'social context evidence' in family violence cases ([160]). This may include evidence about the history of the parties' relationship, the defendant's culture, the non-psychological impediments to leaving a violent relationship ([160]-[165]). However, the Court emphasised that in order for contextual evidence to be admitted, counsel must 'explain precisely and specifically how it is relevant to the issues which the jury are required to decide' ([166]).

The social worker gave evidence in relation to the dangers of leaving a domestic violence relationship ([169]-[177]) and the exercise of power and control which characterises domestic and family violence ([178]-[183]). The Court held that the evidence was too general, and would not assist the jury beyond the knowledge and

inferences able to be drawn by a reasonable person ([177],[183]).

Evidence of an Academic - Examples

DPP v Williams [2014] VSC 304 (27 June 2014) – Victorian Supreme Court

'Aggravating factor' – 'Defensive homicide' – 'Emotional and psychological abuse' – 'Evidence' – 'Expert evidence - academic' – 'History of violence' – 'Lack of disclosure of family violence' – 'Mitigating factors' – 'Physical violence and harm' – 'Sentencing'

Charges: Defensive Homicide.

Hearing: Sentence.

Facts: The defendant was charged with murdering her de facto partner but was found guilty of defensive homicide. She struck the deceased to the head 16 times with an axe. She buried the deceased's body in the backyard and lied about his whereabouts to family and friends for more than four years, claiming that he had gone interstate. The defendant gave an account of a violent fight which led to the deceased's death which included the deceased taunting and goading the defendant. She attested to a long history of family violence by the deceased.

Issue/s: The appropriate sentence to be imposed.

Decision and Reasoning: The defendant was sentenced to 8 years' imprisonment, with a non-parole period of 5 years. In finding the defendant guilty of defensive homicide, the jury had to be satisfied that the killing took place in the context of a serious history of family violence. Hollingworth J noted at [20] that, while there was no evidence that the defendant or her children had ever complained about family violence, this is not uncommon.

The deceased was the dominant person in the relationship. He had a long history of violence and drank heavily. His behaviour towards the defendant 'over many years, was abusive, belittling and controlling, and involved both physical and psychological abuse' ([26]). Her Honour noted, 'The final act or acts of the deceased may well be relatively minor, if looked at in isolation; but what happens in such cases is that the victim of family violence finally reaches a point of explosive violence, in response to yet another episode of being attacked. In such a case, it is not uncommon for the accused to inflict violence that is completely disproportionate to the immediate harm or threatened harm from the deceased' ([32]).

The Court heard (largely unchallenged) expert evidence from Professor Patricia Easteal regarding the complex dynamics of family violence, the reasons why women often do not leave violent partners and the use of weapons by female victims of family violence against male partners ([33]-[34]). Given this evidence, Her Honour noted that while ordinarily, striking 16 blows with an axe in response to a minor physical and verbal attack by an unarmed attacker would seem disproportionate, this may not be the correct conclusion in family violence cases involving a female offender ([36]). However, aggravating factors included the defendant's deceit and a lack of remorse. Her offending had a large impact on the deceased's family.

Vulnerable or special witnesses

The approach to the protection of adult victims of domestic and family violence and sexual assault complainants / witnesses (sometimes called vulnerable or special witnesses) in family law matters, domestic violence protection order matters and criminal cases varies throughout Australia. Protections may include closed courtrooms, using closed circuit television rather than being in court, using a screen in court, pre-recording evidence in chief, allowing the presence of a support person and disallowing direct cross-examination of one party by another in certain proceedings. Below is a brief overview of relevant provisions.

Note that detailed information about children giving evidence in criminal proceedings can be found here: Bench Book For Children Giving Evidence In Australian Courts

Place	Relevant statutes	General overview
C'th	*Evidence Act 1995* (Cth) Part 2.1, Div 3, 5	The court has control over the questioning of witnesses and can make orders about the way evidence is given; can disallow questions etc.
ACT	*Evidence (Miscellaneous Provisions) Act 1991* (ACT) Chapter 4: Part 4.1; 4.2; 4.3	Protections are provided for complainants in a sexual or violent offence, generally for people with a cognitive impairment and for evidence in domestic violence proceedings.
	Evidence *Act 2011* (ACT) Part 2.1, Div 2.1.3, 2.1.5	The court has control over the questioning of witnesses and can make orders about the way evidence is given; can disallow questions etc.
NSW	*Criminal Procedure Act 1986* (NSW) Chapter 6: Parts 4B, 5, 6	Protections are provided for domestic violence complainants in proceedings for a domestic violence offence; complainants in sexual assault matters and cognitively impaired persons.
	Evidence Act 1995 (NSW) Part 2.1, Divs 3 and 5	The court has control over the questioning of witnesses and can make orders about the way evidence is given; can disallow questions etc.
	Crimes (Domestic and Personal Violence) Act 2007 (NSW) Part	Protections for children in protection order proceedings and right to presence of a support person for a party in protection order proceedings.

	9	
NT	*Evidence Act 1939* (NT) Part 3, Part 3A.	Protections are provided for a 'vulnerable witness' - includes a person who is a child, suffers from an intellectual disability, a victim of a sexual offence to which the proceedings relate, or in the opinion of the court is vulnerable. (Provisions apply to variety of criminal offence proceedings). Protections specific to domestic violence proceedings include a requirement for self-represented defendants to obtain leave to cross-examine vulnerable witnesses.
	Domestic and Family Violence Act 2007 (NT) Chapter 4, Part 4.1, Div 4.	Protections are provided for a 'vulnerable witness' - an adult who is the protected person named in a Domestic Violence Order; or a child, an adult witness who suffers from an intellectual disability, who is the alleged victim of a sexual offence to which the proceedings relate or whom a court considers to be vulnerable. Applies to application, variation, revocation or confirmation proceedings related to domestic violence order.
	Sexual Offences (Evidence and Procedure) Act 1983 (NT) Part 2, s5	Complainant (re: sexual offence) cannot be directly cross-examined by the defendant without leave of the court.
Qld	*Evidence Act 1977 (QLD)* Part 2, Divs 4, 4A, 6	Protections are provided for a 'special witness' - includes a child under 16 years; or a person who, in the court's opinion would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness, or would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged whilst giving evidence. Protections are provided for 'affected children' – a child who is a witness in a relevant proceeding and who is not a defendant in the proceeding. Protections are provided for 'protected witness' – include a witness under 16 years, a witness who is a person with an impairment of the mind, for a proceeding for a prescribed special offence, an alleged victim of the offence, and for a proceeding for a prescribed offence, an alleged victim of the offence who the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness. Accused cannot directly cross-examine protected witness.
	Domestic and Family Violence Protection Act 2012 (Qld) Part 5, Div 2, ss150, 151	For proceedings under this Act protections for the aggrieved, child or relative or associate of the aggrieved who is named in the application that relates to the proceeding. (Includes protection from cross-examination by unrepresented respondent in certain cases).
SA	*Evidence Act 1929* (SA) Part 2.	Protections are provided for a 'vulnerable witness'- includes a witness who is under 16 years of age, a person who suffers from a cognitive disability (including mental illness), a complainant in a sexual or serious offence, a complainant who, in the opinion of the court, would be specially disadvantaged if not treated as a vulnerable witness, a witness who has been subjected to threats of violence or retribution or has reasonable grounds to fear violence or

		retribution or any other case where the court deems the witness to be specially disadvantaged.
	Criminal Law (Legal Representation) Act 2001 (SA) Part 2, s6	If unrepresented defendant applies for legal assistance for purpose of cross-examination of a witness, the commission must grant it.
TAS	*Evidence (Children and Special Witnesses) Act 2001* (Tas) Parts 3 and 4, ss8, 8A	Protections are provided for a 'special witness' - a person unable to give evidence satisfactorily because of their intellectual, mental or physical disability or a person who is likely to suffer severe emotional trauma or be so intimated or distressed as to be unable to give evidence or give evidence satisfactorily. Note: an 'affected child' is defined as a victim of a sexual offence or a witness in family violence proceedings. Applies to criminal and family violence order proceedings.
	Evidence Act 2001 (Tas) Chapter 2, Divs 3 and 5	The court has control over the questioning of witnesses and can make orders about the way evidence is given; can disallow questions etc.
Vic	*Criminal Procedure Act 2009* (Vic) Part 4.7, s133; Part 8.2	There are special rules applicable to sexual offences and the giving of evidence in committal hearings. Protections are provided for a 'protected witness' – includes a witness in a sexual offence or family violence proceeding.
	Family Violence Protection Act 2008 (Vic) Part 4, ss69-73	The Court may direct alternative arrangements be made in respect of a family violence intervention order or a litigation restraint order proceeding. Protections provided for 'protected witnesses' (including affected family members, protected person, a child, people with a cognitive impairment or otherwise in need of protection) in relation to direct cross-examination. Section 73 identifies that the court may admit evidence from an expert witness about the dynamics and characteristics of family violence.
	Evidence Act 2008 (Vic) Part 2.1, ss26-36, ss40-46	The court has control over the questioning of witnesses and can make orders about the way evidence is given; can disallow questions etc.
WA	*Evidence Act 1906* (WA) ss25A, ss37-39F, 106E-106G, 106R, 106RA	Protections are provided for a 'special witness' - a person who the court is satisfied would, by reason of a physical or mental impairment, be unlikely to be able to give evidence or to give evidence satisfactorily; or be likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily; or a complainant to a 'serious sexual offence'. Includes protection of alleged victim from direct cross-examination by the offender in certain circumstances. Sections 38-39F identifies that the court may admit evidence from an expert witness about the nature and effects of family violence.

Sentencing

Sentencing laws vary between states and territories (see Table 1 below).

Where an offence is committed in the context of domestic and family violence and the offence breaches an existing protection order, this is usually considered an aggravating feature for sentencing purposes (it is not a mitigating factor) (see Table 2 below).

In all Australian jurisdictions it is possible for judicial officers to recognise the dynamics of family violence when sentencing offenders who have committed offences in the context of domestic and family violence.

Sentencing provides an important opportunity for judicial officers to clearly denounce domestic and family violence, to emphasise the accountability of the offender and to recognise the harm done to the victim [ALRC/NSWLRC 2010].

It is important to consider community safety and protection in sentencing for offences that take place in the context of domestic and family violence. The safety of the victim may be a relevant consideration in the selection of an appropriate penalty.

Rehabilitation of the offender may be an appropriate aim in sentencing some offenders who have committed offences in the context of domestic and family violence. In such cases there may be benefits in utilising sentencing approaches that require the perpetrator to attend a perpetrator intervention program.

Courts have recognised that the need to deter future domestic and family violence is an important aim of sentencing for offences committed in the context of domestic and family violence.

Table 1: Approaches to sentencing where offences committed in the context domestic and family violence.

Generally	*The Queen v Kilic* (2016) 259 CLR 256 at [21] *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55]
Australian Capital Territory	Section 34B *Crimes (Sentencing) Act 2005* (ACT). See for example: *R v Wyper* [2017] ACTCA 59

New South Wales	*ss 4A, 4B, see also 21A(2)(d) Crimes (Sentencing Procedure) Act 1999* (NSW) Judicial Commission of NSW, Sentencing Bench Book (2021) [NSW Sentencing Bench Book 2021] *Thorp v R* [2022] NSWCCA 180 (31 August 2022) *Diaz v The Queen* [2018] NSWCCA 33 (14 March 2018)
Northern Territory	See for example: *Emitja v The Queen* [2016] NTCCA 4
Queensland	ss 9(10A) and 12A *Penalties and Sentences Act 1992* (Qld) Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021) [DFV Protection Act 2012 Bench Book 2021], See for examples: *R v Major; ex parte Attorney-General* (Qld) [2011] QCA 210 (30 August 2011) *R v Fairbrother; ex parte A-G (Qld)* [2005] QCA 105
South Australia	Sentencing Act 2017 (SA) See for example: *Warne v The Queen* [2020] SASCFC 124 (21 December 2020)
Tasmania	See for example *Director of Public Prosecutions v Karklins* [2018] TASCCA 6 (20 April 2018) See also: ss 13 and 13A *Family Violence Act 2004* (Tas)
Victoria	Judicial College of Victoria, Victorian Sentencing Manual (2022) [Vic Sentencing Manual 2022] Judicial College of Victoria, *Family Violence Bench Book* (2014) especially 4.2 [Vic FV Bench Book 2014] ss124E and 124F Sentencing Act 1995 (WA) regarding sentencing serial family violence offenders. See Legal Aid Western Australia, Family violence offences & Serial Family Violence Offenders, 2021
Western Australia	Department of Attorney General (WA), *Equality Before the Law: Bench Book* (2021) [WA Equal Justice Bench Book 2021] See for example: *Bropho v Hall* [2015] WASC 50 (9 February 2015)

See also 9.3.1 Sentencing Considerations- Breaches of protection Orders:

Table 1: Jurisdictional approaches to sentencing breaches of protection orders.

Sentencing - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. Chapter 12 discussed penalties and sentencing for breach of protection orders. The report notes that: 'The overwhelming majority of stakeholders that addressed this issue were in favour of sanctions that could help to change the behaviour of those who commit violence. Therefore, there was support for 'perpetrator programs' such as violence and drug and alcohol rehabilitation programs; probation with special conditions, such as attending 'perpetrators' courses or counselling'; men's behaviour programs; psychiatric assessment and treatment; anger management programs; and educational programs on family violence with 'therapeutic interventions'' (at [12.172].) Other options raised (as an alternative to imprisonment) included community service orders (provided the work associated with the penalty is 'meaningful, constructive and rehabilitative') (at [12.173])

The underlying issue in Chapters 13 and 14 is the way in which the criminal law accounts for the nature and dynamics of family violence. Criminal laws are traditionally perceived as 'incident-based', in that they are focused upon discrete acts forming the basis of individual offences. As identified in Chapter 5, family violence is characterised by patterns of controlling, coercive or dominating behaviour and may include both physical and non-physical violence [13.2].

Hidderley, Laura, Samuel Jeffs and Lauren Banning, The impact of domestic violence as an aggravating factor on sentencing outcomes: Research brief No. 1, May 2021, Queensland Sentencing Advisory Council.

This research brief explores whether there is a difference in sentencing outcomes for cases involving charges of common assault or assault occasioning bodily harm (AOBH) sentenced as domestic violence offences compared to non-domestic violence offences in Queensland. It concludes that "courts are treating domestic violence offences as more serious offending, warranting the greater use of custodial penalties and longer custodial sentences. This suggests that the sentencing reforms introduced in 2016 may be having their

desired impact on sentencing outcomes. However, further research is needed to determine if this is due to the introduction of the new aggravating factor under section 9(10A) of the PSA, or reflects court sentencing practices prior to the introduction of these reforms when the separate identification and recording of offences as domestic violence offences for reporting purposes was not possible."

Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders: Final report No.5* (2015).

This Report provides advice on the sentencing of adult family violence offenders in Tasmania and includes consideration of the range and adequacy of sentencing options and support programs available and the role of specialist family violence lists or courts in dealing with family violence matters. Included in the terms of reference: (2) Sentencing practices in relation to family violence offences across Tasmania; (3) Sentencing standards for family violence offences in comparison to similar offences outside the family violence context; (4) the range and adequacy of sentencing options and support programs available to the courts when sentencing family violence matters

3.2 SENTENCING PRINCIPLES AND SENTENCING ORDERS

On a finding or plea of guilt the sentencing officer's task is informed by the aims and purposes of sentencing. In Tasmania, these aims (replicating recognised common law objectives) are set out in s 3 of the Sentencing Act 1997and include punishment, deterrence, prevention, denunciation and rehabilitation. The decision on sentence is also shaped by a number of other general common law sentencing principles including the central principle of proportionality, which requires that the punishment imposed be commensurate with the blameworthiness of the offender.

When sentencing for a family violence offence an additional consideration is the fact that the legislation suggests that family violence offences need to be regarded seriously and that victim safety may be a more significant factor in the sentencing exercise. The objects clause of the FVA states that the 'safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations.'

4.1 COMPARATIVE SENTENCING STANDARDS

This section of the Report examines sentencing standards by comparing sentences imposed where an offence is committed in the context of family violence with those imposed for the same offence committed in a

non-family violence context. The most common of these (and the only one for which sufficient data exists to enable a meaningful comparison) is the offence of assault contrary to the *Police Offences Act*, 1935.

5.2 DOMESTIC PROGRAMS

All Australian States and Territories have rehabilitation programs as part of their response to family violence but not all have made legislative provision for referral to such programs. Some of the key differences in the programs are: when a treatment order may be made; whether a counselling order is mandatory, voluntary, or made in connection with sentencing; the type of treatment available; and the effect of a counselling order.

Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family violence Intervention Orders: Final Report* (2009).

This is a report compiled by the Sentencing Advisory Council from Victoria on Intervention Orders in Victoria: their usage, purpose, efficacy and, most importantly, the penalties awarded for their breach. The Council compiled the report by reviewing relevant literature on family data, analysing data on sentencing and conducting new research by consulting those involved in the sentencing process (magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group). The report found:

- The sanctions imposed during sentencing for breach of a family violence order were considered by most stakeholders to be far too lenient (viii)
- Fines are inappropriate sentences for breach of intervention orders (viii) as they can punish the victim as well as the offender (ix)

'Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine.' (at [6.12]).

Sentencing Advisory Council (Vic), *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015).

This report is a continuation of previous monitoring work, examining sentencing patterns over yearly periods from 2009 and 2015 for offences involving contravention of a family violence intervention order (FVIO) or a family violence safety notice (FVSN) made under the *Family Violence Protection Act 2008* (Vic). In particular, this report examines sentencing for the offences of:

- contravention of an FVIO;
- contravention of an FVSN;
- contravention of an FVIO intending to cause harm or fear for safety;
- contravention of an FVSN intending to cause harm or fear for safety; and
- persistent contravention of notices and orders.

In terms of sentencing for FVIO and FVSN contravention, there was an increase in the use of imprisonment and community sentences (including community correction orders (CCOs), following the phased abolition of suspended sentences.

Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017).

This report examines whether 'swift, certain and fair' ('SCF') approaches towards sentencing of family violence offenders are desirable in Victoria (p ix). SCF approaches include:

- targeting offenders serving their sentence in the community;
- monitoring compliance;
- responding to contraventions within 72 hours; and
- responding to contraventions with fixed (usually custodial) sentences, with lengths of between a few hours to a month (p x).

The report concludes that SCF approaches towards sentencing of family violence offenders are *not* desirable in Victoria because, for example:

- there is an absence of evidence for the effectiveness of SCF approaches to family violence offences (see [3.15]-[3.24]);
- the potential risks to victims (see [3.51]-[3.61]);
- the potential for disproportionate impact on particular groups, especially Aboriginal and Torres Strait Islander people (see [3.117]-[3.129]); and
- overwhelming stakeholder opposition (p xi).

The report recommends instead that judicial officers make increased use of judicial monitoring conditions in community correction orders (CCO) (Recommendation 5; see [4.56]). The report notes that the Law Institute of Victoria, in its submission, identified judicial monitoring as one of the 'most promising approaches in reducing family violence offending' (see [4.27]). Data from the Victorian Magistrates Court reveals that a judicial monitoring condition was attached in 14% of cases (510 of 3,560) where a family violence offender was sentenced to a CCO during the 2015-16 financial year ([4.34]). It is argued that judicial monitoring hearings, in front of the same judicial officer, help foster a sense of accountability in offenders ([4.104])

International

Cissner et al., A National Portrait of Restorative Approaches to Intimate Partner Violence: Pathways to Safety, Accountability, Healing, and Well-Being (2019).

This study seeks to document how these restorative approaches are being applied to intimate partner violence across the USA. It draws on a national survey of programs along with five in-depth cases studies based on follow-up site visits. The survey results suggest a wide variation in how restorative approaches are being used, some overarching themes emerge: programs that responded prioritize survivor agency and safety, focus on active accountability for those who have caused harm, and emphasize voluntary participation.

Sentencing - Other Bench Books

NSW

Judicial Commission of NSW, *Sentencing Bench Book* (2021).

[63-505] – [63-520] These sections of the Sentencing Bench Book provide information about sentencing domestic violence matters in NSW.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Chapter 20.9 discusses the principles and issues relating to the sentencing for breach of a domestic violence order.

Vic

Judicial College of Victoria, *Family Violence Bench Book* (2014).

4.2 discusses criminal offences in the context of family violence, including gravity of offences, sentencing purposes, and the relevance of the attitude of the victim. 4.1.1 discusses the contravention of a family violence intervention order, including sentencing, sentencing practices, and types of sanctions.

Judicial College of Victoria, Victorian Sentencing Manual (4th edition 2022).

This Bench Book provides a search tool (re: Family Violence). See esp. 5.2.8.3 regarding relevance of family violence regarding the gravity of offending.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

Chapter 13 focuses on domestic, family and sexual violence.

Sentencing - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Fiona

Sentencing - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***R v UG* [2020] ACTCA 8 (27 February 2020) – ACT Court of Appeal**

"49. In relation to the application of a separate sentencing regime to family violence offences, s 34(2)(a) of the Sentencing Act expressly addresses the issue, but not in a way that assists the Crown. It provides:

(2) In deciding how an offender should be sentenced for an offence, a court must not reduce the severity of a sentence it would otherwise have imposed because– (a) the offence is a family violence offence; or …

50. There is no mention of increasing the sentence that a court would otherwise have imposed.

51. When sentencing a particular offender for a "family violence offence", the usual sentencing principles apply. This means that, when relevant to the particular case and subject to the De Simoni principle (R v De Simoni (1981) 147 CLR 383), the sentencing court will take into account matters that are frequently associated with "family violence offences". These matters include:

(a) whether the offence forms part of a course of conduct (Sentencing Act s 33(1)(c));

(b) whether and how a weapon was used;

(c) whether the offence was associated with actual or threatened violence;

(d) the impact on victims (Sentencing Act s 33(1)(f)); and

(e) whether the offender was in a position of trust or authority vis-à-vis the victim (Sentencing Act s 33(1)(u)), which is usually–perhaps even "necessarily"–the case in relation to domestic violence offences: see R v Kilic [2016] HCA 48; 259 CLR 256 at [28].

However, such factors are not taken into account because the offence can be labelled a "family violence offence", but because they attach to the particular offending conduct."

Parker v Tasmania **[2020] TASCCA 9 (12 June 2020) – Tasmanian Court of Criminal Appeal**

At [28], Estcourt J stated:

> *"As I have said in the past, vulnerable women such as the complainant are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the courts."*

Citing Price v Tasmania [2016] TASCCA 22, Director of Public Prosecutions v Karklins [2018] TASCCA 6, Gregson v Tasmania [2018] TASCCA 14 and Director of Public Prosecutions v Johnson [2020] TASCCA 4, Geason J stated at [41]:

> *"…this Court has on a number of occasions emphasised the importance of general deterrence in sentencing for offences involving the infliction of violence on the vulnerable. Too frequently this occurs in a domestic or relationship context. Such conduct requires a sentence that reflects the insidious nature of such offending, and the importance of protecting those vulnerable to such harm…"*

Hardwick v Tasmania **[2020] TASCCA 2 (20 March 2020) – Tasmanian Court of Criminal Appeal**

At [52]-[53], the Court stated:

> *"The dangers attached to choking have been well documented over many years, particularly in homicide cases. Judges sitting in criminal law have become familiar with evidence of pathologists that death in choking cases is usually as a result of pressure applied to the carotid arteries, thereby blocking the arterial blood supply to the brain… In recent years, criminal courts across Australia have come to understand that choking of female victims by male offenders is a prevalent and dangerous feature of violence perpetrated in domestic circumstances."*

At [64], the Court noted that:

> *"The prevalence and devastating impacts of violence perpetrated against women and children in domestic circumstances are well recognised across Australia by the criminal courts and the wider community. Victims in these cases are vulnerable. The crimes are often committed within the confines of the family home in breach of the sanctity and safety of the home. Choking is a common and dangerous*

> *feature."*

***Degney v The Queen* [2019] VSCA 183 (19 August 2019) – Victorian Court of Appeal**

At [50], the Court stated:

> '…[T]hose considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of our community and will not hesitate to impose stern punishment upon wrongdoers. In 2014, this Court sent out what it hoped would be an unequivocal message to would-be perpetrators of domestic violence – that if they offended, they would be sentenced to lengthy terms of imprisonment. The sentence we are about to impose follows through on that message.'

At [52], the Court observed:

> 'There has been an increasing community disquiet over violence of males towards their female partners (or ex-partners) and this is one reason why denunciation of this conduct must be given full expression in the sentence.'

***DPP v Smith* [2019] VSCA 266 (21 November 2019) – Victorian Court of Appeal**

At [35], the Court stated:

'…[T]hose considering similar brutal, degrading abuse of a domestic partner must understand that the courts have a duty to protect vulnerable members of our community and will not hesitate to impose stern punishment upon wrongdoers. In 2014, this Court sent out what it hoped would be an unequivocal message to would-be perpetrators of domestic violence – that if they offended, they would be sentenced to lengthy terms of imprisonment. The sentence we are about to impose follows through on that message.'

***Director of Public Prosecutions v Foster* [2019] TASCCA 15 (12 September 2019) – Tasmanian Court of Criminal Appeal**

At [29], Estcourt J held:

'Violent behaviour by men towards women in relationships must be condemned and discouraged. Vulnerable women, such as the complainant, are entitled to the protection of the law against brutal partners, and the community expectation is that such protection will be provided by the courts.'

R v Pikula **[2015] ACTSC 380 (12 November 2015) – Australian Capital Territory Supreme Court**

Refshauge J at [1]: 'There can be no doubt that one of the marks of a civilised society is that its members can be protected from violence in their lives. While there can, of course, be no guarantee of such protection, nevertheless, the community expects that appropriate steps will be taken to maximise such protection. This is especially true of the need for safety within the family'.

R v Peadon **[2015] ACTSC 132 (14 May 2015) – Australian Capital Territory Supreme Court**

Burns J at [4]:'these offences [were] family violence offences and as such must be treated very seriously by [the] Court. [The] community views with great abhorrence the infliction of violence by people in family relationships'.

R v Hamid **[2006] NSWCCA 302 (20 September 2006) – New South Wales Court of Criminal Appeal**

Johnson J at [77]: 'An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control: J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004, pp 6–7'.

R v Edigarov **[2001] NSWCCA 436 (5 October 2001) – New South Wales Court of Criminal Appeal**

Wood CJ at [41]: 'As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996, Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell (2000) NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable'.

R v Dunn **[2004] NSWCCA 41 (21 December 2004) – New South Wales Court of Criminal Appeal**

Adams J at [47]: 'Crimes involving domestic violence have two important characteristics which differentiate them from many other crimes of violence: firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat. These elements also usually mean that the victim never feels truly safe. Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted'.

R v June Oh Seo **[2019] NSWSC 639 (31 May 2019) – New South Wales Supreme Court**

Wilson J noted

At [53]-

> *She was attacked by him in her own home, a home in which he had no right to be, Ms Choi having asked him to leave. Thus did what should have been a place of peace and safety become a place of great danger for Ms Choi.*

At [82] –

> *'Whilst there are men in the community, and it is mostly men, who view women as second class citizens who must bend to their will, when that attitude results in the commission of crime, and particularly violent crime, the courts will impose heavy punishment. Such conduct is never acceptable and it will be strongly repudiated by the courts.'*

***R v MCW* [2018] QCA 241 (28 September 2018) – Queensland Court of Appeal**

The Court referred to the *Explanatory Notes for the Criminal Law (Domestic Violence) Amendment Bill (No 2*) 2015 at [39] –

> *'The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide…'*

***Her Majesty's Attorney-General v O* [2004] TASSC 53 (9 June 2004) – Supreme Court of Tasmania**

Quoting the Canadian decision of *R v Brown* (1992) 73 CCC (3d) 242, 249 (as cited in *Parker v R* [1994] TASSC 94):

'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.'

***DPP v Smeaton* [2007] VSCA 256 (15 November 2007) – Victorian Court of Appeal**

Dodds-Streeton JA at [21]: 'Violence, and in particular violence by men against women as a means of control in current relationships or in relationships which have ended, is a prevalent and even critical social evil'.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [53]-[54]: 'Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them

many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.'

'The effects of family violence are now well documented. They are not confined to physical injury. Victims often feel responsible for the violence and ashamed that they were not able to prevent the perpetrator from offending. As occurred in this case, it is common for victims to deny or conceal that their partners have assaulted them until the violence becomes unbearable. This phenomenon was reflected in the behaviour of D, which is described at [5] and [8] to [10] above. Victims who have been dominated, controlled and beaten by their partners over a significant period experience serious and longlasting psychological trauma. As in the present case, the physical effects of the violence and its erosion of the victim's confidence can also affect their ability to participate in paid work and have other serious financial effects'.

***R v Davsanoglu* [2019] VSC 332 (24 May 2019) – Victorian Supreme Court**

Lasry J noted at [5] -

> *'This is yet another case of a man inflicting his will on a woman by the use of fatal violence in her home. Whilst the circumstances of this case are unusual to a degree, in other respects, they are all too familiar. Violence by men against women remains of epidemic proportions, and it simply must be stemmed.'*

***Silva v The State of Western Australia* [2013] WASCA 278 (4 December 2013) – Supreme Court of Western Australia (Court of Appeal)**

Buss JA with whom Mazza JA agreed (quoting the sentencing judge):

'The law is clear that disputes between partners, no matter how emotionally hurtful, must be resolved peacefully. People must understand that marriage is not a licence to treat a spouse as a chattel and violence in the course of a marriage breakdown will be met with deterrent sentences' ([42]).

Sentencing considerations - breaches of protection orders

This list of considerations is adapted from the Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders prepared by the Sentencing Advisory Council (Victoria) 2009 [Sentencing Advisory Council Vic 2009] and recommended by the Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response (ALRC Report 114) 2010 (rec. 12.8) [ALRC/NSWLRC 2010].

Sentencing a breach of a protection order can be an extremely complex task. Subject to legislation and relevant case law that requires a specific approach (see Table 1 below), in sentencing an offender for breach of a protection order, the following matters may be important to consider:

1. **The purposes of sentencing an offender for breach of a protection order:**

   (a) Appropriately balancing the purposes of sentencing is a delicate task in family violence cases, where measures intended to protect the victim can place them at increased risk, and sentences designed to punish the offender may indirectly punish the victim.

   (b) As the function of a protection order is to protect the victim from future harm, an important purpose of sentencing for breach of an order should be to deter non-compliance with the order or future orders to ensure the safety and protection of the victim. The protection of the community, which encompasses protecting the victim, is an important consideration.

   (c) Denunciation and punishment are also important purposes in sentencing for contravention of a protection order. The integrity of an intervention order system relies on there being serious consequences if orders are breached.

   Some sentences which are intended to punish the offender may have an unintended consequence. The dynamics of domestic and family violence may mean the imposition of a fine can also punish the victim. Sentences which are structured to ensure that it is the offender who is punished may be more effective in achieving this sentencing purpose (for example orders that require the offender comply with conditions such as completing community work).

   (d) Another sentencing purpose which can be compatible with protecting the victim (particularly in the long

term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course or parenting course) as well as a punitive element (such as community work, a financial condition or a jail term) strikes a better balance between the purposes of sentencing than a sentence such as a fine.

(a) **Factors relating to the victim include:**

i) **Nature of the breach and its impact on the victim**

The nature of the breach of the protection order and its impact on the victim are important factors.

When sentencing for a breach of a protection order regard should be had to the fact that the damage caused to victims who have suffered years of domestic and family violence may make them particularly vulnerable to conduct that in another context would seem relatively innocuous.

Breaches not involving physical violence can have a significant impact on the victim and should not necessarily be treated as less serious than breaches involving physical violence.

Where an offence has taken place in or in the vicinity of the victim's home, thereby depriving the victim of any feeling of safety or sanctuary, the breach may be regarded as more serious.

Consider whether, if there is no victim impact statement, the judicial officer should enquire as to whether the victim has been given the opportunity to make such a statement. It is however important not to insist on the provision of a victim impact statement and judicial officers should not underestimate the effect of the breach on the victim in the absence of a victim impact statement. Victims may feel it is not safe for them to provide a victim impact statement (see (iv) below.)

ii) **Abuse of power** People in family relationships generally have ongoing emotional, legal and/or financial ties, which can also include the joint care of children. They are therefore in a position to commit the kind of breach that could more seriously affect a family member, not merely physically, but so as to cause mental anguish.

iii) **Presence of children** When sentencing breaches of protection orders, information about the exposure of any children to family violence may be relevant. Where the original order was imposed to protect children, whether or not alongside another victim or victims, any breach of this order will

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iv) **Attitude of the victim**

In NSW the attitude of the victim is not to be taken into account.

In all other jurisdictions generally, the views of the victim should not significantly influence the appropriate sentence for a particular offence. Because victims of family violence may be placed in danger of further violence if they are regarded by the perpetrator as being responsible for the sentence, a court should be mindful as to whether the victim has provided any views on sentence free of pressure or coercion. This may require some consideration of the dynamics of the relationship between the victim and the offender.

v) **Contribution of the victim**

It may be relevant that the conditions of the order were breached following contact initiated by the victim. However, in assessing the degree to which this may mitigate the seriousness of the offence it is important to consider the history of the relationship between the parties, the nature of the contact and the victim's motivation in making contact (and in particular whether the victim was acting under any pressure or coercion). This may require some consideration of the dynamics of the relationship between the victim and the offender.

Some victims have reported that they feel safer if they maintain contact with the offender so they can monitor their level of risk.

vi) **Vulnerability of the victim** The particular circumstances of the victim—including any special vulnerability—are relevant to the nature and impact of a breach. Victim vulnerability may aggravate the seriousness of a breach of a protection order such that a higher penalty is justified.

(b) **Factors relating to the offender include:**

i) **Nature of the breach** Depending on the dynamics of the relationship even apparently 'minor', 'trivial', 'technical' or 'low level' breaches can have a serious impact on the victim.

ii) **Culpability**

In considering the offender's culpability in a breach of protection order offence, the court should consider whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order.

Generally, the fact that the offender was not present in court when the original order was made and the consequences of breach explained should not mitigate culpability. However, there may be situations in which the offender has not properly understood the conditions of the order (for

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Generally, the fact that the offender was not present in court when the original order was made and the consequences of breach explained should not mitigate culpability. However, there may be situations in which the offender has not properly understood the conditions of the order (for example, where the offender has poor English skills, an intellectual disability or a mental illness).

iii) **Prior convictions and other offending behaviour** A court should take into account information about prior convictions in particular any that relate to the victim in question or other family violence offences, where that information is available.

iv) **Previous good character** If there is a proven pattern of domestic and family violence, any

evidence of the offender's 'good behaviour' and reputation in society generally should be considered in light of the proven pattern.

v) **Timing of the breach** Where an order is contravened only a short time after the making of the protection order or there has been an earlier breach, this may be an aggravating factor.

(c) Where a criminal offence is charged in combination with a breach of a protection order:

Where the facts which formed the basis of both charges are the same, consideration must be given to the question of 'double punishment'.

Table 1: Jurisdictional approaches to sentencing breaches of protection orders

Australian Capital Territory	section 34B *Crimes (Sentencing) Act 2005* (ACT) section 43 *Family Violence Act 2016* (ACT)
New South Wales	section 14(4) *Crimes (Domestic and Personal Violence) Act 2007* (NSW) Judicial Commission of NSW, *Sentencing Bench Book* (2021) [NSW Sentencing Bench Book 2021] [63.515]; [63.518] *Browning v The Queen* [2015] NSWCCA 147 (17 June 2015)
Northern Territory	section 121(7) *Domestic and Family Violence Act 2007* (NT) Eg. *Bush v Lyons* [2018] NTSC 20 (28 April 2018)
Queensland	section 9(10A) *Penalties and Sentences Act 1992* (Qld) sections 73, 177-179 *Domestic and Family Violence Protection Act 2012* (Qld) Queensland *Domestic and Family Violence Protection Act 2012* Bench Book (2021) see sections [20.1], [20.2], [20.3]; [20.8]; [20.9] [DFV Protection Act 2012 Bench Book 2021]
South Australia	Section 31 *Intervention Orders (Prevention of Abuse) Act (2009)* SA Eg. *R v Fox* [2017] SASC 5 (3 February 2017)
Tasmania	*section 35 Family Violence Act 2004 (Tas)* Eg. *Harrison v Moore* [2018] TASSC 53 (19 October 2018)
Victoria	sections 37, 37A, 123,123A *Family Violence Protection Act (2008)* Vic. Judicial College of Victoria, Family Violence Bench Book [Vic FV Bench Book 2014] (2014), [4.1.1]- [4.1.3], [4.2]. *R v Cotham* [1998] VSCA 111 (17 November 1998)
Western Australia	Sections 124E and 124F Sentencing Act 1995 (WA) regarding sentencing serial family violence offenders. Sections 61-61C *Restraining Orders Act (1997)* WA Sections 67A, 76A, 84CA, 124D-124G *Sentencing Act (1995)* WA

	eg: *Howell v Davies* [2019] WASC 220 (27 June 2019)

See also 9.3 Sentencing:

Table 1: Approaches to sentencing where offences committed in the context domestic and family violence.

Sentencing considerations - breaches of protection orders - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. Chapter 12 discussed penalties and sentencing for breach of protection orders. The report notes that: 'The overwhelming majority of stakeholders that addressed this issue were in favour of sanctions that could help to change the behaviour of those who commit violence. Therefore, there was support for 'perpetrator programs' such as violence and drug and alcohol rehabilitation programs; probation with special conditions, such as attending 'perpetrators' courses or counselling'; men's behaviour programs; psychiatric assessment and treatment; anger management programs; and educational programs on family violence with 'therapeutic interventions'' (at [12.172].) Other options raised (as an alternative to imprisonment) included community service orders (provided the work associated with the penalty is 'meaningful, constructive and rehabilitative') (at [12.173])

The underlying issue in Chapters 13 and 14 is the way in which the criminal law accounts for the nature and dynamics of family violence. Criminal laws are traditionally perceived as 'incident-based', in that they are focused upon discrete acts forming the basis of individual offences. As identified in Chapter 5, family violence is characterised by patterns of controlling, coercive or dominating behaviour and may include both physical and non-physical violence [13.2].

Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders: Final report No.5* (2015).

This Report provides advice on the sentencing of adult family violence offenders in Tasmania and includes consideration of the range and adequacy of sentencing options and support programs available and the role of specialist family violence lists or courts in dealing with family violence matters. Included in the terms of reference: (2) Sentencing practices in relation to family violence offences across Tasmania; (3) Sentencing standards for family violence offences in comparison to similar offences outside the family violence context; (4) the range and adequacy of sentencing options and support programs available to the courts when

sentencing family violence matters

3.2 SENTENCING PRINCIPLES AND SENTENCING ORDERS

On a finding or plea of guilt the sentencing officer's task is informed by the aims and purposes of sentencing. In Tasmania, these aims (replicating recognised common law objectives) are set out in s 3 of the Sentencing Act 1997and include punishment, deterrence, prevention, denunciation and rehabilitation. The decision on sentence is also shaped by a number of other general common law sentencing principles including the central principle of proportionality, which requires that the punishment imposed be commensurate with the blameworthiness of the offender.

When sentencing for a family violence offence an additional consideration is the fact that the legislation suggests that family violence offences need to be regarded seriously and that victim safety may be a more significant factor in the sentencing exercise. The objects clause of the FVA states that the 'safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations.'

4.1 COMPARATIVE SENTENCING STANDARDS

This section of the Report examines sentencing standards by comparing sentences imposed where an offence is committed in the context of family violence with those imposed for the same offence committed in a non-family violence context. The most common of these (and the only one for which sufficient data exists to enable a meaningful comparison) is the offence of assault contrary to the *Police Offences Act*, 1935.

5.2 DOMESTIC PROGRAMS

All Australian States and Territories have rehabilitation programs as part of their response to family violence but not all have made legislative provision for referral to such programs. Some of the key differences in the programs are: when a treatment order may be made; whether a counselling order is mandatory, voluntary, or made in connection with sentencing; the type of treatment available; and the effect of a counselling order.

Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family violence Intervention Orders: Final Report* (2009).

This is a report compiled by the Sentencing Advisory Council from Victoria on Intervention Orders in Victoria: their usage, purpose, efficacy and, most importantly, the penalties awarded for their breach. The Council

compiled the report by reviewing relevant literature on family data, analysing data on sentencing and conducting new research by consulting those involved in the sentencing process (magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group). The report found:

- The sanctions imposed during sentencing for breach of a family violence order were considered by most stakeholders to be far too lenient (viii)
- Fines are inappropriate sentences for breach of intervention orders (viii) as they can punish the victim as well as the offender (ix)

'Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine.' (at [6.12]).

Sentencing Advisory Council (Vic), *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015).

This report is a continuation of previous monitoring work, examining sentencing patterns over yearly periods from 2009 and 2015 for offences involving contravention of a family violence intervention order (FVIO) or a family violence safety notice (FVSN) made under the *Family Violence Protection Act 2008* (Vic). In particular, this report examines sentencing for the offences of:

- contravention of an FVIO;
- contravention of an FVSN;
- contravention of an FVIO intending to cause harm or fear for safety;
- contravention of an FVSN intending to cause harm or fear for safety; and
- persistent contravention of notices and orders.

In terms of sentencing for FVIO and FVSN contravention, there was an increase in the use of imprisonment and community sentences (including community correction orders (CCOs), following the phased abolition of

suspended sentences.

Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017).

This report examines whether 'swift, certain and fair' ('SCF') approaches towards sentencing of family violence offenders are desirable in Victoria (p ix). SCF approaches include:

- targeting offenders serving their sentence in the community;
- monitoring compliance;
- responding to contraventions within 72 hours; and
- responding to contraventions with fixed (usually custodial) sentences, with lengths of between a few hours to a month (p x).

The report concludes that SCF approaches towards sentencing of family violence offenders are *not* desirable in Victoria because, for example:

- there is an absence of evidence for the effectiveness of SCF approaches to family violence offences (see [3.15]-[3.24]);
- the potential risks to victims (see [3.51]-[3.61]);
- the potential for disproportionate impact on particular groups, especially Aboriginal and Torres Strait Islander people (see [3.117]-[3.129]); and
- overwhelming stakeholder opposition (p xi).

The report recommends instead that judicial officers make increased use of judicial monitoring conditions in community correction orders (CCO) (Recommendation 5; see [4.56]). The report notes that the Law Institute of Victoria, in its submission, identified judicial monitoring as one of the 'most promising approaches in reducing family violence offending' (see [4.27]). Data from the Victorian Magistrates Court reveals that a judicial monitoring condition was attached in 14% of cases (510 of 3,560) where a family violence offender was sentenced to a CCO during the 2015-16 financial year ([4.34]). It is argued that judicial monitoring hearings, in front of the same judicial officer, help foster a sense of accountability in offenders ([4.104])

Weatherburn, Don and Sara Rahman, 'General offending by domestic violence offenders' *Crime and Justice Bulletin* (Contemporary Issues in Crime and Justice, Number 215, 2018).

The purpose of the paper is to assess 1) the extent to which domestic violence (DV) offenders specialise in DV offending; 2) the types and frequency of involvement in non-DV offences by DV offenders; and 3) the similarities and differences between DV assault offenders and non-DV assault offenders. The first two questions were answered by examining non-DV offending by offenders convicted in New South Wales of a DV offence between 2008 and 2017. To address the third question, classification techniques were employed to determine how well DV assault offenders and non-DV assault offenders can be separated on the basis of demographic and criminal justice variables. Results showed that DV offenders committed more than 2.5 times as many non-DV offences as DV offences. The most common non-DV offences committed by the DV offenders were traffic offences (27.99%), theft offences (14.67%) and drug offences (12.31%). There was very little difference between DV and non-DV assault offenders in terms of their demographic and criminal justice profile. The findings, therefore, suggest that most DV offenders do not specialise in DV offending, but a significant proportion of convicted DV offenders do. The fact that most DV offenders commit other offences is significant because measures aimed at deterring and incapacitating them may have consequential benefits in relation to other types of crime (page 8).

Sentencing considerations - breaches of protection orders - Other Bench Books

NSW

Judicial Commission of NSW, *Sentencing Bench Book* (updated 2021).

See [63.515]-[63.518] sentencing domestic violence offences.

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

Sections [20.1], [20.2], [20.3]; [20.8];[20.9] discuss the principles and issues relating to the sentencing for breach of a domestic violence order or police protection notice.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

See [4.1.1] - [4.1.3] for a discussion of sentencing and family violence in the context of the *Family Violence Protection Act* 2008.

See [4.2] for a discussion of sentencing for other criminal offences in the context of family violence.

Sentencing considerations - breaches of protection orders - Other Resources

> **Sentencing Range and Factors.**

Legal Aid Western Australia, *Family violence offences & Serial Family Violence Offenders*, 2021.

This sheet provides information about family violence offences and the consequences of committing them. It explains when a court may declare a person to be a Serial Family Violence Offender and the consequences of such a declaration.

Sentencing considerations - breaches of protection orders - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Anna

Carol

Fiona

Jennifer

Melissa

Sentencing considerations - breaches of protection orders - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Khan v Evans **[2013] ACTSC 211 (4 October 2013) – Australian Capital Territory Supreme Court**

Refshauge ACJ at [52]: 'While the offence against Mr Khan's father could also be described as domestic violence, the fact is that the interim personal protection order and the personal protection orders are there to protect the complainant from what might be described as domestic violence in its widest sense. Therefore, such orders are an important component of the criminal justice system's response to domestic violence. Breaches of personal protection orders are serious matters which the courts must treat seriously to ensure the integrity of the system which the protection orders are intended to put in to effect'.

Jeffries v The Queen **[2008] NSWCCA 144 (26 June 2008) – New South Wales Court of Criminal Appeal**

Johnson J at [91]: 'Significant aggravating factors existed, given that the offences were committed whilst the Applicant was on bail for an offence of violence committed against AW and was subject to an apprehended domestic violence order intended to control his conduct towards his domestic partner. The present offences were committed in flagrant breach of both forms of conditional liberty, which were intended to protect AW'.

Suksa-Ngacharoen v Regina **[2018] NSWCCA 142 (10 August 2018) – New South Wales Court of Criminal Appeal**

Wilson J said at [132]:

> *'The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship…*

Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in Pearce v The Queen (1989) 194 CLR 610.'

***R v MJ* [2016] NSWDC 272 (12 May 2016) – New South Wales District Court**

Berman J at [42]: 'Despite the rehabilitation that the offender appears to have achieved leading up to the jury's verdict, there still is a need for specific deterrence. The offender's history, and it is a history, of acting in a violent way towards partners is of great concern. True it is that he has not always done that; indeed, some of the people with whom he was in relationships with have spoken positively about him in references tendered to the Court today. But much more important than specific deterrence is, of course, general deterrence. Again, I go back to what I said at the beginning of these remarks on sentence. Offences such as these cause enormous harm, both to the individual victims concerned and to the community generally. Offenders who commit crimes such as I have described, particularly after they have been subject to apprehended violence orders, put in place to protect their partners from precisely such conduct, need to be given in sentences which will deter others who may be tempted to act in a similar way. Most fundamentally in assessing the relevant sentence to impose upon the offender is, of course, the objective gravity of what he has done'.

***Andalong v O'Neill* [2017] NTSC 77 (19 October 2017)– Northern Territory Supreme Court**

The question is whether the elements of the offences charged are identical, or substantially the same in the sense that all the elements of one offence are wholly included in the other ([23])

***Queensland Police Service v KBH* [2023] QDC 26 (16 February 2023) – Queensland District Court**

In holding that the sentences were manifestly inadequate Coker DCJ observed:

[30] With the greatest of respect to the learned Magistrate, these were not minor breaches by any stretch of the imagination. Rather, they were repeat instances of exactly the behaviour which had previously led to periods of imprisonment being imposed in relation to this matter.

[31] I set out at some length those particular issues in relation to this matter because, in my assessment, it is

important that they be detailed so as to explain the reason why, in my assessment, this appeal must be upheld. It was not simply a situation where the penalty imposed was more lenient than might have been expected or, more particularly, more lenient than I might have imposed in relation to this matter. Rather, it was manifestly inadequate and, as indicated within the cases, an imposition in relation to the matter which simply indicates that it was unreasonable and inadequate in all of the circumstances; noting particularly, as I do, the acknowledgement on the part of the respondent himself, that imprisonment was well within range.

[32] I am satisfied, that, therefore, the imposition of a fine of a very lenient character in itself is simply outside the range of what might have been appropriate in relation to this matter. In that regard, I note particularly the more recent developments in relation to the domestic violence legislation, and of the very real need to accept that domestic violence is something far more than simply the imposition of physical force by one party to an intimate relationship upon another. There are a multitude of means by which there can be control exercised upon another and it is important, in fact, in my view, overwhelmingly so, that penalties imposed reflect the recognition of the importance of ensuring that such behaviours do not continue.

[33] As was indicated by President McMurdo, as her Honour then was. In *R v Fairbrother; ex parte the Attorney-General* [2005] QCA 105 the following was said:

> *Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment ... Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the Courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders, but also others who might otherwise think they can commit such acts with near impunity.*

[34] I would hasten to add here that this is not a serious act of domestic violence but it is a repeat act of domestic violence in circumstances where, clearly, the respondent to this appeal has failed to accept the opportunities previously given and, as such, more significant penalties are appropriately required to be imposed in relation to this matter. It is not a situation where the offending is minor or trivial, lacking in real impact. It has continued to impact upon the aggrieved and, as identified by President McMurdo in *R v Fairbrother*, is a situation where it is a crime against the State warranting salutary punishment.

[35] Here it is clear, in circumstances where the respondent had prior convictions, 10 it is submitted, - for domestic violence offences, all against this same aggrieved, and had previously been sentenced to various

penalties, including terms of imprisonment subject to operational periods for suspended sentences, that it was a significant consideration, as well as the fact that the reoffending occurred only 21 days after the most recent sentence, prior to coming before the Court.

[36] In my view the imposition of a fine was unreasonable and unjust. It fell below what could even be considered the most lenient of penalties that might be imposed in relation to the matter and, as I have indicated, it is my view, therefore, that the appeal must be successful.

In accepting the appellant's submission that the sentence imposed was so lenient that it should be considered an erroneous exercise of the court's jurisdiction, and it amounts to a manifestly inadequate sentence that ought to be corrected on appeal, citing *JRB v Bird* [2009] QDC 277, *TZL v QPS* [2015] QDC 171, *PFM v QPS* [2017] QDC 210 and *Queensland Police Service v JSB* [2018] QDC 120, Coker DCJ observed:

[38] What those particular cases show is that there are significantly greater penalties warranted in relation to offending, even where there are not direct indications of domestic violence of a physical character. As was clear in each of those cases, penalties can and should be imposed which reflect the continued and repetitive nature of offending and of the very real need to ensure that there is a clear indication, not only to the individual offender but also to the community at large, that such offending will be met with significant penalties.

***R v MKW* [2014] QDC 300 (18 June 2014) – Queensland District Court**

The crucial issue was whether the original prosecution for the breach offence against the Act constituted a 'proceeding' under that act. If it did, s 138(3)(a) would apply so that the prosecution for the breach offence would not affect any other proceeding against the applicant arising out of the same conduct.

***Craill v Police* [2016] SASC 168 (4 November 2016) – South Australia Supreme Court**

Stanley J at [28]: 'In *R v McMutrie* this Court said that a breach of a restraining order is a matter of particular gravity. The object of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) is the prevention of domestic and non-domestic abuse, and the exposure of children to the effects of such abuse. The principal instrument for achieving this objective is the making of intervention orders. The protective objects of the Act can only be achieved if courts are scrupulous in doing what they can to ensure that persons who are subject

to such orders comply with them. The repeated breaches of those orders by the appellant demonstrate a persistent, blatant and contumelious disregard for the orders and the authorities that impose them. Crimes of domestic violence are often occasions for the exercise, or attempted exercise, of power over the victim by the offender. Breaches of intervention orders can be occasions for the offender to intimidate the victim with an implied threat that such orders will not protect them. The courts must act to contradict this impression'.

Mullins v Police **[2013] SASC 148 (20 September 2013) – South Australia Supreme Court**

I accept the submission of counsel for the respondent that if, say, an assault is performed in circumstances where the offender knows that the assault is also a contravention of an Intervention Order, then that knowledge is an aggravating feature of the offending and should be taken into account on sentencing without there being a separate charge of contravening an Intervention Order.

R v McMutrie **[2002] SASC 253 (8 August 2002) – South Australia Supreme Court**

On appeal Counsel for the Crown accepted that there was a risk of a miscarriage of justice. It was acknowledged that the jury may have relied on the one set of facts as the basis for both convictions. It was accepted that if this had happened the appellant was entitled to a defence of autrefois acquit to the charge possessing a knife with intent. The Crown's concession was appropriate. The conviction on count 3 must be set aside.[11]

DPP v Johnson **[2011] VSCA 288 (23 September 2011) – Victorian Court of Appeal**

Neave JA at [4]-[5]: 'All Australian states have enacted legislation which is intended to protect potential victims of family violence from physical injury and from being placed in fear by harassment or threats. Family violence is a serious problem in Australia. In 2004, it was reported that family violence is 'the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years'.[1] Breach of intervention orders is relatively common.[2] In its Report on Breaching Intervention Orders, the Sentencing Advisory Council said that, between July 2004 and June 2007, the Magistrates' Court of Victoria and the County Court of Victoria imposed on average approximately 14,000 intervention orders per year. Over a quarter of all intervention orders imposed were breached.

'Further, offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them.[3] As was recognised during parliamentary debates on the Family Violence Protection Bill 2008,[4] intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. The Victorian Law Reform Commission, in its report which 'underpin[ned]' many of the changes in the Bill,[5] observed: '*The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – 'not worth the paper they are written on' – by victims and perpetrators alike*".

***DPP v Paulino* (Sentence) [2017] VSC 794 (21 December 2017) – Victorian Supreme Court**

In relation to protection orders, Bell J stated at [11]:

> In the context of aggravation, I referred to the intervention order not for reasons of formality. To murder a person protected by a family violence intervention order is a very serious matter. Family violence intervention orders are not worthless pieces of paper. The general purpose of such an order is to provide legally enforceable protection for the safety of the individual, usually a woman at risk of violence from a man. The contravention in the present case is not separately charged but represents a seriously aggravating feature of the murder.

***Filiz v The Queen* [2014] VSCA 212 (11 September 2014) – Victorian Court of Appeal**

Redlich JA at [21]-[23]: 'Senior counsel for the applicant rightly conceded that general deterrence is a significant sentencing factor in this case, not only in relation to aggravated burglary generally, but most particularly in relation to violent offending against a former domestic partner (*Felicite v The Queen* at [20]; *DPP v Pasinis* at [53]). Of particular significance is the fact that the applicant was already subject to a Family Violence Intervention Order. Offending of this nature is too often perpetrated by men whose response to the breakdown of a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. This Court has made it clear that such offending will attract serious consequences and even harsher penalties where it involves the breach of an order which

exists for the victim's protection (*Cotham v The Queen* at [14]; *DPP v Johnson* at [38]-[49]).

'At the oral hearing it was said that the complainant's fear would have been greater if her home had been invaded by strangers seeking to steal personal property. It was suggested that the context of the offending affected its seriousness. We do not accept that these matters affect the objective gravity of the offences. The level of fear engendered by the applicant, in kicking in the locked bedroom door and proceeding to beat the victims with an iron rod, did not have to be evaluated according to such niceties. The attack the applicant launched upon his ex-partner was strongly suggestive of a desire to do her and her partner serious harm, and anybody in their position would have feared that such harm would occur. The complainant's victim impact statement makes clear that the physical and emotional effects will be lasting.

'It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners. In such circumstances, the submission that the complainant's level of fear when being attacked by her ex-partner was less than it might have been if she had been attacked by a stranger should be rejected'.

***Marrah v The Queen* [2014] VSCA 119 (18 June 2014) – Victorian Court of Appeal**

Tate JA at [25]: 'The gravity of the offending was aggravated by the fact that the applicant was at the time the subject of an intervention order, which he flagrantly disregarded. Offending of this nature is too often perpetrated by men whose response to difficulties in a relationship is one of possessive, violent rage. It goes without saying that such a response, to what is a common human situation, is utterly unacceptable. The sentences must convey the unmistakeable message that male partners have no right to subject their female partners to threats or violence. The sentences must be of such an order as to strongly denounce violence within a domestic relationship'.

***R v Cotham* [1998] VSCA 111 (17 November 1998) – Victorian Court of Appeal**

Charles JA at [14]: 'Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could

breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated'.

Brown v Roe **[2004] WASCA 210 (16 September 2004) – Western Australia Supreme Court (Court of Appeal)**

Barker J at [42],[44],[46]: 'It is plain from what the Magistrate said in his reasons that he held the view that the protected person had elected from time to time to enforce, at her discretion, the terms of the VRO. He said she used it as a "walking stick". It is not immediately apparent to me that this view is correct. Indeed, it appears to be a gratuitous comment. The explanation given by the protected person as to why, on some occasions, she tolerated the presence of the respondent at her home and, on other occasions, she did not, is quite understandable. In short, she has found it easier to attempt to manage the situation on many occasions when the respondent has called at her home unannounced or uninvited, but on other occasions when has become troublesome and she has invited him to leave, she has found it necessary to complain to the police and enforce the terms of the order.

'It may be recognised that, in many circumstances, the continuing relationship between persons who were once in a close personal relationship will be strained, especially after a VRO has been granted by a Court. Nonetheless, a person who is bound by a VRO must take all appropriate steps to ensure that the terms of the order are complied with. It may well be that, on some occasions, by virtue of a course of conduct, a person bound by the order may feel entitled to approach physically or telephone a protected person. It may be that a prior course of conduct in some cases implies a consent to approach the protected person in that way, at least initially. But if the protected person makes it plain that she or he does not consent to that contact or that initial contact continuing, then it behoves the person bound by the order to back off and strictly comply with the order.

'In my view, it is not appropriate for a Court, while a VRO is in place, effectively to suspend the operation of a VRO by taking the view that a person protected is inclined to use the VRO as a "walking stick", as the Magistrate in this case suggested'.

***Dennis v Lanternier (No 2)* [2017] WASC 5 (12 January 2017) – Western Australia Supreme Court**

Jenkins J referred to the role of the *Restraining Orders Act* in deterring domestic violence at [152]:

> The long title of the Restraining Orders Act reflects Parliament's intention for the Act to provide for orders to 'restrain people from committing acts of family or domestic or personal violence by imposing restraints on their behaviour and activity'. In order for the Act to be effective, offenders must appreciate that if they breach a VRO they will receive a significant penalty. The community and the courts have [an] intolerance and abhorrence of violence and threatened violence in domestic and former domestic relationships. The penalties imposed for breaches of VROs must reflect that intolerance and abhorrence, in the hope that the penalties deter offenders and protect victims.

***Lutey v Jacques* [2010] WASC 78 (28 April 2010) – Western Australia Supreme Court**

Simmonds J at [62]: ‘ The approach is one recognising that the Act is social legislation of the utmost importance as part of the legal response to domestic violence: *Pillage v Coyne* [2000] WASCA 135 [13] (Miller J); it is essential the courts ensure their orders are not ignored: *Kenny v Lewis*(Unreported, WASC, Library No 990113, 12 March 1999) (Kennedy J) 10; and violence restraining orders are notoriously difficult to enforce, and the need for general and individual deterrence will ordinarily outweigh subjective or other mitigating considerations: *Dominik v Volpi* [2004] WASCA 18 [80] (Roberts-Smith J)’.

***Musgrove v Millard* [2012] WASC 60 (22 February 2012) – Western Australia Supreme Court**

38 However, on this occasion, I do not consider that it is necessary to resolve the controversy over whether or not s 11 applies directly in the circumstances of this case. In view of the complexities involved and as there is a satisfactory alternative route to the conclusion of this appeal, it seems desirable to leave such contentious issues to another occasion when it might be essential to resolve them. This is because it is acknowledged by counsel for the respondent that there is an associated principle, often termed the 'common elements principle', which applies when two offences of which an offender stands convicted contain common elements so that it would be wrong to punish that offender twice for the commission of the elements that are common: Pearce v The Queen [1998] HCA 57; (1998) 194 CLR 610 [40] and Eves v The State of Western Australia

[2008] WASCA 7 [5], [10] (Steytler P) and [27] (McLure JA).

***Sakkers v Thornton* [2009] WASC 175 (22 June 2009) – Western Australia Supreme Court**

Section 11(1) of the Sentencing Act 1995 provides that a person is not to be sentenced twice on the same evidence. Simmonds J stated at [22] – 'Here the offence of aggravated stalking was constituted by the course of conduct whose constituents were the 12 breaches of the violence restraining order. The sentences for the 12 breaches of violence restraining order, globally, are the same as the sentence for the aggravated stalking.' As such, the global sentence for the breach offences was set aside.

***Wallam v Grosveld* [2015] WASC 145 (24 April 2015) – Western Australia Supreme Court**

Martin J at [78]: 'Those significant statutory penalties speak loudly as to the seriousness of a breach of a restraining order and dictate how closely and carefully the underlying circumstances of such an offence must be assessed in every case. In the past there have, of course, been well referenced instances where terrible crimes of violence have been committed in the community against protected persons by individuals otherwise bound by a restraining order, but who chose to ignore it. Plainly, the statutory right to apply for a VRO is meant to assist the more vulnerable to protect themselves from violence, especially (but not solely) women who are the victims of domestic violence. Thus, issues of general and specific deterrence concerning offenders are more than usually important in this arena. To that end, I note a recent report canvassing some of these issues - Law Reform Commission of Western Australia, *Enhancing Laws Concerning Family and Domestic Violence*, Final Report (2014)'.

Specific considerations - Aboriginal and Torres Strait Islander people

Due to social and cultural influences unique to the lives of Aboriginal and Torres Strait Islander people including gender-specific cultural roles and protocols, and experiences of colonisation, dispossession, racism, assimilation and the Stolen Generations, the broader understanding of domestic and family violence applied in other Australian contexts may not fully reflect the experience of Aboriginal and Torres Strait Islander people [Blagg et al 2015].

Aboriginal and Torres Strait Islander people may delay reporting or be reluctant to report, assist prosecution authorities or seek help for the domestic and family violence they experience as they may fear retribution from the perpetrator or the perpetrator's family; they may fear the child protection agency will remove their children; they may distrust or fear the police [JCCD, The Path to Justice (ATSI) 2016], criminal justice system and mainstream services where they themselves have a record of violence or offending; they may fear the perpetrator will be jailed or that he will die in custody; or they may fear gossiping and shaming by members of the local community. Some Aboriginal and Torres Strait Islander women with children, feeling a duty to keep the family together, may prefer that the violence stops to leaving the perpetrator whom they may continue to feel empathy for and committed to.

Aboriginal and Torres Strait Islander people may experience a range of complex factors such as a loss of traditional culture, fragmentation of kinship systems, discrimination, poverty, unemployment, homelessness, drug and alcohol misuse, and a decline in traditional gender roles and status.

In the context of deciding an appeal against sentence involving an Aboriginal and Torres Strait Islander man's manslaughter of his Aboriginal and Torres Strait Islander defacto partner the High Court in *Munda v Western Australia* [2013] HCA 38 (2 October 2013) observed that while mitigating factors such as social disadvantage need to be afforded appropriate weight in sentencing, this cannot result in the imposition of a penalty which is disproportionate to the gravity of the offending. In particular, the joint majority of the High Court (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) noted at [53] – 'to accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity' and 'Further, it would be wrong to accept that a victim of violence by an Aboriginal

offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.' The Court also addressed the argument that general deterrence has less significance in relation to crimes which are not premeditated in the context of social disadvantage. In dismissing this assertion, the Court noted that the criminal law is not limited to the 'utilitarian value of general deterrence' and stated that the obligation of the State is 'to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence' (see at [54]). The joint majority of the High Court (at [42]) approved the following remarks of McLure P in *Western Australia v Munda* [2012] WASCA 164: 'While the role of the criminal law in deterring the commission of violent acts is problematic, and particularly so in relation to Aboriginal communities, it is important to indicate very clearly that drunken violence against Aboriginal women is viewed very seriously.'

In some jurisdictions imprisonment of Aboriginal and Torres Strait Islander offenders is currently the most common form of punishment in domestic and family violence related matters, however researchers and judicial officers have observed that, while incarceration may give the victim some respite from the violence, it may not be effective in deterring the offender or like-minded offenders from violence in the future or in positively changing offender behaviours [Blokland 2016]. Aboriginal and Torres Strait Islander women victims may not report violence so as to avoid the prospect of incarceration of the offender [Blagg et al 2015]; instead they may express a preference for restorative justice responses to the types of offending behaviour they believe the community can appropriately manage [Nancarrow 2006].

Restorative justice principles applied in the Aboriginal and Torres Strait Islander context are focused on healing and the restoration of relationships, taking into account cultural sensitivities, and provide opportunities for self-determination [Blagg et al 2015]. For example, circle sentencing is practised in some New South Wales courts where community members sit with the Magistrate in a circle to discuss the offender, the offence, and the appropriate sentence. In the Murri Court in Queensland, coupled with suitable punishment, probation orders can include regular meetings with community Elders or Community Justice Groups, attending counselling through the Indigenous Healing Centre, or attending substance misuse programs with Aboriginal and Torres Strait Islander health organisations [Hennessy & Willie 2006]. An Australian study examining the use of Aboriginal and Torres Strait Islander sentencing courts, where Elders and community representatives participate as moral and cultural guides, found that offenders considered the process fairer and more

supportive than the mainstream criminal justice system, while also more challenging due to the sense of shame they experienced in having to face and account to respected members of their community [Marchetti 2015].

Specific considerations - Aboriginal and Torres Strait Islander people - Key Literature

Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities* (Human Rights and Equal Opportunity Commission, 2006).

This report overviews a number of issues about domestic and family violence in Indigenous communities. The section titled: 'Resolving conflicts between human rights and Aboriginal customary law' (p14) makes a number of points relevant to sentencing, in particular that Indigenous custom and law can adapt to general societal change and women's right to individual safety and freedom from violence should be ensured.

Blagg, Harry, Nicole Bluett-Boyd and Emma Williams, *Innovative Models In Addressing Violence Against Indigenous Women: State Of Knowledge Paper* (ANROWS, 2015).

This state of knowledge paper draws on both national and international literature and policy and program evaluations, to establish what is currently known about innovative responses to violence against Indigenous women in Australia. It provides an overview of current literature about innovate justice practices that have been developed specifically for and often by Indigenous communities. The authors identify a trend towards holistic and responses. Among other things the authors identify that part of a holistic response to violence against women in Indigenous communities requires: 'The increased provision of behavioural change programs, including anger management programs and drug and alcohol programs, and the introduction of skills-oriented employment programs that are accessible and culturally appropriate.(p17) While the authors identify support for secondary and tertiary interventions (including men's behaviour change programs), they caution that programs should be culturally sensitive and specific to address the needs of Indigenous men and that logistical and administrative issues may need to be addressed (for example transport to the program.) These issues may be particularly pertinent for men living in rural and remote communities.(p13-14)

Blokland, Justice Jenny, 'Unnecessary suffering: Violence against Aboriginal women in the Northern Territory – A discussion of contemporary issues and possible ways forward' (2016) 3 *Northern Territory Law Journal* 3.

The author is a Justice of the Northern Territory Supreme Court. She observes that imprisonment is the most common form of punishment in cases of assaults by men against women (p. 4). She observes: 'Although incarceration as a response to violence in this setting may serve a purpose in providing respite to victims for the term of imprisonment, it is clearly not deterring like-minded offenders. More significantly, for many offenders, it is not effecting behavioural changes to stop the physical violence. All studies emphasise the need to engage men both as individuals and members of social groups to effect transformative change. Recent international literature dealing with similar problems emphasises primary, secondary and tertiary interventions, the first two being preventative to assist in reducing violence of this kind and other harmful practices'(p. 13).

In the Northern Territory, respectful relationships education to young people is being used as a primary prevention strategy to stop men and boys using violence in the first place (p. 13). Secondary measures are aimed at reducing opportunities for violence. These include the imposition of DVOs (p. 14). In terms of tertiary stage intervention, the Indigenous Family Violence Offender Program (Family Violence Program) is important. The FVP aims to re-educate and shift attitudes in relation to women. It is particularly effective when people have self-referred and is inappropriate for serious matters. Participation in the program needs to be encouraged at the first sign of offending (p. 15). 'Practitioners need to proceed with an awareness of how entrenched the ideas of control by violence are for many Aboriginal men' (p. 16).

Bolger, Audrey, *Aboriginal women: A report for the Criminology Research Council and the Northern Territory Commissioner of Police* (ANU, North Australian Research Unit, 1991).

The research underlying this ground breaking report was carried out in the Northern Territory in 1989-1990. Data were collected in a variety of ways, the major ways being informal talks with Aboriginal women individually or in small groups, meetings of women's organisations, or by observation of events in communities. Aboriginal men in communities who were willing to discuss the issues were also approached both as individuals and as members of Aboriginal organisations. See especially p50: 'As in other societies around the world there was still, in the final analysis, a culture of male dominance. However, it seems clear that the combination of inaccurate anthropological representations of Aboriginal women and the experience of colonisation have worked against them so that their status has deteriorated. Their situation today is affected by issues of race and gender, which intersect to influence negatively their position both within Australian society at large and within their own culture. One result of this is that they are now subject to violence from

their own men of a kind which would not have been countenanced within traditional society. There are now three kinds of violence in Aboriginal society “alcoholic violence, traditional violence and bullshit traditional violence.” Women are victims of all three. By bullshit traditional violence is meant the sort of assault on women which takes place today for illegitimate reasons, often by drunken men which they then attempt to justify as a traditional right’.

Gallant, David et al ‘Aboriginal men's programs tackling family violence: A scoping review’ (2017) 20(2) *Journal of Australian Indigenous Issues* 48-68.

This study evaluates 11 studies of the effectiveness of interventions for Aboriginal men who commit domestic violence. A significant finding was that programs targeted at Aboriginal men must address multiple power constructs. Interventions should recognise that colonisation continues to have a significant impact on Aboriginal communities, but should not excuse the impact that men’s violence has on female victims (p 61).

Hennessy, Annette and Carolyn Willie, *Sentencing Indigenous Offenders in Domestic and Family Violence Matters: A Queensland Experience*. Paper presented at the ANZSOC 2006 Conference: Criminology and Human Rights, Hobart, 7-9 February 2006).

This Australian paper draws predominately on findings and observations from the Murri Court in Queensland to consider important factors that arise when sentencing indigenous offenders for domestic violence.Author Hennessey is a practicing magistrate and author Willie is a community development officer. The authors highlight the importance of ensuring that any rehabilitation aspect of sentencing is culturally appropriate and effective. They note an inequity in relation to the availability of appropriate programs for Indigenous people. Drawing on a small sample the authors explain that through the Murri Court, (a specialist sentencing court) domestic violence offenders can be placed on a probation orders, requiring regular meetings with community Elders or a Community Justice Group, attending counselling through an Indigenous Healing Centre, attending counselling for substance abuse with an indigenous health organisation and other programs as may be appropriate to the offender’s situation (p 7). The authors argue that this approach reduced short term recidivism (p 8). The authors empahsise the need to consider culturally appropriate and effective counselling and treatment for offenders whilst, at the same time, ensuring they are suitably punished (p 10).

Kelly, Judith, '*The intersection of Aboriginal customary law with the NT criminal justice system: the road not taken?*' Paper presented at the NTBA, Dili, Conference 10 July 2014 Dili.

In this presentation, a judge of the Northern Territory Supreme Court considers how traditional Aboriginal law and the law of the Northern Territory can co-exist. Domestic Violence is mentioned sporadically throughout the paper and it is concluded that despite whatever used to be the norm with regard to domestic violence, traditional law has reformed and violence in any respect is no longer appropriate. The authors state that Indigenous Australians traditionally did have a different approach to violence, punishment and discipline and state: 'The practice of interpersonal violence as a form of punishment, the infliction of violent revenge, and the belief in the legitimacy of such practices, have continued through the second half of the twentieth century and beyond.' (p7)

Marchetti, Elena, 'An Australian Indigenous-Focussed Justice Response to Intimate Partner Violence: Offenders' Perceptions of the Sentencing Process' (2015) 55(1) *British Journal of Criminology* 86.

Abstract: 'This article draws on research conducted over the past four years on the use of Indigenous sentencing courts in Australia for sentencing Indigenous offenders of intimate partner violence (IPV). It presents interview findings of offenders' perceptions of justice of a sentencing process that involves the participation of Elders and Community Representatives, as moral and cultural guides. This study concludes that the vast majority of interview participants found an Indigenous sentencing court process is fairer than a mainstream sentencing court process despite the fact that it is more challenging and confronting facing Elders and Community Representatives when being sentenced for an IPV offence. Their respect for Elders and Community Representatives, and the respect afforded to Elders and Community Representatives by the mainstream criminal justice system created a forum that both 'shamed' and supported the offenders in ways that reflected cultural values and norms' (p. 86).

Marchetti, Elena and Kathleen Daly, 'Indigenous Partner Violence, Indigenous Sentencing Courts, and Pathways to Desistance' (2016) *Violence Against Women* 1.

Indigenous sentencing courts exist 'to create a more meaningful sentencing process that has a deeper impact on Indigenous offenders' attitudes and, ultimately, their behaviour. Drawing from interviews with 30

Indigenous offenders, [this paper explores] the ways in which the courts can motivate Indigenous partner violence offenders on pathways to desistence' (p.1).

The study shows that it is not impossible to change offending behaviours. Marchetti and Daly write, '[u]sing culture as a "hook for change" (Giordano, Cernkovich, & Rudolph, 2002), Indigenous perpetrators of partner violence, with a readiness to change, can find the support and motivation to desist from further offending in towns that have Indigenous sentencing courts. By "using culture" as a hook for change, we mean a rekindling of Indigenous values, and of being reminded of one's cultural heritage and identity, which requires respecting not only one's Elders, but also family, kin, and partners. When we probe with care into patterns of offending after an Indigenous sentencing process, we are able to re-define "success" by including those who are on pathways to desistance' (pp.16-17). They also note that the process of change is not 'linear and immediate, but zigzag and lengthy' (p.17).

Nancarrow, Heather 'In search of justice for domestic and family violence: Indigenous and non-Indigenous Australian women's perspectives' (2006) 10:1 *Theoretical Criminology* 87-106.

In this Australian research, the attitude of women towards responses to domestic violence is examined. The author interviewed 10 Indigenous women and ten non-Indigenous women (the Indigenous women in the sample were drawn from various urban and remote locations which were spread over a distance of almost 2000 kilometres and included two indigenous communities). None of the Indigenous women interviewed preferred the criminal justice system as a response to domestic and family violence (p 95). However Indigenous women did say criminal law needed to be applied in cases of homicide, serious assaults and sexual abuse of children - as these types of cases were too 'big' (sensitive) for communities to handle on their own. The majority of Indigenous women interviewed preferred restorative justice. Indigenous critique of criminal justice system (p 97): irrelevant (symbolically), it often escalated rather than ended violence and its interventions continued to separate families.

Olsen, Anna and Ray Lovett, *Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: Key findings and future directions* (ANROWS, 2016).

This resource provides a brief summary of published literature on Indigenous women and violence. It is based on *Existing knowledge, practice and responses to violence against women in Australian Indigenous*

communities: State of knowledge paper. This literature review found that "the cumulative nature of socio-economic disadvantage (such as personal, family and economic related stressors) and the lasting effects of colonisation are thought to be linked to violence against women in Indigenous communities. Any attempts to reduce violence in Indigenous communities requires a multi-faceted and holistic approach including efforts to improve the wider social, economic and health of Indigenous communities".

Pascoe Gaymarani, George, 'Yolngu Ngarra Law customary law painting presentation' (2011) 4 *Balance: Journal of the Northern Territory Law Society* 26.

In this presentation the author (a traditional Owner for Milingiimbi, Gamurr-Guyurra, Arnhem Land, Northern Territory of Australia; leading Yolngu customary law identity and Ngarra Elder) attempts to describe the Ngarra law of Arnhem Land in order to provide access to the law for interested people, especially "white" (Balanda) lawyers. The law described is that of the Yolngu people (who speak the Yolngu matha languages). The author notes: 'domestic violence is not permitted. Domestic violence is no longer appropriate. Ngarra law has no place for domestic violence. In the past, husbands did hit their wives sometimes – this happened in both Balanda and Yolgnu society. The law – both Balanda law and Yolgnu law – allowed it to happen. Not anymore! We do not have to be ashamed of what happened in the past, but we all need to work together now as a nation.' (p28)

''Pay back' is another thing that has changed over time. When 'pay back' happened in the past, it involved physical punishment, just like in the Old Testament: 'an eye for an eye and a tooth for a tooth'. These days 'pay back' is more like a mutual obligation: when you look after my children when they visit you, I have to 'pay back' by looking after your children when they visit me. When people break the Ngarra law these days they can be punished by other means, including compensation of discipline training camps in the bush (Gunapipi).When there has been a really serious breach of law, say murder or rape, the Balanda system can take care of it. The Ngarra law can work together with the Balanda law'(p28).

Purdie Nola, Pat Dudgeon and Roz Walker, eds. *Working together: Aboriginal and Torres Strait islander mental health and Well-being Principles and Practice*, 2nd edition (2014, Telethon Kids).

This book includes chapters on a wide range of issues associated with Aboriginal and Torres Strait islander mental health. The editors identify that the purpose of the book is to provide an appropriate resource for a

range of health professionals who work with Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander health workers, counsellors, and other staff of Indigenous health services. Chapter 1 ’Australian Aboriginal and Torres Strait Islander Mental Health: An Overview’ by Robert Parker provides a good summary of relevant issues, see especially from p5-7. See also chapter 10 ‘Trauma, Transgenerational Transfer and Effects on Community Well-being’ by Judy Atkinson et al.

Specific considerations - Aboriginal and Torres Strait Islander people - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (2022).

2.3.8 discusses points to consider in sentencing Aboriginal offenders, however it does not deal specifically with domestic and family violence related offences.

QLD

Supreme Court of Queensland, *Equal Treatment Bench Book* (2005).

'The Royal Commission into Aboriginal Deaths in Custody recommended that incarceration be used only as a last resort when sentencing Indigenous people. Throughout Queensland there are examples of local Indigenous community groups working constructively with the police and the courts in deterring and dealing with Indigenous crime and assisting in the sentencing process […]The Murri Court was officially opened in Brisbane in August 2002 and serves to assist Magistrates, court officers and, in particular, Indigenous defendants. The purpose of the Brisbane Murri Court is "to impose appropriate sentences by having regard to the offence committed and the defendant's personal and cultural background"' (p. 102). It takes into account cultural issues relevant to the defendant and provides a forum where Indigenous people have an input into the sentencing process. 'It seeks to overcome language and cultural barriers by having an Elder present to assist in dialogue between the defendant, Magistrate and other court officers' (p. 103).

Supreme Court of Queensland, *Equal Treatment Bench Book* (2016).

Chapter 10, Part VI:

"The Department of Justice and Attorney-General funds Community Justice Groups (CJGs) in a number of urban, regional and remote Aboriginal and Torres Strait Islander Communities in Queensland. CJGs consist of Elders, traditional owners and community members and they provide support to Indigenous people who have come into contact with Queensland's Criminal Justice System as either victims or offenders. The introduction of CJGs forms part of the Queensland Government's response to recommendations made

following the Royal Commission into Aboriginal Deaths in Custody. Judges can obtain assistance with sentencing from Community Justice Groups. Section 9(2) of Penalties and Sentences Act 1992 (Qld) provides:

"In sentencing an offender, a court must have regard to –

…

(o) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example:

i) the offender's relationship to the offender's community; or

ii) any cultural considerations; or

iii) any considerations relating to programs and services established for offenders in which the community justice group participates".

Section 150(1)(g) of the Youth Justice Act 1992 (Qld) is in similar terms with respect to Aboriginal or Torres Strait Islander children.

The Supreme Court and District Court have also facilitated the making of CJG submissions through practice directions. Apart from assisting in the sentencing process, CJGs are also involved in providing a range of local initiatives intended to reduce crime and divert Aboriginal and Torres Strait Islander offenders away from the criminal justice system." [p112]

WA

Fryer-Smith, Stephanie, *Aboriginal Benchbook for Western Australia Courts* (2nd ed, 2008).

Chapter 8 of the bench book deals with sentencing of Aboriginal offenders.

Chapter 8.1 Introduction

By way of introduction, the bench book notes that Aboriginal customary law 'is characterised by notions of summary justice, strict liability, payback and family/group punishment and responsibility: *Bolton v Nielsen* (1951) 53 WALR 48' [8.1.1]. 'Principles of substantive equality may support a special approach to the sentencing of Aboriginal offenders' [8.1.3]. The *Royal Commission into Aboriginal Deaths in Custody:*

National Report examined the role of sentencing in the high incarceration rate of Aboriginal people and made a number of recommendations to reduce that rate including that imprisonment should be used as a last resort, criminal records should be expunged after an appropriate time has lapsed, authorities should consult with Aboriginal communities and organisations, and an appropriate range of non-custodial sentencing options should be made available [8.1.4].

Chapter 8.3 Aboriginality

Sentencing principles: 'The same principles are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group: *Neal v the Queen* (1982) 42 ALR 609; *Rogers and Murray* (1989) 44 A Crim R 301; *State of Western Australia v Richards* [2008] WASCA 134' [8.3.1].

Chapter 8.4 Aggravating factors

Domestic violence: 'The primary concern of the courts must be to protect women in the community from vicious, drunken and abusive behaviour: *Woodley* (1994) 76 A Crim R 302; 'Even where a complainant continues to cohabit with an offender, the court should deal with assaults upon that complainant as it would a member of the wider community: *Woodley* (1994) 76 A Crim R 302; 'Courts cannot deal with the core problem of an offender being unable to resist the use of physical violence when intoxicated and angered by his/her partner's conduct: *Woodley* (1994) 76 A Crim R 302; *Daniel* (1997) 94 A Crim R 96' [8.4.1].

Chapter 8.5 Mitigating factors

Facts existing only by reason of ethnicity, circumstances underlying alcohol/substance abuse, emotional stress, cultural dislocation, effect of removal from family, socio-economic factors, the impact of imprisonment, customary punishment, the wishes of the Aboriginal community, the impact of traditional belief.

Specific considerations - Aboriginal and Torres Strait Islander people - Other Resources

[Former] Federal Circuit Court of Australia, Reconciliation Action Plan 2019 – 2021.

"This RAP provides a platform to introduce practical measures to promote reconciliation, and addresses some of the barriers faced by Aboriginal and Torres Strait Islander peoples in interacting with the Court. It also prioritises establishing relationships with Aboriginal and Torres Strait Islander communities and community leaders, agencies servicing Aboriginal and Torres Strait Islander peoples, legal services and other stakeholders, in order to assist Aboriginal and Torres Strait Islander peoples to access the Court."

Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016).

See p6: 'this report is a summary of consultations undertaken by the Judicial Council on Cultural Diversity. As such, the views expressed in the document are those of stakeholders who work with Aboriginal and Torres Strait women. The purpose of the document is to inform the thinking of the Judicial Council on Cultural Diversity in its deliberations on matters relating to access to justice for Aboriginal and Torres Strait Islander women.

At p. 7: The key pre-court issues consistently raised were:

- Fear that reporting violence will mean that authorities will remove children;
- Geographical barriers;
- The impact of poor police responses;
- Family and community pressure on women seeking to protect themselves and their children;
- The complexity of legal problems experienced by Indigenous women;
- Lack of access to legal assistance and advice; and
- Lack of legal knowledge and understanding of their rights under the law.

At p7: 'Many Aboriginal and Torres Strait Islander women had trouble communicating in the language of the justice system, adversely impacting on their ability to deal with police, engage with support services including legal representatives, and communicate with court staff and judicial officers.'

Judicial Council on Cultural Diversity Website.

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to the diverse needs of the judiciary, including the particular issues that arise in Aboriginal and Torres Strait Islander communities. This website includes a number of useful resources and links.

Law Society Northern Territory, *Indigenous Protocols for Lawyers* (second edition, 2015).

This handbook is written for lawyers and identifies and discusses six protocols to assist lawyers in communicating with their clients. See p5 which sets out the six protocols. The remaining part of the document discusses these protocols in depth.

Protocol 1:	Assess whether an interpreter is needed before proceeding to take instructions.
Protocol 2:	Engage the services of a registered, accredited interpreter through the Aboriginal Interpreter Service.
Protocol 3:	Explain your role to the client.
Protocol 4:	Explain the relevant legal or court process to the client prior to taking instructions.
Protocol 5:	Use ‘plain English’ to the greatest extent possible.
Protocol 6:	Assess whether your client has a hearing or other impairment that may affect their ability to understand

Specific considerations - Aboriginal and Torres Strait Islander people - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

Munda v Western Australia **[2013] HCA 38 (2 October 2013) – High Court of Australia**

The majority at [53]: ‘Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide’.

At [55]: ‘A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law’.

Reid v Smith **[2014] ACTSC 349 (21 October 2014) – Australian Capital Territory Supreme Court**

Penfold ACJ at [24]: In *Bugmy v The Queen*, the High Court said at [37],[41],[44],[44]: ‘An Aboriginal

offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence… the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background… An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender'.

At [27]: '[W]hile the decision in Bugmy is certainly relevant to the sentencing of aboriginal offenders, it is also relevant in clarifying that a claim of failure to give adequate weight to particular considerations arising in such a sentencing is not a useful appeal ground. While it might have been an error on the Magistrate's part if she had entirely disregarded Mr Reid's somewhat troubled background, her Honour instead made specific mention of it. The fact that she did not as a result grant as much leniency to Mr Reid as he apparently hoped for does not establish a specific error of the kind alleged'.

***Drew v R* [2016] NSWCCA 310 (16 December 2016) – New South Wales Court of Criminal Appeal**

At [84], N Adams J held –

> *'…A Court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities. Whether or not the victim in each case is in such a class of vulnerable victims will always be a matter that must be proved beyond reasonable doubt based on the evidence in that case.'*

At [88], her Honour states –

> *'It is notorious that offences committed within the context of domestic violence are under-reported and that such under-reporting is not confined to Indigenous communities.'*

At [89], her Honour states –

> *'High rates of non-disclosure by Indigenous victims of domestic violence have been attributed, among other things, to the potential for stigma and ostracism from family and community members. Indigenous victims may also, for historical and pragmatic reasons, fear contact with police and the courts or regard the authorities as unable to help them'*

***Emitja v The Queen* [2016] NTCCA 4 (21 October 2016) – Northern Territory Court of Criminal Appeal**

Grant CJ and Kelly J quoted from *Amagula v White* (unreported, Northern Territory Supreme Court, 7 January 1998): *'The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased'.*

Their Honours continued at [32]-[34]: 'As this Court has repeatedly observed before and since that statement was made, such conduct must be dealt with in a manner which reflects the serious nature of the offending and its corrosive effect on well-being in Aboriginal communities'.

While 'some Aboriginal communities have an unusually high incidence of serious crimes of violence and that the courts are powerless to alleviate the dysfunction and deprivation which underlies that violence. Aboriginal women and children living in those communities 'are entitled to equality of treatment in the law's responses to offences against them'. The protection which the law affords includes the imposition of sentences which include a component designed to deter other members of the community from committing crimes of that nature'.

There are also practical societal reasons to consider personal and general deterrence. As in *The Queen v Haji-Noor*: *'The offender's crime against Mr Ellis was committed in a domestic context. Domestic violence is a leading contributor to death, disability and illness in the community. Such violence affects the whole community. Medical and hospital treatment for the victims of domestic violence is extremely costly and imposes a considerable strain on the health system and those who work in it'.*

***R v Stevenson* [2015] NTSC – Sentencing Remarks 21353266 (Kelly J) (14 September 2015) – Northern Territory Supreme Court**

Kelly J: 'Taking away somebody's life is one of the most serious crimes anyone can commit. I have to give you a sentence that says just how much the court and the whole community disapproves of violent crimes like this and that will discourage other men from doing the same thing. Drunken violence is far too common in our community. It is particularly common, unfortunately, in Aboriginal communities and vulnerable Aboriginal women, vulnerable people of all kinds, deserve the fullest protection that the law can give them'.

R v MBY **[2014] QCA 17 (18 February 2014) – Queensland Court of Appeal**

Morrison JA at [67] and [69] discussing High Court authority: 'Properly understood, the High Court [in *Bugmy v the Queen*] was going no further than to say that the deprived background of an offender, be they Aboriginal or otherwise, and whether or not derived from a situation of endemic alcohol abuse and alcohol fuelled violence, may mitigate the sentence imposed on the offender because of its impact on the assessment of moral culpability. However, the proper weight to be given to that factor will depend upon the particular case. Further, the weight that is given to such a factor, in terms of mitigation, will depend upon the interplay of considerations relevant to sentencing, including punishment, protection of society, personal deterrence and general deterrence'.

'The High Court [in *Munda v Western Australia*]…said: 'Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence"'.

R v Bell & Anor; ex parte Attorney-General (Qld) **[1994] QCA 220 (20 June 1994) – Queensland Court of Appeal**

The appellant was an Aboriginal man. Fitzgerald P: 'It was right for [the sentencing judge] to have regard to the respondent's disadvantages and open to him, as a result, to sentence the respondent as leniently as the circumstances of his offence admitted. However, such disadvantages do not justify or excuse violence against women or, to take another example, abuse of children. Women and children who live in deprived communities or circumstances should not also be deprived of the law's protection. A proposition that such offences should not be adequately penalised because of disadvantages experienced by a group of which an offender is a member is not one which is acceptable to the general community or one which we would expect

to be accepted by the particular community of which an offender and complainant are members'.

R v Kina **[1993] QCA 480 (29 November 1993) – Queensland Court of Appeal**

Fitzgerald P and Davis JA: 'In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice'.

Wongawol v The State of Western Australia **[2011] WASCA 222 (17 October 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [39]: 'This is a case where the protection of the community in which the appellant lives and both personal and general deterrence are very weighty sentencing considerations. The incidence of alcohol and drug fuelled violence within Aboriginal communities is distressingly high. A new generation of children are scarred. The cycle continues'.

R v Nelson **[2017] SASCFC (8 May 2017) – Supreme Court of South Australia (Full Court)**

"It was necessary for the sentencing judge to take into account, as his Honour did, the defendant's background of disadvantage and social deprivation arising from his upbringing in a traditional and remote Aboriginal community. However, the fact that … the defendant had very recently been released after a period of imprisonment imposed for two assaults on a different female drinking companion operated to reduce the leniency that his personal circumstances might otherwise have attracted. Moreover, the attack by the defendant upon his domestic partner was particularly brutal and has had grave consequences for her … The sentence did not give appropriate effect to the views consistently expressed by this Court concerning the need to give significant weight to considerations of specific and general deterrence when sentencing defendants who have engaged in serious domestic violence." Parker J stated at [45]-[47].

Listening to victims

In recent decades researchers [Booth 2012] and practitioners involved in reform of court procedures have given greater attention to the merits of allowing victims to participate in some way in the sentencing process. More generally, it is better understood that many victims have certain expectations of the criminal justice system [Clark 2010], including that their experiences will be taken seriously and validated [Anderson 2015], and that they will be provided a forum though which they are able to voice their experiences [Bluett-Boyd & Fileborn 2014]. In a sentencing context however, victims' expectations must be balanced with the need to maintain the integrity of the court in an adversarial system.

The purpose of a sentencing hearing is for the judicial officer to determine the appropriate sentence according to the law. Within legislative constraints, the judicial officer exercises their discretion having regard to the available evidence regarding relevant factors. The victim is not a party to proceedings that have resulted in the finding that an offence has been committed, for example where a person is found to have breached a protection order; and yet they are directly affected by the offending behaviour and possibly by the sentence. A victim's emotional need to be heard by the court—to be given the opportunity to explain the impact of the offender's violence—should be accommodated where possible [Booth 2012].

One way of enabling a victim's involvement in sentencing is through a victim impact statement that is submitted, quoted from, or read aloud to the court. These are not permitted in relation to some offences. Where permitted, bench books [Other Bench Books] advise that sentencing courts must treat the victim's statements with caution. For example, the victim may express forgiveness towards the offender. A victim may, as a result of the domestic and family violence they have experienced, be pressured or coerced by the perpetrator or the perpetrator's family members and friends to present a view of the harm experienced, the offender and the offence that is not commensurate with the seriousness of the offender's behaviour, the resulting harm and future risk [Klein 2009].

Research clearly acknowledges healing and restorative benefits to some victims in giving their account of their experiences of violence to the court, orally or in writing, provided they are fully informed of the limits of their capacity to influence sentencing outcomes [Herman 2005].

Listening to victims - Key Literature

Australia

Bluett-Boyd, Nicole and Bianca Fileborn, 'Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions' (Research Paper No 27, Australian Institute of Family Studies, Australian Government, 2014).

This report focuses on possible law reform aimed at meeting victim/survivor needs in sexual assault matters, it contains relevant observations to listening to victims. Participants in the research identified a number of victim/survivor justice needs including: receiving emotional support and counselling; having a voice and being heard; being believed; having their version of events vindicated; being informed about the status of their case; being educated as to how the criminal justice system works, the reason for processes such as cross-examination, what acquittals and convictions mean, and so forth; avoiding having to constantly retell their story; being able to give evidence remotely; confronting their perpetrator in a public setting; their perpetrator being brought to justice or being convicted; and having closure and a sense of finality to their experience (p. 21). There is a useful table (p. 27) that provides a summary of the key justice needs of victim/survivors across the criminal justice process. (p. 28).

Booth, Tracey '"Cooling out" victims of crime: Managing victim participation in the sentencing process in a superior sentencing court' (2012) 45(2) *Australian & New Zealand Journal of Criminology* 214-230.

This research draws on an observation study of 18 sentencing hearings in the NSW Supreme Court, selected randomly from published court lists, between July 2007 and December 2008. The study was supplemented with digital copies of the transcripts of 16 of the 18 hearings and 22 of the 30 Victim Impact Statements (VISs) read aloud in those hearings. Although not focussed on domestic and family violence cases specifically, this study found that victims reading out VISs did raise the emotional tension in the hearings but that any potential adverse impact was managed and contained through various cooling out processes and structures. Relevant here are the cooling out processes in the courtroom that operate to defuse the expression of victim distress and/or anger and lessen the strains of the ordeal of presenting VISs. For example the author points to judge's remarks that recognised the victims' interests and status as victims in the particular matter by acknowledging

their disappointment and taking the time to explain the legal position around VISs to them (p225, 226). She notes 'empathic responses to the plight of the family victims were fundamental to the cooling out processes…'(p226).

Clark, Haley, ''What is the justice system willing to offer?' Understanding sexual assault victim/survivors' criminal justice needs' [2010] (85) *Family Matters* 1.

This article includes some relevant observations about what victims expect from the criminal justice system. The findings are drawn from interviews with 22 adult victim / survivors:

- Justice: 'Participants emphasised that establishing justice was integral to criminal justice system responses, but the meaning of 'justice' differed considerably according to individual participants. For some, justice involved retribution, while others sought official acknowledgement of the crimes, and yet others felt that community safety was their primary justice goal' (p. 30).
- Information: Victim/ survivors emphasised the value of having clear accessible information about the criminal justice system and its procedures including practical information about the various stages of the system, the key players, their role in the procedures, the potential implications for them of the legal processes, and possible outcomes. Such information was considered important as it allowed them to make informed decisions about engaging with the system, and to prepare for the criminal justice processes' (p. 31).
- Validation: 'Expressing belief to victims/survivors is recognised as being necessary to their healing process, and corresponds with reduced victim trauma and increased help-seeking. In terms of procedural justice for victims, being believed is a stepping stone to attaining acknowledgement, validation, victim status and support. Victims/survivors in this study expressed that being believed by system officials was essential in criminal justice responses' (p. 32).
- Voice: Participants advocated for a forum through which they could voice their experience. For many, the most customary place for this was a courtroom. Many stipulated that they wanted their 'day in court'. (pp. 33-34).
- Control: Many identified their lack of control over the process (p. 34).

Sentencing Advisory Council, *Sentencing Practices for Breach of Family violence Intervention Orders: Final Report* (2009).

This is a report compiled by the Sentencing Advisory Council Victoria on Intervention Orders in Victoria; it includes a consideration of the penalties awarded for breach of intervention orders. The Council compiled the report by reviewing relevant literature on family data, analysing data on sentencing and conducting new research by consulting those involved in the sentencing process (magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group). It found that the sanctions imposed during sentencing for breach of a family violence order were considered by most stakeholders to be far too lenient (viii) it noted that in sentencing an offender for breach of an order, the protection of the community, which encompasses ensuring the future safety and protection of the victim should be the central purpose against which all other sentencing purposes are balanced (ix).

International

Anderson, Kristin 'Victims' Voices and Victims' Choices in Three IPV Courts' (2015) 21 (1) *Violence Against Women* 105.

This article in written in the context of USA where there is significant debate about mandatory processes. Drawing on current literature, this paper provides a helpful overview of the key debates about mandatory policies. It draws a distinction between voice and choice, suggesting that allowing victims a voice while accepting that in certain contexts they may not have a choice is a compromise position. The author also reports on an observational study of court processes. The author comments 'courts that provided victims with an opportunity to be heard also validated the harm of domestic violence, communicated that the wishes of victims were important, and demonstrated the worth of victims by treating them with respect'.(p121)

Cattaneo, Lauren Bennett et al, 'Intimate partner violence victims' accuracy in assessing their risk of re-abuse' (2007) 22(6) *Journal of Family Violence*, 429.

This paper reports on an exploratory study undertaken in the USA primarily involving low-income African American women. It provides a discussion of the literature on the reliability of victim's assessment of their

level of risk of future domestic violence. The authors identify that prediction of re-abuse or assessment of danger is a major research focus in the area of intimate partner violence. They observe that victims choose certain courses of action based on their assessments of how much danger they are in. They also note that taking these assessments into account is often a key component of counselling victims or making system-related decisions. While the authors conclude that overall, their findings document victims' considerable strengths in accurately assessing their risk of re-abuse, they also note considerable limitations to their study and with other research currently available.

Dancig-Rosenberg, Hadar and Dana Pugach, 'Pain, Love and the Voice: The Role of Domestic Violence Victims in Sentencing' (2012) 18(2) *Michigan Journal of Gender and Law* 423-483.

The article is predominately theoretical and draws on past literature. See from p465 in relation to the question: should consideration be given to the request of women living under the shadow of violence to impose lighter sentences? The article identifies a complex range of views based on a review of literature. For example on one view refusing to consider the apparently "irrational" request by women to lighten the sentence of their violent partners is actually a device for protecting them, preserving their dignity and creating a "protective space" for them in which the dynamic of men controlling them will not succeed.(p467). Also conceiving the phenomenon of domestic violence as one that endangers the peace and security of society as a whole is consistent with the desire to follow an uncompromising policy that does not take into account the wishes of the individual woman (p468). On the other hand the authors note that some people argue that respecting women's requests for leniency is an empowering mechanism that is adapted to female ethical thinking. Giving voice is an act of empowerment particularly where the experience of victimization entails repression and control (p469).

Erez, Edna, Julie L Globokar and Peter R Ibarra, 'Outsiders inside: Victim management in an era of participatory reform' (2014) 20(1) *International Review of Victimology* 169.

This article identifies the issues associated with victims' participation in court processes: stress placed on victims during court proceedings because of the emotions associated with the crime; victims' apprehension regarding the legal process and its uncertain outcomes; logistical challenges and disruptions posed to victims' daily lives, particularly in the context of prolonged court cases. Professionals noted that the emotional stress

of involvement can be exacerbated when the victim and defendant are known to one another, such as with cases of domestic violence and intrafamilial sex crimes, in which victims may be particularly fearful of, or struggle with a sense of allegiance to, the defendant. (p. 174).

Fisher, Hilary, 'Justice for Women: From Reporting to Sentencing.' Presented at the All Party Parliamentary Group on Domestic and Sexual Violence Inquiry, Paris, 9 December 2013.

This paper, prepared on behalf of Women's Aid (England) is the culmination of submissions discussing key issues affecting women experiencing domestic violence, including their experience of the criminal justice system. Conclusions with regard specifically to sentencing (p 5): Many respondents (both organisations and individual survivors) believed that perpetrators received very minimal sentences, with no support to prevent reoffending on their release. Many respondents submitted that women frequently report their abusers being given a longer sentence for assaulting strangers than them, this results in them feeling worthless and the perpetrator with the message that domestic violence is a lesser crime.

Harne, Lynne and Jill Radford, *Tackling Domestic Violence: theories, policies and practice* (Open University Press, 2008).

Chapter 4 and 5 consider criminal interventions in domestic violence cases including sentencing. Of relevance the authors note that many victims of domestic and family violence expressed fears of further violence once a perpetrator program had ended and felt that being referred to a program was a soft option – the program was only effective when combined with the sanction of imprisonment for further violence.

Herman, Judith Lewis, 'Justice From the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571.

The author draws on interviews with 22 victims of violent crime. She argues that survivors' views of justice do not fit well into either retributive or restorative models. This has implications for current efforts to use restorative models in cases of violence against women' (p. 571). She observes that the wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings. Victims need:

- social acknowledgement and support; the court requires them to endure a public challenge to their

credibility;

- to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control.
- an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative.
- to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused. Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law (p. 574).

The most important object for participants in interacting with the justice system was to gain validation from the community. This required an acknowledgment of the basic facts of the crime and an acknowledgement of harm. Beyond acknowledgment, what survivors sought must frequently was vindication. The wanted their communities to take a clear and unequivocal stand in condemnation of the offence (p. 585).

Klein, Andrew, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice (US), 2009).

This report reviews research in the United States on domestic violence to determine what works best in protecting victims and stopping abuse. It review the available studies and literature about sentencing. Specifically it suggests that victim preferences should generally not be taken in to account, from p*53:* ‘Although victim perceptions of the dangerousness of suspects have been found to be good predictors of subsequent revictimization], victim preferences on how the case should be disposed are not good predictors. The victims in the Quincy, Mass., study who wanted the charges dropped were as likely to be revictimized (51 percent vs. 48 percent after one year) as those who did not want the charges dropped. Similarly, studies in New York found that victim cooperation with prosecutors did not predict recidivism. In other words, when judges imposed sentences to which victims objected, these victims were no more or less likely to be revictimized than victims who wanted their abusers to be prosecuted and sentenced.’

Listening to victims - Other Bench Books

NSW

Judicial Commission of NSW, Equality before the Law: Bench Book (updated 2021).

This bench book discusses the experience of court processes of a range of vulnerable groups (Aboriginal people, people from CALD backgrounds, people of a particular religious affiliation, people with disabilities, children and young people, women, GLBTIQ people, and older people). The discussion is mostly not specific to proceedings relating to domestic and family violence matters, however the practical guidance provided to judicial officers is likely to be useful in those proceedings, including considerations of the victim's circumstances and vulnerabilities, and the impact of the behaviour, crime, decision and/or sentence on the victim.

Judicial Commission of NSW, *Sentencing Bench Book* (updated 2022).

[See 63.500] Domestic Violence Offences

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

4.2 discusses criminal offences in the context of family violence, including the relevance of the attitude of the victim.

Judicial College of Victoria, Victorian Sentencing Manual (2022).

This manual provides comprehensive overview on sentencing generally in Victoria.

WA

Department of Justice (WA), Equal Justice Bench Book (2nd edition September 2021).

See general [10.4] Practical Considerations.

See also [13.9.8] Sentencing other decisions and judgment writing

Points to consider:

- If a witness is not personally capable of giving a victim impact statement for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf
- Consider whether to quote from a victim impact statement in court.

International

Neilson, Linda C, *Domestic Violence Electronic Bench Book* (National Judicial Institute, 2020).

See Section 5.4.2: What if the targeted person has forgiven the past abuse and violence?: '[d]omestic violence is a cumulative phenomenon… The fact that a targeted person has forgiven or reconciled does not erase DV or the accumulating damage it causes. Forgiveness does not erase the effects on children or the association between domestic violence and parenting deficits. In other words, evidence of past domestic violence, forgiven or not, is both necessary and pertinent to decisions about adult safety, risk assessment, and child custody and access.'

Listening to victims - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

R v Vincent **[2018] ACTSC 347 (12 December 2018) – Australian Capital Territory Supreme Court**

At [13], his Honour noted –

> *'Expressions of reconciliation by victims of domestic violence are often a regrettable reflection of the dominance of the abuser.'*

R v Stanley [2015] ACTSC 322 (12 October 2015) – Australian Capital Territory Supreme Court

Refshauge ACJ at [71]-[74]: 'The victim prepared a victim impact statement which the Crown Prosecutor read out. That can be important as it then is clear that the offender has heard what the victim has to say. It was difficult to hear that victim impact statement without experiencing some of the pain and hurt that the victim described. Courts know of the serious effects of such violence and invasions of the bodily integrity of victims but it is very valuable to hear the voices of the victims and understand how the hurt and damage can be different for each victim.'

R v Mazaydeh **[2014] ACTSC 325 (13 November 2014) – Australian Capital Territory Supreme Court**

Murrell CJ at [15]-[16]: 'These offences occurred in the context of a previous relationship between the offender and the victim and involved violence within the victim's home, an apparent sense of entitlement on the part of the offender, and humiliation through verbal and text abuse of the victim.

'The sentencing purposes of punishment, general deterrence and denunciation are very important, as well as the recognition of harm to the victim personally and the community generally through offences of this nature. The victim provided a victim impact statement in which she referred to impacts upon her of the type that frequently result from offences of domestic violence, including feelings of anxiety, difficulty sleeping, difficulty

concentrating at work and elsewhere, and an adverse effect on her ability to form relationships. Since the incident, the victim has moved house because she felt unsafe in the apartment where the offence occurred'.

***Guy v Anderson* [2013] ACTSC 5 (14 January 2013) – Australian Capital Territory Supreme Court**

Refshauge J at [78]-[79]: 'I also accept that the fact that the complainant and Mr Guy have reconciled needs to be approached cautiously. I did not detect any error in her Honour's approach to this issue which, in fact, she hardly mentioned. Forgiveness by victims of domestic violence offences is highly problematic and must be treated with considerable caution for the reasons outlined by Simpson J in R v Glen [1994] NSWCCA 1 (19 December 1994) at 8. As her Honour said, "the victim's attitude to sentencing … was not a matter which should have influenced the sentencing decision." See also *R v Palu* [2002] NSWCCA 381; (2002) 134 A Crim R 174 at 183–4; [37]; *R v Burton* [2008] NSWCCA 128 at [102]–[105].

'In *Shaw v The Queen* [2008] NSWCCA 58, Fullerton J, with whom McClellan CJ at CL and Grove J agreed, confirmed that approach (at [27]) but did point out (at [45]) that the reconciliation of the complainant and the offender (as opposed to her forgiveness) can be relevant as to prospects of rehabilitation. That is also clearly relevant here'.

***Talukder v Dunbar* [2009] ACTSC 42 (16 April 2009) – Australian Capital Territory Supreme Court**

Refshauge J at [82]: 'In my view, there is a great danger in putting a victim of domestic violence in the position where they are seen to have some power to influence a sentence. This is often likely to be an intolerable choice between the bonds of affection which often persist despite the violence and their need for protection against recurrence and for the offender to be held accountable'.

***R v Quach* [2002] NSWCCA 173 (15 May 2002) – New South Wales Court of Criminal Appeal**

O'Keefe J at [28]: 'The fact that he expressed contrition to his wife and that she said that she forgave him did not detract from the duty of the judge to impose a proper sentence. Her views in relation to the contrition of the Applicant, as opposed to what he said to her, do not seem to have been tested. Furthermore, even the stated acceptance by the victim of her acceptance of her attacker's contrition does not bind the court, nor does it detract from the need to give proper weight to the principle of general deterrence, *Regina v Kanj*

[2000] NSWCCA 408, a principle that is important in cases of domestic violence (*Regina v Green* [2001] NSWCCA 258; *Regina v Glen* [1994] NSWCCA unreported 19 December 1994). Furthermore, the fact that a victim may forgive her attacker is not determinative. Indeed, its weight in relation to general deterrence will be a variable depending on the offence and the circumstances. It is a matter for judgment by the sentencing judge'.

***R v Glen* [1994] NSWCCA 1 (19 December 1994) – New South Wales Court of Criminal Appeal**

Simpson J: 'In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind [general evidence of forgiveness and desire that the assailant/ partner not be imprisoned] in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been he) could attain the victim's forgiveness.

'There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

‘For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.

‘The second reason of principle for treating with extreme caution the evidence of the forgiveness of the victim in the circumstances of this case is that the legislature has, since 1982, made clear its intention that special considerations apply to offences of domestic violence’.

***R v Kershaw* [2005] NSWCCA 56 (1 March 2005) – New South Wales Court of Criminal Appeal**

Bryson JA at [24]: ‘In cases involving domestic violence it happens from time to time that a complainant is shown to have a forgiving and optimistic attitude about violence in the relationship which it is difficult for others to understand or share. The sentencing process is not and of course should not be in the hands of complainants, and the merciful or relenting attitude of a complainant does not reduce the gravity of the offence and does not have much effect on the interest of justice in imposing an appropriate sentence. Cf *R v. Glen* (unreported, NSWCCA, 19 December 1994) per Simpson J’.

***Walker v Verity* [2010] NTSC 68 (7 December 2010) – Northern Territory Supreme Court**

Barr J at [40]-[41]: ‘I accept the respondent’s submission that in domestic violence cases such as the present, the importance of general deterrence may well override any relevance that evidence of forgiveness might have: *R v Rowe*; that in cases involving domestic violence, the sentencing process is not and should not be in the hands of complainant victims; and that the merciful or relenting attitude of a complainant does not reduce the gravity of the offence and does not have much effect on the interest of justice in imposing an appropriate sentence: *Regina v Kershaw.* In my opinion those statements of principle are equally applicable here, where the victim’s attitude was not one of forgiveness as such, but rather one of claimed insight into the appellant’s alcoholism, leading to her belief as to the need for a non-custodial disposition’.

***R v Murray* [2014] QCA 160 (18 July 2014) – Queensland Court of Appeal**

McMurdo P at [35]: 'The offence was a serious example of grievous bodily harm in a domestic violence situation. It required a deterrent sentence, both generally and personally. His recidivism also made the protection of those with whom he forms intimate relationships a relevant factor in sentencing. The fact that the young Ms Coolwell, the victim of her abusive relationship with the applicant, was a reluctant complainant is not a mitigating feature. The only matters in his favour were his guilty plea and his dysfunctional background'.

***Commissioner of Police v DGM* [2016] QDC 022 (15/3279) Kingham DCJ 22 February 2016 – District Court of Queensland**

Kingham DCJ at [33]-[35]: 'On appeal, the prosecutor submitted the sentencing Magistrate placed too much weight on this factor. Ongoing support of the victim is often a feature of domestic violence and can be associated with repeat offending against that victim.

'Courts in Queensland and in other states of Australia, have recognised the need to approach submissions about reconciliation with real caution, because of the particular features of domestic and family violence. The fact that a victim is a reluctant complainant is not a mitigating factor (*R v Murray* [2014] QCA 160 at [35]). Likewise, reconciliation after the victim has complained ought not mitigate the sentence.

'There may be cases in which reconciliation is relevant to an offender's prospects of rehabilitation (*Shaw v The Queen* [2008] NSWCCA 58). However, that comes from the offender's conduct, not the victim's forgiveness. The nature of the relationship means victims may, contrary to their own welfare, forgive their attacker. That does not reduce the risk posed by the offender and, depending on the dynamics in a particular relationship, it could well exacerbate the risk. Necessarily, prospects of rehabilitation must be assessed by reference to the offender's attitude and conduct, not the victim's.

'Even if the complainant's support for Mr DGM is relevant, it is only one factor to be considered on sentence (*R v O'Neill* [2006] QCA 383 at p.6). Denunciation and deterrence are the dominant considerations on sentence for such offences (*R v King* [2006] QCA 466 at [18]; *R v Rowe* (1996) 89 A Crim R 467 (3 October 1996); *Pasinis v R* [2014] VSCA 97 at [15]; *Guy v Anderson* [2013] ACTSC 5 at [78]'.

***Craill v Police* [2016] SASC 168 (4 November 2016) – Supreme Court of South Australia**

Stanley J at [33], [36]: 'While the attitude of the victim to an offence is not an irrelevant factor in sentencing (*Coulthard v Kennedy* (1992) 60 A Crim R 415), that attitude cannot be determinative of what constitutes an appropriate sentence. Moreover, this principle must be applied with considerable caution in cases of domestic violence.

'The reason for such caution is obvious. In situations of domestic violence a victim's motivation for advocating a particular penalty is often influenced by their ongoing relationship with the defendant and an unhealthy relationship of dependency between them. Their attitude is often influenced by apprehension about the consequences for them in the future given a continuing relationship with the defendant. This attitude frequently fails to reflect what is in their best interests and what the court might consider appropriate in all the circumstances. It would be contrary to sound sentencing practice to place victims of domestic violence in the position where they hold, or appear to hold, the keys to the offender's release. To place victims in that position is to impose on them a burden they ought not be required to bear (*R v Fadah* [1999] NSWCCA 267 at [26])'.

***Director of Public Prosecutions (Acting) v J C N* [2015] TASFC 13 (27 November 2015)– Supreme Court of Tasmania**

Pearce J at [18], [20]: 'Thus, because the respondent is charged with family violence offences, he is not to be granted bail unless he satisfies this Court that his release on bail would not be likely to adversely affect the safety, wellbeing and interests of the complainant and her children. The Act thereby creates a presumption against bail: *Re S* [2005] TASSC 89; (2005) 157 A Crim R 451. The onus is on the respondent to displace the presumption: *Olsen v State of Tasmania* [2005] TASSC 40.

'The respondent also deposes, in a recent affidavit, that the complainant "is not afraid of my release". What is to be conveyed by that proposition is not entirely clear. It may mean simply that the complainant is "not afraid". It may also be intended to carry an inference that the complainant supports the respondent's release on bail. In the absence of evidence from the complainant, it is not possible to make findings about such matters, but some comments can be made. The response to family violence is often complex. Family violence offences are not uncommonly accompanied by support of a perpetrator by a victim and reluctance on the part of the victim to assist a criminal prosecution. That is so for a range of possible factors including fear and a

wish to preserve relationships, even dysfunctional and violent ones, for the sake of loyalty, affection, companionship, economic and domestic support. Sometimes those motivations are misguided but persist nevertheless. As a result, victims sometimes act in a way that seems to an objective observer to be incongruous and difficult to understand. In such cases a court has a duty to consider the interests of persons who may be affected by family violence and, if necessary, act to protect them. By doing so it may sometimes act contrary to the wishes of an affected person. None of these comments is intended to suggest that the complainant in this case supports the respondent's application for bail, or that she does not and will not support his prosecution. Rather, it is to indicate that, in my assessment of this application, whether the complainant is afraid of the respondent, whether she supports the grant of bail or whether she instigated or acquiesced in the previous breaches, are considerations of little weight. The task of this Court is to consider the safety, wellbeing and interests of the complainant and her children in the particular circumstances of this case'.

***Hester v The Queen* [2007] VSCA 298 (29 November 2007) – Victorian Court of Appeal**

Neave JA at [27]: 'It is a common pattern of behaviour for perpetrators of domestic violence to express penitence and persuade their victims to reconcile. For a number of complex reasons which have been discussed in the social science literature dealing with this issue, many victims are assaulted on several occasions before they summon the courage to leave an abusive relationship. Often they require considerable support in order to do so. In my view, these are matters which should be given considerable weight by a judge who is considering the weight that should be given to a victim impact statement made by a person who has been the victim of domestic violence. I therefore agree with the comments of Simpson JA in *R v Glen* that evidence of forgiveness of the victim of domestic violence should be treated with extreme caution'.

***R v Sa* [2004] VSCA 182 (7 October 2004) – Victorian Court of Appeal**

Eames JA at [38]-[40]: 'The statement of his Honour that the attitude of the victim could not "govern" the sentencing approach was consistent with the principles stated in *Skura*. In the present case, however, there was good reason why the judge would be cautious in evaluating the weight to be given to the evidence of the victim. In the first place, he was not the only victim of the appellant's crime; the two children also witnessed what must have been a horrifying incident, although there was no evidence of any long lasting adverse effects

on the children. Crimes of violence frequently create alarm and distress to people other than the immediate victims, and in assessing the need for general deterrence a sentencing judge must have regard to the impact of crime more broadly than merely upon the immediate victim.

'An additional reason for being cautious about the weight to be given to the evidence of the victim related to the nature of Tofa's evidence. One reason why courts do not allow the wishes of the victim to determine the sentence to be imposed is that the victim might not always be able to assess what is in his or her own best interest. For example, when considering what weight to give to factors of general and specific deterrence in a case of a woman assaulted by her partner a sentencing judge would be minded to have regard to the imperatives which might motivate a battered wife to plead for leniency towards her attacker. In such circumstances the sentencing judge might be cautious about giving undue weight to such a plea for leniency.

'In the present case, the victim was himself in a difficult position among other members of the Samoan community, and his acceptance of the apology might have been motivated by a range of considerations'.

R v Skura **[2004] VSCA 53 (7 April 2004) – Victorian Court of Appeal**

Eames JA at [12]-[13]: 'This Court has often acknowledged that the introduction of victim impact statements has served an important purpose of ensuring that sentencing judges have a full appreciation of the consequences of criminal conduct to the victims of the crimes, thereby ensuring that judges properly weigh the factors relevant to victims which must be considered by virtue of s.5 of the Sentencing Act 1991. The courts have also warned that the victim impact statements should not be misused so as to produce a sentence which is unfair, and that an articulate or emotional victim impact statement could not justify a sentence being imposed which was not just in all the circumstances.

'Whilst judges must be careful that they do not allow the contents of a victim impact statement to unbalance the sentencing process so as to cause a miscarriage of the judicial sentencing discretion it is undoubtedly the case that consideration of victim impact statements in many instances would have the effect of producing a more severe sentence than a judge might, at first, have thought appropriate to the circumstances. If a victim impact statement can have that effect in encouraging a view of the case which would justify a more severe sentence, then in my view sentencing judges ought to give equally appropriate weight to a victim impact statement where the victim positively expresses support for the accused and argues for a more lenient sentence'.

The State of Western Australia v Cheeseman **[2011] WASCA 15 (19 January 2011) – Supreme Court of Western Australia (Court of Appeal)**

McLure P at [2]-[3]: 'The sentencing judge said: 'The decision to suspend or not is difficult but you are I think a person in whom I can grant suspension, and primarily because of your acceptance of responsibility in these unique circumstances in which there was a matrimonial breakdown, if you like, that you have reconciled, that your partner wants you back, that there is a child of your union and that you are a person who can get employment readily within the community and thereby if the system can rehabilitate you to assume full responsibility for your family through looking after them financially and by getting back into work, then rehabilitation perhaps outweighs the requirement for you to serve the term (ts 20)'.

'The circumstances to which the sentencing judge referred are neither unique nor mitigatory. The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C'.

Options

In the following sections three possible options are considered for sentencing an offender convicted of an offence / offences committed in the context of domestic and family violence (imprisonment, intermediate sanctions and fines). While other options may be available these options have received some attention in the research literature in the context of domestic and family violence.

Imprisonment

In some circumstances a period of imprisonment will be the only appropriate option or the only option available in sentencing an offender charged with an offence committed in the context of domestic and family violence.

Australian and international studies demonstrate that offenders in general who are sentenced to a term of imprisonment are no less likely to reoffend than offenders given a non-custodial sanction. In fact, a prison sentence may increase the likelihood of reoffending where the offender has the opportunity to learn criminal behaviour and attitudes while in custody, or the stigma of having been incarcerated reduces their prospects of leading a non-criminal way of life on release [Trevena & Weatherburn 2015].

A New South Wales lower courts study has shown that domestic and family violence related offenders are less likely than those convicted of other offences to be sentenced to imprisonment; and, when imprisoned, they receive significantly shorter terms [Bond & Jeffries 2014]. A judicial study conducted in the Northern Territory reported however that imprisonment of Aboriginal and Torres Strait Islander offenders is currently the most common form of punishment in domestic and family violence related matters. It observed that while incarceration may give the victim some respite from the violence, it may not be effective in deterring the offender or like-minded offenders from violence in the future or in positively changing offender behaviours [Blokland 2016]. A US study found that offenders who served a prison sentence or were placed in a community corrections facility or received a suspended sentence exhibited much higher rates of recidivism, and that imprisonment proved effective only when combined with mandated treatment of the offending behaviour [Klein 2009].

The Australian Law Reform Commission review [ALRC/NSWLRC 2010] of legal responses to domestic and family violence highlighted the drawbacks of imprisonment as a sentencing option for domestic and family violence related offenders. While it may be a means of serving traditional sentencing objectives and providing a period of safety for victims during the offender's time in custody, it may be damaging to family relationships and financial wellbeing and to the offender's capacity to live a socially productive life.

Imprisonment - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

Chapter 12 discusses penalties and sentencing for breach of protection orders. Of note:

- The drawbacks of imprisonment are highlighted: “The use of imprisonment is costly in both financial and human terms, including for families. It may be an important means for providing some period of safety for victims, at least in the interim while the offender is in custody, as well as serving other traditional sentencing objectives, but it can be damaging. The alleged benefits of incarceration should not be overstated. Offenders may not necessarily receive access to appropriate treatment or other programs while in custody. The negative effects of prison may further undermine the offender’s capacity to live a socially productive life. Imprisonment should be used sparingly and when justified by the facts.” (12.165)
- Other options raised (as an alternative to imprisonment) included financial sanctions and community service orders (provided the work is ‘meaningful, constructive and rehabilitative’) (12.173)

Blokland, Justice Jenny, ‘Unnecessary suffering: Violence against Aboriginal women in the Northern Territory – A discussion of contemporary issues and possible ways forward’ (2016) 3 *Northern Territory Law Journal* 3.

Imprisonment is the most common form of punishment in cases of assaults by men against women (p. 4). ‘Imprisonment has generally been the sentencing outcome regardless of the contribution of the minimum mandatory terms of imprisonment. Imprisonment will obviously continue to be utilised; however, it is clear the imprisonment is not reducing the incidence of this form of violence. The reason this article focuses on this form of violence is in an attempt to understand and improve the situation, not to demonise any Aboriginal person, male or female, or their legal representatives, but to encourage diverse approaches that might deal with the problem’ (p. 10).

‘Although incarceration as a response to violence in this setting may serve a purpose in providing respite to victims for the term of imprisonment, it is clearly not deterring like-minded offenders. More significantly, for

many offenders, it is not effecting behavioural changes to stop the physical violence'(p. 13).

Bond, Christine EW and Samantha Jeffries, 'Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases' (2014) 54 *British Journal of Criminology* 849.

Using a population of cases sentenced in New South Wales lower courts between January 2009 and June 2012, this article reports 'multivariate analyses of the sentencing of domestic violence and non-domestic violence offences.' Results show that when sentenced under statistically similar circumstances, domestic violence offenders are less likely than those convicted of crimes outside of domestic contexts to be sentenced to prison although the substantive impact is small. Further, of those imprisoned, domestic violence offenders receive significantly shorter terms of imprisonment. The findings also suggest that, 'for domestic violence offences, there may be a 'punishment cost' to being older, male and Indigenous' (p. 849).

Trevena, Judy and Don Weatherburn, 'Does the first prison sentence reduce the risk of further offending?' [2015] (187) *Contemporary Issues in Crime and Justice* 1.

This study examines whether short prison sentences (up to 12 months) exert a special deterrent effect (it does not specifically examine sentencing in family violence cases). Australian and international studies 'have found little evidence that offenders given a prison sentence are any less likely to re-offend than comparable offenders given a non-custodial sanction. In fact, a prison sentence may increase the likelihood of re-offending, perhaps by providing opportunities to learn criminal behaviour and attitudes from others while in custody or because the stigma of being labelled reduces opportunities to pursue a non-criminal way of life on release' (p. 1). 'The main finding of this study is that, in a matched comparison between groups of offenders who got either a prison sentence or a suspended sentence, the subsequent time to re-offend did not depend on the type of sentence received. This suggests that there is no particular deterrent effect in receiving a prison sentence for people who had not previously been sentenced to prison, and is consistent with other findings (p. 11).

International

Bell, Margret E et al, 'Criminal Case Outcomes, Incarceration, and Subsequent Intimate Partner Violence' (2013) 28(5) *Journal of Family Violence* 489.

Abstract: ‘Given the centrality of court interventions to the U.S. response to intimate partner violence (IPV), it is crucial to evaluate their impact on reabuse. To do so, this study examined whether female IPV victims’ experiences of abuse in the year following a criminal court case against their partner varied by case outcome or by whether the batterer had or had not been incarcerated. Consistent with prior research, [this article found] no main effect differences in reabuse trajectories by court case outcome or by incarceration. [This study] also examined variables that might moderate the impact of case outcome and incarceration on rebause and found that although batterer legal history did not affect the impact of case outcome, his age, Time 1 employment status, the couple’s Time 1 living arrangement, and duration of abuse did interact with case outcome’ (p. 489).

Joel H. Garner, Christopher D. Maxwell, and Jina Lee, *The Specific Deterrent Effects of Criminal Sanctions for Intimate Partner Violence: A Meta-Analysis*, 111 J. Crim. L. & Criminology 227 (2020).

From abstract: …this research uses meta-analytic methods to assess the specific deterrent effects of three post-arrest criminal sanctions—prosecution, conviction, and incarceration—for one offense type—intimate partner violence. Based upon 57 studies that reported 237 tests of specific deterrence theory, the effects of sanctions varied: there is a marginal deterrent effect for prosecution, no effect for conviction, and a large escalation effect among incarcerated offenders. In addition, deterrent effects in the available research are stronger in tests that use more rigorous research designs, that measure repeat offending using victim interviews instead of official records, and that use new offenses against the same victim—not new arrests or new convictions against any victim—as the criteria for repeat offending.

Klein, Andrew *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice, U.S. Department of justice Programs: 2009).

This is a comprehensive review of USA based research on issues relevant to domestic violence and law enforcement. The recommendations are made in the US context. This study notes: ‘The research is fairly consistent. Simply prosecuting offenders without regard to the specific risk they pose, unlike arresting domestic violence defendants, does not deter further criminal abuse. The minority of abusers arrested who are low risk are unlikely to reabuse in the short run, whether prosecuted or not. Alternatively, without the imposition of significant sanctions including incarceration, the majority of arrested abusers who are high risk

will reabuse regardless of prosecution — many while the case against them is pending.' (at 52).

The author references a study that confirms that 'the more intrusive sentences — including jail, work release, electronic monitoring and/or probation — significantly reduced rearrest for domestic violence as compared to the less intrusive sentences of fines or suspended sentences without probation. The difference was statistically significant: Rearrests were 23.3 percent for defendants with more intrusive dispositions and 66 percent for those with less intrusive dispositions' (at p52).

The author concludes: 'Simply imposing guilty findings may not reduce the risk of reabuse. Judges should consider more intrusive sentences, including incarceration, for repeat abusers and those with prior criminal histories. (Research basis: Although studies conflict with each other on the subject of abuse prosecution, several sentencing studies suggest that more intrusive sentences may significantly deter reabuse.)' (p53)

Kramer, Ronald, 'Differential Punishment of Similar Behaviour: Sentencing Assault Cases in Specialised Family Violence Court and 'Regular Sentencing' Courts' (2015) *British Journal of Criminology Advance Access* 1.

Based on fieldwork conducted in a large, urban district court in New Zealand, this article explores legal responses to domestic and non-domestic assaults. It finds that men who assault intimate partners receive sentences that emphasize their rehabilitative needs and often result in discharges without conviction. Conversely, non-domestic assaults are met with relative severity' (p. 1).

Imprisonment - Other Bench Books

NSW

Judicial Commission of NSW, *Sentencing Bench Book* (updated 2021).

[63-500] 'Domestic violence offences' is a dedicated chapter of the bench book dealing with the sentencing approach to domestic violence and apprehended violence orders. For breaches of apprehended violence orders, the bench book notes s 14(4) of the *Crimes (Domestic and personal Violence) Act 2007* that states '[u]nless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person' [63-520].

[2-240] 'To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)' notes that 'weight should be given by a court to general and specific deterrence for a range of offences' including 'violent offences: committed in a domestic context: *Simpson v R* [2014] NSWCCA 23 at [35]; *Smith v R* [2013] NSWCCA 209 at [69]; *R v Hamid* (2006) 164 A Crim R 179 at [68]; and premeditated violence, particularly leading to grievous bodily harm, in *R v Najem* [2008] NSWCCA 32 at [33]'.

Vic

Judicial College of Victoria, *Victorian Sentencing Manual* (2022).

The bench book does not contain observations regarding imprisonment specifically in the context of family violence cases. However, it does contain some general observations.

Part 8.1 Sanction of last resort

'Legislation and the common law state that imprisonment is the sanction of last resort and is not to be imposed unless the court is satisfied that no other penalty is appropriate. Specifically, the Sentencing Act 1991 (Vic) ss 5(4)-(4C) ('the Act') state that a sentence requiring confinement of the offender cannot be imposed unless the court considers that the sentencing purposes cannot be met by another sentence.'

Imprisonment - Cases

The cases identified here provide examples of the way judicial officers have dealt with some of the issues raised in the context statement.

Click on the citation to be directed to a summary of the case in the Case Database.

***R v NQ* [2015] ACTSC 308 (14 October 2015) – Australian Capital Territory Supreme Court**

Robinson AJ at [15]: 'I have come to the view that only a sentence of imprisonment is appropriate to the level of offending in this case. There is a need to punish this offending and to send a clear message by way of general deterrence to others that participation in sexual behaviour is a matter of choice not subjugation'.

***R v Aumash* [2020] NSWDC 168 (1 May 2020) – New South Wales District Court**

> *"Placing men in gaol, an intrinsically violent environment is an ineffective way of addressing the underlying causes of crimes against women. But the need for community protection, supported by growing community perceptions about the impact of domestic violence, requires that men who commit such offences, particularly those who do so repeatedly, be removed from the community" [62].*

***R v Wilkinson* [2008] SASC 172 (4 July 2008) – South Australia Supreme Court**

Gray J at [27]: 'Although imposing longer and longer terms of imprisonment does remove perpetrators from the community, domestic violence continues and its incidence increases. The imposing of sentences of imprisonment is a blunt instrument that does not adequately address the underlying causes of domestic violence in any real way'.

***Pasinis v The Queen* [2014] VSCA 97 (22 May 2014) – Victorian Court of Appeal**

Kyrou AJA at [57]: 'General deterrence is of fundamental importance in cases of domestic violence. The victims of such violence are often so enveloped by fear that they are incapable of either escaping the violence or reporting it to the authorities. The key to protection lies in deterring the violent conduct by sending an

unequivocal message to would-be perpetrators of domestic violence that if they offend, they will be sentenced to a lengthy period of imprisonment so that they are no longer in a position to inflict harm'.

***DPP v Neve* [2013] VSC 488 (13 September 2013) – Victorian Supreme Court**

Bell J at [67]: 'Denunciation of your crimes and general deterrence are powerful sentencing considerations in your case, leading to an immediate sentence of imprisonment. Ms Fuller was your wife. You are guilty of committing appalling domestic violence towards her. Many of your actions were not only violent but calculated to belittle and demean her and place her in abject fear. The double barrel shotgun was a common feature of all five charges and it was loaded when the first four offences were committed. This criminal conduct deserves the strongest condemnation of the court. Others must be made to appreciate the consequences of committing crimes of this nature'.

***Pedrochi v Brown* [2021] WASC 81 (25 March 2021) – Western Australia Supreme Court**

The applicant's application for leave to appeal against a sentence of 2 years and 6 months imprisonment was allowed only insofar as to correct the commencement date by 4 days. It was noted at [62]-[63]:

> "It is characteristic of offences of this kind that they involve significant power imbalances (as the offence in this case did), that they are committed behind closed doors (as the offence in this case was) and that they are accompanied by lies and gas lighting (as the offence in this case undoubtedly was).
>
> These features underscore the need for the courts, in imposing sentences commensurate with the seriousness of the offence in each case and applying all relevant sentencing principles, to send a strong signal that violence of this kind is intolerable and will be dealt with accordingly. The "firming up" of sentences for such violence, referred to in *Duncan v The Queen* [2018] WASCA 154, reflects that need."

In addition, the court emphasised at [64] that:

> "offences involving strangulation are particularly serious. As [the magistrate] said "a case of non-fatal strangulation … is extremely serious" and that "the courts now recognise how serious that action is." In my view, her Honour can here be taken to be referring to the growing appreciation of the particular dangers associated with offences involving strangulation and with the role they play in cases of intimate and family

violence. That recognition has, of course, led to legislative action, introducing a specific offence of suffocation or strangulation. That offence was, of course, not in existence at the time of the appellant's offending against Ms Hallam. Nevertheless, as the learned Magistrate recognised, the recognition of the seriousness and danger of non fatal strangulation predated those legislative reforms and was a relevant sentencing consideration."

Intermediate sanctions

While Australian state and territory sentencing legislation and case law vary in terminology and approach, there are sentencing options available in each jurisdiction that allow for suitable offenders who have committed offences involving domestic and family violence to be placed on orders requiring them to be supervised in the community and/or to abide by specific conditions. Such conditions may include performing community-based work, undertaking a rehabilitation program, or other conditions that ensure the offender complies with a current Family Court order or a protection order.

The Australian Law Reform Commission's review of legal responses to domestic and family violence [ALRC/NSWLRC 2010] notes significant support from stakeholders for sanctions that are designed to help change the behaviour of violent offenders, including rehabilitation programs addressing the offending behaviour, drug and alcohol misuse, counselling and psychiatric needs, and other therapeutic interventions.

The Sentencing Advisory Council Victoria [Vic Sentencing Advisory Council 2009] observes that multiple sanctions requiring community work and mandatory attendance at a behaviour change program may provide a constructive balance between punitive and coercive rehabilitation measures, while also ensuring the protection of the victim and community. They may also be more effective in achieving deterrence and long-term compliance with a protection order than a fine or term of imprisonment.

USA studies have shown that while a suspended sentence or fine negated the deterrent value of a conviction [Ventura & Davis 2005], specialised domestic violence probation supervision programs for lower-risk offenders [Klein et al 2008] (with conditions similar to those already identified) resulted in significantly reduced recidivism rates, improved offender accountability and greater victim satisfaction with outcomes.

Intermediate sanctions - Key Literature

Australia

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. Chapter 12 discussed penalties and sentencing for breach of protection orders. The report notes that: 'The overwhelming majority of stakeholders that addressed this issue were in favour of sanctions that could help to change the behaviour of those who commit violence. Therefore, there was support for 'perpetrator programs' such as violence and drug and alcohol rehabilitation programs; probation with special conditions, such as attending 'perpetrators' courses or counselling'; men's behaviour programs; psychiatric assessment and treatment; anger management programs; and educational programs on family violence with 'therapeutic interventions'' (at [12.172].) Other options raised (as an alternative to imprisonment) included community service orders (provided the work associated with the penalty is 'meaningful, constructive and rehabilitative') (at [12.173])

Queensland Police Service, 'The Domestic and Family Violence GPS-Enabled Electronic monitoring Technology, Evaluation Report, April 2019, Government of Queensland.

This report presents the findings of a trial of GPS tracking for family violence offenders and victims in Queensland. The trial assessed the effectiveness, reliability and responsiveness of GPS-enabled technology to track an individual accurately and activate an alert in the event of a pre-programmed zone being breached. The GPS-enabled technology was tested in different geographical areas and with police personnel rather than actual offenders and victims. Thirty-five tests were carried out, with the technology failing to respond in 26% of cases. The technical issues are discussed in more detail. Overall, the findings demonstrate that electronic monitoring does not provide an effective risk-mitigating solution for high-risk perpetrators and is not a reliable substitute for perpetrator case management. However, it may be of use in some lower-risk cases, in conjunction with other measures. This trial was a suggestion of the 2015 Queensland Special Taskforce on Domestic and Family Violence, which noted how little was known about electronic monitoring programs.

Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family violence Intervention Orders: Final Report* (2009).

This report was compiled by the Sentencing Advisory Council Victoria and examines the penalties awarded for the breach of protection orders. The Council compiled the report by reviewing relevant literature on family data, analysing data on sentencing and conducting new research by consulting those involved in the sentencing process (magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group). The report made a number of comments around community based sentencing responses: (at 2)

- It observed that 'sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition), which are structured to ensure that it is the offender that must serve the punishment, may be more effective in achieving this sentencing purpose'
- It noted that 'another sentencing purpose that can be compatible with protecting the victim (particularly in the long term) is rehabilitation. There will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine. Such sentences may achieve more in ensuring long-term compliance with the intervention order.
- It identified that the 'central purpose [in sentencing] should be achieving compliance with the order to ensure the protection of the victim and the community. This is not to suggest that these offenders should always receive sentences of imprisonment. The Council would suggest that in some cases sanctions that intervene in the offender's pattern of violent behaviour, such as community-based orders and intensive correction orders, may be more appropriate.'

Sentencing Advisory Council (Vic), *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015).

This report is a continuation of previous monitoring work, examining sentencing patterns over yearly periods from 2009 and 2015 for offences involving contravention of a family violence intervention order (FVIO) or a

family violence safety notice (FVSN) made under the *Family Violence Protection Act 2008* (Vic). In particular, this report examines sentencing for the offences of:

- contravention of an FVIO;
- contravention of an FVSN;
- contravention of an FVIO intending to cause harm or fear for safety;
- contravention of an FVSN intending to cause harm or fear for safety; and
- persistent contravention of notices and orders.

In terms of sentencing for FVIO and FVSN contravention, there was an increase in the use of imprisonment and community sentences (including community correction orders (CCOs), following the phased abolition of suspended sentences.

Trimboli, Lili, 'Persons convicted of breaching Apprehended Domestic Violence Orders: their characteristics and penalties' NSW Bureau of Crime and Statistics Research, Issue 102, January 2015.

This paper describes the characteristics of those found guilty of breaching an Apprehended Domestic Violence Order (ADVO) in NSW in 2013 and the principal penalties they received. Of 3,154 persons who were found guilty of breaching an ADVO as their principal offence n132 (4.2%) received a community based sentence with an average of 111 hours of work and n489 (15.5%) received a good behaviour bond with supervision (average time 16 months).(at 3)

International

Joel H. Garner, Christopher D. Maxwell, and Jina Lee, *The Specific Deterrent Effects of Criminal Sanctions for Intimate Partner Violence: A Meta-Analysis*, 111 J. Crim. L. & Criminology 227 (2020).

From abstract: …this research uses meta-analytic methods to assess the specific deterrent effects of three post-arrest criminal sanctions—prosecution, conviction, and incarceration—for one offense type—intimate partner violence. Based upon 57 studies that reported 237 tests of specific deterrence theory, the effects of sanctions varied: there is a marginal deterrent effect for prosecution, no effect for conviction, and a large escalation effect among incarcerated offenders. In addition, deterrent effects in the available research are stronger in tests that use more rigorous research designs, that measure repeat offending using victim

interviews instead of official records, and that use new offenses against the same victim—not new arrests or new convictions against any victim—as the criteria for repeat offending.

Klein, Andrew et al. *Evaluation of the Rhode Island Probation Specialized Domestic Violence Supervision Unit* (2008) National Criminal Justice Reference Service.

This USA based study examines a specialised domestic violence probation supervision compared to standard probation supervision where supervision includes a mix of cases. It found several significant differences. The specialised domestic violence probation supervision program consists of a 26 week batterer intervention program, routine checks by a parole officer and a substantial percentage of offenders were ordered to have no contact with their victims. Few were required to undergo treatment for and/or remain abstinent from drugs and/or alcohol. The study is on 552 random male probationers drawn from nearly 3000 misdemeanour probationers in Rhode Island as of January 1, 2003.The study concluded that lower-risk abusers, constituting almost half of the probation abuser caseload supervised by the specialized unit, were significantly less likely to be rearrested for domestic violence and nondomestic violence crimes than were those supervised in the traditional mixed caseloads. Victims' satisfaction appeared to be higher, and abusers were held more accountable (the authors make this statement based on the higher number of probationers charged with technical breaches that those in the mixed case group). The authors speculate on the reasons why this specialised approach to probation may have positive effects on recidivism.

A version of this report is also published as: Crowe, Ann and Andrew Klein, 'Findings From and Outcome Examination of Rhode Island's Specialised Domestic Violence Probation Supervision Program' (2008) 14(2) *Violence Against Women* 226-246.

Klein, Andrew *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice, U.S. Department of justice Programs: 2009).

This is a comprehensive review of USA based research on issues relevant to domestic violence and law enforcement. The recommendations are made in the US context. Notes that a review of reported studies confirms that 'the more intrusive sentences — including jail, work release, electronic monitoring and/or probation — significantly reduced rearrest for domestic violence as compared to the less intrusive sentences of fines or suspended sentences without probation. The difference was statistically significant: Rearrests were

23.3 percent for defendants with more intrusive dispositions and 66 percent for those with less intrusive dispositions' (at p52).

Johnson, Richard, 'Correlates of Re-arrest among Felony Domestic Violence Probationers' (2008) 72(3) *Federal Probation* 42- 47.

This USA based study considers the factors associated with recidivism whilst on probation for a domestic violence offence. A sample of 273 domestic violence offenders in a suburban county in the Chicago metropolitan area was examined. Of the 273 offenders, 112 (41%) the following characteristics increased the likelihood of reoffending (p 45): young age, employment instability, residential instability, residing with the victim, substance abuse, prior criminal and violence convictions. Whether or not the offender had successfully completed a domestic batterer counselling program prior to his current sentencing was not significantly associated with re-arrest, (p 46). The strongest predictor for re-arrest was having a prior conviction for a drug and/or alcohol offence, this almost doubled an offender's odds of re-arrest while on probation. The article concludes that taking into account the characteristics of an offender and tailoring a probation program on the likelihood of re-arrest could significantly increase the efficiency of legal responses to domestic violence (p 47).

Johnson, Richard, 'Intensive Probation for Domestic Violence Offenders' (2001) 65(3) *Federal Probation* 36-39.

This USA based study investigates a specialist Domestic Violence Program (the Domestic Violence Officer Program) set up in Kane County, Illinois (within the Chicago Metropolitan area). The program selected high-risk domestic violence offenders (classified as repeat or serious offenders) for specialised supervision (which included a 26-week domestic violence counselling program) as part of a sentence. The first 25 offenders placed in the program were monitored and compared to a control group of similar offenders and it was found that those who completed the domestic violence counselling program were less likely to be arrested for a new criminal or domestic violence offence in the 24 months after being sentenced to probation. The short term results of the program appeared promising, but note that the program was not probation alone but rather probation combined with heightened supervision and counselling. It is noted that the supervision of domestic violence offenders on probation can be difficult and sometimes dangerous.

Olson, David and Loretta Stalans, 'Violent Offenders on Probation: Profile, Sentence, and Outcome Differences Among Domestic Violence and Other Violent Probationers' (2001) 7(10) *Violence Against Women* 1164-1185.

This USA based research reports on the analysis of data collected from every adult probationer discharged from supervision during a 4-week period in November and December 1997 in Illinois. The information collected was grouped into three categories: probationer characteristics, conditions of the probation sentence and measures of case outcome. Data from 2438 offenders was obtained – 124 (5%) of those were domestic violence offenders. The authors report that domestic violence offenders were more likely to report a substance abuse history (though less likely to report alcohol abuse). However there were no other significant differences between domestic violence perpetrators and others. Because domestic violence offenders were primarily charged with lower level offences, the sentence length was significantly shorter (15.4 months v 22.4 months. Sentences for domestic violence offences had more conditions attached – the offenders were more likely to have to pay fines, attend programs, but less likely to be required to do community service. Domestic violence offenders were 3 times more likely to re-victimise the original victim, they were more likely to be contacted by probation officers. Those convicted and ordered probation were four times more likely to re-victimise. Those ordered to complete treatment were five times more likely to re-victimise (the authors speculate that this was possibly because these were more serious offenders).

Uekert, Brena et al., *Juvenile Domestic and Family Violence: The Effects of Court-Based Intervention Programs on Recidivism* (The National Centre for State Courts, 2006).

This is a USA based study on the effectiveness of court-based intervention programs (essentially probation with intensive supervision) for juvenile domestic and family violence perpetrators. The study involved three sites: Santa Clara, San Francisco and Contra Costa County. Agency and community-based staff were interviewed, court hearings were observed and agency protocols and reports were collected. Data on program completion showed among other things that: offenders with prior delinquency records were less likely to successfully complete probation and program requirements than were those without prior records; all things being equal- the likelihood of successfully completing the probation program increased if the offender did not violate probation, the offender was placed on electronic monitoring, the offender was not in Santa Clara County, and the offender was young. Primary findings from the study include the following:

The specialised intervention programs in both Santa Clara and San Francisco counties had a deterrent effect on first-time offenders. The deterrent effect, which lasted up to two years following the date of the incident, was especially apparent in Santa Clara County.

Ventura, L., and G. Davis. "Domestic Violence: Court Case Conviction and Recidivism." (2005) 11(2) *Violence Against Women* 255-277.

This USA based study examined recidivism among a cohort of 519 cases. While fines and suspended sentences were found to be significantly associated with recidivism (p271), by comparison, of the 189 convicted batterers who received sanctions of jail time, work release sentence, electronic monitoring, or probation, only 44 (23.3%) were rearrested on domestic violence during the follow-up period (p272). The authors conclude in part: 'that any deterrent value of conviction may be negated when the sanctions imposed are only suspended sentences or fines. Such sanctions may have little impact on the convicted batterer. The authors speculate that if a convicted batterer receives only a fine or a suspended jail sentence without probation, the offender has no specific rules or treatment requirements to complete to avoid incarceration.

Intermediate sanctions - Other Bench Books

QLD

Magistrates Court of Queensland, *Domestic and Family Violence Protection Act 2012 Bench Book* (2021).

See section 20.9 and 20.10 for a discussion of sentencing breach of protection order conditions.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

See 4.1.1.3 for a discussion of sentencing responses to contravention of protection order charges.

NSW

***Judicial Commission of NSW, Sentencing Bench Book* (updated 2022).**

[63-500] 'Domestic violence offences' is a dedicated chapter of the bench book dealing with the sentencing approach to domestic violence and apprehended violence orders.

Fines

Sentencing Advisory Councils in Victoria [Vic Sentencing Advisory Council 2009] and Tasmania [Tas Sentencing Advisory Council 2015] explain that the purpose of a fine is to punish the offender and act as a deterrent to future offending by the offender and others. However, it is acknowledged that, in the context of domestic and family violence, a fine may not be an appropriate sanction because it may adversely impact the victim. For example, the fine may need to be paid from the joint financial resources of the victim and offender, or the offender may threaten or coerce the victim into paying the fine. This outcome may perpetuate the violence experienced by the victim and erode financial resources necessary to meet the daily living needs of the victim and their families [Stewart 1999].

In some studies victims have reported feeling that the imposition of a fine trivialised or minimised the harm [Douglas & Stark 2010] they had experienced, or feeling that the court had not taken a breach of a protection order charge seriously [Douglas & Godden 2002] where a fine was ordered. US research indicates that less intrusive sentences (such as fines and suspended sentences) impose limited responsibility on an offender to account for the harm they have caused, or to take steps to change their behaviour [Klein 2009].

Other Australian bench books [Other Bench Books] explain the potentially adverse implications of fines as a penalty option in the domestic and family violence context, and encourage judicial officers to have regard to all relevant factors, including the offender's financial means.

Fines - Key Literature

Australia

Douglas, Heather and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (2010).

This research draws on interviews with 20 women who had experienced domestic violence, many of whom gave evidence in domestic violence-related court proceedings. Some of the women reported:

- Speaking out in court was the first time many women spoke publicly about their abuse;
- Some women felt that they were in danger when they went to court (p 70);
- That court staff should be properly trained about domestic violence;
- It would be helpful if court staff could advise when the violent partner had left court (p 71);
- It was extremely stressful waiting in the court foyer for their matter to be called. Some women experienced further intimidation and abuse from their former partners while waiting for their case to be called on while others were worried that further trouble might arise;
- When they had access to safe rooms to wait they felt much safer and less intimidated (p 73);
- Different access points to the court for victims and offenders (p 74).

Douglas, Heather and Lee Godden, 'Decriminalisation of Domestic Violence: Possibilities for Reform' (Paper presented at the "Expanding Our Horizons" Conference, Sydney, 18-22 February 2002).

This paper examined the interaction between the Queensland Criminal Code and the *Domestic Violence (Family Protection) Act*. Specifically, with regards to fines, the paper reports: there is a broad recognition that the imposition of fines is inappropriate in matters of domestic violence, as they are often paid by the accused or from the joint household income (p 10). In some studies it is noted that women believed that fines were an indication that the court had not taken the incident seriously (p 14)

Sentencing Advisory Council (Vic), *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009).

This is a report compiled by the Sentencing Advisory Council from Victoria on Intervention Orders in Victoria: their usage, purpose, efficacy and, most importantly, the penalties awarded for their breach. The Council compiled the report by reviewing relevant literature on family data, analysing data on sentencing and conducting new research by consulting those involved in the sentencing process (magistrates, court staff, Victoria Police, community legal centre representatives, family violence service providers, defence lawyers, workers from men's family violence programs and a family violence victims' support group). The report found:

- The sanctions imposed during sentencing for breach of a family violence order were considered by most stakeholders to be far too lenient (viii)
- Fines are inappropriate sentences for breach of intervention orders (viii) as they can punish the victim as well as the offender (ix)

'Some sentences which are intended to punish the offender may fail to achieve that purpose. For example, the most common sentencing disposition for breaching an intervention order is a fine. The purpose of a fine is generally said to be to punish the offender and act as a deterrent to future offending by the offender and others. However, the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine.' (at [6.12]).

Sentencing Advisory Council (Vic), *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices: Second Monitoring Report* (2015).

This report is a continuation of previous monitoring work, examining sentencing patterns over yearly periods from 2009 and 2015 for offences involving contravention of a family violence intervention order (FVIO) or a family violence safety notice (FVSN) made under the *Family Violence Protection Act 2008* (Vic). In particular, this report examines sentencing for the offences of:

- contravention of an FVIO;
- contravention of an FVSN;
- contravention of an FVIO intending to cause harm or fear for safety;
- contravention of an FVSN intending to cause harm or fear for safety; and
- persistent contravention of notices and orders.

In terms of sentencing for FVIO and FVSN contravention, there was an increase in the use of imprisonment and community sentences (including community correction orders (CCOs), following the phased abolition of suspended sentences.

Stewart, Anna, *Domestic Violence: Deterring Perpetrators*. Paper presented at the 3rd National Outlook Symposium Mapping the Boundaries of Australia's Criminal Justice System, Canberra, 22-23 March 1999.

This paper explores how the criminal justice system can adequately respond to the issue of domestic violence and the role of the victim in deterring perpetrators. With regard to the imposition of fines, the author considered them an unhelpful punishment as they were inevitably paid for out of the household budget (p 10)

Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders: Final report No.5* (2015).

See section 3.83 The Use of Fines.

'The purpose of a fine is 'generally said to be to be to punish the offender and to act as a deterrent to future offending by the offender and others.' However, in the context of family violence, a fine may also in effect punish the victim as well. The Victorian Sentencing Advisory Council has considered the use of fines for breaches of family orders and suggests that they are 'generally an inappropriate sanction.' The Council noted that they do not address the offending behaviour and in any case it is often the victim who ends up with the burden of paying the fine. The offender may threaten or coerce the victim into paying the fine for him. Funds which would otherwise be used to satisfy the needs of the family — food, clothing, rent or child support — are directed instead to paying the fine. The Victorian Council recognised that 'sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition)' which are structured to ensure that the burden of the penalty falls on the offender are more appropriate for this offence.' (p31)

Taylor, Annabel, Nada Ibrahim, Shellee Wakefield and Katrina Finn, *Domestic and family violence protection orders in Australia: An investigation of information sharing and enforcement: State of*

knowledge paper **(ANROWS, 2015).**

Care should be taken with this report as many jurisdictions have changed their legislation since this report was produced. South Australia now imposes a maximum term of 10 years imprisonment for a breach which is a second or subsequent aggravated offence involving physical violence or a threat thereof. The Northern Territory imposes a mandatory 7 days imprisonment for repeat offenders and multiple states have tiered penalties for subsequent offences.

The authors note: 'The penalties for breaches of protection orders vary across states and territories which can be expected given that each respective domestic violence law has had its own history of development and amendments.' This paper presents an overview of available monetary penalties for breach of protection order in Australian jurisdictions in 2015 (see p16-17). The authors identify the variety of different levels of fines available.

Trimboli, Lili, 'Persons convicted of breaching Apprehended Domestic Violence Orders: their characteristics and penalties' NSW Bureau of Crime and Statistics Research, Issue 102, January 2015.

This paper describes the characteristics of those found guilty of breaching an Apprehended Domestic Violence Order (ADVO) in NSW in 2013 and the principal penalties they received. Of 3,154 persons who were found guilty of breaching an ADVO as their principal offence about one in five (22.5%) received a bond without supervision (average length=14 months) as their principal penalty; 17.8 per cent (n 560) were fined (average amount=$432) (p4).

International

Klein, Andrew *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice, U.S. Department of justice Programs: 2009).

This is a comprehensive review of USA based research on issues relevant to domestic violence and law enforcement. The recommendations are made in the US context. Notes that a review of reported studies confirms that 'the more intrusive sentences — including jail, work release, electronic monitoring and/or probation — significantly reduced rearrest for domestic violence as compared to the less intrusive sentences of fines or suspended sentences without probation. The difference was statistically significant: Rearrests were 23.3 percent for defendants with more intrusive dispositions and 66 percent for those with less intrusive

dispositions' (at47).

Ventura, L., and G. Davis. "Domestic Violence: Court Case Conviction and Recidivism." (2005) 11(2) *Violence Against Women* 255-277.

This USA study examined recidivism among a cohort of 519 cases. The only sanction found to be significantly associated with recidivism was receiving a suspended sentence or fines (p271). Of the 15 'batterers' who received a suspended sentence or fines recidivated on another domestic violence charge during the 1-year follow-up period. By comparison, of the 189 convicted batterers who received sanctions of jail time, work release sentence, electronic monitoring, or probation, only 44 (23.3%) were rearrested on domestic violence during the follow-up period. (p272) The authors conclude in part: 'that any deterrent value of conviction may be negated when the sanctions imposed are only suspended sentences or fines. Such sanctions may have little impact on the convicted batterer. If a convicted batterer receives only a fine or a suspended jail sentence without probation, the offender has no specific rules or treatment requirements to complete to avoid incarceration. There is no ongoing monitoring of the batterer. This lack of monitoring and lack of accountability maybe interpreted by a batterer as the equivalent of receiving a free pass to do as he pleases.'

Fines - Other Bench Books

NSW

Judicial Commission of NSW, *Sentencing Bench Book* (updated 2022).

[6-110] 'Availability'

There are restrictions imposed on the court in exercising the discretion to impose a fine. Section 6 *Fines Act* 1996 provides that:

In the exercise by a court of the discretion to fix the amount of any fine, the court is required to consider:

(a) such information regarding the means of the accused as is reasonably and practicably available to the court for consideration, and

(b) such other matters as, in the opinion of the court, are relevant to that fixing of the amount.

Vic

Judicial College of Victoria, Family Violence Bench Book (2014).

See 4.1.1.3 for a discussion of sentencing responses to contravention of protection order charges.

Fines - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Carol

Family law proceedings

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act*

1975.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Family law proceedings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Erin

Felicity

Gillian

Jane

Susan

Foundational information

Foundational information - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. The effect of family violence and parenting arrangements is discussed at [15.11] (p 675). The report notes that –

- 'Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims' parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self-esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim's behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.'

Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135, March 2019

The ALRC was commissioned to consider appropriate reforms to the family law system and *Family Law Act* necessary or desirable in relation these matters (see the Terms of Reference and p5 of the Final Report):

- the appropriate, early and cost-effective resolution of all family law disputes
- the protection of the best interests of children and their safety
- family law services, including (but not limited to) dispute resolution services
- family violence and child abuse, including protection for vulnerable witnesses
- the best ways to inform decision makers about the best interests of children, and the views held by children in family disputes
- collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection

systems

- whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes
- rules of procedure, and rules of evidence, that would best support high quality decision making in family disputes
- mechanisms for reviewing and appealing decisions
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness
- the underlying substantive rules and general legal principles in relation to parenting and property
- the skills, including but not limited to legal, required of professionals in the family law system
- restriction on publication of court proceedings
- improving the clarity and accessibility of the law
- any other matters related to these terms of reference.

The ALRC released its report in March 2019, including 60 recommendations for reform. Key recommendations include:

- closing jurisdictional gaps between Commonwealth and state/territory courts
- factors to be considered when determining parenting arrangements that promote a child's best interests
- compliance with children's orders
- introducing a statutory tort of family violence applicable in the context of determining the division of property interests
- encouraging amicable resolution between parties of property and financial matters
- case management and social support services for people engaged with the family law system.

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-

separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men. Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports. The study raised many questions about how well family law policies, as expressed in the legislation and implemented in the national service system, respond to violence in families such as those who were involved in this research (p 49).

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This paper investigates the separate impacts of parental substance misuse, domestic violence and parental mental health problems. It presents evidence regarding the extent to which these problems co-occur and a discussion of the wider context of exclusion and disadvantage, its causes and its consequences. Finally, it provides an overview of research and theory for working with families with multiple and complex problems. This literature review cites statistics from a US study, the statistics were collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See generally from p 4 – 'There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them. These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs' (p 4).

The theme of the report is discussed at p 5 - 'A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding'.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter discusses the history and place of family law in Australia's federal system. Difficulties in addressing family violence in what is an often fragmented legal framework are discussed. Many different courts and jurisdictions are involved, especially where the dispute extends between states or territories. This is particularly problematic where child protection is an issue.

De Maio, John, et al, 'Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011' (Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.

Family Law Council, 'In Response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report to the Attorney-General, June 2015).

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the first two matters. The remaining matters will be dealt with in a report due June 2016.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and

territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

This report comprehensively summarises the legislative provisions governing the resolution of parenting disputes under the Family Law Act, and the intersection with legal systems governing family violence and child protection. Some important observations:

- Fragmented legal systems – families most likely to be involved with more than one of these jurisdictions are those with support needs associated with DFV and at a time of high risk and vulnerability (child protection/children's court; family courts; state/territory DFV courts)
- Reluctance by state/territory magistrates to use s68R FLA to vary Family Court orders when making DFV orders in order to resolve inconsistencies between DFV orders and parenting orders; can be done on its own motion without the consent of the parties; and sometimes magistrates assume that the parenting order is sufficient to protect child without needing to include the child on the DFV order (concerns about inadequate time limits in s68T on variation/suspension of parenting order where done in interim proceedings)
- The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 Family Violence – A National Legal Response report. They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:
    - a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others involved in family violence protection order proceedings;
    - a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
    - judicial officers lacking adequate information or evidence necessary to amend the parenting orders;

and

- parties to proceedings not having access to appropriate legal advice.

Family Law Council, Report to the Attorney-General on 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, June 2016 (Terms, 3, 4 & 5)'.

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the matters listed below in items 3, 4 and 5.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

The Family Law Council made 22 recommendations (summarised at pp12-18) in the following areas:

- Family safety services
- Early whole-of-family risk assessments
- Family lawyers and risk identifications
- Family dispute resolution practitioners and risk management strategies

- Judicial risk assessments and court-ordered programs
- A court-based integrated services model
- Case-managed integrated services in the family relationships sector
- Self-represented litigants with complex needs
- Support services for families in rural and regional areas
- Collaboration between family law and state and territory courts
- Family violence competency
- Joint professional development
- Children's views and experiences
- Family dispute resolution and confidentiality
- State and territory courts exercising family law jurisdiction
- Aboriginal and Torres Strait Islander families
- Culturally and linguistically diverse families
- Court support workers
- Self-represented litigants and misuse of process
- Crossover cases
- Consent parenting orders
- Legislative reform.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers how the [former] Family Court of Australia deals with matters involving children where there are allegations of abuse. It identifies that the balancing of the interests of the children and the parents, and frequently of other people associated with the children, is at the centre of what is just in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Evidence issues are

discussed in detail.

Kaspiew, Rae, et al, '[Evaluation of the 2012 Family Violence Amendments]' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of practices and perspectives of family law professionals (*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- Court Outcomes Project involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts and
    - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much

less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)'* (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who had separated between 1 July 2010 and 31 December 2011; and the 6,079 parents surveyed in the SRSP 2014, who had separated between 1 July 2012 and 31 December 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 represents parents' their post-reform experiences.

Together with the Longitudinal Study of Separated Families (LSSF) Wave 1 data, these samples of separated parents reported similar levels of family violence, with around 1 in 5 parents indicating they suffered physical hurt by their former partner and nearly 2 in 5 reporting emotional abuse alone (p 14). See generally chapter 3 – 'Family Violence and Safety Concerns'. Most parents in both cohorts reported at least one type of emotional abuse before/during or since separation (p 58). Further, 'overall, mothers reported experiencing emotional abuse in greater proportions than fathers both before/during separation and since separation' (p 58). The most commonly reported form of emotional abuse (see p24) was '—insults with the intent to shame, belittle or humiliate' (p 58). A similar proportion of parents in both cohorts reported that their children saw or heard family violence prior to or during separation (p 60). However, the proportion of parents reporting that their children witnessed family violence in the period since separation decreased in the second cohort.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

It concludes that 'overall, the general patterns in findings suggest a positive response to the 2012 family violence reforms, with practitioner responses indicating that protection from harm is given greater weight now than it was previously, and that advice-giving practices have shifted in a direction consistent with the intent of the reforms to better identify families where this is an issue. At the same time, the responses do not suggest that any less weight is placed on maintaining relationships with parents and children after separation where this is appropriate' (p 13).

Practitioners' views about striking the right balance between protecting a child from harm and maintaining a meaningful relationship with both parents (in the context of the 2012 reforms and the 'tie-breaker' provision (s 60CC(2A)) of the *Family Law Act 1975* (Cth)) are discussed from p 14. Many practitioners were positive about the effect of s 60CC(2A) in re-prioritising family violence and protecting children from harm which leads to better outcomes for children.

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are ‘not uncommon’ for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, Rae et al, ‘Evaluation of the 2006 Family Law Reforms’ (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

- See generally Chapter 2: ‘Characteristics of separated parents: Challenges and issues for family relationships and wellbeing’. Of particular relevance is the discussion from p 24 dealing with ‘Separated parents’ reports of experiencing family violence’. It was found that nearly two-thirds of separated mothers and just over half of separated fathers indicated that they suffered emotional abuse from their partner

before or during separation. 26% of mothers and 16.8% of fathers indicated that they suffered physical abuse prior to their separation. Of this group, most respondents indicated that their children witnessed violence or abuse.

- See from p 29 which considers - 'Co-occurrence of family violence, mental health problems and addiction issues'. It was found that parents who indicated that both mental health and addiction issues were present were most likely to report that the other parent had physically hurt them (43% of fathers and 50% of mothers). Overall, 'experiences of family violence were reported by 85% of fathers and 92% of mothers who said that both mental health and addiction issues had been present before separation, compared with 41% of fathers and 46% of mothers who said that neither of these problems had been present. In other words, family violence seemed to be pervasive among families in which both mental health and addiction issues were thought to be present' (p 30).
- See Chapter 10: 'Family violence and child abuse: Parents' pathways and professionals' perspectives'. This chapter is relevant in relation to its general discussion of family violence in the family law system.
- See Chapter 11, 'Children's wellbeing', in particular section 11.3 (p 262) which discusses 'Family violence, safety issues and the nature of inter-parental relationships'.

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia,

particularly in relation to parenting orders. See especially from p 179 which discusses ‘Shared parenting and family violence’. The author notes, ‘the issue of protecting women and children from violence has not proved effective as an argument against laws that recognise the indissolubility of parenthood, nor against having any provisions in legislation that encourage the continuing involvement of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children’s lives, and an increased risk of violence. There is simply no evidence for a linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver.’

The chapter concludes – ‘There is no future in arguments that say encouraging the involvement of both parents in children’s lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence… The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence’ (p 183).

Qu, Lixia et al, ‘Post-separation parenting, property and relationship dynamics after five years’ (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and

compares this with care-time arrangements and family dynamics.'

The findings painted a positive picture of separated families overall but there were still a minority of parents who faced significant issues such as violence and abuse and held safety concerns. 'It has become increasingly clear that each of the mainstream professions in the family law system has a potentially constructive role to play in helping to untangle the serious predicaments in which a minority of family law clients find themselves' (p xix).

For example, higher levels in children's wellbeing emerged where parents indicated that there was a positive inter-parental relationship – 'consistently low or worsened child wellbeing was more likely to be reported by parents who reported experiencing violence/abuse, holding safety concerns, or having negative inter-parental relationship in both waves compared with reports of other parents' (p 162).

Also, where emotional abuse was experienced by a small minority of parents (in Wave 3 of the data), large proportions of these victims indicated that the abuse occurred 'sometimes or often', as opposed to 'rarely or only once' in the preceding 12 months (p 40).

'In fact, most respondents who stated that the other parent had engaged in humiliating insults, monitored their whereabouts, or circulated of defamatory comments also indicated that these behaviours occurred sometimes or often. After about five years of separation, the monitoring of a person's whereabouts may be particularly likely to reflect obsessive harassment, unless such monitoring has been instigated by genuine concerns about personal safety or the safety of others, including the children' (p 40).

Tomison, Adam M, 'Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence' (National Child Protection Clearinghouse Issues Paper No 13, Australian Institute of Family Studies, June 2000).

This article reviews the research about the relationship between domestic violence and various forms of child maltreatment. In particular, it points to the high proportion of cases of emotional abuse of children identified by child protection workers in families where there is domestic and family violence and to the mild association between presence of domestic violence and a higher than expected proportion of children sustaining injuries. Pages 8-9 of this article discusses the variety of ways a child may be exposed to domestic violence, including as a hostage to ensure the mother's return home and forcing a child to watch assaults.

Foundational information - Other Resources

Children: Safety and Risk.

Open via Federal Circuit and Family Court of Australia website

. This webpage contains information about requirements to notify the Court about family violence and child abuse, family violence orders, risk assessment, Lighthouse, staying safe at court and getting help and support.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Family Violence Information Sheet (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This information sheet contains important information for litigants who allege they have experienced, or are alleged to have perpetrated, family violence, including safety at court, legal and support services at court, and cross-examination.

Family Violence: Overview.

Open via Federal Circuit and Family Court of Australia website.

This webpage outlines the principles which guide the FCFCA's response to family violence, behaviours which may constitute family violence, coercive and controlling behaviours which may amount to family violence and common forms of family violence.

It also contains links to information on:

- Help and support;
- Family violence orders;
- Family violence and children;
- How the court considers safety and risk;
- Safety at court;
- Frequently asked questions; and
- Lighthouse.

Family Violence Plan - Former Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan ‘builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation’. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan ‘contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.’

See in particular at p 2, ‘The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child’s best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.’

Guidelines for Independent Children’s Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.

Open via Family Court of Western Australia website.

Independent Children’s Lawyer information sheet.

Accessible via Legal Aid Western Australia.

Independent Children’s Lawyers, National Legal Aid: About.

Includes information about the role of Independent Children’s Lawyers and links to information brochures for

children, parents and potential supervisors.

Parental conflict and its effect on Children (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This fact sheet provides information for parents about the ways family conflict affects children, both in families who live together and in families who have separated.

In families where there is a high level of conflict and animosity between parents, children are at a greater risk of developing emotional, social and behavioural problems, as well as difficulties with concentration and educational achievement.

Frequent and intense conflict or fighting between parents also has a negative impact on children's sense of safety and security which affects their relationships with their parents and with others. Parental conflict that focuses on children is also linked to adjustment problems, particularly when children blame themselves for their parents' problems.

'Good quality parenting', that is parenting that provides structure, warmth, emotional support and positive reinforcement, has been found to reduce the impact of conflict.

Reconciliation Action Plan 2019-2021: Former Federal Circuit Court of Australia.

Open via Federal Circuit and Family Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

What is an Independent Children's Lawyer?

A brochure accessible via:

Legal Aid New South Wales

Legal Aid Queensland

Legal Aid Commission of Tasmania

FCFCA Family Violence Best Practice Principles

> ***Family Violence Best Practice Principles – December 2016***

Open via Federal Circuit and Family Court of Australia website.

FCFCA Family Violence Best Practice Principles - Cited References

The following references are cited in the *Family Violence Best Practice Principles – December 2016*.

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks* (Consultation Paper, 2010).

On 17 July 2009, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry together with the New South Wales Law Reform Commission (NSWLRC) into particular questions in relation to family violence that had arisen from the 2009 report of the National Council to Reduce Violence against Women and their Children, Time for Action. At its meeting on 16–17 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed that Australian law reform commissions should work together to consider these issues. The ALRC was asked to consider the issues of:

1. the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, State and Territory criminal laws; and
2. the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence' (p 7).

The Consultation Paper is arranged in five Parts: an introductory section, followed by parts dividing up the subject areas of the Terms of Reference as providing the lens through which the interaction issues are considered' (p 91).

Bartels, Lorana, 'Emerging Issues in Domestic/Family Violence Research', Research in Practice report no.10, Australian Institute of Criminology, April 2010.

The paper presents an overview of the key emerging issues in Australian domestic and family violence research. In particular, the paper considers this research in the context of gay, lesbian, bisexual, transgender and intersex communities; the elderly; those with disabilities; people from culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander communities; homelessness; the impact on children; and issues around perpetrator programs.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

Professor Chisholm was required to 'assess the appropriateness of the legislation, practices and procedures' that apply in cases where family violence is an issue and to recommend improvements. The author acknowledged the challenges that family violence presents for the family law system and observed that more than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent (p 4). The report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

Jaffe, Peter G et al 'Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans' (2008) 46 *Family Court Review* 500.

Premised on the understanding that domestic violence is a broad concept that encompasses a wide range of behaviors from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim, this article addresses the need for a differentiated approach to developing parenting plans after separation when domestic violence is alleged. A method of assessing risk by screening for the potency, pattern, and primary perpetrator of the violence is proposed as a foundation for generating hypotheses about the type of and potential for future violence as well as parental functioning.

James, Kerrie, 'Domestic Violence Within Refugee Families: Intersecting Patriarchal Culture and the Refugee Experience' (2010) 31 The Australian and New Zealand Journal of Family Therapy 275.

This article examines the stages of the refugee journey and the intersections of domestic violence with culture, trauma, resettlement and masculinity. Arguing that therapists must challenge aspects of culture that promote violations of women's human rights while understanding the unique situation of refugee families, the article concludes by identifying principles for therapeutic and community based interventions. See in particular

at 276 where the author notes 'The popular view of culture is *essentialist*; that is, a view of culture as fixed and immutable. Yet 'culture' is not a bounded entity experienced in the same way by all people within it. Culture is diverse, fluid and contested, intersecting with oppression and power. Within cultures there is often strong opposition to harsh and unjust practices and to people using religion or tradition to justify women's oppression and exploitation.'

Kelly, Joan B & Johnson, Michael P, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476.

A growing body of empirical research has demonstrated that intimate partner violence is not a unitary phenomenon and that types of domestic violence can be differentiated with respect to partner dynamics, context, and consequences. The authors describe four patterns of violence: Coercive Controlling Violence, Violent Resistance, Situational Couple Violence, and Separation-Instigated Violence. The controversial matter of gender symmetry and asymmetry in intimate partner violence is discussed in terms of sampling differences and methodological limitations. Implications of differentiation among types of domestic violence include the need for improved screening measures and procedures in civil, family, and criminal court and the possibility of better decision making, appropriate sanctions, and more effective treatment programs tailored to the characteristics of different types of partner violence. The authors argue that in the family court, reliable differentiation should provide the basis for determining what safeguards are necessary and what types of parenting plans are appropriate to ensure healthy outcomes for children and parent–child relationships.

Laing, Lesley, 'No Way To Live' (June 2010).

This research explored the experiences of 22 women as they navigated the family law system following their separation from a relationship in which they had experienced domestic violence. The research was conducted following the 2006 reforms to the *Family Law Act 1975 (Cth)* relating to shared parental responsibility.

McIntosh, Jennifer et al, 'Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children' [2011] (86) *Family Matters* 41.

In recent years there has been much interest in the impacts on children, both positive and negative, of different patterns of parenting after separation, especially where the care of children is shared equally or substantially between both parents. This article summarises key findings from two recent Australian studies of outcomes for two potential risk groups: school-aged children living in separations characterised by high inter-parental conflict (Study 1), and infants and preschoolers in the general population of separated families (Study 2). Both studies were commissioned by the Australian Government Attorney-General's Department.

National Scientific Council on the Developing Child, 'Excessive Stress Disrupts the Architecture of the Developing Brain' Working Paper No 3 (2005).

This working paper from the National Scientific Council on the Developing Child defines the concept of "toxic stress"—what happens when children experience severe, prolonged adversity without adult support. It discusses how significant adversity early in life can alter a child's capacity to learn and adapt to stressful situations, as well as how sensitive and responsive caregiving can buffer the effects of such stress.

Perry, Bruce D, 'Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children', in *Working with Traumatized Youth in Child Welfare*, ed by Nancy Boyd Webb, Guilford Press NY (2006).

This chapter examines therapeutic work with maltreated children from a neurodevelopmental perspective. The overarching premises of this perspective are that an awareness of human brain development and functioning provides practical insights into the origins of the abnormal functioning seen following adverse developmental experiences (e.g. abuse, neglect, and trauma), and, furthermore, that an understanding of how neural systems change suggests specific therapeutic interventions (p 27). See in particular at p 40, where the author notes 'The majority of (the) sequential and use-dependent development of the brain takes places in early childhood. Indeed, by age 4, a child's brain is 90% adult size. The organizing brain is very malleable and responsive to the environment. This means that of all the experiences throughout the life of an individual, the organizing experiences of early childhood have the most powerful and enduring effects on brain organization and functioning. Three years of neglect can cause a lifetime of dysfunction and lost potential'.

Sturge, Claire and Danya Glaser, 'Contact and Domestic Violence – The Experts' Court Report' (2000) 30 *Family Law*, 615-629.

This expert report was prepared for the cases *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334. The experts were asked to prepare an opinion on the circumstances in which a child should have no contact with a parent who has used or exposed the child to domestic and family violence. The adverse effects on children of being exposed to family violence are discussed.

At p 615, the authors discuss the psychiatric principles of contact between the child and the non-residential parent as guided by developmental and psychological knowledge, theory and research. This includes knowledge of child development, interactional issues and innate factors. These core principles should guide decisions relating to contact. The different purposes of contact are discussed at p 616. The benefits and risk of direct and indirect contact with the non-residential parent is discussed from p 617-619.

Warrier, Sujata 'It's in Their Culture: Fairness and Cultural Considerations in Domestic Violence' (2008) 46 *Family Court Review* 537.

This essay attempts to critique the prevailing thinking on culture and cultural competency within the context of domestic violence. See in particular at p 539, where the author notes 'Thinking of culture as fixed leads us to make generalizations based only upon ethnic or racial identification. Such thinking conveniently overlooks the intersection of other categories such as class, sexual orientation, disability, immigration status, and so on. Further, none of these categories are fixed in time or one-dimensional. All these categories intersect in individuals and groups differently and change over time as the social and political landscape changes.'

Key statutory provisions in Family Law Act (Cth) and Family Court Act (WA)

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice

and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act 1975*.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Commonwealth *Family Law Act 1975*

Definitions

- Interpretation : *"abuse"* – Section 4
- Definition of family violence etc – Section 4AB

Best interests of the child

- Objects of Part – Section 60B
- Child's best interests paramount consideration in making a parenting order – Section 60CA
- How a court determines what is in a child's best interests – Section 60CC (note: s60CC(2A) risk of harm prioritised over meaningful relationship)
- Informing court of relevant family violence orders – Section 60CF
- Court to consider risk of family violence – Section 60CG
- Informing court of care arrangements under child welfare laws – Section 60CH
- Informing court of notifications to, and investigations by, prescribed State or Territory agencies – Section 60CI
- Adviser's obligations in relation to best interests of the child – Section 60D

Family dispute resolution

- Attending family dispute resolution before applying for Part VII order – Section 60I (note: exception in s60I(9))
- Family dispute resolution not attended because of child abuse or family violence – Section 60J

Parental responsibility

- Meaning of parental responsibility – Section 61B

- Presumption of equal shared parental responsibility when making parenting orders – Section 61DA

Parenting orders

- Court to consider child spending equal time or substantial or significant time with each parent in certain circumstances – Section 65DAA
- Effect of parenting order that provides for shared parental responsibility – Section 65DAC

Allegations of child abuse and family violence

- Where member of the Court personnel, family counsellor et al suspects child abuse etc – Section 67ZA
- Where interested person makes allegation of family violence – Section 67ZBA
- Court to take prompt action in relation to allegations of child abuse or family violence – Section 67ZBB
- Cross examination of parties where allegations of family violence – Sections 102NA and 102NB

Injunctions

- Injunctions – Section 68B
- Powers of arrest – Section 68C
- Injunctions – Section 114

Recovery orders

- Recovery orders – Section 67U FLA
- Stop and search, entry powers and the use of force – Section 67Q FLA

Family violence

- Obligations of court making an order or granting an injunction under this Act that is inconsistent with an existing family violence order – Section 68P
- Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act – Section 68R
- Special provisions relating to proceedings to make an interim (or interim variation of) family violence order – Section 68T

Conducting child-related proceedings

- Principles for conducting child-related proceedings – Section 69ZN

- General duties – Section 69ZQ
- Evidence relating to child abuse or family violence – Section 69ZW

Vexatious proceedings

- Summary decrees – Section 45A
- Definitions: "*vexatious proceedings*" – Section 102Q
- Making vexatious proceedings orders – Section 102QB

Western Australia *Family Court Act 1997*

Definitions

- Interpretation : "abuse" – Section 5
- Definition of family violence etc – Section 9A

Best interests of the child

- Objects of Part – Section 66
- Child's best interests paramount consideration in making a parenting order – Section 66A
- How a court determines what is in a child's best interests – Section 66C (note: s66C(3A) risk of harm prioritised over meaningful relationship)
- Informing court of relevant family violence orders – Section 66F
- Court to consider risk of family violence – Section 66G
- Informing court of care arrangements under child welfare laws – Section 66HA
- Informing court of notifications to, and investigations by, prescribed State or Territory agencies – Section 66HB
- Adviser's obligations in relation to best interests of the child – Section 66HC

Family dispute resolution

- Attending family dispute resolution before applying for Part VII order – Section 66H (note: exception in s66H(8))
- Family dispute resolution not attended because of child abuse or family violence – Section 66I

Parental responsibility

- Term used: parental responsibility – Section 68
- Presumption of equal shared parental responsibility when making parenting orders – Section 70A

Parenting orders

- Court to consider child spending equal time or substantial or significant time with each parent in certain circumstances – Section 89AA
- Effect of parenting order that provides for shared parental responsibility – Section 89AC

Allegations of child abuse and family violence

- Where member of the Court personnel, family counsellor et al suspects child abuse etc – Section 160
- Where interested person makes allegations of family violence – Section 162A
- Court to take prompt action in relation to allegations of child abuse or family violence – Section 162B

Injunctions

- Injunctions – Section 235
- Injunctions – Section 235A
- Powers of arrest where injunction breached – Section 236

Recovery orders

- Recovery orders – Section153
- Stop and search, entry powers and the use of force – Section 149

Family violence

- Obligations of court making an order or granting an injunction under this Act that is inconsistent with an existing family violence order – Section 174
- Power of court making a family violence order to revive, vary, discharge or suspend an existing order, injunction or arrangement under this Act – Section 176
- Special provisions relating to proceedings to make an interim (or interim variation of) family violence order – Section 178

Conducting child-related proceedings

- Principles for conducting child-related proceedings – Section 202B
- Evidence relating to child abuse or family violence – Section 202K

Vexatious proceedings

- Frivolous or vexatious proceedings – Section 242

Intersection of legal systems

The most common legislative mechanism used to address domestic and family violence at state and territory level is the protection order (referred to as a 'family violence order' under the *Family Law Act 1975* (Cth)) – a civil law response to a victim's immediate concerns of safety (and in some jurisdictions, police are also empowered to initiate proceedings [Croucher 2014]).

Where domestic and family violence occurs in the context of families with children, and parents separate, parties may also apply to a court exercising jurisdiction under the *Family Law Act 1975* (Cth) (primarily, the Federal Circuit and Family Court of Australia or Family Court of Western Australia) for parenting orders (under Part VII of the *Family Law Act 1975* (Cth) (*FLA*) and Part 5 of the *Family Court Act 1997* (WA) (*FCA*) – here called a 'Family Court'). Proceedings for a parenting order can also be instituted in a state or territory court of summary jurisdiction subject to the limitations set out in Section 69N *FLA* and Section 43 *FCA*.

In all parenting proceedings the child's best interests are the paramount consideration (Section 60CA *FLA*; Section 66A *FCA*). In any determination of what is in a child's best interests a Family Court must give greater weight to ensuring that the child lives in an environment where they are safe from violence or abuse than any benefit to the child of having a meaningful relationship with both parents (Section 60CC(2A) *FLA*; Section 66C(3A) *FCA*).

When allegations of child abuse or family violence are raised each party has an obligation to file and serve a Notice of Child Abuse, Family Violence or Risk of Family Violence (see Sections 67Z and 67ZBA *FLA* and Sections 159 and 162A *FCA*).

When an allegation of family violence or abuse is raised, a Federal Circuit and Family Court is required to take prompt action (Section 67ZBB *FLA* and Section 162B *FCA*). Such prompt action includes considering what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegation to be obtained as expeditiously as possible and so as to protect the child or any of the parties to the proceedings. Prompt action also includes making such orders as the court considers appropriate (such as orders or injunctions for personal protection of the child or any other person) and dealing with the issues raised by the allegations as expeditiously as possible.

A Family Court has the power to gather evidence directly through:

- Obtaining material from a child welfare authority, police or other prescribed government agency by order (Section 69ZW *FLA*; Section 202K *FCA*);
- Requesting information as a "Prescribed Body" under state and territory child welfare laws;
- Requesting material from other courts and tribunals, subject to any legislative limitations on such requests. This may be of particular assistance when seeking to obtain transcripts of evidence given in other courts or tribunals so that it may be received into evidence in child-related proceedings (Section 69ZX *FLA*; Section 202L *FCA*);
- Ordering parties to attend one or more appointments with a Family Consultant who then prepares and provides a report to the Court (Sections 11F and 62G *FLA*; Sections 65 and 73 *FCA*);
- Appointing an Independent Children's Lawyer (Section 68L *FLA*; Section 164 *FCA*);
- Requiring that a party or Independent Children's Lawyer file and serve a subpoena.

When making a parenting order, a Family Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility (Section 61DA(1) *FLA*; Section 70A(1) *FCA*). However, the presumption does not apply where there are reasonable grounds to believe that a parent or person living with a parent has engaged in child abuse or family violence and the presumption may be rebutted by evidence which demonstrates that the application of the presumption is contrary to the child's best interests.

Parties are required to ensure that a copy of any existing protection order is filed with a Family Court when making an application for parenting orders (Section 60CF *FLA*; s.66F *FCA*) (see also 10.5 Information sharing) and if a protection order is in force the court must consider any relevant inferences that can be drawn from the protection order by taking into account the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made in the protection order proceedings and any other relevant matter (Section 60CC(3)(k) *FLA*; Section 66C(3)(k) *FCA*). Where, however, a party withdraws their protection order application on the basis of undertakings given by the other party to the court; where a protection order is made by consent without admission; and where the responding party makes a cross application resulting in mutual orders [ALRC & NSWLRC 2010], there may be no admission of fact capable of being relied upon by a Family Court in making a determination regarding the perpetration of domestic and family violence.

In considering a parenting order, a Family Court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order is consistent with any protection order and does not expose any person to an unacceptable risk of domestic and family violence (Section 60CG *FLA*; Section 66G *FCA*). While a Family Court has no jurisdiction to vary a protection order, it is permitted by Section 68P *FCA* and Section 174 *FCA* to make a parenting order (or make a recovery order or grant an injunction) that is inconsistent with the protection order, however the court must ensure the parties fully understand the nature and effect of the parenting order. This may occur in cases where information or evidence comes before a Family Court that was not available to the court of summary jurisdiction that made the protection order. In circumstances of ongoing violence, where a protected person is having difficulty with enforcement of a protection order as a result of the operation of a parenting order made by a Family Court, the protected person may need to return to the court of summary jurisdiction and make application under Section 68R *FLA* or Section 176 *FCA* to ensure the consistency and enforceability of orders.

In making or varying a protection order, a court of summary jurisdiction is empowered to resolve any inconsistencies with an existing parenting order (Section 68R *FLA*; Section 176 *FCA*). There is, however, an inherent tension between the focus of protection orders and parenting orders: on the one hand, the protection order may direct one parent to keep away from the other parent and their children; on the other hand, the parenting order is focused on the time (with possible conditions including supervision) that children are to spend with their parents and with whom the children shall live.

Intervention by a child protection authority may present additional challenges: a parent experiencing domestic and family violence by the other parent is expected to be protective of their children, or risk having them removed by the relevant child protection authority. When a protection order is in force it is possible that a Family Court determining a subsequent application for a parenting order may make an order that permits the respondent in the protection order application proceedings to spend time with the children, or requires the parent protected by the protection order to continue to have contact with the respondent (for example, at changeover times [Croucher 2014]). Such determinations would be made by reference to the evidence in the particular case and an assessment of risk. For example, a Family Court may consider it necessary for changeovers to occur at a neutral venue and/or to be arranged in a way where the parties are not required to come into contact with one another.

When a child is subject to a state or territory child welfare order a Family Court cannot make a parenting order with respect to that child unless the order is expressed to come into effect at the expiration of the child

welfare order or with the consent of the relevant child protection authority (Section 69ZK *FLA*; Section 202 *FCA*). The 2010 joint Australian Law Reform Commission and New South Wales Law Reform Commission Report [ALRC & NSWLRC 2010], *Family Violence—A National Legal Response* noted that "…each state and territory has its own system of child protection laws and supporting agencies. These laws are invoked when parents are determined to be insufficiently protective of a child. In each jurisdiction there are thresholds for intervention by child protection authorities to protect children and to assist parents and families."

As these thresholds vary considerably between jurisdictions, a Family Court considering a parenting order application may experience some difficulty in deciding the relevance of and weight to be given to information provided by a child protection authority. Child protection cases may potentially present themselves in multiple jurisdictions: a state or territory children's court for care proceedings; a state or territory criminal court if the violence or abuse is subject to criminal charges; a state or territory magistrates' court for a protection order application; and a Family Court for parenting orders. The need to go to multiple courts increases the possibility of inconsistent orders, and the possibility that parties will drop out of the system without the protections they need, thus putting them at risk of further violence abuse [ALRC & NSWLRC 2010].

The families most likely to be involved with more than one of these jurisdictions are those with support needs associated with domestic and family violence at a time of high risk and vulnerability. For example, a party may be an applicant for a protection order, a prosecution witness for assault charges where they are the victim, a respondent in a child protection application, and simultaneously experiencing related legal issues concerning parenting issues and housing and debt [Family Law Council 2015]. While the expectation of the courts is that in matters relating to domestic and family violence and child abuse the legal responses should be as seamless as possible, the fragmentation of legal systems and differing requirements and processes in each may be confusing to affected parties, in particular those who are self-represented, and may result in delays in the finalisation of cases [Croucher 2014].

Intersection of legal systems - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. The effect of family violence and parenting arrangements is discussed at [15.11] (p 675). The report notes that –

- ‘Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims’ parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self-esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim’s behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.’

Chisholm, Richard, ‘Family Courts Violence Review: A Report’ (Canberra: Attorney-General’s Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See generally from p 4 – ‘There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly

dangerous for children, whether or not it is directed specifically at them. These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs' (p 4).

The theme of the report is discussed at p 5 - 'A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding'.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter discusses the history and place of family law in Australia's federal system. Difficulties in addressing family violence in what is an often fragmented legal framework are discussed. Many different courts and jurisdictions are involved, especially where the dispute extends between states or territories. This is particularly problematic where child protection is an issue.

Family Law Council, 'In Response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report to the Attorney-General, June 2015).

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the first two matters. The remaining matters will be dealt with in a report due June 2016.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

This report comprehensively summarises the legislative provisions governing the resolution of parenting disputes under the Family Law Act, and the intersection with legal systems governing family violence and child protection. Some important observations:

- Fragmented legal systems – families most likely to be involved with more than one of these jurisdictions are those with support needs associated with DFV and at a time of high risk and vulnerability (child protection/children's court; family courts; state/territory DFV courts)
- Reluctance by state/territory magistrates to use s68R FLA to vary Family Court orders when making DFV orders in order to resolve inconsistencies between DFV orders and parenting orders; can be done on its own motion without the consent of the parties; and sometimes magistrates assume that the parenting order is sufficient to protect child without needing to include the child on the DFV order (concerns about inadequate time limits in s68T on variation/suspension of parenting order where done in interim proceedings)
- The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 Family Violence – A National Legal Response report. They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:
    - a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others

involved in family violence protection order proceedings;

- a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
- judicial officers lacking adequate information or evidence necessary to amend the parenting orders; and
- parties to proceedings not having access to appropriate legal advice.

Family Law Council, Report to the Attorney-General on 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, June 2016 (Terms, 3, 4 & 5)'.

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the matters listed below in items 3, 4 and 5.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

The Family Law Council made 22 recommendations (summarised at pp12-18) in the following areas:

- Family safety services
- Early whole-of-family risk assessments
- Family lawyers and risk identifications
- Family dispute resolution practitioners and risk management strategies
- Judicial risk assessments and court-ordered programs
- A court-based integrated services model
- Case-managed integrated services in the family relationships sector
- Self-represented litigants with complex needs
- Support services for families in rural and regional areas
- Collaboration between family law and state and territory courts
- Family violence competency
- Joint professional development
- Children's views and experiences
- Family dispute resolution and confidentiality
- State and territory courts exercising family law jurisdiction
- Aboriginal and Torres Strait Islander families
- Culturally and linguistically diverse families
- Court support workers
- Self-represented litigants and misuse of process
- Crossover cases
- Consent parenting orders
- Legislative reform.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers how the Federal Circuit and Family Court of Australia deals with matters involving children where there are allegations of abuse. It identifies that the balancing of the interests of the children

and the parents, and frequently of other people associated with the children, is at the centre of what is just in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Evidence issues are discussed in detail.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of practices and perspectives of family law professionals (*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- Court Outcomes Project involving:
    - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
    - an examination of patterns in courts filings based on administrative data from the three family law courts and
    - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns

for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)'* (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who had separated between 1 July 2010 and 31 December 2011; and the 6,079 parents surveyed in the SRSP 2014, who had separated between 1 July 2012 and 31 December 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 represents parents' their post-reform experiences.

Together with the Longitudinal Study of Separated Families (LSSF) Wave 1 data, these samples of separated parents reported similar levels of family violence, with around 1 in 5 parents indicating they suffered physical hurt by their former partner and nearly 2 in 5 reporting emotional abuse alone (p 14). See generally chapter 3 – 'Family Violence and Safety Concerns'. Most parents in both cohorts reported at least one type of emotional abuse before/during or since separation (p 58). Further, 'overall, mothers reported experiencing emotional abuse in greater proportions than fathers both before/during separation and since separation' (p 58). The most commonly reported form of emotional abuse (see p24) was '—insults with the intent to shame, belittle or humiliate' (p 58). A similar proportion of parents in both cohorts reported that their children saw or heard

family violence prior to or during separation (p 60). However, the proportion of parents reporting that their children witnessed family violence in the period since separation decreased in the second cohort.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

It concludes that 'overall, the general patterns in findings suggest a positive response to the 2012 family violence reforms, with practitioner responses indicating that protection from harm is given greater weight now than it was previously, and that advice-giving practices have shifted in a direction consistent with the intent of the reforms to better identify families where this is an issue. At the same time, the responses do not suggest that any less weight is placed on maintaining relationships with parents and children after separation where this is appropriate' (p 13).

Practitioners' views about striking the right balance between protecting a child from harm and maintaining a meaningful relationship with both parents (in the context of the 2012 reforms and the 'tie-breaker' provision (s 60CC(2A)) of the *Family Law Act 1975* (Cth)) are discussed from p 14. Many practitioners were positive about the effect of s 60CC(2A) in re-prioritising family violence and protecting children from harm which leads to better outcomes for children.

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-

based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are 'not uncommon' for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

- See generally Chapter 2: 'Characteristics of separated parents: Challenges and issues for family relationships and wellbeing'. Of particular relevance is the discussion from p 24 dealing with 'Separated

parents' reports of experiencing family violence'. It was found that nearly two-thirds of separated mothers and just over half of separated fathers indicated that they suffered emotional abuse from their partner before or during separation. 26% of mothers and 16.8% of fathers indicated that they suffered physical abuse prior to their separation. Of this group, most respondents indicated that their children witnessed violence or abuse.

- See from p 29 which considers - 'Co-occurrence of family violence, mental health problems and addiction issues'. It was found that parents who indicated that both mental health and addiction issues were present were most likely to report that the other parent had physically hurt them (43% of fathers and 50% of mothers). Overall, 'experiences of family violence were reported by 85% of fathers and 92% of mothers who said that both mental health and addiction issues had been present before separation, compared with 41% of fathers and 46% of mothers who said that neither of these problems had been present. In other words, family violence seemed to be pervasive among families in which both mental health and addiction issues were thought to be present' (p 30).
- See Chapter 10: 'Family violence and child abuse: Parents' pathways and professionals' perspectives'. This chapter is relevant in relation to its general discussion of family violence in the family law system.
- See Chapter 11, 'Children's wellbeing', in particular section 11.3 (p 262) which discusses 'Family violence, safety issues and the nature of inter-parental relationships'.

Intersection of legal systems - Other Resources

Family Violence Information Sheet (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This information sheet contains important information for litigants who allege they have experienced, or are alleged to have perpetrated, family violence, including safety at court, legal and support services at court, and cross-examination.

Family Violence Plan - Former Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan 'builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation'. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan 'contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.'

See in particular at p 2, 'The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child's best interest. Ensuring the safety of all people engaged in the family law system, including when

attending court, is also a high priority for the courts.'

Jurisdiction of FCFCA

In Australia, there is now a single court where jurisdiction under the Family Law Act 1975 (Cth) (FLA) is predominantly exercised: the Federal Circuit and Family Court of Australia (FCFCA). *State courts of summary jurisdiction (usually the relevant local court or magistrates' court) are also able to exercise jurisdiction under the FLA*. Prior to 2021 there were two federal courts exercising jurisdiction under the *FLA,* the Family Court of Australia and the Federal Circuit Court of Australia.

The former Family Court was a superior court of record which has original jurisdiction to hear family law matters. It is intended by the merger of the Family Court and the Federal Circuit Court that Divison 1 of the FCFCA will be a continuation of the Family Court of Australia and Division 2 will be a continuation of the Federal Circuit Court of Australia.

Division 1 of the FCFCA deals with the most complex and intractable parenting disputes requiring substantial court time. These cases often involve allegations of physical or sexual abuse of children, family violence, mental health issues, and substance abuse. Other areas of family law affecting children that Division 1 deals with include domestic and international relocation, international child abduction and the Hague convention, as well as medical procedures requiring court authorisation. Division 1 also acts as an appeal court from decisions of single judges of Division 1 (and the former Family Court) and Division 2 (and the former FCCC). The number of cases that are now dealt with at first instance in the Division 1 (formerly the Family Court) represents a small percentage of all family law cases as the majority of parenting cases are now dealt with in Division 2.

Division 2 is also a court of record and of law and equity however it is not a superior court. Division 2 is considered the high-volume or trial court and deals with most divorce applications and the majority of first instance family law applications nationally (excluding Western Australia). On 12 April 2013 the name of the former FCCA was changed from the Federal Magistrates Court to the FCCA. Division 2 regularly conducts regional circuits and has judges based in all capital cities and some regional cities. Division 2 has jurisdiction in family law and child support though does not have jurisdiction to determine matters relating to adoption or applications for nullity or validity of marriage.

In Western Australia, family law cases are dealt with by the *Family Court of Western Australia*.

Jurisdiction of FCFCA - Other Resources

About the Court.

Open via the Federal Circuit and Family Court of Australia website.

This webpage outlines the anticipated benefits of the new Court structure.

The Court now “comprises two divisions:

- Division 1 (a continuation of the Family Court of Australia) deals with family law matters. Division 1 has 35 specialist family law judges hearing both trials and appeals.
- Division 2 (a continuation of the Federal Circuit Court of Australia) deals with family law, migration and general federal law matters. Division 2 has 76 judges; 55 of which are specialists in family law and the remainder experts in various areas of general federal law and migration.

The Court will operate under the leadership of one Chief Justice with the support of one Deputy Chief Justice, who each hold a dual commission to both Divisions of the Court. A second Deputy Chief Judge assists in the management of the general federal law and Fair Work jurisdictions of Division 2.”

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See in particular at p 2, ‘The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child’s best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.’

Jurisdiction of the Family Court of Western Australia

The Family Court of Western Australia (FCWA) is the only state Family Court in Australia, established under the *Family Court Act 1975* (WA; now repealed,) and continued by the *Family Court Act 1997* (WA) (FCA).

The FCWA and the Magistrates Court of Western Australia exercise federal jurisdiction under the *Family Law Act 1975* (Cth) in relation to matrimonial causes where there is a nexus to Western Australia (s35 *FCA*, s38 *FCA*) between married parties, or unmarried parents of a child located outside Western Australia.

The FCWA's non -federal jurisdiction (s36 *FCA*) includes making parenting orders in respect of children of unmarried parents, and determination of financial disputes between unmarried parties when the threshold tests of jurisdiction are satisfied (s205X *FCA*). The principles the court must apply in the exercise of its non-federal jurisdiction mirror the principles set out in s43 of the *Family Law Act 1975* (Cth) (s37 *FCA*). Appeals in the non-federal jurisdiction lie to the Supreme Court of Western Australia. See *CDW v LVE* [2015] WASCA 247 for discussion on the appeal process for interlocutory decisions.

Western Australian Family Law Magistrates are "specialist" magistrates co-located with the FCWA. In practice, federal and non-federal jurisdiction is exercised by Judges and Registrars of the FCWA and Family Law Magistrates throughout the state. Western Australian Magistrates not appointed Family Law Magistrates are unable to exercise family law jurisdiction in the Perth metropolitan region. Outside that region the family law jurisdiction is exercised by non-Family Law Magistrates initially, and defended cases are then transferred to a circuit of the FCWA (usually conducted by a Family Law Magistrate).

Although Family Law Magistrates have power to make restraining orders under the *Restraining Orders Act 1997* (WA) as "specialist" family law magistrates, they are not resourced to do so. The *Restraining Orders Act 1997* (WA) empowers a court exercising family law jurisdiction to make a restraining order (s63(2)) subject to a number of conditions, including that the person against whom the order is sought must be present when the order is made and has been given the opportunity to be heard (s63(4)(c)).

The Family Court of Western Australia's case management guidelines provide that applications seeking parenting orders (regardless of whether other relief is sought) are allocated to a first return date in a child-related proceedings list, conducted by a Family Law Magistrate and allocated to the Magistrate's Track. The

Family Law Magistrate is assisted by a family consultant in the child-related proceedings list, the family consultant having read the files and made enquiries regarding police information and DCPFS (*Department for Child Protection and Family Support*) information regarding the parties and the children. This information is reported to the Family Law Magistrate in open court in the presence of the parties. The family consultant may also suggest appropriate therapeutic services to which the parties may be ordered or referred. Proceedings are managed by the same Family Law Magistrate unless and until the proceedings are allocated to either the Standard Track (matters in which the trial is likely to exceed two days, or the monetary limit exceeds the ceiling of magistrates' jurisdiction in financial matters) or the Complex track (matters involving, for example, interstate or international relocation; complicated issues of fact, law or evidentiary material; or international issues such as jurisdiction).

Jurisdiction of the Family Court of Western Australia - Other Resources

Forms and resources of the Family Court of Western Australia.

This resource has links to Forms, Information Kits and Brochures and Legal Resources for use in the Family Court of Western Australia.

Jurisdiction of state/territory courts

Courts of summary jurisdiction, usually local, magistrates' or children's courts, have limited jurisdiction under the *Family Law Act 1975* (Cth) (*FLA*) (Sections 39, 39B, and 69J *FLA*). The position in Western Australia is different as it is the only state that has its own Family Court established under the *Family Court Act 1997* (WA) (*FCA*) (Sections 38 and 39 *FCA*). Courts of summary jurisdiction have jurisdiction to hear defended property proceedings in relation to property with a total value up to $20,000 or such higher amount as prescribed by regulation (Section 46 and 46A *FLA*; Section 43A *FCA*) without restriction (Sections 39B *FLA*). They can also hear matters where the value of the property exceeds $20,000 or such higher amount as prescribed by regulation, with the consent of all parties. If a party does not consent, the matter must be transferred to the Federal Circuit and Family Court of Australia (*Section 46 and 46A FLA*; Section 43A *FCA*).

Courts of summary jurisdiction and courts prescribed in regulations under Section 69GA *FLA* also have jurisdiction in relation to children's matters. However, these courts cannot hear defended proceedings for a parenting order unless all parties consent (Section 69N *FLA*; Section 43 *FCA*). Should the parties not consent to the court determining the matter, then the court of summary jurisdiction or prescribed court must transfer the matter to the Federal Circuit and Family Court of Australia. Before transferring the matter, the court of summary jurisdiction or prescribed court can make such orders as it considers necessary. If the parties consent to the court hearing a defended matter, the court of summary jurisdiction may still transfer the matter on its own initiative. Where a court is prescribed in regulations under Section 69GA *FLA,* the regulations may prescribe particular classes of proceedings in which the court has jurisdiction in relation to children's matters. The regulations may also prescribe state or territory rules of court as applying when the prescribed court is exercising its jurisdiction in relation to children's matters.

In addition to this jurisdiction, the *FLA* and *FCA* allow state and territory courts of summary jurisdiction, when making or varying a protection order under state or territory family violence legislation, to vary a parenting order. Section 68R *FLA* and Section 176 *FCA* permit a state or territory court with jurisdiction under Part VII Division 11 *FLA*/Part 5 *FCA* to 'revive, vary, discharge or suspend':

- a parenting or recovery order;
- an injunction granted under Section 68B or 114 *FLA*/Section 235 or 235A *FCA*

- an undertaking given to a court exercising jurisdiction under the *FLA* or *FCA*;
- a registered parenting plan; or
- a recognisance entered into under an order under the *FLA* or *FCA*.

Jurisdiction of state/territory courts - Other Resources

Forms and resources of the Family Court of Western Australia.

This resource has links to Forms, Information Kits and Brochures and Legal Resources for use in the Family Court of Western Australia.

Prevalence of domestic and family violence in the family law system

Parents engaged in the family law system may be affected by a complex range of interrelated issues including domestic and family violence, mental ill-health and substance misuse. For some of those parents, domestic and family violence may adversely affect their capacity to make decisions about parenting arrangements [Bagshaw et al 2011] and about the safety of themselves and their children [De Maio et al 2013].

Confirming earlier comparative findings, the Australian Institute of Family Studies reported in 2015 [Kaspiew et al Evaluation 2015] that family violence is a common experience among separated parents, with a majority of parents reporting either emotional or, to a lesser extent, physical abuse. Mothers reported experiencing either form of abuse before, during and since separation in greater proportions than fathers. In the post-separation period mothers were also more likely to report that they felt fearful, while fathers reported in greater proportions than mothers that they often felt coerced or controlled; reports in this context by mothers were substantially higher than those made by fathers. Feelings of fear, coercion and control were more commonly reported by parents who had experienced physical hurt and or/attempted unwanted sexual activity rather than emotional abuse. Research [Qu et al 2014] shows that by five years post separation, a minority of parents continue to face significant problems, including ongoing domestic and family violence, safety concerns, and highly conflictual or fearful inter-parental relationships.

The most commonly reported effects on day-to-day activities of experiencing domestic and family violence related to mental health, with mothers reporting a higher incidence. Significantly, for children of parents with domestic and family violence and safety concerns, a 2015 survey conducted by the Australian Institute of Family Studies showed an overall shift to spending 100% of nights with their mother, and daytime only contact with their father [Kaspiew et al Synthesis 2015].

Prevalence of domestic and family violence in the family law system - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114) 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. The effect of family violence and parenting arrangements is discussed at [15.11] (p 675). The report notes that –

- 'Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims' parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self-esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim's behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.'

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men. Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports. The study raised many questions about how well family law policies, as expressed in the legislation and implemented in

the national service system, respond to violence in families such as those who were involved in this research (p 49).

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This paper investigates the separate impacts of parental substance misuse, domestic violence and parental mental health problems. It presents evidence regarding the extent to which these problems co-occur and a discussion of the wider context of exclusion and disadvantage, its causes and its consequences. Finally, it provides an overview of research and theory for working with families with multiple and complex problems. This literature review cites statistics from a US study, the statistics were collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See generally from p 4 – ‘There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them. These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties’ consent or by the court’s adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs’ (p 4).

The theme of the report is discussed at p 5 - ‘A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding’.

Croucher, Rosalind, ‘Family Law: Challenges for Responding to Family Violence in a Federal System’ in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter discusses the history and place of family law in Australia’s federal system. Difficulties in addressing family violence in what is an often fragmented legal framework are discussed. Many different courts and jurisdictions are involved, especially where the dispute extends between states or territories. This is particularly problematic where child protection is an issue.

De Maio, John, et al, 'Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011' (Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.

Family Law Council, 'In Response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report to the Attorney-General, June 2015).

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the first two matters. The remaining matters will be dealt with in a report due June 2016.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and

other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

This report comprehensively summarises the legislative provisions governing the resolution of parenting disputes under the Family Law Act, and the intersection with legal systems governing family violence and child protection. Some important observations:

- Fragmented legal systems – families most likely to be involved with more than one of these jurisdictions are those with support needs associated with DFV and at a time of high risk and vulnerability (child protection/children's court; family courts; state/territory DFV courts)
- Reluctance by state/territory magistrates to use s68R FLA to vary Family Court orders when making DFV orders in order to resolve inconsistencies between DFV orders and parenting orders; can be done on its own motion without the consent of the parties; and sometimes magistrates assume that the parenting order is sufficient to protect child without needing to include the child on the DFV order (concerns about inadequate time limits in s68T on variation/suspension of parenting order where done in interim proceedings)
- The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 Family Violence – A National Legal Response report. They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:
    - a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others involved in family violence protection order proceedings;
    - a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
    - judicial officers lacking adequate information or evidence necessary to amend the parenting orders; and
    - parties to proceedings not having access to appropriate legal advice.

Family Law Council, Report to the Attorney-General on 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, June 2016 (Terms, 3, 4 & 5)'.

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the matters listed below in items 3, 4 and 5.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

The Family Law Council made 22 recommendations (summarised at pp12-18) in the following areas:

- Family safety services
- Early whole-of-family risk assessments
- Family lawyers and risk identifications
- Family dispute resolution practitioners and risk management strategies
- Judicial risk assessments and court-ordered programs
- A court-based integrated services model
- Case-managed integrated services in the family relationships sector

- Self-represented litigants with complex needs
- Support services for families in rural and regional areas
- Collaboration between family law and state and territory courts
- Family violence competency
- Joint professional development
- Children's views and experiences
- Family dispute resolution and confidentiality
- State and territory courts exercising family law jurisdiction
- Aboriginal and Torres Strait Islander families
- Culturally and linguistically diverse families
- Court support workers
- Self-represented litigants and misuse of process
- Crossover cases
- Consent parenting orders
- Legislative reform.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers how the Federal Circuit and Family Court of Australia deals with matters involving children where there are allegations of abuse. It identifies that the balancing of the interests of the children and the parents, and frequently of other people associated with the children, is at the centre of what is just in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Evidence issues are discussed in detail.

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022). ANROWS.

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of practices and perspectives of family law professionals (*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently

Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and

- Court Outcomes Project involving:
  - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
  - an examination of patterns in courts filings based on administrative data from the three family law courts and
  - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)*' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119

parents surveyed in the SRSP 2012, who had separated between 1 July 2010 and 31 December 2011; and the 6,079 parents surveyed in the SRSP 2014, who had separated between 1 July 2012 and 31 December 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 represents parents' their post-reform experiences.

Together with the Longitudinal Study of Separated Families (LSSF) Wave 1 data, these samples of separated parents reported similar levels of family violence, with around 1 in 5 parents indicating they suffered physical hurt by their former partner and nearly 2 in 5 reporting emotional abuse alone (p 14). See generally chapter 3 – 'Family Violence and Safety Concerns'. Most parents in both cohorts reported at least one type of emotional abuse before/during or since separation (p 58). Further, 'overall, mothers reported experiencing emotional abuse in greater proportions than fathers both before/during separation and since separation' (p 58). The most commonly reported form of emotional abuse (see p24) was '—insults with the intent to shame, belittle or humiliate' (p 58). A similar proportion of parents in both cohorts reported that their children saw or heard family violence prior to or during separation (p 60). However, the proportion of parents reporting that their children witnessed family violence in the period since separation decreased in the second cohort.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

It concludes that 'overall, the general patterns in findings suggest a positive response to the 2012 family violence reforms, with practitioner responses indicating that protection from harm is given greater weight now than it was previously, and that advice-giving practices have shifted in a direction consistent with the intent of the reforms to better identify families where this is an issue. At the same time, the responses do not suggest that any less weight is placed on maintaining relationships with parents and children after separation where this is appropriate' (p 13).

Practitioners' views about striking the right balance between protecting a child from harm and maintaining a meaningful relationship with both parents (in the context of the 2012 reforms and the 'tie-breaker' provision (s 60CC(2A)) of the *Family Law Act 1975* (Cth)) are discussed from p 14. Many practitioners were positive about the effect of s 60CC(2A) in re-prioritising family violence and protecting children from harm which leads to better outcomes for children.

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are 'not uncommon' for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

- See generally Chapter 2: 'Characteristics of separated parents: Challenges and issues for family relationships and wellbeing'. Of particular relevance is the discussion from p 24 dealing with 'Separated parents' reports of experiencing family violence'. It was found that nearly two-thirds of separated mothers and just over half of separated fathers indicated that they suffered emotional abuse from their partner before or during separation. 26% of mothers and 16.8% of fathers indicated that they suffered physical abuse prior to their separation. Of this group, most respondents indicated that their children witnessed violence or abuse.
- See from p 29 which considers - 'Co-occurrence of family violence, mental health problems and addiction issues'. It was found that parents who indicated that both mental health and addiction issues were present were most likely to report that the other parent had physically hurt them (43% of fathers and 50% of mothers). Overall, 'experiences of family violence were reported by 85% of fathers and 92% of mothers who said that both mental health and addiction issues had been present before separation, compared with 41% of fathers and 46% of mothers who said that neither of these problems had been present. In other words, family violence seemed to be pervasive among families in which both mental health and addiction issues were thought to be present' (p 30).
- See Chapter 10: 'Family violence and child abuse: Parents' pathways and professionals' perspectives'. This chapter is relevant in relation to its general discussion of family violence in the family law system.
- See Chapter 11, 'Children's wellbeing', in particular section 11.3 (p 262) which discusses 'Family

violence, safety issues and the nature of inter-parental relationships'.

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders. See especially from p 179 which discusses 'Shared parenting and family violence'. The author notes, 'the issue of protecting women and children from violence has not proved effective as an argument against laws that recognise the indissolubility of parenthood, nor against having any provisions in legislation that encourage the continuing involvement of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children's lives, and an increased risk of violence. There is simply no evidence for a linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver.'

The chapter concludes – 'There is no future in arguments that say encouraging the involvement of both parents in children's lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence… The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when

parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence' (p 183).

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and compares this with care-time arrangements and family dynamics.'

The findings painted a positive picture of separated families overall but there were still a minority of parents who faced significant issues such as violence and abuse and held safety concerns. 'It has become increasingly clear that each of the mainstream professions in the family law system has a potentially constructive role to play in helping to untangle the serious predicaments in which a minority of family law clients find themselves' (p xix).

For example, higher levels in children's wellbeing emerged where parents indicated that there was a positive inter-parental relationship – 'consistently low or worsened child wellbeing was more likely to be reported by parents who reported experiencing violence/abuse, holding safety concerns, or having negative inter-parental relationship in both waves compared with reports of other parents' (p 162).

Also, where emotional abuse was experienced by a small minority of parents (in Wave 3 of the data), large proportions of these victims indicated that the abuse occurred 'sometimes or often', as opposed to 'rarely or only once' in the preceding 12 months (p 40).

‘In fact, most respondents who stated that the other parent had engaged in humiliating insults, monitored their whereabouts, or circulated of defamatory comments also indicated that these behaviours occurred sometimes or often. After about five years of separation, the monitoring of a person’s whereabouts may be particularly likely to reflect obsessive harassment, unless such monitoring has been instigated by genuine concerns about personal safety or the safety of others, including the children’ (p 40).

Prevalence of domestic and family violence in the family law system - Other Resources

Children: Safety and Risk.

Open via Federal Circuit and Family Court of Australia website.

This webpage contains information about requirements to notify the Court about family violence and child abuse, family violence orders, risk assessment, Lighthouse, staying safe at court and getting help and support.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Family Violence Information Sheet (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This information sheet contains important information for litigants who allege they have experienced, or are alleged to have perpetrated, family violence, including safety at court, legal and support services at court, and cross-examination.

Family Violence: Overview

Open via Federal Circuit and Family Court of Australia website.

This webpage outlines the principles which guide the FCFCA's response to family violence, behaviours which may constitute family violence, coercive and controlling behaviours which may amount to family violence and common forms of family violence.

It also contains links to information on:

- Help and support;
- Family violence orders;
- Family violence and children;
- How the court considers safety and risk;
- Safety at court;
- Frequently asked questions; and
- Lighthouse.

Family Violence Plan - Former Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and

Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan 'builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation'. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan 'contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.'

See in particular at p 2, 'The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child's best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.'

Guidelines for Independent Children's Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

Independent Children's Lawyer information sheet.

Accessible via Legal Aid Western Australia.

Parental conflict and its effect on Children (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This fact sheet provides information for parents about the ways family conflict affects children, both in families who live together and in families who have separated.

In families where there is a high level of conflict and animosity between parents, children are at a greater risk of developing emotional, social and behavioural problems, as well as difficulties with concentration and educational achievement.

Frequent and intense conflict or fighting between parents also has a negative impact on children's sense of safety and security which affects their relationships with their parents and with others. Parental conflict that focuses on children is also linked to adjustment problems, particularly when children blame themselves for their parents' problems.

'Good quality parenting', that is parenting that provides structure, warmth, emotional support and positive reinforcement, has been found to reduce the impact of conflict.

Reconciliation Action Plan 2019-2021: Former Federal Circuit Court of Australia.

Open via Federal Circuit and Family Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

What is an Independent Children's Lawyer?

A brochure accessible via:

Legal Aid New South Wales

Legal Aid Queensland

Legal Aid Commission of Tasmania

Impact of domestic and family violence on children and parenting capacity

Where domestic and family violence occurs in families with children, the victim is most likely to be the perpetrator's female intimate partner and the mother of the children. A perpetrator may also directly abuse the children or otherwise expose them to violence. These children are also victims of domestic and family violence.

The experience of domestic and family violence may also adversely affect a victim's parenting capacity, and may be compounded by the effects of mental illness or substance misuse that emerge as a consequence of the violence, placing children at heightened risk of abuse and neglect.

An extensive review [Bromfield et al 2010] by the Australian Institute of Family Studies of Australian and international literature indicates a co-occurrence in this context of multiple and complex parenting problems, often within a broader experience of social isolation and economic disadvantage. For example, mothers who are victims of domestic and family violence may remain with their violent partner if they consider it too dangerous to leave; they may prioritise the violent partner's needs over their children's needs in order to reduce the risk of further violence; the debilitating effects of violence may make them unavailable or unable to meet their children's needs; and frequent belittling, undermining, insulting, and physical harm by the violent partner in front of the children may affect the children's respect for their mother's authority or her ability to assert her authority. In relation to the capacity of violent fathers to parent, the research is limited, however children who are exposed to their father's violence may feel a loss of trust, love and respect for their father, or see their father as a source of fear and terror [Bromfield et al 2010].

If mental illness or substance misuse are also relevant, a parent's cognition, moods, perception, self-awareness and self-esteem may be adversely affected, resulting in possible further impacts on a parent's capacity to perform basic tasks, maintain daily routines, respond to children's physical, material, and emotional needs, and provide consistent and positive parenting [Bromfield et al 2010].

Impact of domestic and family violence on children and parenting capacity - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (*ALRC Report 114*) 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. The effect of family violence and parenting arrangements is discussed at [15.11] (p 675). The report notes that –

- 'Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims' parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self-esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim's behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.'

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men. Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports. The study raised many questions about how well family law policies, as expressed in the legislation and implemented in

the national service system, respond to violence in families such as those who were involved in this research (p 49).

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This paper investigates the separate impacts of parental substance misuse, domestic violence and parental mental health problems. It presents evidence regarding the extent to which these problems co-occur and a discussion of the wider context of exclusion and disadvantage, its causes and its consequences. Finally, it provides an overview of research and theory for working with families with multiple and complex problems. This literature review cites statistics from a US study, the statistics were collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Carson, Rachel, Edward Dunstan, Jessie Dunstan and Dinika Roopani, *Children and young people: Family law system experiences and needs - Final Report 2018* (Research Report – June 2018, Australian Institute of Family Studies).

This report sets out findings from the Children and Young People in Separated Families: Family Law System Experiences and Needs project, a qualitative study commissioned and funded by the Australian Government Attorney-General's Department (AGD). This study aimed to investigate the experiences and needs of young

people whose parents had separated and had accessed the family law system.

The study comprised in-depth, semi-structured interviews carried out between May 2017 and April 2018, with 61 children and young people aged between 10 years and 17 years (supplemented by interviews with 47 parents of these children). The interviews with 47 parents of these children were undertaken by telephone to enable the collection of demographic information by way of background to the data provided by the children and young people. These data enabled the research team to understand the services accessed by the parents and the pathways used to resolve their family law matters. Against this backdrop, the data from the interviews with children and young people provided rich insights into the experiences and needs of children and young people whose parents had separated and had accessed the family law system.

Findings are included in the executive summary and included:

- Most children and young people (76%) wanted parents to listen more to their views in relation to parenting arrangements and regarding the separation more generally, to provide them with space and time to process events, and for their parents to respect their views as their own even if they disagree with them.
- Of those children and young people who indicated that they felt both parents listened to them (21% of participants), all except one felt either quite close or very close with both parents.
- More than one-third (38%) of children and young people described wanting ongoing communication with parents and others to understand more about what was going on in the post-separation context.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See generally from p 4 – 'There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law

system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them. These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs' (p 4).

The theme of the report is discussed at p 5 - 'A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding'.

Croucher, Rosalind, 'Family Law: Challenges for Responding to Family Violence in a Federal System' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter discusses the history and place of family law in Australia's federal system. Difficulties in addressing family violence in what is an often fragmented legal framework are discussed. Many different courts and jurisdictions are involved, especially where the dispute extends between states or territories. This is particularly problematic where child protection is an issue.

De Maio, John, et al, 'Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011' (Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about

child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.

Family Law Council, 'In Response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report to the Attorney-General, June 2015).

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the first two matters. The remaining matters will be dealt with in a report due June 2016.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

This report comprehensively summarises the legislative provisions governing the resolution of parenting disputes under the Family Law Act, and the intersection with legal systems governing family violence and

child protection. Some important observations:

- Fragmented legal systems – families most likely to be involved with more than one of these jurisdictions are those with support needs associated with DFV and at a time of high risk and vulnerability (child protection/children's court; family courts; state/territory DFV courts)
- Reluctance by state/territory magistrates to use s68R FLA to vary Family Court orders when making DFV orders in order to resolve inconsistencies between DFV orders and parenting orders; can be done on its own motion without the consent of the parties; and sometimes magistrates assume that the parenting order is sufficient to protect child without needing to include the child on the DFV order (concerns about inadequate time limits in s68T on variation/suspension of parenting order where done in interim proceedings)
- The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 Family Violence – A National Legal Response report. They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:
    - a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others involved in family violence protection order proceedings;
    - a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
    - judicial officers lacking adequate information or evidence necessary to amend the parenting orders; and
    - parties to proceedings not having access to appropriate legal advice.

Family Law Council, Report to the Attorney-General on 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, June 2016 (Terms, 3, 4 & 5)'.

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the

matters listed below in items 3, 4 and 5.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

The Family Law Council made 22 recommendations (summarised at pp12-18) in the following areas:

- Family safety services
- Early whole-of-family risk assessments
- Family lawyers and risk identifications
- Family dispute resolution practitioners and risk management strategies
- Judicial risk assessments and court-ordered programs
- A court-based integrated services model
- Case-managed integrated services in the family relationships sector
- Self-represented litigants with complex needs
- Support services for families in rural and regional areas
- Collaboration between family law and state and territory courts
- Family violence competency
- Joint professional development
- Children's views and experiences
- Family dispute resolution and confidentiality

- State and territory courts exercising family law jurisdiction
- Aboriginal and Torres Strait Islander families
- Culturally and linguistically diverse families
- Court support workers
- Self-represented litigants and misuse of process
- Crossover cases
- Consent parenting orders
- Legislative reform.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers how the Family Court of Australia deals with matters involving children where there are allegations of abuse. It identifies that the balancing of the interests of the children and the parents, and frequently of other people associated with the children, is at the centre of what is just in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Evidence issues are discussed in detail.

Humphreys, Cathy and Monica Campo, *Fathers who use violence: Options for safe practice where there is ongoing contact with children* (CFCA Paper No. 43 – June 2017, Australian Institute of Family Studies).

The following summarises the key aspects of this paper:

Background

This paper responds to a challenge that has continued to frustrate workers attempting to intervene to support women and children living with DFV – that the DFV intervention system (in the specialist women's DFV sector

and statutory child protection) is structured around women and their children separating from men who use violence. However, many women and children may not be in a position to separate from their abusive and violent partners, and some women and children's wellbeing and safety may not be enhanced by separation.

Inquiry

The paper explored these questions by conducting a review of exisitng literature:

- What is the practice or evidence base for working with families where the perpetrator remains in the home?
- Are there safe ways to work with women and children living with a perpetrator of DFV, or for women and children who still have significant contact with a perpetrator post-separation?
- In particular, whether there are strategies for working with fathers who use violence, that engage and address the issues for children, women and men who are continuing to live with DFV.

Observations

This review demonstrates that there is a paucity of evidence for effective approaches for responding to DFV in families where the perpetrator remains in the home or in regular contact with women and children. There are, however, a number of practices developing in these areas: nurse home visits; restorative justice approaches; couple counselling; statutory child protection investigations; and interventions with vulnerable families/whole of family approaches. All urge caution and all recommend a priority on training workers, and only ever bringing men and women together under certain circumstances and with strict caveats. This is necessary if work is to be effective and not inadvertently escalate danger and/or collude with the power and controlling tactics of the perpetrator of violence.

Conclusions

There is some experimentation with interventions in these complex family situations, and some early signs of success. The challenges of working with the diverse nature of fathers who use violence are significant. Nevertheless, this may prove to be an important practice development for future DFV intervention.

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022).

Compliance with and enforcement of family law parenting orders: Views of professionals and judicial

officers (Research report, 01/2022). ANROWS.

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse

exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are 'not uncommon' for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K., … Dunstan, J. Domestic and family violence and parenting: Mixed method insights into impact and support needs *(ANROWS, 2017)*.

The Domestic and Family Violence and Parenting Research program examined the impact of domestic and family violence (DFV) on parenting capacity and parent–child relationships in Australia. It focused on three main issues:

- parental conflict in families and impacts on the emotional health and parenting behaviours of mothers and fathers and child functioning;
- how DFV experienced before separation, after separation, or both affects parents' emotional health and parent–child relationships; and
- mothers' experiences of engagement with services in the domestic and family violence, child protection, and family law systems in the context of DFV.

A mixed method approach involved: literature review; analysis of the Longitudinal Study of Australian

Children; analysis of two (Australian Institute of Family Studies) datasets of over 16,000 separated parents; qualitative in-depth interviews with 50 women who had experienced DFV and engaged with services in the DFV sector, the child protection system, or the family law system.

The Key findings and future directions research summary related to this report identifies specific implications for practitioners engaging with mothers, fathers, and children against a background of DFV:

- Women who engage with services against a background of DFV have a number of complex material and psycho-social needs.
- If women are not already engaged with a specialist DFV service, then such a referral is usually necessary.
- It is likely that women and their children are experiencing ongoing abuse unless contact with the perpetrator has ceased and other safety measures to prevent abuse are available (e.g. being legally permitted to live at an undisclosed address to prevent stalking).
- Women may need assistance and referral in relation to financial and housing needs, including being informed about the availability of Financial Wellbeing and Capability services and Financial Counselling.
- Women and their children may be experiencing physical and emotional consequences from DFV and abuse and may need long-term therapeutic assistance.
- Mothers may need referrals to programs and services that will support the restoration of parenting capacity from a perspective of understanding the dynamics of DFV, including programs that offer services to mothers and children together. Children may also need assistance separately.
- Where relationships between fathers and children are being maintained, fathers may need referral to services in relation to parenting. Where this is occurring, the wellbeing and safety of children need to be monitored.
- Service providers should be alert to the fact that their services and other types of services and agencies may be used in a pattern of systems abuse. Staff, including legal professionals, should be trained to recognise this and provide appropriate advice and referrals wherethis is occurring.

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from

some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

- See generally Chapter 2: ‘Characteristics of separated parents: Challenges and issues for family relationships and wellbeing’. Of particular relevance is the discussion from p 24 dealing with ‘Separated parents’ reports of experiencing family violence’. It was found that nearly two-thirds of separated mothers and just over half of separated fathers indicated that they suffered emotional abuse from their partner before or during separation. 26% of mothers and 16.8% of fathers indicated that they suffered physical abuse prior to their separation. Of this group, most respondents indicated that their children witnessed violence or abuse.
- See from p 29 which considers - ‘Co-occurrence of family violence, mental health problems and addiction issues’. It was found that parents who indicated that both mental health and addiction issues were present were most likely to report that the other parent had physically hurt them (43% of fathers and 50% of mothers). Overall, ‘experiences of family violence were reported by 85% of fathers and 92% of mothers who said that both mental health and addiction issues had been present before separation, compared with 41% of fathers and 46% of mothers who said that neither of these problems had been present. In other words, family violence seemed to be pervasive among families in which both mental health and addiction issues were thought to be present’ (p 30).
- See Chapter 10: ‘Family violence and child abuse: Parents’ pathways and professionals’ perspectives’. This chapter is relevant in relation to its general discussion of family violence in the family law system.
- See Chapter 11, ‘Children’s wellbeing’, in particular section 11.3 (p 262) which discusses ‘Family violence, safety issues and the nature of inter-parental relationships’.

Kaspiew, Rae, et al, ‘Evaluation of the 2012 Family Violence Amendments’ (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily

involved online surveys of practices and perspectives of family law professionals (*n*=653)

- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- Court Outcomes Project involving:
  - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
  - an examination of patterns in courts filings based on administrative data from the three family law courts and
  - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)*' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who had separated between 1 July 2010 and 31 December 2011; and the 6,079 parents surveyed in the SRSP 2014, who had separated between 1 July 2012 and 31 December 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 represents parents' their post-reform experiences.

Together with the Longitudinal Study of Separated Families (LSSF) Wave 1 data, these samples of separated parents reported similar levels of family violence, with around 1 in 5 parents indicating they suffered physical hurt by their former partner and nearly 2 in 5 reporting emotional abuse alone (p 14). See generally chapter 3 – 'Family Violence and Safety Concerns'. Most parents in both cohorts reported at least one type of emotional abuse before/during or since separation (p 58). Further, 'overall, mothers reported experiencing emotional abuse in greater proportions than fathers both before/during separation and since separation' (p 58). The most commonly reported form of emotional abuse (see p24) was '—insults with the intent to shame, belittle or humiliate' (p 58). A similar proportion of parents in both cohorts reported that their children saw or heard family violence prior to or during separation (p 60). However, the proportion of parents reporting that their children witnessed family violence in the period since separation decreased in the second cohort.

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

It concludes that 'overall, the general patterns in findings suggest a positive response to the 2012 family violence reforms, with practitioner responses indicating that protection from harm is given greater weight now than it was previously, and that advice-giving practices have shifted in a direction consistent with the intent of the reforms to better identify families where this is an issue. At the same time, the responses do not suggest that any less weight is placed on maintaining relationships with parents and children after separation where this is appropriate' (p 13).

Practitioners' views about striking the right balance between protecting a child from harm and maintaining a meaningful relationship with both parents (in the context of the 2012 reforms and the 'tie-breaker' provision (s 60CC(2A)) of the *Family Law Act 1975* (Cth)) are discussed from p 14. Many practitioners were positive about the effect of s 60CC(2A) in re-prioritising family violence and protecting children from harm which leads to better outcomes for children.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders. See especially from p 179 which discusses 'Shared parenting and family violence'. The author notes, 'the issue of protecting women and children from violence has not proved effective as an argument against laws that recognise the indissolubility of parenthood, nor against having any provisions in legislation that encourage the continuing involvement of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children's lives, and an increased risk of violence. There is simply no evidence for a

linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver.'

The chapter concludes – 'There is no future in arguments that say encouraging the involvement of both parents in children's lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence… The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence' (p 183).

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and compares this with care-time arrangements and family dynamics.'

The findings painted a positive picture of separated families overall but there were still a minority of parents who faced significant issues such as violence and abuse and held safety concerns. 'It has become increasingly clear that each of the mainstream professions in the family law system has a potentially constructive role to play in helping to untangle the serious predicaments in which a minority of family law clients find themselves' (p xix).

For example, higher levels in children's wellbeing emerged where parents indicated that there was a positive inter-parental relationship – 'consistently low or worsened child wellbeing was more likely to be reported by parents who reported experiencing violence/abuse, holding safety concerns, or having negative inter-parental relationship in both waves compared with reports of other parents' (p 162).

Also, where emotional abuse was experienced by a small minority of parents (in Wave 3 of the data), large proportions of these victims indicated that the abuse occurred 'sometimes or often', as opposed to 'rarely or only once' in the preceding 12 months (p 40).

'In fact, most respondents who stated that the other parent had engaged in humiliating insults, monitored their whereabouts, or circulated of defamatory comments also indicated that these behaviours occurred sometimes or often. After about five years of separation, the monitoring of a person's whereabouts may be particularly likely to reflect obsessive harassment, unless such monitoring has been instigated by genuine concerns about personal safety or the safety of others, including the children' (p 40).

Tomison, Adam M, 'Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence' (National Child Protection Clearinghouse Issues Paper No 13, Australian Institute of Family Studies, June 2000).

This article reviews the research about the relationship between domestic violence and various forms of child maltreatment. In particular, it points to the high proportion of cases of emotional abuse of children identified by child protection workers in families where there is domestic and family violence and to the mild association between presence of domestic violence and a higher than expected proportion of children sustaining injuries. Pages 8-9 of this article discusses the variety of ways a child may be exposed to domestic violence, including as a hostage to ensure the mother's return home and forcing a child to watch assaults.

Impact of domestic and family violence on children and parenting capacity - Other Resources

Children: Safety and Risk.

Open via Federal Circuit and Family Court of Australia website.

This webpage contains information about requirements to notify the Court about family violence and child abuse, family violence orders, risk assessment, Lighthouse, staying safe at court and getting help and support.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Family Violence Information Sheet (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This information sheet contains important information for litigants who allege they have experienced, or are alleged to have perpetrated, family violence, including safety at court, legal and support services at court, and cross-examination.

Family Violence: Overview

Open via Federal Circuit and Family Court of Australia website.

This webpage outlines the principles which guide the FCFCA's response to family violence, behaviours which may constitute family violence, coercive and controlling behaviours which may amount to family violence and common forms of family violence.

It also contains links to information on:

- Help and support;
- Family violence orders;
- Family violence and children;
- How the court considers safety and risk;
- Safety at court;
- Frequently asked questions; and
- Lighthouse.

Family Violence Plan - Former Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and

Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan 'builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation'. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan 'contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.'

See in particular at p 2, 'The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child's best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.'

Guidelines for Independent Children's Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

Independent Children's Lawyer information sheet.

Accessible via Legal Aid Western Australia.

Parental conflict and its effect on Children (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This fact sheet provides information for parents about the ways family conflict affects children, both in families who live together and in families who have separated.

In families where there is a high level of conflict and animosity between parents, children are at a greater risk of developing emotional, social and behavioural problems, as well as difficulties with concentration and educational achievement.

Frequent and intense conflict or fighting between parents also has a negative impact on children's sense of safety and security which affects their relationships with their parents and with others. Parental conflict that focuses on children is also linked to adjustment problems, particularly when children blame themselves for their parents' problems.

'Good quality parenting', that is parenting that provides structure, warmth, emotional support and positive reinforcement, has been found to reduce the impact of conflict.

Reconciliation Action Plan 2019-2021: Former Federal Circuit Court of Australia.

Open via Federal Circuit and Family Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

What is an Independent Children's Lawyer?

A brochure accessible via:

Legal Aid New South Wales

Legal Aid Queensland

Legal Aid Commission of Tasmania

Independent children's lawyer

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view.

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

The Court can appoint an independent children's lawyer (ICL) under Section 68L of the *Family Law Act 1975* (Cth) and Section 164 of the *Family Court Act 1997* (WA), or on the application of a child, an organisation concerned with the welfare of children or any other person, to represent and promote the best interests of a child in family law proceedings.

An ICL is usually appointed by the Court upon application by a party to the proceedings where one or more of the following circumstances exist:

- there are allegations of abuse or neglect in relation to the children
- there is a high level of conflict and dispute between the parents
- there are allegations made as to the views of the children and the children are of a mature age to express their views
- there are allegations of family violence
- serious mental health issues exist in relation to one or both of the parents or children, and/or
- there are difficult and complex issues involved in the matter.

ICLs are obliged to consider the views of the child, but ultimately provide their own, independent perspective about what arrangements or decisions are in the child's best interests.

Their main roles include:

- arranging for necessary evidence, including expert evidence, to be obtained and put before the court

- facilitating the participation of the child in the proceedings in a manner which reflects the age and maturity of the child and the nature of the case
- acting as an honest broker between the child and the parents and facilitating settlement negotiations where appropriate.

Guidelines [Guidelines for ICL 2021] have been issued to assist practitioners, parties, children and other people in contact with the family law courts with information about the Courts' general expectations of ICLs. These Guidelines have been endorsed by the Chief Justice of the Federal Circuit and Family Court of Australia.

Judicial consideration has also been given to the role of ICLs.

Independent children's lawyer - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. The effect of family violence and parenting arrangements is discussed at [15.11] (p 675). The report notes that –

- 'Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims' parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self-esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim's behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.'

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men. Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports. The study raised many questions about how well family law policies, as expressed in the legislation and implemented in the national service system, respond to violence in families such as those who were involved in this research

(p 49).

Bromfield, Leah, et al, 'Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-Occurrence of Domestic Violence, Parental Substance Misuse and Mental Health Problems' (National Child Protection Clearinghouse Issues Paper No 33, Australian Institute of Family Studies, December 2010).

This paper investigates the separate impacts of parental substance misuse, domestic violence and parental mental health problems. It presents evidence regarding the extent to which these problems co-occur and a discussion of the wider context of exclusion and disadvantage, its causes and its consequences. Finally, it provides an overview of research and theory for working with families with multiple and complex problems. This literature review cites statistics from a US study, the statistics were collected from household census data from over 20,000 households (G. Fox and M. Benson 'Violent men, bad dads? Fathering profiles of men involved in intimate partner violence.' In R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement.* (Mahwah, New Jersey: Lawrence Erlbaum Associates Publishers, 2004)):

- 37% of children were accidentally hurt during domestic violence;
- 26% of children were intentionally hurt during domestic violence;
- 49% of mothers were hurt protecting children;
- 47% of perpetrators used the child as pawn to hurt mothers;
- 39% of perpetrators hurt mothers as punishment for children's acts;
- 23% of perpetrators blamed mothers for perpetrators' own excessive punishment of children.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See generally from p 4 – ‘There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them. These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties’ consent or by the court’s adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs’ (p 4).

The theme of the report is discussed at p 5 - ‘A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding’.

Croucher, Rosalind, ‘Family Law: Challenges for Responding to Family Violence in a Federal System’ in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter discusses the history and place of family law in Australia’s federal system. Difficulties in addressing family violence in what is an often fragmented legal framework are discussed. Many different courts and jurisdictions are involved, especially where the dispute extends between states or territories. This is particularly problematic where child protection is an issue.

De Maio, John, et al, ‘Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011’

(Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.

Family Law Council, 'In Response to the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report to the Attorney-General, June 2015).

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the first two matters. The remaining matters will be dealt with in a report due June 2016.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

This report comprehensively summarises the legislative provisions governing the resolution of parenting disputes under the Family Law Act, and the intersection with legal systems governing family violence and child protection. Some important observations:

- Fragmented legal systems – families most likely to be involved with more than one of these jurisdictions are those with support needs associated with DFV and at a time of high risk and vulnerability (child protection/children's court; family courts; state/territory DFV courts)
- Reluctance by state/territory magistrates to use s68R FLA to vary Family Court orders when making DFV orders in order to resolve inconsistencies between DFV orders and parenting orders; can be done on its own motion without the consent of the parties; and sometimes magistrates assume that the parenting order is sufficient to protect child without needing to include the child on the DFV order (concerns about inadequate time limits in s68T on variation/suspension of parenting order where done in interim proceedings)
- The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 Family Violence – A National Legal Response report. They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:
    - a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others involved in family violence protection order proceedings;
    - a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
    - judicial officers lacking adequate information or evidence necessary to amend the parenting orders; and
    - parties to proceedings not having access to appropriate legal advice.

Family Law Council, Report to the Attorney-General on 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, June 2016 (Terms, 3, 4 & 5)'.

The Attorney-General requested the Family Law Council to consider the following matters in relation to the complex needs of families seeking to resolve their parenting disputes, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. This report relates to the matters listed below in items 3, 4 and 5.

(a) The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

(b) The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

(c) The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

(d) The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

(e) Any limitations in the data currently available to inform these terms of reference.

The Family Law Council made 22 recommendations (summarised at pp12-18) in the following areas:

- Family safety services
- Early whole-of-family risk assessments
- Family lawyers and risk identifications
- Family dispute resolution practitioners and risk management strategies
- Judicial risk assessments and court-ordered programs
- A court-based integrated services model
- Case-managed integrated services in the family relationships sector
- Self-represented litigants with complex needs
- Support services for families in rural and regional areas
- Collaboration between family law and state and territory courts
- Family violence competency

- Joint professional development
- Children's views and experiences
- Family dispute resolution and confidentiality
- State and territory courts exercising family law jurisdiction
- Aboriginal and Torres Strait Islander families
- Culturally and linguistically diverse families
- Court support workers
- Self-represented litigants and misuse of process
- Crossover cases
- Consent parenting orders
- Legislative reform.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers how the Federal Circuit and Family Court of Australia deals with matters involving children where there are allegations of abuse. It identifies that the balancing of the interests of the children and the parents, and frequently of other people associated with the children, is at the centre of what is just in the family law system. This issue is examined here, together with the differences in the roles of judges and experts in child development and abuse, and child psychology and psychiatry, and how each has a part to play in the system of justice. Also of concern is how the voices of children are being heard in the system. Evidence issues are discussed in detail.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence and has three parts:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of practices and perspectives of family law professionals (*n*=653)
- the Experiences of Separated Parents Study (ESPS), which comprised two cross-sectional quantitative surveys - the Survey of Recently Separated Parents [SRSP] 2012 (*n*=6,119) and the Survey of Recently Separated Parents 2014 (*n*=6,079) providing pre-reform and post-reform data on parents' experiences of separation and the family law system; and
- Court Outcomes Project involving:
  - Court Files Study: an examination of quantitative data from 1,892 family law court files providing insight into patterns in orders made by judicial determination and consent made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia, including in relation to parental responsibility and parenting time (pre-reform: *n*=895; post reform *n*=997);
  - an examination of patterns in courts filings based on administrative data from the three family law courts and
  - an analysis of published judgments applying to the 2012 family violence amendments.

One of the 'Key messages' from the report is that parents who use family law systems tend to be those affected by complex issues including family violence, mental ill-health, substance abuse and safety concerns for themselves and/or their children. This is discussed in detail in chapter 2. In particular, it was found that each cohort of separated parents studied had similar patterns of family violence (p 10). Around two-thirds of separated parents indicated that they had a history of emotional abuse or physical violence prior to or during separation and this continued for a slightly lower proportion after separation (p 10). It noted the 'prevalence of physical violence diminished after separation, as did the prevalence of emotional abuse, though to a much less significant extent' (p 10). The exposure of children to family violence for each cohort of separated parents is discussed at p 14. Chapter 4 sets out the evaluation findings on whether the 2012 family violence amendments had supported increased disclosure of family violence and child abuse concerns to family law system professionals, the screening and assessment practices and responses to disclosures of family violence and/or child safety concerns.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)*' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who had separated between 1 July 2010 and 31 December 2011; and the 6,079 parents surveyed in the SRSP 2014, who had separated between 1 July 2012 and 31 December 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 represents parents' their post-reform experiences.

Together with the Longitudinal Study of Separated Families (LSSF) Wave 1 data, these samples of separated parents reported similar levels of family violence, with around 1 in 5 parents indicating they suffered physical hurt by their former partner and nearly 2 in 5 reporting emotional abuse alone (p 14). See generally chapter 3 – 'Family Violence and Safety Concerns'. Most parents in both cohorts reported at least one type of emotional abuse before/during or since separation (p 58). Further, 'overall, mothers reported experiencing emotional abuse in greater proportions than fathers both before/during separation and since separation' (p 58). The most commonly reported form of emotional abuse (see p24) was '—insults with the intent to shame, belittle or humiliate' (p 58). A similar proportion of parents in both cohorts reported that their children saw or heard family violence prior to or during separation (p 60). However, the proportion of parents reporting that their children witnessed family violence in the period since separation decreased in the second cohort.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

It concludes that ‘overall, the general patterns in findings suggest a positive response to the 2012 family violence reforms, with practitioner responses indicating that protection from harm is given greater weight now than it was previously, and that advice-giving practices have shifted in a direction consistent with the intent of the reforms to better identify families where this is an issue. At the same time, the responses do not suggest that any less weight is placed on maintaining relationships with parents and children after separation where this is appropriate’ (p 13).

Practitioners’ views about striking the right balance between protecting a child from harm and maintaining a meaningful relationship with both parents (in the context of the 2012 reforms and the ‘tie-breaker’ provision (s 60CC(2A)) of the *Family Law Act 1975* (Cth)) are discussed from p 14. Many practitioners were positive about the effect of s 60CC(2A) in re-prioritising family violence and protecting children from harm which leads to better outcomes for children.

Kaspiew, Rae, et al, ‘Court Outcomes Project’ (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) ‘were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children.

The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments’ (p vii).

The report contains numerous statistical comparisons of the situation pre- and post-reform. It identified that allegations of family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility in the context of family violence or child abuse is consistent with the aim of the 2012 reforms.

A detailed overview of the prevalence of family violence allegations in family court proceedings after the amendments is provided from p 43. 36% of cases after the 2012 amendments involved allegations of family

violence, compared with 26% pre-reform. The prevalence of allegations of both physical and emotional abuse also increased after the reforms, but this was more marked for physical violence.

The proportion of allegations made against both parents also increased (p 43). Other statistical interpretations of this data, such as the prevalence of family violence allegations after the reforms according to the way the matters were resolved (p 45) are provided.

An overview of factual issues raised (particularly how factual issues changed following the reforms) is provided from p 46. It is noted that issues such as substance abuse and mental ill health are 'not uncommon' for parents who use family law services (p 47).

Parental capacity is discussed in section 4.5 (p 89).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

- See generally Chapter 2: 'Characteristics of separated parents: Challenges and issues for family relationships and wellbeing'. Of particular relevance is the discussion from p 24 dealing with 'Separated parents' reports of experiencing family violence'. It was found that nearly two-thirds of separated mothers and just over half of separated fathers indicated that they suffered emotional abuse from their partner before or during separation. 26% of mothers and 16.8% of fathers indicated that they suffered physical abuse prior to their separation. Of this group, most respondents indicated that their children witnessed violence or abuse.
- See from p 29 which considers - 'Co-occurrence of family violence, mental health problems and addiction issues'. It was found that parents who indicated that both mental health and addiction issues were present were most likely to report that the other parent had physically hurt them (43% of fathers and 50% of mothers). Overall, 'experiences of family violence were reported by 85% of fathers and 92% of mothers who said that both mental health and addiction issues had been present before separation,

compared with 41% of fathers and 46% of mothers who said that neither of these problems had been present. In other words, family violence seemed to be pervasive among families in which both mental health and addiction issues were thought to be present' (p 30).

- See Chapter 10: 'Family violence and child abuse: Parents' pathways and professionals' perspectives'. This chapter is relevant in relation to its general discussion of family violence in the family law system.
- See Chapter 11, 'Children's wellbeing', in particular section 11.3 (p 262) which discusses 'Family violence, safety issues and the nature of inter-parental relationships'.

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders. See especially from p 179 which discusses 'Shared parenting and family violence'. The author notes, 'the issue of protecting women and children from violence has not proved effective as an argument against laws that recognise the indissolubility of parenthood, nor against having any provisions in legislation that encourage the continuing involvement of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children's lives, and an increased risk of violence. There is simply no evidence for a linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver.'

The chapter concludes – ‘There is no future in arguments that say encouraging the involvement of both parents in children’s lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence… The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence’ (p 183).

Qu, Lixia et al, ‘Post-separation parenting, property and relationship dynamics after five years’ (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and compares this with care-time arrangements and family dynamics.’

The findings painted a positive picture of separated families overall but there were still a minority of parents who faced significant issues such as violence and abuse and held safety concerns. ‘It has become increasingly clear that each of the mainstream professions in the family law system has a potentially constructive role to play in helping to untangle the serious predicaments in which a minority of family law clients find themselves’ (p xix).

For example, higher levels in children’s wellbeing emerged where parents indicated that there was a positive

inter-parental relationship – ‘consistently low or worsened child wellbeing was more likely to be reported by parents who reported experiencing violence/abuse, holding safety concerns, or having negative inter-parental relationship in both waves compared with reports of other parents’ (p 162).

Also, where emotional abuse was experienced by a small minority of parents (in Wave 3 of the data), large proportions of these victims indicated that the abuse occurred ‘sometimes or often’, as opposed to ‘rarely or only once’ in the preceding 12 months (p 40).

‘In fact, most respondents who stated that the other parent had engaged in humiliating insults, monitored their whereabouts, or circulated of defamatory comments also indicated that these behaviours occurred sometimes or often. After about five years of separation, the monitoring of a person’s whereabouts may be particularly likely to reflect obsessive harassment, unless such monitoring has been instigated by genuine concerns about personal safety or the safety of others, including the children’ (p 40).

Independent children's lawyer - Other Resources

Children: Safety and Risk.

Open via Federal Circuit and Family Court of Australia website.

This webpage contains information about requirements to notify the Court about family violence and child abuse, family violence orders, risk assessment, Lighthouse, staying safe at court and getting help and support.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Family Violence Information Sheet (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This information sheet contains important information for litigants who allege they have experienced, or are alleged to have perpetrated, family violence, including safety at court, legal and support services at court, and cross-examination.

Family Violence: Overview

Open via Federal Circuit and Family Court of Australia website.

This webpage outlines the principles which guide the FCFCA's response to family violence, behaviours which may constitute family violence, coercive and controlling behaviours which may amount to family violence and common forms of family violence.

It also contains links to information on:

- Help and support;
- Family violence orders;
- Family violence and children;
- How the court considers safety and risk;
- Safety at court;
- Frequently asked questions; and
- Lighthouse.

Family Violence Plan - Former Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan ‘builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation’. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan ‘contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.’

See in particular at p 2, ‘The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child’s best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.’

Guidelines for Independent Children’s Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

Independent Children’s Lawyer information sheet.

Accessible via Legal Aid Western Australia.

Parental conflict and its effect on Children (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This fact sheet provides information for parents about the ways family conflict affects children, both in families who live together and in families who have separated.

In families where there is a high level of conflict and animosity between parents, children are at a greater risk of developing emotional, social and behavioural problems, as well as difficulties with concentration and educational achievement.

Frequent and intense conflict or fighting between parents also has a negative impact on children's sense of safety and security which affects their relationships with their parents and with others. Parental conflict that focuses on children is also linked to adjustment problems, particularly when children blame themselves for their parents' problems.

'Good quality parenting', that is parenting that provides structure, warmth, emotional support and positive reinforcement, has been found to reduce the impact of conflict.

Reconciliation Action Plan 2019-2021: Former Federal Circuit Court of Australia.

Open via Federal Circuit and Family Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

What is an Independent Children's Lawyer?

A brochure accessible via:

Legal Aid New South Wales

Legal Aid Queensland

Legal Aid Commission of Tasmania

Family dispute resolution

Among the objectives of the 2006 amendments to the *Family Law Act 1975* (Cth) (*FLA*) and the *Family Court Act 1997* (WA) (*FCA*) were the discouragement of adversarial approaches to family dispute resolution (FDR) and the introduction of a national network of family relationship centres resourced with accredited FDR practitioners [Bagshaw et al 2011]. Section 60I *FLA* and Section 66H *FCA* aim to ensure that all parties who have a dispute about Part VII *FLA* or Part 5 *FCA* (children) matters make a genuine effort to resolve the dispute by FDR before applying for an order under the Part. FDR can be provided through the 65 Family Relationship Centres, other government funded organisations, Legal Aid Commissions and private services [Other Resources].

A court must not hear an application under Part VII *FLA* or Part 5 *FCA* unless the applicant has either filed and served a certificate by an FDR practitioner (certifying that the parties have attended or attempted to attend FDR (s.60I(7) FLA; s.66H(7) FCA) and the FCFCA Fact Sheet) or have attended upon a Registrar and obtained an exemption from attending FDR (s.60I(9) FLA; s.66H(9) FCA) on the basis that there are reasonable grounds to believe that there has been or that there is a risk of family violence or child abuse by one of the parties to the proceedings; or the application relates to the contravention of an order made under this part in the previous 12 months; or there are circumstances of urgency or impracticality. The Family Violence Best Practice Principles make it clear that it is not compulsory for parties to participate in FDR in these circumstances. Where family violence issues are not identified in the FDR intake process, but become apparent in the course of the negotiations, a certificate may be issued by an FDR practitioner under Section 60I *FLA* or Section 66H *FCA* certifying that it would be inappropriate to continue [AG s60I Certificate Fact Sheet]. It is important to note that the assessment of the suitability of parties to attend dispute resolution at any stage, has not changed as a result of the merger of the Courts and the implementation of *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (*FCFCOA Rules*) (Sch 1 Part 1 cl 1(8) and Sch 2 Part 1 cl 1(8)) and the Central Practice Direction Family Law - Case Management 2021 (*Central Practice Direction*). However, it appears from the pre-action procedures that in the event FDR is not appropriate, for whatever reason, a written notice of an intention to start a proceeding must be given to the other party prior to the filing of an application to the Court (FCFCOA Rules Sch 1 Part 1 cl 3(4) and Sch 1 Part 2 cl 3(4)).

Where a FDR practitioner assesses it safe to do so, a matter involving family violence may proceed to FDR. The specific model of FDR utilised (for example, telephone, skype, online, shuttle, legally-assisted) will be

dependent on the circumstances, complexities and needs of individual families.

Any communications made to an FDR practitioner during FDR are confidential unless disclosure is required or authorised by law (Section 10H *FLA* or Section 53 *FCA*). Such communications made in FDR are also not admissible in any court or proceedings in any jurisdiction (Section 10J *FLA* or Section 54 *FCA*). Additionally, a communication made when a professional consultation is being carried out, on referral from an FDR practitioner, is inadmissible in any court or proceedings in any jurisdiction. However, an admission or disclosure that indicates that a child under 18 has been abused, or is at risk of abuse, may be admitted as evidence unless there is sufficient evidence of the admission or disclosure available to the court from other sources.

Under Section 13C *FLA* or Section 65K *FCA*, a judge may also refer parties back to FDR, family counselling, a course, program or service at any stage of the family law proceedings but before doing so must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (Section 11E *FLA* or Section 64 *FCA*).

With the introduction of the FCFCA Rules and the Central Practice Direction,there has been an increased focus on the importance of and reliance on dispute resolution and Family Dispute Resolution (*FDR*). "Dispute Resolution" is defined in the FCFCOA Rules to include a mediation and conference (r. 105). One of 10 the core principles underpinning the family law jurisdiction and designed to facilitate the resolution of family law matters is the importance of dispute resolution. In the Central Practice Direction this is described as follows:

1. The Court encourages the use of dispute resolution procedures;
2. Before commencing actions, parties are expected to make a genuine attempt to resolve the dispute including by complying with requirements and obligations of Section 60I of the FLA and the preaction procedures set out in the FCFCOA Rules;
3. After commencement of an action, parties are expected to:
   (a) Be proactive and identify the appropriate time and appropriate way in which they can participate in dispute resolution; and
   (b) Be prepared to make and consider reasonable offers of settlement at any stage. Failure to do so may have a cost consequence.

It is also important to note that another of the 10 core principles is assessment of risk. This includes the prioritisation of the safety of children, vulnerable parties and litigants as well as the identification and appropriate handling of issues of risk including alleged family violence. As a result, participation in family dispute resolution and dispute resolution more broadly needs to be considered in this context.

The Central Practice Direction also includes consideration after any interim hearings, as to whether dispute resolution is appropriate and whether measures can be implemented to ensure safety in matters involving family violence and safety concerns. This includes parties being referred off to private mediation, private or community based Family Dispute Resolution, and/or arbitration with the consent of the parties. If the Court is satisfied that it is appropriate for the parties to participate in dispute resolution, the matter will be listed for a date within 6 months of filing for a Conciliation Conference, a Judicial Settlement Conference or a Family Dispute Conference. The Central Practice Directions also note that a second or subsequent dispute resolution may be listed at any time if it appears to the Court that it is reasonably likely this will assist with the resolution or narrowing of the dispute.

There are additional requirements included in the FCFCOA Rules and the Central Practice Direction that parties provide a detailed list of documents to the Mediator or FDR Practitioner and to the other party involved not less than 7 days before the mediation/FDR. These include the following:

1. All relevant Applications, Responses, Affidavits and Financial Statements filed in the proceedings;
2. Any relevant expert reports;
3. A Balance Sheet setting out agreed and disputed assets and liabilities;
4. Any documents exchanged between the parties which is directly relevant to an issue remaining in dispute (with relevant passages highlighted);
5. A Minute setting out the precise terms of orders required to give effect to the settlement proposal;
6. A confidential case outline document in the approved form;
7. Particulars of any financial resource and a valuation of any asset the value of which is in dispute;
8. Valuations or market appraisals for any parcel of real estate in which any party has an interest, or any motor vehicle in which the value is not agreed;
9. Valuation of any superannuation interests and written confirmation that the superannuation trustee of any fund that may be subject to a splitting order has been afforded procedural fairness;

10. Any family violence orders currently in place; and

11. Any other documents reasonably requested by the mediator/FDRP.

Research [Kaspiew et al 2015 (Survey of Family Law Practices & Experiences)] by the Australian Institute of Family Studies (AIFS) in 2015 suggests that parties, and perhaps other professionals involved in the FDR process, may not have a thorough understanding of the 60I/66H exemption. This research shows that some parents who experience family violence continue to present for FDR services, although many who experience family violence proceed directly to the Court without attending or attempting to attend FDR. This research found there was a significant reluctance by parties to disclose family violence issues in the FDR process, and a low 60I/66H exemption rate where family violence issues are disclosed [Kaspiew et al 2015 (Survey of Family Law Practices & Experiences)]. A separate AIFS study shows that among those parents who used FDR services as a means of resolving parenting issues, substantial proportions of parents reported having experienced physical violence or emotional abuse [Kaspiew et al, Synthesis Report 2015].

Another Australian study [Bagshaw et al 2011] reported that women were more likely than men not to disclose family violence and twice as likely as men to report that FDR proceeded notwithstanding a disclosure of family violence. Central to disclosure is what Chisholm has called the victim's dilemma: a victim's choice of balancing the risk to the child of not taking protective action to prevent further family violence, against the risk to the child of doing so unsuccessfully due to, for example, insufficient evidence, with the possible result that the child spends more time with the perpetrator [Chisholm 2009].

The critical question remains in each case, however, as to whether FDR or other mediated or facilitated negotiation processes are appropriate or effective where there is a history of family violence between parties attempting to reach agreement as to parenting arrangements. AIFS has observed in its research that in some circumstances, the process may be empowering for the victim; in other circumstances, the process may cause the victim further fear and trauma, making the victim more vulnerable to the impacts of ongoing power imbalances with the perpetrator, and may produce coerced outcomes that may not be in the best interests of the child [Kaspiew et al 2012]. Overall, fewer parents reach agreement using FDR processes where family violence issues exist, and many are unable to reach agreement [De Maio et al 2013]. For those who do reach agreement, there is evidence that the consequent parenting arrangements may be unstable due to unresolved and ongoing family violence issues and safety concerns, and as a result, these families are likely to need additional support [Qu et al 2010]. There is an acknowledged need for constant vigilance by FDR practitioners in

recognising and assessing a party's fear and safety concerns prior to the commencement and throughout the course of the FDR process and, where necessary, issuing a 60I/66H certificate [Kaspiew et al 2009].

If parties reach agreement through FDR they may wish to apply to the Court for consent orders. Where an application is made to the FCFCA for a parenting order by consent (whether or not resulting from an outcome mediated through FDR), the parties must formally advise the Court whether any allegations of family violence or child abuse or neglect (or risk thereof), or of mental ill-health, drug or alcohol misuse, serious parental incapacity or any other allegation involving a risk to the child concerned have been made AND whether a party considers that the child concerned has been or is at risk of abuse, neglect or family violence, and whether a party considers that he or she or another party to the proceedings has been or is at risk of family violence. Should any of these circumstances be advised, the parties must explain to the Court how the parenting order attempts to deal with the allegations (see Rule 10.05 of FCFCA Rules).

Family dispute resolution - Key Literature

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports key findings of two national online surveys with adults and children in relation to post-separation parenting, which formed part of the larger research. Adult respondents described how family violence affected their parenting arrangements and their use of family services to assist with parenting decisions. There were gender differences in the reported experiences of and responses to violence, with women reporting more serious forms of violence than men.

See in particular from p 54 where the issue of disclosure is discussed. The article observes that fear of disclosing family violence is a significant issue in the context of Family Dispute Resolution (and more broadly). In particular, 'Only 60% of the respondents who attended FRCs said they disclosed their experiences of family violence and only 10.5% of those who reported violence to a FDR service were given a certificate of exemption (see s60I of the Family Law Act) from using the service. In this context, women were more likely than men not to disclose violence and twice as likely to report that family dispute resolution proceeded if family violence was disclosed' (p 54).

Caruana, Catherine, 'Dispute resolution choices: A comparison of family dispute resolution, family law conferencing services and collaborative law' [2010] (85) *Family Matters* 80.

This article provides a comparison of family dispute resolution, family law conferencing and collaborative law. Practitioners' views, differences in the lawyer's role, cost and the range of applicable issues in each theatre are discussed. Traditional mediation (known as Family Dispute Resolution - FDR) is discussed on p 81. The article identifies that careful screening processes for issues such as domestic violence and child abuse are conducted and FDR practitioners 'may refuse mediation where they believe there is a concern about the safety of the clients or the mediators, or where there is a power imbalance that cannot be adequately addressed within the process' (p 81). It points out that while the client must be able to negotiate on their own behalf, there are mechanisms available to support clients including conducting the mediation 'on a shuttle basis where the parties are located in separate rooms and the mediators move between the rooms' (p 81).

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Part 2 considers court practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

See in particular from p 27 where the author discusses the 'victim's dilemma' where 'the victim has experienced family violence and has well-founded fears for the safety of the children if they are to be in the care of the perpetrator.' The dilemma relates to 'balancing the risk to the child from not taking protective action against the risk to the child of doing so unsuccessfully, with the consequence that the child spends more time with the perpetrator' (p 28). If a victim were to seek orders to protect the children from risk (such as no-contact or supervised contact orders), it may be seen 'as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator.'

This could result in the decision maker taking an adverse view of the victim and making orders which place the children with the perpetrator for longer periods 'to protect them from what it might see as a style of parenting by the victim that would harm the children by alienating them from the other parent. Such an outcome, the victim would believe, would place the children at *additional* risk of harm' (p 27).

The author notes that often, a history of domestic violence in the relationship which may not have previously been disclosed will contribute to the seriousness of the victim's dilemma. This may make it difficult for the victim to disclose the violence later (such as in Family Dispute Resolution (FDR) or court proceedings) because such disclosure 'may be met with the criticism that if such things had happened, the victim would have complained: it will be argued that the victim's lack of action at the time is a sign that there really had been no such family violence, or that it was of a trivial nature' (p 28). The author notes that the dilemma applies at all stages of proceedings and before proceedings begin. (p 28).

See further at p 152, where the author discusses the risks associated with delay in relation to FDR agencies.

De Maio, John, et al, 'Survey of Recently Separated Parents: A study of parents who separated prior to the implementation of the Family Law Amendment (Family Violence and Other Matters) Act 2011' (Commissioned Report, Australian Institute of Family Studies, 2013).

This report presents key findings from the Survey of Recently Separated Families (SRSP) 2012. The study aimed to gain a more detailed understanding of parents' experiences of family violence and concerns about child safety, and how well the legal system responds. Interviews were conducted with 6,119 parents who separated between 31 July 2010 and 31 December 2011 - that is, five years after the family law reforms of 2006 and one year prior to the legislative reforms introduced by the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. The study found that family violence is common among separated families, and though many of the participants reported this violence to police or other services, a sizeable minority (47%) of them did not.'

At p E2, it is noted that the most common services accessed by separating parents were Family Dispute Resolution (FDR) (and lawyers). Further, where parents experienced the two broad categories of family violence (physical violence with or without the presence of emotional abuse, and emotional abuse alone), use of all types of family law services including FDR increased. In particular, '69% of parents who experienced physical violence before/during separation contacted a counselling, mediation or family dispute resolution service, compared with 40% of parents who did not report experiencing any family violence' (p 46).

Section 4.3.1 discusses FDR specifically. It is noted that, 'A smaller proportion of parents who reported experiencing family violence before/during the separation than those who didn't experience family violence reached an agreement through FDR' (Table 4.13) (p 52).

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: a number of issues including family dispute

resolution (FDR).

FDR is considered in section 4.6 from p 59. The study identifies that dealing with family violence/abuse is 'core business' for FDR practitioners (p 67). The data suggests that 'although the experience of family violence/abuse is common among those parents who attempt FDR, those who do not reach agreement but who are not issued with a certificate, are more likely than those who reach agreement to report this experience, while those who are issued with a certificate are the most likely of all to make such a report. A similar pattern can be seen when safety concerns are examined. Those who reach agreement are the least likely to report safety concerns; those who do not reach agreement but are not issued with a certificate are somewhat more likely to report safety concerns; and those who are issued with a certificate are the most likely to have such concerns' (p 62).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

Chapter 5 discusses family dispute resolution (p 93). In situations where FDR or mediation was clearly reported as having been attempted, 'Parents who reported experiencing violence (physical or emotional) were much more likely to have attempted FDR (41% of those who experienced physical violence and 35% of those who had experienced emotional abuse only) than those who did not report experiencing violence (15%)' (p 100).

Table 5.6, which reports on the outcomes of FDR according to whether family violence had been experienced is particularly relevant. (p 100). Table 5.7 discusses FDR agreement rates for mothers and fathers 'by fear, abuse or threats an ability to negotiate'. (pp 100-101). Table 5.8 examines similar issues but in relation to the issuing of s 60I certificates. It suggests 'a strong correlation between mothers' reporting of fear, both generally and inside the sessions, and the issuing of a certificate. There is a weaker though still statistically significant correlation between fathers' reporting of abuse or threats outside the sessions and the issuing of a certificate' (p 102). Authors note there are cases where no certificates are issued but there are reports of fear and

threats (p102). There were also reports from some who felt pressured into FDR or into reaching an agreement (p 110). A survey of 2335 clients of family relationships services suggested, in relation to the effectiveness of service responses to concerns and fears of the other person who attended the service in 35% of cases, the participant indicated their fears weren't adequately addressed.

Kaspiew, Rae, et al, 'Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases' (Commissioned Report, Australian Institute of Family Studies, 2012).

The Coordinated Family Dispute Resolution model was developed to provide a safe, non-adversarial, and child-sensitive means for parents to sort out their post-separation parenting disputes. The model was trialled in five sites across Australia. This report presents an evaluation of the model, examining whether the model addressed practitioner and family safety during the program, safe parenting arrangements, the best interests of children, and power imbalances between parents. The evaluation also examines challenges and advantages due to the interdisciplinary nature of the model.

Chapter 7 (p 102) discusses 'CFDR negotiation in the shadow of family violence'. See further at p 116 – Notes: '…FDR is based on the notion that the process supports parents in agreeing on parenting arrangements and is a step in the direction of future self-management. In the context of family violence, this ideal is recognised to be difficult to achieve because of the power dynamics such a history creates in a relationship, at a general level, and more specifically, because of the potential ongoing effects of trauma.'

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives

- Court Outcomes Project involving: a quantitative analysis of patterns in orders for parental responsibility and time made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia; a national analysis of court filings data provided by those courts and an analysis of published judgments

See in particular section 3.1.5 (esp. p24) – Family dispute resolution outcomes.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

See in particular figure 5.1, which shows, *inter alia,* 'the estimates of the proportion of cases that are unsuitable for family dispute resolution due to the presence of concerns about family violence and child abuse and neglect'. The findings show that these issues are relevant in a substantial proportion of cases though family violence is more frequently identified than child abuse' (p 89).

Qu, Lixia and Ruth Weston, 'Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms' (Commissioned Report, Australian Institute of Family Studies, 2010).

This report examines, 'the pathways that separating families have taken through the family law system, and the impact the changes to the family law system have had on these families. The Longitudinal Study of Separated Families examined relationships and wellbeing in separated families in Australia. Some 10,000 separated parents with children were interviewed for the first wave in 2008, as part of the evaluation of the 2006 Family Law reforms. This report presents findings from the second wave, when the parents had been separated for two to three years'. See in particular section 4.2 – 'Use of family dispute resolution (FDR)'. Recent use of FDR in the context of physical or emotional abuse is considered at p 49. Use of FDR was

reported by around one in three fathers and one in four mothers who said that they had experienced physical or emotional abuse between survey waves and by only around 10% of parents who had not experienced either form of abuse' (p 49).

Qu, Lixia, *Family dispute resolution: Use, timing, and outcomes* (2019) *Australian and New Zealand Journal of Family Therapy* 24-42.

After the 2006 Australian family law reforms, it became mandatory for separating or separated parents to mediate disputes over children before filing an application for the courts. The process is known as Family Dispute Resolution (FDR).

This paper examines three cohorts of parents who had separated in different periods after the reforms. It shows that parents who went to FDR were typically able to reach an agreement, but also that the use of and outcomes from FDR were closely linked to circumstances surrounding separation. And finally that parents who used FDR typically did so in the early stage of separation, with its use much less common after a separation of three or four years.

Key points:

1. Use of FDR is quite common among separated parents and the take-up has increased. Among the two cohorts of recently separated parents (surveys conducted in 2012 and 2014), nearly four in 10 reported use of FDR within a year and half after separation, representing an increase from three in 10 for a similar 2008 survey.
2. Separated parents who used FDR differed from those who did not, with a higher likelihood of use associated with higher socio-economic status, separation from a registered marital relationship and having children of primary or junior high school age. More importantly, FDR use was closely associated with experience of toxic issues (family violence, mental health, or substance misuse) before or during separation and poor quality of inter-parental relationship and post-separation safety concerns.
3. Parents who used FDR were more likely to reach an agreement than to have other outcomes. The rate of reaching agreements increased over time, with close to one-half of FDR users among the more recent cohort (2014 survey) reporting this positive outcome. On the other hand, the rate of issuing a certification fell.

4. The longitudinal data of separated parents who were interviewed at three time points after separation (1.5, 2.5, and 5.5 years) revealed that most used FDR once, which typically occurred soon after separation.
5. The data further reveal that the longer the separation, the less likelihood parents reached an agreement through FDR.

Family dispute resolution - Other Resources

- **Australian Government, Attorney-General's Department website.**

Family Relationships Online – Family Dispute Resolution.

Family Relationships Online, an Australian Government initiative, provides all families (whether together or separated) with access to information about family relationship issues, ranging from building better relationships to dispute resolution. It also allows families to find out about a range of services that can assist them to manage relationship issues, including agreeing on appropriate arrangements for children after parents separate.

Family Relationships Online – Family Dispute Resolution Register.

Family Relationships Online maintains details in the FDR Register (the Register), for administrative purposes only, of those practitioners accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. Courts that deal with family law matters, such as the Federal Circuit and Family Court of Australia and the Family Court of Western Australia will be authorised to access *some* information in the Register to verify that certificates are issued under section 60I of the *Family Law Act* by accredited FDR practitioners. The courts will have access to the names of practitioners included on the Register, the organisation for which they provide services (if any) and the registration number of the practitioner.

***Section 60I Certificates Fact Sheet* – website.**

This Fact Sheet outlines general information about certificates issued under Section 60I of the *Family Law Act 1975* (Cth) and the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008.* It includes information about the:

1. Certificate template
2. Purpose of 60I certificates
3. Types of certificates

4. Issuing of certificates
5. Time frame for issuing certificates
6. Revocation of certificates.

Court-based dispute resolution in the Federal Circuit and Family Court of Australia (September 2021).

Open via Federal Circuit and Family Court of Australia website.

This factsheet outlines the practical measures the Court will take to fulfil the Court's overarching purpose 'to facilitate the just resolution of disputes a) according to law and b) as quickly, inexpensively and efficiently as possible'."

"The Court's new case management pathway, and particularly the events which are conducted by judicial registrars in court lists and in dispute resolution, is designed to focus parties on potential areas of agreement, and move towards a final resolution of all issues as safely as possible, and without the impact, stress and expense of protracted family law litigation."

"Not all matters are appropriate for dispute resolution including those where there are significant allegations of risk of harm including as a result of domestic and family violence, drug and alcohol abuse and/or coercive control. In all cases, very careful consideration will be given to whether or not a dispute resolution conference is appropriate."

***Family Violence Best Practice Principles – December 2016*.**

Open via Federal Circuit and Family Court of Australia website.

See at p 8 where it is noted that 'It is important that people seeking assistance from the courts know IT IS NOT COMPULSORY for parties to participate in family dispute resolution processes prior to the commencement of court proceedings, in cases where the court is satisfied there are reasonable grounds to believe:

(a) there has been family violence or abuse, or

(b) there is a risk of family violence or abuse'.

Court and case management

Child-related proceedings

Part VII, Division 12A of the *Family Law Act 1975* (Cth) and Part 5, Division 11A of the *Family Court Act 1997* (WA) contain the provisions relating to the conduct of child-related proceedings. Section 69ZN *FLA* and Section 202B *FCA* set out the five principles governing the conduct of proceedings relating to children as follows:

1. The Court is to consider the needs of the child concerned, and the impact that the conduct of the proceedings may have on the child, in determining the conduct of the proceedings.
2. The Court is to actively direct, control and manage the conduct of the proceedings.
3. The proceedings are to be conducted in a way that will safeguard:
   - the child concerned against family violence, child abuse and child neglect, and
   - the parties to the proceedings against family violence.
4. The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
5. The proceedings are to be conducted without undue delay and with as little formality as possible.

Research indicates that cases involving allegations of domestic and family violence may present additional challenges as the objective of parents setting aside their conflict and working cooperatively to achieve a shared parenting arrangement may work against the interests of the party experiencing violence. Allegations of domestic and family violence may require a factual determination as to their veracity. The safety of children and other parties at risk of violence is paramount, while also ensuring that the party experiencing violence has the opportunity to engage in the proceedings [Chisholm 2007]. It may be more difficult than usual for a person who has experienced violence to be self-represented and to have to conduct their own proceedings [Kaspiew et al 2009].

In some registries the Court is screening for family violence through Lighthouse [Lighthouse].

Child-related proceedings - Key Literature

Chisholm, Richard, '"Less adversarial" proceedings in children's cases' [2007] (77) *Family Matters* 28.

The author discusses the 'Less Adversarial Proceedings' approach in relation to hearing child related proceedings, introduced in 2006 amendments to the Family Law Act. This article overviews the less adversarial principles and duties under the new legislation (at 31-32).

Family Court of Australia, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (April 2007).

This document contains a general overview of the Family Court's transition from the traditional common law adversarial trial to the less adversarial trial (LAT). It contains a history of procedural reforms to the Family Court. It discusses the differences between adversarial and inquisitorial systems, and contains detailed discussion of the operation of the LAT model.

See in particular at pp 6-7, where it is noted that traditional adversarial processes such as cross-examination present particular difficulties in family disputes which are often compounded when there are family violence allegations or more subtle imbalances of power in the relationship.

Family violence generally is discussed at pp 55-56 - 'The frequency with which issues of both child and spousal abuse are raised in Family Court proceedings makes it vital that any procedural changes provide at least the same level of protection to possible targets of violence as did the processes which they replaced.'

The LAT improves the Court's responses to family violence allegations through

- Early consideration of the issue;
- Determination of single issues of disputed fact separately and;
- Judicial consistency (the same judicial officer handles the case for its duration).

See further - 'The direct dialogue between the judge and the parties enables the judge to assess the circumstances of the family without the buffer of formality and, hopefully, without the parties being intimidated or overwhelmed by the courtroom environment. There is a need for care in dealing with such cases particularly where one party may be in fear of the other. A party may well have concerns about speaking

freely in the presence of the other party and the judge must be conscious of such a possibility. Arrangements can include changes to the format of the courtroom, permission to have additional companions present or special arrangements for a party being able to participate by video as is consistent with the Court's family violence strategy. Family consultants may play a significant role in such cases, especially where they have had prior involvement with the family' (pp 55-56).

Family Court of Australia, 'Implications of the Australian Institute of Family Studies "Allegations of Family Violence and Child Abuse in Family law Children's Proceedings" report: Response from the Family Court of Australia' [2007] (77) *Family Matters* 16.

This article emphasises the value of reliable evidence and guidelines in judicial decision making, and highlights Family Court initiatives in improving practices and outcomes, such as the Less Adversarial Trial, the Child Responsive Model, and staff training.

See in particular at p 17 – 'The issue-based focus of the Less Adversarial Trial and the greater control exercised by the trial judge over the conduct of proceedings, including the evidence to be relied upon, enables the Family Court to bring a more structured and purposive approach to its consideration of allegations of violence and abuse'…'Although the report highlighted the lack of expert evidence in particular cases, the new Less Adversarial Trial process will allow the judge to identify issues of violence or abuse at an early stage and direct the appropriate evidence to be put before the Court.'

Kaspiew, R., et al., (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022).

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. See page 11-12 for key findings.

The findings in this report demonstrate that non-compliance arises from a complex range of issues, with five overlapping themes emerging as particularly significant: family violence and safety concerns, child-related

issues, circumstances where parents' behaviour is seen as particularly difficult (including situations where systems abuse may be occurring), orders that are seen as unworkable for technical or substantive reasons, and the existence of a contravention regime that is widely regarded as ineffective.

In relation to responding to non-compliance: The financial cost associated with legal proceedings was the most commonly identified obstacle to taking action in relation to compliance, with 96 per cent of the sample agreeing this discourages clients from taking action. Similarly, reluctance to re-engage with a court process and the level of complexity associated with legal proceedings were seen as obstacles by 93 per cent and 88 per cent of participants respectively. Fear of the other party was nominated as an obstacle by 80 per cent of the sample.

A majority of the professionals involved in the survey and interviews considered the system for responding to contraventions was ineffective, with 56 per cent disagreeing with the proposition that the regime is effective in discouraging non-compliance with parenting orders and only 14 per cent agreeing.

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files.

See further in section 14.3 (p 328-330) which contains qualitative insights into less adversarial proceedings. Some judicial officers and legal practitioners expressed reservations about the way family violence cases were handled within the less adversarial framework. The report notes: 'There were two aspects to these concerns. First, some believed the more personal nature of LAT proceedings, where parties speak directly to the judge, may not be optimal for parties who have experienced family violence. Second, some maintained that the informality of the LAT may not be the best approach for determining allegations that often concern serious criminal offences.'

Views that the less adversarial processes achieved appropriate outcomes for cases involving allegations of family violence or child abuse were expressed less frequently. However, those who espoused this view suggested that less adversarial trials allowed a broader picture of a child's circumstances, including in relation

to family violence and child abuse, to be put before the court (p 329).

Kaspiew, Rae, et al, 'Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases' (Commissioned Report, Australian Institute of Family Studies, 2012).

This report presents an evaluation of the Coordinated Family Dispute Resolution model piloted in the community sector. The evaluation also examines challenges and advantages due to the interdisciplinary nature of the model. This was not intended to be integrated into court-based practice.

See generally chapter 7 – 'CFDR negotiation in the shadow of family violence'. It is noted that 'The application of mediation-based processes in circumstances where there has been a history of family violence raises significant challenges to some of the core notions that underpin approaches to mediation. For a range of reasons linked primarily to the power imbalances that ensue from a history of family violence, facilitated processes such as mediation have frequently been thought to be inappropriate for these cases. At the same time, empirical evidence and the practice literature demonstrate that such processes are quite widely applied in circumstances in which family violence has been alleged. Sometimes the process can be an empowering one for the victim, but sometimes it can engender fear and/or leave the victim in an even more vulnerable position' (p 102).

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The findings indicate that considerable value is placed on the role, especially by judges. There are three overlapping aspects to the ICL role, relating to participation, litigation management and evidence gathering. In fulfilling the litigation management and evidence-gathering role, ICLs are seen to bring a child focus to proceedings that would otherwise be conducted bilaterally and adversarially. The capacity of many ICLs is recognised to be excellent. It is also clear from the range of responses across participant groups that there are concerns about the capacity and commitment of some practitioners. (p xii)

It was found that ICLs play an important role 'in influencing the focus of proceedings that would otherwise be conducted bilaterally in an adversarial manner' (p 53). See also section 8.4.3 (p 127) – 'ICL involvement in

cases of family violence and child abuse'. There was a strong theme from parental interviews that the ICLs 'did not maintain a position of impartiality and that this in turn influenced the stance adopted in relation to their evidence-gathering role', particularly in relation to cases where family violence and child abuse concerns were present. Further, 'Almost all of the women who reported a history of family violence or concerns about child safety identified the ICL as having had a negative effect on the case, from their perspective' (p 130).

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. See in particular section 6.3.2 – lawyers (p 124). This section contains family lawyers' views ofthe 2012 family violence reforms.

Maloney, et al, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study' (Research Report No. 15, Australian Institute of Family Studies, 2007).

'The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.'

Qu, Lixia et al, 'Post-separation parenting, property and relationship dynamics after five years' (Commissioned report, Australian Institute of Family Studies, December 2014).

'The Longitudinal Study of Separated Families examines the experiences, circumstances, and wellbeing of separated parents and their children in Australia. It was commissioned as part of the evaluation of the 2006 Family Law reforms, and three waves of surveys have now been conducted. This current report presents

findings from wave 3, conducted in 2012 with 9,028 parents five years after separation. It explores the opinions and experiences of separated parents regarding: quality of inter-parental relationships; child-focused communication between parents; safety concerns and violence and abuse; use and perceived helpfulness of family law services; pathways for developing parenting arrangements; family dispute resolution; stability and change in care-time arrangements; property division and their timing and perceived fairness; and child support arrangements and compliance. The report also asks parents about their child's wellbeing, and compares this with care-time arrangements and family dynamics.'

See in particular at p 13 where it is noted that 'How to create and maintain child-focused dialogues against a background of high levels of emotion, disappointment and anger has been recognised as an important challenge for family dispute resolution practitioners and service providers. Approaches that involve greater collaboration between lawyers and less adversarial processes within courts have also been developed as steps in the direction of discouraging the conflation of interpersonal difficulties and the resolution of parenting disputes.'

International

James-Hanman, D & Holt, S. Post-Separation Contact and Domestic Violence: our 7-Point Plan for Safe[r] Contact for Children (2021) 36 Journal of Family violence 991-1001 doi: 10.1007/s10896-021-00256-7

This commentary poses some difficult questions, challenging a conversation about both the risks and benefits of contact in the context of a history of domestic violence and abuse. The authors outline a seven-point plan, based on the evidence, that they argue could make a significant difference to safe(r) post-separation contact for children. The seven points are discussed in the paper but include:

- The emphasis must be on safe and meaningful contact
- Be aware that domestic violence and abuse is a specific and deliberate attack on the mother-child bond and interventions need to therefore repair this, not damage it further
- Question parental knowledge of and genuine interest in their children
- Recognise that children are active agents in their lives: reports should not be written about them without their input; decisions about contact should be informed by children's voices
- Improved processes in the family courts

- Understand that past physical assaults are not a good indicator of future risk
- Making evidence informed decisions

Child-related proceedings - Other Resources

Guidelines for Independent Children's Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

'The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the family law courts, with information about the courts' general expectations of ICLs. The Guidelines set out these expectations as they relate to children in circumstances where allegations of child abuse and/or family violence are made, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.'

See in particular at section 6.4 (p 6) –

'The ICL is to remain independent, objective and focused upon promoting the child's best interests in all dealings throughout the proceedings. The parties and their legal representatives should be encouraged to be non-adversarial where possible and to maintain a focus on the child's best interests. The ICL should promote this approach whenever appropriate.'

National Strategic Framework for Information Sharing between the Family Law and Family Violence Child Protection Systems. (webpage).

This Framework supports the appropriate and timely two-way information exchange between the Federal Circuit and Family Court of Australia and the Family Court of Western Australia (the family law courts) on the one hand, and state and territory courts, child protection, policing, and firearms agencies on the other.

Reconciliation Action Plan 2019-2021: Federal Circuit Court of Australia.

Open via Federal Circuit Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's

aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

Lighthouse.

Open via Federal Circuit and Family Court of Australia website.

This document explains the role of Lighthouse in the Court's response to cases which may involve family violence.

"The Courts are leading the way in helping families that have experienced family violence and other safety risks to navigate the family law system. Lighthouse plays a central role in the Court's response to cases which may involve risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect, by shaping the allocation of resources and urgency given to such cases."

The three parts of Lighthouse are:

- Screening (using the Family DOORS Triage risk screening process);
- Triage and case pathways; and
- Case management (including referral to the specialist Evatt List in certain registries).

Lighthouse operates in the family law registries in Adelaide, Brisbane, Cairns, Canberra, Dandenong, Darwin, Hobart, Launceston, Melbourne, Newcastle, Parramatta, Rockhampton, Sydney, Townsville and Wollongong.

Cross-examination

Family violence allegations in family law proceedings – personal cross-examination ban

Provisions of the *Family Law Act 1975* (Cth) (*FLA*) (see also s219AK *Family Court Act 1997* (WA)) ensure that appropriate protections for victims of family violence are in place during cross-examination in all family law proceedings.

Section 102NA *FLA* bans personal cross-examination in family law proceedings in certain circumstances where allegations of family violence have been raised. The ban may apply automatically or the court may use its discretion to impose a ban.

The automatic ban applies where there are allegations of family violence between two parties and any of the following circumstances apply:

- either party has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party.
- a family violence order (other than an interim order) applies to both parties.
- an injunction under section 68B or 114 *FLA* for the personal protection of either party is directed against the other party.

The court also has discretion to make an order to ban personal cross-examination even if those circumstances do not apply. The court may make such an order on its own initiative or on the application of either the examining party, the witness party, or an independent children's lawyer (subsection 102NA(3) *FLA*).

Where personal cross-examination is prohibited, cross-examination of both parties must be conducted by a lawyer (subsection 102NA(2) *FLA*). Parties will need to engage a private lawyer or apply to their relevant state or territory legal aid commission for legal representation under the Commonwealth Family Violence and Cross-Examination of Parties Scheme. If a party does not have legal representation, they will not be permitted to cross-examine the other party.

Section 102NB *FLA* requires that where there is an allegation of family violence, but a party is not prohibited from personally cross-examining another party under section 102NA *FLA*, the court must ensure that during

cross-examination there are appropriate protections for the party who is the alleged victim on the family violence.

Other powers to control proceedings

More generally, in the federal jurisdiction, section 26 *Evidence Act* 1995 (Cth) gives the court power to make orders it considers just regarding the questioning of witnesses; and under section 41 *Evidence Act* 1995 (Cth) the court must disallow questions that it considers improper on certain grounds. In the family law jurisdiction specifically, Part VII, Division 12A of the *Family Law Act 1975* (Cth) and Part 5, Division 11A of the *Family Court Act 1997* (WA) contain provisions relating to the conduct of child-related proceedings (see also the Family Violence Best Practice Principles [FCA/FCCA FV BPP 2016]). Section 69ZN *FLA* and Section 202B *FCA* set out the governing principles, including the court's role in actively directing, controlling and managing the conduct of the proceedings, and in safeguarding children and parties against family violence. Section 69ZT *FLA* and Section 202H *FCA* empower the court to dispense with certain rules of evidence, and Section 69ZX *FLA* and Section 202L *FCA* give the court considerable flexibility to make orders and directions in relation to evidentiary matters, including to limit or not allow cross examination of a particular witness.

Where a judicial officer is concerned about the safety of a party they may facilitate a safety plan, which may, for example, provide for the party to give evidence by electronic medium and to be attended by a support person in the courtroom and precinct.

A judicial officer must balance the need for procedural fairness in the presentation of both parties' cases, including proper testing of evidence by cross-examination, with the need to ensure the safety of parties.

Cross-examination may present particular difficulties in family disputes where there are allegations of domestic and family violence between the parties to the proceedings, and a self-represented perpetrator wishes to cross-examine the victim [Harrison 2007] or a self-represented victim is expected to cross-examine the perpetrator.

Where a party who is a victim of domestic and family violence is self-represented and required to cross examine the perpetrator, their capacity to appropriately and fully question may be diminished or negated by their fear of the perpetrator [Coy et al 2012]. Where the perpetrator is represented, a self-represented victim may feel particular pressure to withdraw or not proceed with an application [Qld Special DFV Taskforce Report 2015], or to consent to orders as a result of fear or intimidation, or to avoid being compromised or intimidated by a hearing or other ongoing proceedings [Kaspiew et al 2009].

In some cases a perpetrator may choose to be self-represented to try to secure the opportunity to directly cross-examine the victim. The victim's capacity to give evidence or the quality of the victim's evidence in these circumstances may be compromised by the victim's fear of the perpetrator and, as a consequence, the probative value of the evidence may be diminished or negated.

Where a perpetrator uses their own or the victim's self-represented status to subject the victim to further abuse [Chisholm 2009] through judicial processes [FLC LIP Report 2000], the victim may experience a form of secondary abuse.

These scenarios should be understood in the context of the complex dynamics of domestic and family violence characterised by a pattern of abusive behaviour involving a perpetrator's exercise of control over the victim, often for an extended period.

Cross-examination - Key Literature

Australia

Booth, Tracey, Miranda Kaye, & Jane Wangmann. (2022). Addressing the problem of direct cross-examination in Australian family law proceedings. *University of New South Wales Law Journal*, *45*(4), 1415–1448.

Difficulties experienced by victims of family violence who are cross-examined by the unrepresented perpetrator of that violence (or vice versa) in family law proceedings are well-documented. Such direct cross-examination can be traumatic and unlikely to generate high quality evidence. In 2019 this problem was addressed in Australia by the Family Violence and Cross-Examination Scheme ('Scheme'). Under this Scheme, direct cross-examination by self-represented litigants is prohibited on a mandatory or discretionary basis in certain family law cases involving allegations of family violence. This article examines the implementation of the Scheme by drawing on data from a large ethnographic project that was concerned with self-representation in family law proceedings involving allegations of family violence and an analysis of recent case law. We highlight issues in the early administration of the Scheme as well as more complex ongoing issues. This article provides an evidence base to guide policy and legislative developments in this area.

Bryant, Diana, 'The Family Courts and Family Violence' (Paper Presented at the Judicial Conference of Australia Colloquium, 9-11 October 2015).

This paper discusses various issues which confront the family courts where family violence is a feature. The Chief Justice identifies cross-examination by alleged perpetrators of alleged victims as one of 16 particularly complex issues. See at p 4 – 'Where the alleged perpetrator cannot afford a lawyer, or chooses not to get one, and is ineligible for legal aid, there is a need for the court to ensure that each party is afforded procedural fairness in presenting their case and, where facts are in issue in parenting matters (beyond the question of whether or not violence has occurred), to deal with the issue of cross examination of the alleged victim by the alleged perpetrator.'

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

Professor Chisholm was required to ‘assess the appropriateness of the legislation, practices and procedures’ that apply in cases where family violence is an issue and to recommend improvements.

He observes that: ‘In relation to safety at court as well as other aspects of dealing with family violence issues, measures need to be in place to ensure that risk is disclosed, and understood, and that necessary actions are then taken’. For example, the Federal Magistrates’ Court (at the time) submitted that electronic means of giving evidence should be universally available to ‘balance the requirement of procedural fairness in allowing testing of the evidence when there may be a victim of violence being cross-examined by an abusive partner’ (p 161).

See especially at pp 168-169, where the author cites one submission which noted that sometimes ‘cross-examination of a victim by an unrepresented violent partner can be experienced as a continuation of the violence’.

Moreover, the Family Law Section of the Law Council of Australia submitted – ‘*Self-represented litigants can be at a significant disadvantage. For victims of violence to present a case and argue it, including cross-examining the perpetrator, can be very difficult. If perpetrators are unrepresented this means they may be personally cross-examining the victim. These outcomes are increasingly frequent as legal assistance is under-funded and unable to assist many litigants who cannot otherwise afford representation’* (p 169).

Harrison, Margaret, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (April 2007).

This document contains a general overview of the Family Court’s transition from the traditional common law adversarial trial to the less adversarial trial (LAT). It contains a history of procedural reforms to the Family Court. It discusses the differences between adversarial and inquisitorial systems, and contains detailed discussion of the operation of the LAT model.

See in particular at pp 6-7, where it is noted that traditional adversarial processes such as cross-examination present particular difficulties in family disputes which are often compounded when there are family violence allegations or more subtle imbalances of power in the relationship.

Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000).

This commissioned report extensively considers the issue of litigants in person in the family law context. The report was written in the broader context of the number of self-represented litigants increasing. It contains discussion of the reasons for the increase in unrepresented litigants as well as general characteristics of unrepresented litigants.

See firstly at p 9, where the report notes various concerns that in family law matters involving allegations of family violence, women were suffering a continuing form of abuse through their unrepresented former partners cross-examining them and filing endless interim applications. Note, at p 17, the report notes – 'adequate presentation of a case includes testing the opponent's case by cross-examination and other measures'. At p 25 – 'In many instances a litigant may be intransigent or genuinely disgruntled and not necessarily vexatious. The judge has authority to control proceedings if the unrepresented litigant uses cross examination of the former spouse as an opportunity for harassment. However, judges have to balance concerns about harassment with the unrepresented litigant's right to put evidence to the court, and they generally attempt to avoid any perceptions of bias'.

Fogarty, John, 'Family Court of Australia: into a brave new world' (2009) 20(3) *Australian Family Lawyer* 2-24.

In this article, the author critiques the rationale and operation of the 'less adversarial trial' (LAT). The 'radical' nature of the changes in particular are criticised. The author advocates instead for carefully explained, incremental reform 'with, in particular, strong control over the early identification of the issues and the evidence' (p 10).

Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. Of relevance here

see:

- See Chapter 9: ‘Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn’t feel were in their children’s interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements’ (p 221).
- Also see ‘15.1.2 Consent orders’ (from p337), noting that ‘The tensions in this area are succinctly summarised in this comment by a legal practitioner about the choice litigants face in deciding whether or not to settle: “Most of them settle by consent and you’ve got a real tension because those that settle by consent feel as if they’ve been bullied into it, get a settlement because they can’t afford it and they want to get it over and done with. Those that run the full trial feel as though they got shafted anyway because they didn’t get heard properly. So either way they feel as though they’ve lost”. In reflecting on their practices concerning consent orders, a common observation among registrars and judicial officers was the limited supervisory role courts have in the context of a system that encourages parties to reach agreement by themselves’.

Kaspiew, Rae, et al, ‘Responding to Family Violence: A Survey of Family Law Practices and Experiences’ (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. See in particular from p 114 –16 on leading evidence and cross-examination.

Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Submissions to taskforce raised the lack of legal representation and assistance as a major concern for victims, particularly where a male respondent can afford legal representation. Submissions stated that this often results in the victim withdrawing or not pursuing a legal response and can lead to a failure in protection for an aggrieved. Submissions also noted the benefits from a duty lawyer system:

- 'Mitigating the trauma of the court process for victims;
- Parties are better informed of their rights and the legal process and know what they can and cannot ask of the court
- Victims will receive assistance and advice with completing their application forms. This will ensure all relevant information is before the court. The court process will proceed more smoothly as a consequence of properly prepared documents and legally informed clients appearing before it
- Queensland Police Prosecutors will also indirectly benefit as a consequence in the same way as the court will
- More appropriate orders and conditions can be applied for which improves victims safety, and reduces the risk of recidivism, breach and applications for variations of the orders
- Timely legal advice and information to respondents could lead to a less litigious approach to proceedings and appropriate referrals
- Victims will be empowered to pursue their matters and not withdraw because of fear or intimidation by the perpetrator or because of lack of knowledge of the complex legal system. The result will be greater safety for older people, women and children experiencing domestic and family violence. (p 312)

International

Coy, Maddy et al, *Picking up the pieces: domestic violence and child contact* (Rights of Women and CWASU, 2012).

Section 5 of this report presents quantitative and qualitative data on women and legal professionals' experience of legal proceedings. In relation to legal representation, this report found that there were instances where women had to represent themselves (and thus have to cross-examine men who had been violent to

them) or face the prospect of being cross-examined by their ex-partners. Women were afraid of these two scenarios (p 38). Solicitors and barristers surveyed identified two issues relating to potential abuse and intimidation that self-representation raises. First, ‘perpetrators representing themselves used cross-examination as another route to harass and undermine their ex-partners’. Second, fearful victim-survivors representing themselves may not disclose the full details of their abuse and may inhibit themselves from questioning perpetrators about their actions and motivations (p 39). The report identifies multiple ways in which the outcome of the case can be influenced where women and/or their abusive ex-partners represent themselves:

1. Victim-survivors are not enabled to give their best evidence about histories of abuse, which may be crucial to determining whether contact, and in what form, is deemed appropriate.
2. The difficulties of cross-examining their perpetrators may mean they do not ask sufficiently probing questions or challenge responses, which again informs what evidence is available to the court.
3. They are rarely equipped with the legal knowledge and experience to prepare documentation and negotiate family law processes e.g. requesting finding of fact hearings.
4. Pressure to reach speedy resolution may mean that women accede to arrangements which are not necessarily in their own or their children’s best interests’ (p 40).

Cross-examination - Other Resources

Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (4 ed, 2016).

The Family Violence Best Practice Principles was developed in 2016, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts. A new version is currently being developed and will be available in 2022.

The Family Violence Best Practice Principles are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the *Family Law Act* 1975 (Cth) (*FLA*).

The latest edition reflects the extensive powers of the judiciary in regard to the cross-examination of vulnerable witnesses by alleged perpetrators of family violence. For example, in child-related proceedings, the power to make orders limiting, or not allowing, cross-examination of a particular witness (Section 69ZX(2)(i) *FLA*)* and/or to, with forewarning, refuse permission to continue cross-examination.

The Statement of Principle on pp. 4-5 provides inter alia that:

'These Best Practice Principles have been developed by the [former] Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCCA). They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the place accorded to the issue of family violence in the FLA and
- the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA (FCA and FCCA). They provide useful background information for decision makers, legal practitioners and individuals involved in these cases…

Ensuring the safety of a child is central to all determinations of what is in a child's best interests.

The courts aim to protect children and family members from all forms of harm resulting from family violence and abuse.

All persons attending courts exercising family law jurisdiction are entitled to be safe and the courts will take all appropriate steps to ensure the safety of their users. This includes the creation of an individually tailored safety plan where appropriate.

A safety plan is a document that can be varied at any time and which includes a variety of options available to a person to ensure their safety at court. These include attendance by electronic medium, attendance with support persons, staggered attendances, use of security entrances and, where necessary, security personnel. All court staff are able to prepare a safety plan. Safety planning is one of the strategies that may be implemented to ensure that a person who fears for their safety remains protected from harm. A safety plan for attendances at court events is but one component of safety planning that needs to be incorporated into the individual's overall plan for their safety.'

*This provision is mirrored in Section 202L *Family Court Act* 1997 (WA)

> **Federal Circuit and Family Court of Australian: Family violence information sheet.**

Self-represented litigants

The question of the extent to which a judicial officer is obliged to intervene in proceedings involving a party or parties who are self-represented (here called self-represented litigants – SRLs) was addressed comprehensively by the Full Court of the Family Court in *Re F: Litigants in Person Guidelines* [2001] FamCA 348. The Court set out a number of guidelines regarding interventions judicial officers may make without raising an apprehension of bias. The overriding task of the judicial officer is to ensure procedural fairness to all parties.

The guidelines are expressed as not exhaustive, and are intended to assist judicial officers in their exercise of discretion in any particular case, rather than prescribe how proceedings should be conducted. They include:

- informing the SRL of procedural matters;
- generally explaining the SRL's right to object and claim of privilege;
- questioning witnesses;
- clarifying the relevant issues;
- clarifying the substance of the SRL's submissions and orders sought; and
- identifying submissions and applications that ought to be made.

In the early 2000s, the former Family Court of Australia recognised the challenge of increasing numbers of litigants who are self-represented at some stage or stages in family law proceedings. Findings of court-commissioned research included:

- The majority of SRLs cannot afford legal representation, however a significant minority said they did not need or want representation;
- SRLs are likely to need information about court procedures and support services; advice about completion of court forms, preparation of documents, formulation of legal argument, and court etiquette; and other forms of practical and emotional support;
- Judicial officers and registry staff experience difficulties when dealing with SRLs who lack legal and procedural knowledge;
- SRLs consume more of the Court's resources than represented clients;

- Giving assistance to SRLs may compromise judicial impartiality;
- A need for consistent approaches by judicial officers and registry staff to responding to the needs of SRLs; and
- A link was identified between the unavailability of legal aid and self-representation [FCA SRL Project 2002].

Further research conducted at the time noted the diversity in skills, knowledge, cultural background, socio-economic status, personality and motivations of SRLs; and the need for courts to be flexible when dealing with SRLs and aware that the manner in which SRLs engage in litigation may be influenced by their lack of knowledge and experience of court procedures and family law. However in some cases an SRL's behaviour may be designed to harass or annoy or for another wrongful purpose, which may be considered vexatious. The study observed that:

- matters involving SRLs are more likely to go to a hearing than be resolved by out-of-court settlement;
- SRLs experience significant difficulties cross-examining their former partner; and
- judicial officers, in addressing the needs of SRLs, must consider and weigh both the need to redress any power imbalance between the parties due to lack of representation or a history of domestic and family violence and the need to avoid any perception of leniency or unfair advantage towards the SRL [FLC LIP Report 2000].

Later research also indicated that where one or both parties are unrepresented, the Court's ability to receive appropriate evidence and make decisions in the child's best interests may be jeopardised [Chisholm 2009].

An extensive Australian Institute of Family Studies evaluation [Kaspiew et al 2009] of the 2006 changes to the *Family Law Act* reported that women regularly felt pressured to agree to outcomes in negotiations that they didn't feel were in the children's interests. There were particular concerns regarding the suitability of agreements reached in cases where there was a lack of representation at all and the parties agreed to shared or equivalent care, or there was a perceived imbalance between the parties in the quality of legal representation, and cases where there had been a history of domestic and family violence. Where a self-represented party had also experienced violence, there were additional concerns that the party found it difficult to speak personally to the judicial officers. The circumstances surrounding consent orders raised similar concerns where orders were made to formalise agreements made either outside the court process or sometime after court proceedings had been initiated.

In some cases where consent orders are proposed it may be appropriate for the judicial officer to ask

questions or request further information in order to closely scrutinise the suitability of the proposal, or to appoint an Independent Children's Lawyer or order a Family Report or expert report to determine what is in a child's best interests.

Where an application is made to the Federal Circuit and Family Court of Australia for a parenting order by consent, the parties must formally advise the Court whether any allegations had been made in the proceedings of family violence or child abuse or neglect (or risk thereof), or of mental ill-health, drug or alcohol, serious parental incapacity or any other allegation involving a risk to the child concerned AND whether a party considers that the child concerned has been or is at risk of abuse, neglect or family violence, and whether a party considers that he or she or another party to the proceedings has been or is at risk if family violence. Should any of these circumstances be advised, the parties must explain to the Court how the parenting order attempts to deal with the allegations (see Rule 10.05 of the FCFCOA Rules).

Research has shown the value to the court and parties of self-represented parties receiving advice and information on appropriate conduct and language in the courtroom prior to any court appearance or hearing. Legal assistance providers deliver duty lawyer services to self-represented litigants at many locations of the Federal Circuit and Family Court of Australia including providing legal advice and information about court processes, help with the preparation of documents, and in some cases, representation.

With the merger of the Family Court of Australia and the Federal Circuit Court of Australia it is intended that the Court process will be simplified and make it easier to navigate for SRL's. However, in practice the addition of a new set of Rules - coupled with an already complex piece of legislation, regulations and protocols - it is not clear whether the new FCFCA will make things easier or more difficult for SRLs. This is a problem that has confronted the Court for some time.

Important note: The expression "self-represented" is used in this bench book to refer to any situation where a party is not represented by a lawyer. It is acknowledged that the expression may be inappropriate in some contexts. It may, for example, suggest that a party has exercised a choice to represent themselves, when in fact they do so due to lack of financial resources or access to legal assistance. On the other hand, some parties choose to represent themselves because they believe they are best equipped to do so and may object to the use of an expression such as "unrepresented" on the basis that it may, for example, be interpreted to suggest that they are unable to properly or fully participate in the proceedings in their own right.

Self-represented litigants - Key Literature

Anstie, Lara, 'Cross examination of victims of family and domestic violence by self-represented perpetrators in family law proceedings' (2016) 43(4) *Brief* 38.

Authored by a Western Australian family law practitioner, this article discusses the potential for cross-examination to be exploited by perpetrators to commit further emotional abuse against victims, and in that context, the court's obligation to ensure procedural fairness to an alleged perpetrator while protecting the interests of an alleged victim of domestic and family violence. Reference is made to the Family Court of Australia's Family Violence Best Practice Principles and the Family Court of Western Australia's Family Violence Policy, and recommendations are made for changes to the *Family Court Rules 1998* (WA) and *Family Court Act 1997* (WA) that provide for a process for the protection of victim witnesses in cross-examination and otherwise in giving oral testimony.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers the issue of family violence in the family law system. Part 2 considers practices and procedures of the federal family courts in cases that include family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation.

In discussing appropriate legal representation (see p 168-169), the report notes that the 'importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence'. The author notes that where one or more parties are unrepresented this jeopardises the ability of the court to receive appropriate evidence and to make decisions about the child's best interests. 'Settled cases, too, are a worry when parties are unrepresented, because they may reach agreements in ignorance of the legal situation, or because they know they cannot properly put their case before the court. It is universally agreed in the family law system that despite a lot of good work done to help unrepresented parties, such cases are the most likely to occupy the court's time unfruitfully, or, as sometimes happens, effectively collapse because one or both parties is unable to organise witnesses or present their case in a satisfactory way. One submission pointed out that in some circumstances, cross-examination of a

victim by an unrepresented violent partner can be experienced as a continuation of the violence. In such cases children are at risk, because they do not have the protection of a well-informed judicial outcome'.

Dewar, John, et al, 'Litigants in Person in the Family Court of Australia: A report to the Family Court of Australia', 2000).

(The findings of this report were summarised concisely in: Family Court of Australia, *Self-represented Litigants - A Challenge: Project Report* (December 2000-December 2002) and Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000) - see below)

The methodology is set out at p28-32. This study employed quantitative and qualitative approaches, primarily questionnaires and semi-structured interviews with judges, judicial registrars, registrars and litigants in person; the researchers interviewed a small number of legal practitioners, and convened focus groups with various groups. 49 unrepresented litigants who had conducted their own matters at the interim stage were also interviewed. A number of hearings involving litigants in person were also observed

Findings Include:

- Most unrepresented litigants were unrepresented because they could not afford legal representation. A significant minority of unrepresented litigants did not want to be represented by a lawyer, and a further significant minority had not applied for legal aid because they were advised that they were ineligible.
- Unrepresented litigants are more likely to have limited formal education, limited income and assets and to have no paid employment.
- The needs of unrepresented litigants vary, but include information, support and advice.
- Courts are affected by unrepresented litigants with judicial officers and registry staff reporting high levels of stress and frustration, difficulty maintaining an appearance of impartiality, and balancing the needs of the unrepresented litigant and the opposing party.
- Unrepresented litigants are more demanding of the time of judicial officers and registry staff than represented parties, although matters involving unrepresented litigants tend to have shorter disposition times.

Family Court of Australia, *Self-represented Litigants - A Challenge: Project Report* (December 2000-December 2002).

In a context where the number of partially or fully self-represented litigants before the Family Court is increasing, the Court launched the *Self-represented Litigants – A Challenge* project in December 2000. The goals of the project included developing a nationally consistent approach to providing services to self-represented litigants and improving court services (including practices, procedures, protocols and proformas) (p 3).

'The Family Court recognises that self-representing and other litigants are entitled to all reasonable information and assistance from the Court, so far as is possible, to enable a person to understand what is required to present his or her case to the Court or to engage in dispute resolution processes under the Court's auspices' (p 5).

Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000).

This commissioned report extensively considers the issue of litigants in person in the family law context. The report was written in the broader context of the number of self-represented litigants increasing. It contains discussion of the reasons for the increase in unrepresented litigants as well as general characteristics of unrepresented litigants.

Various theoretical issues are considered from p 14.

See also from p 30 which deals with 'The Effects of Unrepresented Litigants' discussing effects on the current system.

See generally chapter 3 which deals with responses to the needs of self-represented litigants.

See further at p 72 – 'The vexatious, persistent or relentless unrepresented litigant, who chooses to proceed unrepresented, must be distinguished from the first time unrepresented litigant with no knowledge or experience of court procedures and family law. However, even this apparently polarised example is fraught with difficulty. Unrepresented litigants vary in their demeanour, background, knowledge, skills, personality, knowledge of English, culture, intentions, socio-economic status and more. This diversity illustrates the fundamental need for flexibility and adaptability by courts and legal service providers when dealing with

unrepresented litigants.'

Kaspiew, Rae et al, Evaluation of the 2006 Family Law Reforms (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. Of relevance here see:

- Chapter 9: 'Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn't feel were in their children's interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements' (p 221).
- See 14.4 which discusses the Family Court of Western Australia Model.
- Also see '15.1.2 Consent orders' (from p337).

Wangmann, J., Booth, T., & Kaye, M. (2020). *"No straight lines": Self-represented litigants in family law proceedings involving allegations about family violence* (Research report, 24/2020). Sydney: ANROWS.

Abstract: This research focuses on documenting current practice and generating new knowledge about the impact and effect of self-representation by one or both parties in Family Law proceedings involving allegations of family violence.

The research team conducted semi-structured interviews with SRLs and professionals who engage with

SRLs in family law proceedings to produce a general interview sample. The researchers then also undertook an intensive case study that involved court observation, case file review, and interviews with SRLs or other representatives involved in those observed/reviewed cases.

The research confirmed that there are high numbers of SRLs engaged in family law cases involving allegations of family violence, and the primary motivation for self-representing is financial. The study revealed that SRLs are impacted by their self-representation, as well as histories of family violence, in numerous ways. Primarily, SRLs lack knowledge of the legal process: for example, they are often unaware of the heavy emphasis on paperwork and negotiation in family law cases, and they are unprepared to complete paperwork, or negotiate, in ways that effectively support their case. Intersecting with the lack of knowledge is the impact of family violence: ability to complete paperwork and negotiate is also affected by experiences of violence and resulting trauma, and perceptions of safety.

Given these findings, the report stresses the importance of enhanced, up-to-date and practical information for SRLs in multiple formats, as well as increased access to lawyers and legal advice. The report also raises the need to explore possible system change, particularly with a view to the fragmentation of areas of law that respond to family violence. Alongside enhancing family violence expertise across key court personnel, the report recommends integrating information about safety into routinely accessed documents in order to raise awareness about available services.

Self-represented litigants - Other Resources

Reconciliation Action Plan 2019-2021: Former Federal Circuit Court of Australia.

Open via Federal Circuit and Family Court of Australia website.

This document explains the jurisdiction of the Court, including its family law jurisdiction, and the Court's aspirations for engagement with Aboriginal and Torres Strait Islander people. The Plan 'provides a platform to introduce measures to promote reconciliation and addresses some of the barriers faces by Aboriginal and Torres Strait Islander peoples in interacting with the Court. In doing this, the Plan provides four focus areas for the Court: relationships; respect; opportunities; and tracking progress.

Self Represented Litigants Handbooks (2019).

Open via Family Court of Western Australia website.

These handbooks are published by the Family Court of Western Australia and include information about property and children's cases.

These booklets are designed to help those people who do not have a lawyer to present their cases in the Family Court of Western Australia.

They are not a substitute for legal advice, but it is hoped the information provided will make it easier for people to navigate through the court system.

It is expected that each party who does not have a lawyer will have tried their best to become familiar with the booklets before coming to Court.

Both handbooks contain practical advice for self-represented litigants in the Family Court of Western Australia about matters including: information about the court; preparing for trial; trial processes; filing documents and the relevant law.

Vexatious proceedings

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends *Family Law Act 1975* to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act 1975*.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Section 45A(4)-(8) of the *Family Law Act 1975* (Cth) (*FLA*) empowers the court, on its own initiative or on application by a party, to dismiss all or part of proceedings at any stage if satisfied they are frivolous, vexatious or an abuse of process; and to make such costs order it considers just. A similar provision is contained in Section 242 in Part 12 of the *Family Court Act 1997* (WA), however it is limited to proceedings the court is satisfied are frivolous or vexatious. While Part XIB of the *FLA* (no equivalent in WA) deals specifically with vexatious proceedings, Section 102QA preserves the court's broader powers to deal with frivolous or vexatious proceedings, for example under Section 45A *FLA.* For the purposes of Part XIB, Section 102Q defines 'vexatious proceedings' to include proceedings in a court or tribunal that are an abuse of process; that are instituted or conducted to harass or annoy, cause detriment, or for another wrongful purpose; or are instituted or pursued without reasonable ground. Section 102QB sets out the process for the making and types of vexatious proceedings orders. The court must be satisfied as to the threshold issue that a party has frequently instituted or conducted vexatious proceedings or has acted in concert with another person who has done so. It is not necessary for the multiple proceedings to be in the same court or tribunal, and as such the provision serves as an important discouragement to forum shopping.

The legislative definition of vexatious proceedings reflects the understanding expressed in the 2010 joint report of the Australian Law Reform and New South Wales Law Reform Commissions [ALRC/NSWLRC 2010], *Family Violence – A National Legal Response*. While the report specifically deals with vexatious litigation in the context of state and territory protection order proceedings, it recognises the difficulties that vexatious litigation may present in domestic and family violence related proceedings generally. In particular, concerns

arise where perpetrators of violence may use the legal system to further harass, control or abuse the victim. Elsewhere in this bench book, this behaviour is referred to as systems abuse. While any single application may not in itself be considered vexatious, it may be difficult for a court to identify the application as part of a pattern of litigious behaviour that is vexatious without also understanding the history of domestic and family violence perpetrated by the party making the application. Further underlining the difficulty associated with identifying vexatious litigation where there is a history of violence, a victim of long-term violence may, with reasonable grounds, make multiple and frequent applications, for example to enforce parenting orders that have been repeatedly breached by the perpetrator [Chisholm 2009]. Where a party is also self-represented, a court may need to consider the party's lack of knowledge and experience of legal concepts and processes as a legitimate contributing factor to their frequent engagement with the legal system [Dewar et al 2000].

Subsection 45A(5) *FLA* provides that proceedings or a part of proceedings are not to be considered frivolous, vexatious or an abuse of process just because a related application is made and later withdrawn.

It is intended that with the FCFCA Rules, the Central Practice Direction and the introduction of the FCFCA that there be greater focus on accountability for vexatious litigants (and/or their legal representatives personally) earlier on in proceedings.

Vexatious proceedings - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010).

This report identifies that 'vexatious applications in protection order proceedings under state and territory family violence legislation can be a means for a person to misuse the legal system to harass or intimidate a victim of family violence. In addition, because the existence of certain kinds of protection order is a relevant consideration to be taken into account by a court when making orders under the Family Law Act, vexatious applications for protection orders have the potential to affect the operation of both the family law and state and territory family violence regimes.' (p473)

[18.28] *False evidence given in protection order proceedings:* State and territory family violence legislation generally deals with persons who give false evidence or make false allegations or denials by using provisions relating to vexatious applications or other legislation protecting court processes. A person who gives false evidence may also be charged with a number of offences, including perjury, false swearing and false testimony.

[18.29] (p837) In some circumstances, a court's ability to award costs against a person who brings an application for, or to revoke, a protection order that is 'deliberately false' or made in 'bad faith' is linked to vexatious application provisions.

[18.224] (p880) Vexatious litigation may arise in a number of ways in protection order proceedings. For example, repeated applications for a protection order may be made against the same person based on the same or similar allegations and by the respondent to vary or revoke a protection order. Cross applications for protection orders may also be made without legal grounds. [18.225] While such applications may not, in themselves, be vexatious, where they are repeated or made without legal grounds, concerns arise that people who have committed family violence may use the legal system to further harass, control and abuse the victim.

[17.29] (p764) It is particularly important that if family violence matters have been litigated that they are not re-litigated in another proceeding. Where family violence is at play such re-litigation can be a tactic of further abuse.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

This report considers extensively the issue of family violence in the family law system. Of relevance see '4.6 – Other Matters' (p 172) which considers the abuse of litigation and s 118 *Family Law Act 1975* (Cth)) (note that s118 was amended in 2012 and s102QB *Family Law Act 1975* (Cth) now governs the making of vexatious litigation orders.) The author notes – 'Some submissions referred to the use of litigation as a vehicle for harassment of the other party. In some cases, no doubt, litigation which appears to one party as a vehicle for harassment will be considered by the other party to be reasonable and necessary, for example to enforce parenting orders where the other party is frequently in breach. However it is certainly possible for litigation to be abused.

Dewar, John, et al, 'Litigants in Person in the Family Court of Australia: A report to the Family Court of Australia', (Research Report No. 20, 2000).

(The findings of the report were summarised concisely in 'Family Law Council, "Litigants in Person: A Report to the Attorney-General")

The methodology is set out at p28-32. This study employed quantitative and qualitative approaches, primarily questionnaires and semi-structured interviews with judges, judicial registrars, registrars and litigants in person; the researchers interviewed a small number of legal practitioners, and convened focus groups with various groups.

See in particular at p 34, where the views of judges, judicial registrars and registrars are considered. Participants who were interviewed believed that 'A significant number (of self-represented litigants) are considered to be dysfunctional 'serial' litigants, many of whom may be emotionally disturbed or mentally ill. Some serial litigants would seem to be vexatious'. See further at pp 52-53 where the effects of the family law system on litigants in person is discussed: 'The system is not adequately equipped to deal with litigants in person whose personalities are such that they do not accept that a decision may not go their way. In fact the system allows them to persist with repeated applications unless they are declared vexatious. There is a small percentage who keep coming back because they do not believe that the system is right or that they have not had their say. There is a group of "problem litigants", usually associated with children's matters. Litigants in

person may lodge lengthy affidavits.'

Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000).

This commissioned report extensively considers the issue of litigants in person in the family law context. The report was written in the broader context of the number of self-represented litigants increasing. It contains discussion of the reasons for the increase in unrepresented litigants as well as general characteristics of unrepresented litigants.

See in particular at p 25 where s 118 of the *Family Law Act 1975* (Cth) is discussed (note that s118 was amended in 2012 and s102QB *Family Law Act 1975* (Cth) governs the making of vexatious litigation orders.)

'In many instances a litigant may be intransigent or genuinely disgruntled and not necessarily vexatious. The judge has authority to control proceedings if the unrepresented litigant uses cross examination of the former spouse as an opportunity for harassment. However, judges have to balance concerns about harassment with the unrepresented litigant's right to put evidence to the court, and they generally attempt to avoid any perceptions of bias.

See further at p 72 – 'The vexatious, persistent or relentless unrepresented litigant, who chooses to proceed unrepresented, must be distinguished from the first time unrepresented litigant with no knowledge or experience of court procedures and family law. However, even this apparently polarised example is fraught with difficulty. Unrepresented litigants vary in their demeanour, background, knowledge, skills, personality, knowledge of English, culture, intentions, socio-economic status and more. This diversity illustrates the fundamental need for flexibility and adaptability by courts and legal service providers when dealing with unrepresented litigants.'

Kaspiew, Ray, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

This report sets out the overall findings of the Evaluation of the 2012 Family Violence Amendments to the Family Law Act 1975 (Cth), which substantively came into effect on 7 June 2012. The report is based on data from 12,198 parents (pre-reform: n = 6,119, post-reform: n = 6,079) (ESPS), 653 family law system professionals (RFV), 1,892 family law court files (pre-reform: n = 895, post-reform: n = 997) and other data.

See especially [7.3.3] (p68-70) noting a range of studies and analyses highlighting the potential for legal systems and processes to be used as a means of perpetuating harassment, including through litigation over parenting arrangements and other separation-related matters (at p69).

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014.

See in particular at p 187, where concerns about false, frivolous or vexatious allegations of family violence are identified. The report states: 'it should be noted that such concerns have been longstanding and mirror a persistent belief held by about half of the community that women make up false allegations of family violence to obtain advantage in "custody proceedings"'.

Family consultants and expert witnesses

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Family Consultants [Family Consultants FAQs] are psychologists and/or social workers who specialise in child and family issues after separation and divorce, and are specifically appointed to the Federal Circuit and Family Court of Australia, or the Family Court of Western Australia. Save for external appointments under Reg 7 of the *Family Law Regulations 1984*, Family Consultants are co-located within the court premises: in the Federal Circuit and Family Court of Australia within the Court Childrens Services; and in the Family Court of Western Australia, within the Court Counselling and Consultancy Service.

With the introduction of the FCFCA and the FCFCA Rules, there is a new intended pathway for both parenting and property matters to pass through the Court. This is outlined below:

1. First Court Event;
2. Interim Hearing;
3. Dispute Resolution;
4. Compliance and Readiness Hearing;
5. Trial Management Hearing (if required);
6. Trial.

In parenting matters, at the First Court Event, the Court will consider whether a report from a Family Consultant, social scientist, psychologist, psychiatrist or other appropriately qualified expert is necessary.

Depending on the facts and circumstances of the particular case, the court may order (pursuant to Section 11F *FLA* or Section 65 *FCA*) that the parties to child-related proceedings take part in an assessment conducted by a Family Consultant. Some of the common assessments are set out below. Central to all of these assessments is screening for family violence and risk assessment. If the court is made aware that a party has any concerns about their safety, a safety plan will be put in place by the court for these appointments.

Child Dispute Conference: In Division 2 of the FCFCA, the case will be heard by a judge who may ask a Family Consultant to interview the parents/carers and make a preliminary assessment of the issues. This is called a Child Dispute Conference. Children and lawyers are not included. The conference gives the court a preliminary understanding of the family situation, what issues are in dispute, and the steps that might be taken to obtain or commission evidence, assist in the resolution of the proceedings (such as the appointment of an Independent Children's Lawyer), or assist the parties (such as orders to attend family counselling or to participate in an assessment of suitability for Family Dispute Resolution). The focus is on what the children need, and can assist the court in making short-term decisions about arrangements for the children. It may also help the parties reach an agreement. The main purpose of the conference is to conduct a brief and preliminary assessment, but there may also be an opportunity to attempt to negotiate any or all of the issues if time permits.

Child Inclusive Conference: The Division 2 judge hearing the case may ask a Family Consultant to interview the parents/carers and the children and make a preliminary assessment of the issues. This is called a Child Inclusive Conference. Lawyers are not included. The conference is intended to give the court a preliminary understanding of the family situation, particularly the children's experience. The conference can assist the court in making short-term decisions about arrangements for the children. It may also help the parties reach an agreement.

Child Responsive Program: In Division 1 of the FCFCOA, a case may first be heard by a registrar who may order that the family takes part in a Child Responsive Program. This program involves a series of meetings between a Family Consultant, the parties, and usually the children. The aim is to help the parties and the court understand what the children need. When parties cannot agree on the best arrangements for the children, the case will proceed to a Less Adversarial Trial, and the Family Consultant will assist the court with expert opinion and evidence about the children and family.

Case Assessment Conference [WA Case Assessment Conference]: This is an assessment process provided by the

Western Australian Court Counselling and Consultancy Service. It involves a meeting between a Family Consultant, the parties, their lawyers if any, and the Independent Children's Lawyer if appointed. The primary purpose of the conference is risk assessment. A written report is provided to the court, each party and the Independent Children's Lawyer if appointed. In the report, the Family Consultant may suggest information that is currently relevant but missing, as well as various case management and therapeutic options regarding the case.

A Family Report [Family Reports FAQs] is prepared by a Family Consultant as ordered by the court (Section 62G *FLA* and Section 73 *FCA*. Based on their observations of the parties and/or their children, the Family Consultant considers the family circumstances, explores issues relevant to the case, and recommends to the court arrangements that will best meet the children's future care, welfare and developmental needs. The best interests of the children (Section 60CC *FLA* and Section 66C *FCA*) are the main focus of the report. Where family violence is an issue, the Family Violence Best Practice Principles set out the range of matters the court may determine the Family Report to address. In all cases where a Family Report has been ordered, the court must formally release the report and only the parties and their lawyers can receive it unless the court gives permission for it to be shown to other people.

The purpose of the Family Report is not to make findings about disputed facts. The Family Consultant may however consider it appropriate to remark on the apparent veracity of allegations, for example about family violence, after having discussed the allegations with the alleged perpetrator, alleged victim or children. For example, the Family Consultant may wish to record any admissions, inconsistencies or other reflections made or disclosed by the parties in relation to the disputed facts [Moloney et al 2007].

Since the 2012 amendments to the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA), research by the Australian Institute of Family Studies affirms that Family Reports are an important source of independent, expert insight into family dynamics, and are more likely to be generated in cases involving allegations of family violence or child abuse. In particular, there is greater attention in Family Reports to considerations of issues of risk and safety than prior to the legislative reforms, though in nearly half the number of reports analysed there are no conclusions made in relation to risk [Kaspiew et al Court Outcomes 2015].

The conduct of family assessments and development of family reports play a critical role in the decision-making process of judicial officers when dealing with family law parenting disputes. The Australian Standards [Aust Standards Family Assessments & Reporting] launched in 2015 by the Chief Justice of the former Family

Court of Australia, the Chief Judge of the Family Court of Western Australia and the Chief Judge of the former Federal Circuit Court of Australia, are designed to inform all those involved with family law of the standards expected of practitioners preparing Family Reports.

While a Family Report is considered an expert report, it is part of a broader category of expert reports that deal with issues beyond those dealt with in a Family Report. An expert report (that is not Family Report) is ordered by the court where the expert evidence required to assist the resolution of the proceedings is beyond the expertise of a Family Consultant. For example, where there are mental health issues to be considered, the court may require that an expert opinion from a psychiatrist be obtained. Sometimes the Family Consultant will recommend that an expert opinion be obtained from an expert with particular expertise. For example, an addiction specialist may be required when dealing with parental substance misuse or the opinion of an expert maybe required where sexual offending is an issue. Chapter 7 of the FCFCA Rules deals with expert evidence. The purpose of this part is to ensure that there is a single expert appointed by the court who provides an expert report to the court, rather than allowing the parties to appoint their own expert.

Family consultants and expert witnesses - Key Literature

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

Professor Chisholm was required to 'assess the appropriateness of the legislation, practices and procedures' that apply in cases where family violence is an issue and to recommend improvements. The author acknowledged the challenges that family violence presents for the family law system – 'More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them.' (p 4). Part 2 considers practices and procedures of the federal family courts in cases with family violence issues. The author considers family reports in general terms from p 234-237.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives
- Court Outcomes Project involving:
  - a quantitative analysis of patterns in orders for parental responsibility and time made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia
  - a national analysis of court filings data provided by those courts
  - an analysis of published judgments

Family reports are discussed at pp 42-43. The analysis found that the availability of family reports for matters involving family violence substantially increased after the reforms, and that an explicit indication of a risk assessment being undertaken was evident in family reports in three in ten cases after the reforms. In relation to whether family reports provided recommendations that addressed the implications of information about family violence, child abuse and child safety concerns after the reforms, responses indicated unevenness in practice in this regard – 'Two-fifths of the aggregate sample of lawyers and judicial officers agreed that Family Reports or memoranda almost always or often provided such recommendations (RFV report, Figure 6.5). A further 34% reported that this was sometimes their experience, with 16% reporting that this was rarely or never the case' (p 43).

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children. The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii). Family reports are considered from pp 26-27. The report notes that they, 'are an important source of independent, expert insight into family dynamics' (p 26). More specifically, see section 3.3.1 - family reports and risk assessments (from p 50).

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. See in particular, table 4.16 (p 77), which considers evidence-gathering practices for family reports (and family consultants' memoranda). See generally from p

113, which also deals with survey data relating to family reports. At p 114, the results from open-ended survey questions of family consultants and single experts are cited.

Moloney, et al, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study' (Research Report No. 15, Australian Institute of Family Studies, 2007).

'The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.' See in particular the following comments at p 91 (re Family Reports).

Family consultants and expert witnesses - Other Resources

Federal Circuit and Family Court of Australia

Court Children's Service.

Open via Federal Circuit and Family Court of Australia website.

Australian Standards of Practice for Family Assessments and Reporting – February 2015.

Open via Federal Circuit and Family Court of Australia website.

The Australian Standards of Practice for Family Assessments and Reporting was developed in 2015, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

Family Consultants FAQs.

Open via Federal Circuit and Family Court of Australia website.

Federal Circuit and Family Court of Australia, *The Impact of Family Violence on Children*.

Open via Federal Circuit and Family Court of Australia website.

The fact sheet outlines how children experience family violence, how family violence effects parenting, other ways children can be impacted by family violence and factors which can help protect children from the impacts of family violence.

The fact sheet notes – 'Growing up in an environment where family violence is perpetrated can have a profound impact on a child's life. In addition to risks of physical harm, family violence can impact a child's wellbeing in a number of areas:

- Behavioural
- Emotional

- Social
- Developmental
- Educational'

Further 'The risks to children do not necessarily stop following the separation of the parents. Family violence can continue to b perpetrated after parents separate, and for many families separation is a time at which family violence can escalate. In some families, separation is the time at which family violence can commence.'

Family Reports FAQs.

Open via Federal Circuit and Family Court of Australia website.

Family Violence Best Practice Principles (2016).

In particular, Part B - Family and other expert reports, pp13-14.

Open via Federal Circuit and Family Court of Australia website.

Why am I going to see a family consultant ?

- Information for teenagers

  Open via Federal Circuit and Family Court of Australia website.
- Information for kids aged 5-8

  Open via Federal Circuit and Family Court of Australia website.
- Information for kids aged 9-12

  Open via Federal Circuit and Family Court of Australia website.

Family Court of Western Australia

Counselling and Consultancy Service.

Includes information regarding:

- Child-related proceedings
- Family reports
- Case assessment conferences

Open via Family Court of Western Australia website.

Family consultants and expert witnesses - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Erin

Information sharing

The *Family Law Amendment (Information sharing) Bill 2023* (Cth) is currently before Parliament. The bill gives effect to the National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems by amending the *Family Law Act 1975* to expand the information sharing framework for information relating to family violence, child abuse and neglect risks in parenting proceedings before the Federal Circuit and Family Court of Australia, and the Family Court of Western Australia.

More information can be found here:
www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r7009

The former Family Court of Australia (FCA) and former Federal Circuit Court of Australia (FCCA) (collectively called here "the former courts") made a commitment [FCA/FCCA FV Plan 2019] to provide timely, reliable and relevant information to state and territory courts, police and child protection agencies; and to continue to explore opportunities to work with state and territory courts dealing with family violence and child protection matters (and others with a proper interest in such matters, including police and child protection agencies) to ensure that those courts and agencies have reliable and timely access to relevant information about existing or pending family law orders. (See also 10.1.3 Intersection of legal systems). This commitment continues despite the merger of the Courts.

Information-sharing agreements exist between the courts and child welfare and other agencies in Australian state and territory jurisdictions. The terms of these agreements and related protocols vary considerably and are reviewed from time to time to improve procedures [Chisholm 2013].

An important resource in the courts is the National Enquiry Centre (NEC) established in 2000. The NEC is the entry point for all telephone and email enquiries; staff provide users with information and procedural advice, forms and publications and referrals to other services [NEC].

Within the broader commitment to provide information, the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA) provide various mechanisms by which the court can obtain information, including statutory notification requirements in particular circumstances. These are explained in the following paragraphs.

In family law proceedings where a party, an Independent Children's Lawyer or any other interested person alleges that a child has been or is at risk of being abused, Section 67Z *FLA* and Section 159 *FCA* require that person to file a notice of child abuse with the court, and the court registry to notify the relevant child welfare authority as soon as practicable. Where in the course of performing duties or exercising powers any court personnel, family consultant or counsellor, family dispute resolution practitioner, arbitrator or lawyer has reasonable grounds for suspecting a child has been or is at risk of being abused, ill-treated, or psychologically harmed, Section 67ZA *FLA* and Section 160 *FCA* require that person to notify the relevant child welfare authority soon as practicable. In any proceedings affecting the welfare of a child, the presiding court may request the intervention of a child welfare officer in the proceedings and the officer may act on that request (Section 91B *FLA* and Section 207 *FCA*). Even where the officer elects not to intervene, the court's request has the effect of bringing relevant information to the attention of the child welfare authority.

Section 67ZBA *FLA* and Section 162A *FCA* provide that where a party to child-related proceedings, or any other interested person as defined, alleges that there has been, or there is a risk of, family violence by one of the parties to the proceedings, that person must file a statutory notice of risk with the court.

The FCFCOA requires the filing of a Notice of child abuse, family violence or risk (*Notice of Risk)* to be filed with any Initiating Application, Application for Consent Orders or Response to Initiating Application. The Notice of Risk (in the form prescribed by section 67Z *FLA*) requires answers to specific questions directed at eliciting information about child abuse, family violence and a range of other risks. If the notice alleges child abuse or a risk of child abuse (or family violence of such a kind as would satisfy the statutory definition of child abuse), the court registry must notify the relevant state or territory child welfare authority. The child welfare authority may provide a response containing information held by the authority about the child the subject of the proceedings.

Where a Notice of risk is filed, Section 67ZBB *FLA* and Section 162B *FCA* require the court to make the necessary interim orders and to act as expeditiously as possible to enable evidence of the allegations to be obtained, to protect the children and any party to the proceedings, and to deal with the issues raised by the allegations. Section 69ZW *FLA* and Section 202K *FCA* empower the court to make an order in child-related proceedings requiring a state or territory agency to provide the court with specified documents or information about the engagement of a party or child with that agency. Information in this context may include information that is not in the form of a document but is capable of being attested to by an individual. The court is not permitted to disclose the identity of a person who has made a notification to an agency unless the person

consents or disclosure is critically important to the proceedings and failure to do so would prejudice the proper administration of justice. These mechanisms are available in conjunction with the court's powers to subpoena set out in Part 6.5 of the FCFCOA Rules, which include subpoena to produce, to give evidence, and to both produce and give evidence.

Although Section 69ZW *FLA* and Section 202K *FCA* impose additional responsibilities on the police, child welfare authority and other agencies, the purpose of sharing information is to ensure the protection of children and the fulfilment of the court's obligations. The information-sharing provisions allow relevant evidence to be gathered at an early stage and a judicial determination to be made as to how the matter should proceed and whether any expert evidence is required [Faulks 2014]. The experiences of families affected by family violence and child safety concerns (including parents who are issued a 60I/66H Certificate) progressing from counselling, family dispute resolution and other services and agencies to the courts reinforces the need for continuing consideration of information sharing between multiple systems. Depending on the extent of engagement underlying the issuing of a Certificate, a significant amount of intake and assessment activity may have occurred before the parent starts to engage with the court system, yet this activity may not be visible in the court beyond the existence of the Certificate [Kaspiew et al Synthesis Report 2015]. Sections 10D & 10H *FLA* and Sections 49 & 53 *FCA* permit the disclosure of communications made in the course of family counselling or family dispute resolution in certain circumstances, including where the family counsellor or family dispute resolution practitioner reasonably believes the disclosure is necessary to comply with the law, to protect a child from the risk of harm, or to assist an Independent Children's Lawyer to properly represent a child's interests.

More broadly it is acknowledged that interagency collaboration can better meet the needs of families that are vulnerable and at risk [McDonald & Rosier 2011]. Research has found that gaps in protection may reflect gaps in the flow of information, in particular between the family law system, the family violence system and the child welfare system. As a consequence, these gaps may impede timely responses to family violence and have a negative impact on victims [Peel & Croucher 2011].

Information sharing - Key Literature

Bryant, Diana, 'The Family Courts and Family Violence' (Paper Presented at the Judicial Conference of Australia Colloquium, 9-11 October 2015).

This paper discusses various issues which confront the family courts where family violence is a feature.

Her Honour noted the importance of the sharing of information between federal courts and state authorities. Her Honour cited s 69ZW of the *Family Law Act 1975* (Cth) before noting that there are also protocols in place between the state authorities and federal courts for the sharing of information in some places.

Chisholm, Richard, 'Information-sharing in Family Law & Child Protection: Enhancing Collaboration' (Canberra: Attorney-General's Department, 2013).

Chapters 2 and 3 of this report review the relevant legal framework, in particular the federal and state laws that affect information-sharing. Chapter 4 describes a number of formal written information-sharing agreements between the family courts and child protection departments (and other parties). Chapter 5 reviews general issues about drafting such agreements, and makes a number of recommendations. Chapter 6 deals with the most important specific issues, making recommendations about how formal agreements might best address each issue. Chapter 7 deals with information-sharing mechanisms other than formal agreements. In chapter 6, family violence is specifically considered (p 105).

Chisholm, Richard, 'The Sharing of Experts' Reports Between the Child Protection System and the Family Law System' (Canberra: Attorney-General's Department, 2014).

This report is a supplement to the Richard Chisholm's earlier report 'Information-sharing in Family Law & Child Protection: Enhancing Collaboration' (2013). It is noted that experts' reports are one instance of information that can usefully be shared between the systems. Some features of experts' reports require special consideration, and these form the focus of this report (p 1). Part 2 considers the advantages and disadvantages of sharing experts' reports while part 3 considers the legality of the sharing of experts' reports. Part 4 discusses practical issues and recommendations, including the regulation of the disclosure of experts' reports provided to the courts.

Faulks, John, 'Justice and the protection of children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

See in particular at p 157, where the author outlines information sharing procedures between the Family Court and state child protection agencies.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives.
- Court Outcomes Project involving: a quantitative analysis of patterns in orders for parental responsibility and time made in the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia; a national analysis of court filings data provided by those courts and an analysis of published judgments

At p 28, the report notes that there is a need for information sharing between the court system and service providers (such as FDR practitioners): 'depending on the extent of engagement underlying the issuing of a certificate, a significant amount of intake and assessment activity may have occurred before the parent starts to engage with the court system, yet this activity may not be visible in courts beyond the existence of the certificate'. Similar comments are made at p 39-40 where issues of confidentiality in this context are also raised.

McDonald, Myfanwy and Kate Rosier, 'Interagency Collaboration: Part A. What is it, what does it look like, when is it needed and what supports it?' (AFRC Briefing No. 21, Australian Institute of Family Studies, 2011).

These two papers focus attention upon how interagency collaborations benefit children and families. Part A looks at what collaboration is, the benefits and risks of involving families in collaborations, when interagency collaborations are likely to be most effective and explores how they can be supported through specific models of governance. Part B investigates the evidence regarding the relationship between collaboration and improved outcomes for children and families.

Peel, Sara and Rosalind Croucher, 'Mind(ing) the gap: Law reform recommendations responding to child protection in a federal system' [2011] (89) *Family Matters* 21.

This paper considers the 'gap' between the child protection system and the federal family law system. Existing provisions address these gaps to some extent; for example, by enabling family courts to obtain information from child protection agencies, and to issue subpoenas (*Family Law Act 1975* (Cth), s69ZW, Family Law Rules 2004 (Cth), pt 15.3). Family courts may also request child protection agencies to intervene in the court proceedings, thus becoming a party to proceedings; and agencies may choose to intervene in cases that involve allegations of abuse. Information sharing is considered specifically from p 28.

Information sharing - Other Resources

Family Court of Western Australia, *Practice Direction* (No. 1 of 2014).

This practice direction contains discussion of procedural issues relating to information sharing protocols between the Family Court of Western Australia and the Department for Child Protection and Family Support. These protocols, 'provide an important mechanism for gathering evidence in child-related proceedings'.

To be read with Practice Direction (17 July 2014).

Do you need information about the Federal Circuit and Family Court of Australia?

Open via Federal Circuit and Family Court of Australia website.

The National Enquiry Centre (NEC) is the entry point for all telephone and email enquiries on Family Law matters. The NEC provides first level user support for the Commonwealth Courts Portal. This role involves registration, guidance and support for users of the portal. The NEC can provide information and procedural advice, forms and brochures and referral advice to community and support services. NEC staff cannot provide legal advice.

Family Violence Plan – [Former] Family Court of Australia and Federal Circuit Court of Australia – April 2019.

Open via Federal Circuit and Family Court of Australia website.

The Family Violence Plan was developed in 2019, prior to the commencement of the Federal Circuit and Family Court of Australia. The current issue does not reflect the recent structural changes to the Courts.

The Plan 'builds on the important work undertaken by the courts under the 2014-16 Plan and reflects the ongoing commitment of the courts to addressing family violence in all areas of operation'. Along with including the measures contained in the joint Family Violence Best Practice Principles, the Plan 'contains actions for the administration of the courts, and for decision makers, legal practitioners, service providers and others involved in the family law system.

The Plan sets out three priority areas, each of which has defined goals, identified actions and timelines: protection from family violence; safety at court; and information and communication.

The Plan reflects contemporary understandings of the aetiology, dynamics and effects of family violence, informed by social science research. It has been developed in the context of the ongoing commitment of the Government to address and eradicate family violence.'

See in particular at p 2, 'The courts recognise the close connection between family breakdown and violence, and the detrimental impact on both adult victims and children living with family violence. Protecting family members, and particularly children, from the effects of family violence is central to all determinations of what is in a child's best interest. Ensuring the safety of all people engaged in the family law system, including when attending court, is also a high priority for the courts.'

National Strategic Framework for Information Sharing between the Family Law and Family Violence Child Protection Systems. (webpage).

This Framework supports the appropriate and timely two-way information exchange between the Federal Circuit and Family Court of Australia and the Family Court of Western Australia (the family law courts) on the one hand, and state and territory courts, child protection, policing, and firearms agencies on the other.

Unacceptable risk and best interests

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act*

1975.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

The central tenet of Part VII of the *Family Law Act 1975* (Cth) and Part 5 of the *Family Court Act 1997* (WA) is to ensure that the best interests of children are met. Section 60CA *FLA* and Section 66A *FCA* require a court making a parenting order to regard the best interests of the child as the paramount consideration. In determining what is in a child's best interests, Section 60CC(2)/(2A) *FLA* and Section 66C(2)/(3A) *FCA* stipulate the primary considerations as the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm due to family violence or abuse, with greater weight to be given to the need to protect the child from harm.

Depending on the facts and circumstances of the particular case, the court may order (pursuant to Section 11F *FLA* or Section 65 *FCA*) that the parties to child-related proceedings take part in an assessment conducted by a Family Consultant to assist the court in understanding the children's needs and in making short-term decisions about arrangements for the children. Central to all of these assessments is screening for family violence and risk assessment. The court may order that the Family Consultant prepare a Family Report based on their observations during these appointments. The best interests of the children are the main focus of the report. The Family Violence Best Practice Principles set out the range of matters the Court may determine the Family Report to address.

When considering what order to make, Section 60CG *FLA* and Section 66G *FCA* provide that the court must (where possible to do so consistently with the child's best interests as the paramount consideration), ensure that the order is consistent with any family violence order, and does not expose a person to an unacceptable risk of family violence.

The exercise of determining unacceptable risk requires the court, in the first instance, to identify the risk/s with specificity, and then to consider the steps or orders that can and should be made to minimise the specific risk/s. The High Court of Australia has considered the meaning of unacceptable risk in cases of child sexual abuse. This decision has subsequently been applied in cases of family violence and non-sexual abuse. To assess for unacceptable risk is to identify the nature and degree of the risk and whether, with or without safeguards, it is acceptable. The presiding court is not required to make a finding about whether a person has perpetrated violence or abuse; rather, it must determine whether orders for residence or contact create an unacceptable risk of harm for the child. The court must consider any risk to the child based on the facts, and

balance this risk against the desirability of the child maintaining contact with both parents. The facts may include evidence of past violence or abuse proven on the balance of probabilities [Higgins & Kaspiew 2011], but there may also be a range of other factors not proven to that standard that support a conclusion of unacceptable risk. It is appropriate for the court to rely on expert opinion evidence to assist in determining the child's best interests. The High Court also acknowledged that the magnitude of the risk may be less if contact is supervised, however even supervised contact may present a risk of physical, emotional or psychological disturbance to the child.

Section 67ZBA *FLA* and Section 162A *FCA* provide that where a party to child-related proceedings, or any other interested person as defined, alleges that there has been family violence or there is a risk of family violence by one of the parties to the proceedings, that person must file a 'statutory notice' with the court. In the Federal Circuit and Family Court of Australia any party seeking parenting orders must file with their application or response, a 'notice of child abuse, family violence or risk' (*Notice of Risk*) (Rule 2.04 of FCFCA Rules). The Notice of Risk (in the form prescribed by section 67Z *FLA*) requires answers to specific questions directed at eliciting information about child abuse, family violence and a range of other risks.

Where a Notice of Risk is filed, Section 67ZBB *FLA* and Section 162B *FCA* require the court to make the necessary interim orders and to act as expeditiously as possible to enable evidence of the allegations to be obtained, to protect children and any party to the proceedings, and to deal with the issues raised by the allegations. The Family Violence Best Practice Principles recognise that the interim hearing stage is critical in matters involving serious allegations of family violence as it often occurs in a context of urgency, and yet the court may not be able to make findings about disputed facts because not all relevant evidence is available or tested. When considering appropriate interim orders pending a final hearing, the court must assess the risk of future family violence. A screening tool often used by the court (known as 'PPP') analyses risk by reference to three factors: the potency of the violence (level of severity, dangerousness or risk of lethality); the pattern of violence and coercive control; and indicators of who is the primary perpetrator [Family Violence Best Practice Principles – December 2016]. Where an Independent Children's Lawyer (ICL) is involved in the proceedings at this stage, the relevant court guidelines [Guidelines for Independent Children's Lawyer (2021)] indicate that to assist the court in dealing with allegations of unacceptable risk, the ICL should, where possible, issue subpoenas to relevant agencies and be in a position to tender relevant material. The court must consider whether the evidence provided in support of any allegations satisfies the relevant standard of proof, the balance of probabilities [Higgins & Kaspiew 2011].

Research [Faulks 2014] acknowledges the complexity of the concept of unacceptable risk. If the court is satisfied

that the alleged events (involving a parent perpetrating violence or abuse) did occur, there must necessarily be some risk for the child spending time with that parent, at least unsupervised. The position is complicated where the court does not or is not able to make a determination about the alleged events. For the court in these circumstances to disallow contact between parent and child would certainly protect the child from any risk of violence or abuse from the parent, but it may cause other difficulties for the child in the development of their relationship with that parent and perhaps other people. If, on the other hand, the court allows unsupervised contact, and the parent had in fact perpetrated violence or abuse, the child may be at risk and not adequately protected.

A 2015 evaluation by the Australian Institute of Family Studies [Kaspiew et al Synthesis Report 2015] identifies a heightened emphasis by courts and practitioners on identifying family violence issues and safety concerns. It observes that parents self-select into disclosing family violence based on their view of the behaviour, the consequences of disclosure and its implications for parenting arrangements. It also conveys the views of professionals in the family law system indicating that the screening and assessment of family violence and safety concerns remain challenging, particularly in assessing how these issues impact on parenting arrangements. Section 67ZBB *FLA* and Section 162B *FCA* are critical to the court's powers in responding to these issues.

Unacceptable risk and best interests - Key Literature

Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* *(ALRC Report 114)* 2010.

This report presents a comprehensive review of legal responses to Family Violence in Australia. The commissions received many submissions. At p 268, the report notes – '…in making parenting orders, family courts have to ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence'.

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

Professor Chisholm was required to 'assess the appropriateness of the legislation, practices and procedures' that apply in cases where family violence is an issue and to recommend improvements. The report considers the issue of family violence in the family law system. Part 2 considers practices and procedures of the federal family courts in cases with family violence issues. Part 3 discusses issues with the applicable legislation in force at the time. Part 4 considers other matters, mainly relating to support services, information sharing and legal representation. See in particular from p 101, where the author discusses risk.

Faulks, John, 'Justice and the Protection of Children' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014)'.

This chapter considers how the Family Court of Australia (now the Federal Circuit and Family Court of Australia) deals with matters involving children where there are allegations of abuse. The author discusses the issue of unacceptable risk in relation to child abuse at pp 161-162. A particular 'conundrum' is considered – 'If the court were satisfied that the events alleged had occurred, then there must necessarily be some risk for the child in spending time with that parent, at least unsupervised. If the court is satisfied that the events alleged had not occurred, is it not reasonable that the parent and the child should have the opportunity to develop a proper relationship?'

Harrison, Margaret, Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings (April 2007).

This document contains a general overview of the Family Court's transition from the traditional common law adversarial trial to the less adversarial trial (LAT). It contains a history of procedural reforms to the Family Court. It discusses the differences between adversarial and inquisitorial systems, and contains detailed discussion of the operation of the LAT model. See in particular at p 22, which contains discussion of the issue of unacceptable risk, specifically in relation to the 'Magellan' case management model in the Family Court and the decision in *M and M* (1988) 166 CLR 69.

Higgins, Daryl and Rae Kaspiew, 'Child protection and family law… Joining the dots' (NCPC Issues No. 34, Australian Institute of Family Studies, 2011).

This paper looks at the specific issues facing those responsible for ensuring the safety and wellbeing of children in the context of parental separation, and the two separate legal systems: family law and child protection. Of most relevance here is the discussion from p8 which considers the family law system specifically. In particular, the discussion on p 12 considers the application of the 'unacceptable risk test' in the context of allegations of child abuse and child neglect in the family courts. The paper also contains summaries of cases which serve to illustrate the interaction between the family law and child protection systems.

Kaspiew, Rae, et al, '*Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)'* (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who used family law system services in 2011; and the 6,079 parents surveyed in the SRSP 2014, who experienced the system in 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came

substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 their post-reform experiences.

The core focus of the SRSP 2012 and 2014 studies were on investigating parents' experiences of family violence and safety concerns (including children's exposure to family violence) and their experiences in disclosing family violence and safety concerns to family law system professionals. These data sets indicate that family violence is a common experience among separated parents, with a majority of participating parents in both cohorts reporting physical or emotional abuse before/during separation, and mothers reporting these experiences in greater proportions compared to fathers.

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. See generally chapter 10 – 'Family violence and child abuse: Parents' pathways and professionals' perspectives'. The discussion from p 250 regarding burdens of proof is especially relevant for risk considerations.

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975* (Cth) in the area of family violence. See generally chapter 4 which considers risk assessment. Section 4.3.2 deals with the use of screening and assessment tools such as DOORS (Detection of Overall Risk Screen) (pp 38-39).

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children. The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii). See generally chapter 4 which deals with risk considerations and contains extensive analysis of relevant cases. See in particular, section 4.2.2 for discussion of the uncertainty around the application of the unacceptable risk test (pp 68-70).

Moloney, et al, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study' (Research Report No. 15, Australian Institute of Family Studies, 2007).

This study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations.

Moloney, et al, 'Understanding parenting disputes after separation' (Research Report No. 36, Australian Institute of Family Studies, 2016).

'This report explores the behaviour of separated parents by exploring the psychology of post-separation parental disputes and then interrogating three independent data sets to see what further insights they provide on the issues.'

See in particular the findings in Chapter 3, which considered, 'Practitioners' experiences of Parenting Disputes': 'Practitioners noted that often families who were in entrenched conflict had multiple problems, including psychiatric, substance use and violence issues. These issues contributed to disputes as they are

often sources of safety concerns' (p 36).

Parkinson, Patrick, 'Violence, abuse and the limits of shared parental responsibility' [2013] (92) *Family Matters* 7.

The thesis of this article (and a book by the author published in 2011) is that family law around the Western world has shifted fundamentally and irreversibly. Jurisdictions across the Western world have come to the sometimes painful conclusion that while marriage may be dissoluble, parenthood is not. The author argues that one issue with Australian legislation is that it focuses on a historyof family violence or abuse at any time in the course of the relationship, rather than on current safety concerns, and without sufficient clarity about how that history needs to be taken into account in decision-making (see esp. p 12-15).

Strickland, Justice Steven, 'Attachment Theory and Family Violence: a judicial perspective' (Paper delivered at AFCC 49th Annual Conference, Chicago, 6-9 June 2012).

This paper discusses the 2006 and 2011 family law reforms from the perspective of attachment theory. Attachment theory, which relates to the need for strong bonds with 'attachment figures' from an early age is outlined from p 3. See also in particular the comments regarding notices of risk at pp 31-32.

Unacceptable risk and best interests - Other Resources

Children: Safety and Risk.

Open via Federal Circuit and Family Court of Australia website.

This webpage contains information about requirements to notify the Court about family violence and child abuse, family violence orders, risk assessment, Lighthouse, staying safe at court and getting help and support.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Guidelines for Independent Children's Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.

Open via Family Court of Western Australia website.

'The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the family law courts, with information about the courts' general expectations of ICLs. The Guidelines set out these expectations as they relate to children in circumstances where allegations of child abuse and/or family violence are made, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.' See at pp 9-10 (section 6.8), which considers Interim hearings.

Family Violence Best Practice Principles – December 2016.

Open via Federal Circuit and Family Court of Australia website.

Parenting orders and impact on children

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act*

1975.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

The *Family Law Amendment (Information sharing) Bill 2023* (Cth) is currently before Parliament. The bill gives effect to the National Strategic Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems by amending the *Family Law Act 1975* to expand the information sharing framework for information relating to family violence, child abuse and neglect risks in parenting proceedings before the Federal Circuit and Family Court of Australia, and the Family Court of Western Australia.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r7009

Parenting orders and impact on children - Key Literature

Australia

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports on the findings from the analysis of data from two national online surveys (one for adults and one for children), which collected quantitative data and also allowed for qualitative comments about family violence and its impact on parenting and parenting arrangements. The study included adults and children who had separated after 1995 and after the introduction of the Family Law (Shared Parental Responsibility) Amendment Act (Cth) in 2006. The researchers gained the views of a total of 1,153 adults (90%) and children (10%).

Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports.

See in particular at p 53 – 'Some women felt powerless over arrangements to share care of the children with the fathers and felt they had been pressured into unfair agreements. For example, one woman who used services before the 2006 reforms said: 'The power he held over me during the relationship continued afterwards in regard to parenting arrangements and finances'. See also at p 55 where reports of confusion about the meaning of 'equal shared parental responsibility' are discussed.

Bailey, Alice, 'Separating safety from situational violence: Response to "Allegations of family violence and child abuse in family law children's proceedings"' [2007] (77) *Family Matters* 26.

The paper discusses the report: Moloney et al. 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007)- see below. The article notes the Maloney et al report provides evidence challenging a common myth that women frequently claim false allegations of family violence in child custody

cases and that unless allegations are accompanied by strong evidence, they will have little impact on post-separation child contact.

Carson, R., et al., (2022). *Compliance with and enforcement of family law parenting orders: Final Report*, ANROWS.

This research (based on surveys, analysis of court data and overseas models of order enforcement) explores non-compliance with family law orders.

The researchers note: ‘Contravention applications are not particularly common, comprising approximately 8 per cent of all applications for final orders in parenting matters.’(p13)

The research demonstrates that non-compliance arises from a complex interplay of difficult interpersonal dynamics, including family violence, and systemic limitations in the response to them. The researchers observe that ‘parties who engage in litigation over their parenting arrangements following separation are a particularly complex subset of separated parents.’ They show that ‘parents who subsequently experience problems with compliance with parenting orders are an even more complex subset: their families are often characterised by family violence, challenging interpersonal dynamics, conflict over a protracted period of time, and serious concerns about child wellbeing.’ (p14)

‘Women are significantly more likely than men to describe relationships as fearful, and men are significantly more likely than women to describe them as conflictual.’ (p14)

‘Family violence and safety concerns are also a key contributor to non-compliance where such concerns were not brought to the court’s attention or were not given due consideration in the development of parenting orders, resulting in inappropriate or unsafe parenting orders or orders not accepted as safe by the contravening party.’ (p15)

Fehlberg, Belinda and Christine Millward, ‘Family violence and financial outcomes after parental separation’ in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This article provides and analysis of interviews conducted with 60 separated parents as part of a wider study

on links between post-separation parenting and financial settlements, following major family law and process amendments in 2006.

The authors note that their interviews suggested that disclosure of family violence was discouraged in a context where there was pressure to support the abusive partner's involvement and agree to shared time' (p 239). The authors conclude that 'family violence often influenced parenting arrangements and thus indirectly influenced financial settlements. Family violence often affected mothers' child support receipt, including in CSA Collect/Child Support Collect cases. Mothers who described family violence that affected property settlements also commonly described problems obtaining child support from their ex-partner. Family violence that diminished or ceased after separation could still have a continuing influence, discouraging pursuit of legal remedies by those exposed. (at 24)

Humphreys, Cathy and Meredith Kiraly, 'Developmentally sensitive parental contact for infants when families are separated' [2010] (85) *Family Matters* 49.

This paper uses data from an initial research study which explored issues with infants where the children's court ordered high-frequency contact (4-7 days per week) between infants and their parents while the infant was living with foster or kinship carers. The infants originally came into care due to significant issues in relation to child abuse and neglect. The applicable issues for infants taken into out-of-home care are different from situations where infants' parents have separated. However, family law proceedings relating to separated parent of infants contain similar dilemmas in relation to contact orders (p 49).

Importantly, 'experiencing violence and abuse is also dangerous territory for infants. Babies who are "incubated in terror" show attachment disruption and poor neurological development, as the chemicals released in a pervasive environment of fear are inimical to healthy brain development. Protection from violence and abuse is pivotal to the infant's healthy development and safety, particularly given their physical fragility. This issue cuts across all jurisdictions'…'Adversarial processes may not be optimal to finding the way through to the best interests of babies, particularly when some flexibility may be needed. This is true of both the Children's Court and family law jurisdictions. However, by definition, violence and abuse tramples on the rights of the most vulnerable (in this case, infants) and they may in the end need the protection of the court in order to safeguard their interests.' (p 58)

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022). ANROWS.

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives
- Court Outcomes Project involving:

- a quantitative analysis of patterns in orders for parental responsibility and time made in the Federal Circuit and Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia
- a national analysis of court filings data provided by those courts
- an analysis of published judgments

See especially at p 49 relating to court orders for parental responsibility - 'The analysis demonstrates largely consistent levels in the proportions of orders for shared parental responsibility in the consent after proceedings and consent without litigation samples, with around nine out of ten children in each sample subject to orders for equal shared parental responsibility (CO report, Table 3.25). In judicial determination files, 40% of children were subject to orders for shared parental responsibility after the reforms, compared with 51% pre-reform. Overall, the proportion of children with shared parental responsibility outcomes where no allegations of family violence or child abuse were raised remained stable in the two time frames, at about nine in ten (CO report, Table 3.26). Where both these issues were raised, marginal decreases were evident, with the proportion of such children subject to orders for shared parental responsibility decreasing slightly, from 72% to 70%. Where only one of these issues was raised, the likelihood of a shared parental responsibility order increased slightly after the reforms, rising from 80% to 84%.'

Kaspiew, Rae, et al, 'Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who used family law system services in 2011; and the 6,079 parents surveyed in the SRSP 2014, who experienced the system in 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 their post-reform experiences.

See in particular section 5.3.3 entitled 'Influence on care-time arrangements of disclosure of family violence and safety concerns'. 53% of parents in both cohorts who disclosed family violence 'reported that this "very

much" or "somewhat" influenced their child's parenting arrangements. This was similar to the corresponding proportion of parents who disclosed safety concerns (2012: 56% and 2014: 53%)' (p 111).

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children. The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

It identified that arguments about family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. Table 3.13 on page 45 sets out the extent to which allegations of family violence and child abuse were raised in the pre- and post-reform samples according to the way in which matters were resolved (by judicial determination OR by consent after the proceedings had been issued or by application for consent orders). The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility is consistent with the aim of the 2012 reforms.

Kaspiew, Rae, et al, 'Post-separation parenting arrangements involving minimal time with one parent' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter examines recent empirical evidence on post-separation parenting arrangements, with a particular focus on arrangements where children have little or no contact with one parent. It demonstrates that a range of factors is linked with circumstances in which fathers have little or no contact with children, but that contact with services and courts is supportive of maintaining, and in some circumstances, increasing fathers' involvement with their children' (p 224-225).

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. The Survey of FRSP Clients 2009 also revealed high rates of family violence in separated families. The data shows that 33% of clients reported being physically hurt by the person about whom they attended the service and 77% reported being seriously put down or insulted. The participating client reported the other party making threats to harm them, themselves (i.e., the other party) or others (including pets) in 43% of cases. Controlling behaviour on the part of the other party had been experienced by 50% of clients participating in the survey.' (pp26-27)

Family lawyers expressed concerns that arrangements were being made that were developmentally inappropriate or in the context of a history family violence, and such arrangements proved to be unworkable in practical terms' (p 214).

Laing, Lesley, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Faculty of Education and Social Work, University of Sydney, 2010).

This research reports on the experiences of 22 women who were involved in the family law system following

their separation from a relationship in which they had experienced domestic violence. In particular see section titled: "'He just wants to see his children' – a lens for excusing men's behaviour" (from pp47-49) that draws on a number of excerpts detailing how fathers have manipulated police to harass and intimidate mothers (e.g. calling police to her house alleging she'd threatened to kill her children; turning up late for contact).

Moloney, Lawrie, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007).

This research was commissioned by the Federal Attorney-General's Department to provide baseline information to assist in informing the Australian Government's Family Law Violence Strategy. The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations. The study was based on a content analysis of two random samples of court files from the Melbourne, Dandenong and Adelaide registries of the former Family Court of Australia (FCoA) and the former Federal Magistrates Court (FMC): 240 files from the general population of cases in which parenting matters were in dispute (the general litigants sample), and 60 files from judicially determined matters in which parenting was in dispute (the judicial determination sample). In summary, a total of 300 court files were analysed: 150 from the former Family Court of Australia and 150 from the former Federal Magistrates Court. It should not be assumed that this sample is representative of the divorcing population. In other words, the findings should not be generalised to this population. The research found that more than half the cases in the former FCoA and former FMC in both samples contained allegations of adult family violence and/or child abuse. Note the discussion in chapter 8 which identifies that the 'most extensive work to date on the subject …has concluded in that country (Canada) that false denials are more common that false allegations.' Findings included that:

- Cases in the FCoA that required judicial determination were more likely than other cases to contain evidence of spousal violence that appeared to have some strong probative weight.
- Cases that seemed to contain the most severe allegations of spousal violence were especially likely to be accompanied by evidentiary material. Many of these cases required a judicial determination.

McIntosh, Jennifer et al, 'Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children' [2011] (86) *Family Matters* 40.

This article summarises key findings from two recent Australian studies of outcomes for two potential risk groups: school-aged children living in separations characterised by high inter-parental conflict (Study 1), and infants and pre-schoolers in the general population of separated families (Study 2). Both studies were commissioned by the Australian Government Attorney-General's Department.

See in particular at p 46, where it is noted that 'regardless of socio-economic background, parenting or inter-parental cooperation, shared overnight care of children less than four years of age had an independent and significantly deleterious impact on several emotional and behavioural regulation outcomes.' For example, young infants less than two years old living with a non-resident parent for only one or more nights a week 'were more irritable, and were more watchful and wary of separation from their primary caregiver than young children primarily in the care of one parent. Children aged 2–3 years in shared care (at the policy definition of five nights or more per fortnight) showed significantly lower levels of persistence with routine tasks, learning and play, than children in the other two groups' (p 46). They also showed 'severely distressed behaviours in their relationship with the primary parent' which is consistent with attachment theory. However, by kindergarten or school entry (children aged around 4-5 years), these effects were no longer evident as the children were capable of, *inter alia* self-soothing and organising their own behaviour. That is, the child truly 'knows what tomorrow is' which makes them better able to straddle households in a shared overnight parenting arrangement (p 46).

See also at p 48 'The task continues to be to determine those arrangements and attitudes that will maximally support each child within his/her unique developmental context'.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders.

Parkinson, Patrick, 'Violence, abuse and the limits of shared parental responsibility' [2013] (92) *Family Matters* 7.

In this article Parkinson argues that it is important to focus on current safety concerns rather than a history of violence throughout the relationship so as to direct resources to the parents and children at most risk as a result of post-separation parenting arrangements (pp 12-13). He nevertheless acknowledges that a history of coercive controlling violence remains important in relation to, for example, a child's attitude towards living with or visiting a violent parent. It is also important 'in assessing the mother's capacity for parenting and her attitude towards contact between the child and the other parent. For many women who experience this kind of subjugation and control, the psychological effects may have a greater lasting impact than the physical abuse. These effects include fear and anxiety, loss of self-esteem, depression and post-traumatic stress (p 14).

Qu, Lixia and Ruth Weston, 'Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms' (Commissioned Report, Australian Institute of Family Studies, 2010).

This report examines, 'the pathways that separating families have taken through the family law system, and the impact the changes to the family law system have had on these families. The Longitudinal Study of Separated Families examined relationships and wellbeing in separated families in Australia. Some 10,000 separated parents with children were interviewed for the first wave in 2008, as part of the evaluation of the 2006 Family Law reforms. This report presents findings from the second wave, when the parents had been separated for two to three years'.

See in particular at p 117 – 'the presumption of "equal shared parental responsibility" does not apply where there are reasonable grounds to believe that a child's parent, or another person in this parent's household, had engaged in family violence or child abuse. In Wave 2, as in Wave 1, decisions were less likely to be shared equally where respondents expressed safety concerns or said that their child's other parent had been abusive towards them during the preceding 12 months, with abuse in Wave 2 mainly taking the form of humiliating insults.'

Also, 'Although the emergence of safety concerns or experiences of abuse in the 12 months preceding Wave

2 was associated with a decline in the rate of shared decision-making, a substantial minority who reported safety concerns in Wave 2, whether recently emerging or longstanding, said that decisions were made jointly. For fathers, safety concerns mostly represented concerns about their child, and often related to their child's mother. Furthermore, quite serious behaviours, such as violence and anger management issues, were generally behind these concerns (see Chapter 3) (p 117).'

Weston, Ruth et al, 'Care-time arrangements after the 2006 reforms' [2011] (86) *Family Matters* 19.

This article examines the prevalence of different care-time arrangements for separating families after the 2006 reforms, parents' views about the flexibility and workability of their arrangements, characteristics of families with different care-time arrangements and the strength of the relationship between child wellbeing on the one hand and care-time arrangements and family dynamics on the other.

Note at p29: 'Across all care-time arrangements, children's wellbeing appeared to have been compromised where there had been a history of family violence, where parents held safety concerns (for them or their child) associated with ongoing contact with the other parent, and where the inter-parental relationship was either highly conflictual or fearful. Children in shared care-time arrangements appeared to be no worse off than other children where there had been a history of family violence or a negative inter-parental relationship. However, mothers' assessments suggested that, where there were safety concerns, children in shared care fared worse than those who lived mostly with their mother.'

International

Jaffe, Peter G., Janet R. Johnston, Claire V. Crooks, Nicholas Bala, *'Custody disputes involving allegations of Domestic violence: toward a differentiated approach to parenting plans'* (2008) 46(3) Family Court Review 500.

Premised on the understanding that domestic violence is a broad concept that encompasses a wide range of behaviours from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim, this article addresses the need for a differentiated approach to developing parenting plans after separation when domestic violence is alleged. A method of assessing risk by screening for the potency, pattern, and primary perpetrator of the violence is proposed as a foundation for generating hypotheses about the type of and potential for future violence as well as parental functioning. This kind of differential screening for risk in

cases where domestic violence is alleged provides preliminary guidance in identifying parenting arrangements that are appropriate for the specific child and family and, if confirmed by a more in-depth assessment, may be the basis for a long-term plan.

Regarding the credibility of allegations of child maltreatment, domestic violence and parental abuse of drugs and alcohol, the authors (at pp506-509) write there is virtually no research on the extent to which spousal abuse allegations are clearly false and maliciously fabricated, but this issue is becoming an increasing concern for the justice system …it is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators (earlier research sources cited in support).

Parenting orders and impact on children - Other Resources

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Guidelines for Independent Children’s Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

This document is intended to provide guidance to the Independent Children's Lawyer (ICL) in fulfilling his/her role. The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the family law courts, with information about the courts' general expectations of

ICLs. The Guidelines set out these expectations as they relate to children in circumstances where allegations of child abuse and/or family violence are made, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.

Family Violence Best Practice Principles – December 2016.

Open via Federal Circuit and Family Court of Australia website.

Lighthouse.

Open via Federal Circuit and Family Court of Australia website.

This document explains the role of Lighthouse in the Court's response to cases which may involve family violence.

"The Courts are leading the way in helping families that have experienced family violence and other safety risks to navigate the family law system. Lighthouse plays a central role in the Court's response to cases which may involve risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect, by shaping the allocation of resources and urgency given to such cases."

The three parts of Lighthouse are:

- Screening (using the Family DOORS Triage risk screening process);
- Triage and case pathways; and
- Case management (including referral to the specialist Evatt List in certain registries).

Lighthouse operates in the family law registries in Adelaide, Brisbane, Cairns, Canberra, Dandenong, Darwin, Hobart, Launceston, Melbourne, Newcastle, Parramatta, Rockhampton, Sydney, Townsville and Wollongong.

Parenting orders and impact on children - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Erin

Susan

Allegations of domestic and family violence

Section 4AB of the *Family Law Act 1975* describes family violence as violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member),* or cause the family member to be fearful.

The definition of family violence in the *Family Law Act* was expanded in 2011 to incorporate notions of coercion and control and came into effect on 7 June 2012. At the same time, the definition of child abuse was amended to include serious psychological harm arising from the child being subjected to or exposed to family violence (s 4(1) of the *Family Law Act*).

Many parenting matters determined by consent after proceedings are initiated, or by judicial determination, involve allegations of domestic and family violence and/or child abuse [Kaspiew et al Court Outcomes 2015]. Family Violence can take many forms: it can be physical, emotional, psychological or sexual. Common forms of family violence as outlined by the FCFCA are as follows (but are not limited to the below):

1. Spouse/partner abuse (violence among adult partners and ex partners);
2. Child abuse/neglect (abuse/neglect of children by an adult);
3. Parental abuse (violence perpetrated by a child against their parent); and
4. Sibling abuse (violence between siblings).

Research conducted into family violence allegations indicates that it is more likely that victims of family violence will be reluctant to raise allegations for fear of having their motives questioned [Laing 2010], as opposed to people raising false allegations of family violence. It also shows that the making of false allegations is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimisation of abuse by perpetrators [Jaffe et al 2008]. A parent who feels pressure to support the family violence perpetrator's parenting role may feel discouraged from raising allegations of domestic and family violence [Fehlberg & Millward 2014], or may attempt family dispute resolution despite being in circumstances where they are experiencing threats, fear or abuse [Kaspiew et al 2009]. A parent may be even less likely to disclose domestic and family violence where they are self-represented and unfamiliar with the relevant provisions of

the *Family Law Act 1975* (Cth) (*FLA*) or the *Family Court Act 1997* (WA) (*FCA*), or their legal representative has not made sufficient enquiries regarding allegations of violence.

Allegations that are accompanied by evidence of strong probative weight may influence the nature of court-based parenting outcomes [Moloney et al 2007], for example the court may decide to make an Order whereby the child spends no time with the parent who has inflicted family violence, or that the time spent with that parent be supervised or restricted to daytime only [Kaspiew et al Synthesis 2015]. However, the *FLA* and *FCA* do not require independent verification or corroboration of allegations [FV Best Practice 2016] of domestic and family violence (such as police or medical reports) for the court to be satisfied that it has occurred. As the Full Court of the Family Court of Australia said in *Amador & Amador* ([2009] FAMCAFC 196 per May, Coleman and Le Poer Trench JJ:

> *Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a Court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.* (at [79])
>
> *The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.* (at [81])

When corroboration evidence is available but is not called, adverse inferences might appropriately be drawn.

In some registries the Court is screening for family violence through the Lighthouse Project [Lighthouse]. In addition the Commonwealth is piloting the co-location of state and territory child protection and policing officials [Co-location of child protection] in registries across Australia.

Allegations of domestic and family violence - Key Literature

Australia

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports on the findings from the analysis of data from two national online surveys (one for adults and one for children), which collected quantitative data and also allowed for qualitative comments about family violence and its impact on parenting and parenting arrangements. The study included adults and children who had separated after 1995 and after the introduction of the Family Law (Shared Parental Responsibility) Amendment Act (Cth) in 2006. The researchers gained the views of a total of 1,153 adults (90%) and children (10%).

Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports.

See in particular at p 53 – 'Some women felt powerless over arrangements to share care of the children with the fathers and felt they had been pressured into unfair agreements. For example, one woman who used services before the 2006 reforms said: 'The power he held over me during the relationship continued afterwards in regard to parenting arrangements and finances'. See also at p 55 where reports of confusion about the meaning of 'equal shared parental responsibility' are discussed.

Bailey, Alice, 'Separating safety from situational violence: Response to "Allegations of family violence and child abuse in family law children's proceedings"' [2007] (77) *Family Matters* 26.

The paper discusses the report: Moloney et al. 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007)- see below. The article notes the Maloney et al report provides evidence challenging a common myth that women frequently claim false allegations of family violence in child custody

cases and that unless allegations are accompanied by strong evidence, they will have little impact on post-separation child contact.

Fehlberg, Belinda and Christine Millward, 'Family violence and financial outcomes after parental separation' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This article provides and analysis of interviews conducted with 60 separated parents as part of a wider study on links between post-separation parenting and financial settlements, following major family law and process amendments in 2006.

The authors note that their interviews suggested that disclosure of family violence was discouraged in a context where there was pressure to support the abusive partner's involvement and agree to shared time' (p 239). The authors conclude that 'family violence often influenced parenting arrangements and thus indirectly influenced financial settlements. Family violence often affected mothers' child support receipt, including in CSA Collect/Child Support Collect cases. Mothers who described family violence that affected property settlements also commonly described problems obtaining child support from their ex-partner. Family violence that diminished or ceased after separation could still have a continuing influence, discouraging pursuit of legal remedies by those exposed. (at 24)

Humphreys, Cathy and Meredith Kiraly, 'Developmentally sensitive parental contact for infants when families are separated' [2010] (85) *Family Matters* 49.

This paper uses data from an initial research study which explored issues with infants where the children's court ordered high-frequency contact (4-7 days per week) between infants and their parents while the infant was living with foster or kinship carers. The infants originally came into care due to significant issues in relation to child abuse and neglect. The applicable issues for infants taken into out-of-home care are different from situations where infants' parents have separated. However, family law proceedings relating to separated parent of infants contain similar dilemmas in relation to contact orders (p 49).

Importantly, 'experiencing violence and abuse is also dangerous territory for infants. Babies who are "incubated in terror" show attachment disruption and poor neurological development, as the chemicals

released in a pervasive environment of fear are inimical to healthy brain development. Protection from violence and abuse is pivotal to the infant's healthy development and safety, particularly given their physical fragility. This issue cuts across all jurisdictions'…'Adversarial processes may not be optimal to finding the way through to the best interests of babies, particularly when some flexibility may be needed. This is true of both the Children's Court and family law jurisdictions. However, by definition, violence and abuse tramples on the rights of the most vulnerable (in this case, infants) and they may in the end need the protection of the court in order to safeguard their interests.' (p 58)

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022). ANROWS.

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives
- Court Outcomes Project involving:
  - a quantitative analysis of patterns in orders for parental responsibility and time made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia
  - a national analysis of court filings data provided by those courts
  - an analysis of published judgments

See especially at p 49 relating to court orders for parental responsibility - 'The analysis demonstrates largely consistent levels in the proportions of orders for shared parental responsibility in the consent after proceedings and consent without litigation samples, with around nine out of ten children in each sample subject to orders for equal shared parental responsibility (CO report, Table 3.25). In judicial determination files, 40% of children were subject to orders for shared parental responsibility after the reforms, compared with 51% pre-reform. Overall, the proportion of children with shared parental responsibility outcomes where no allegations of family violence or child abuse were raised remained stable in the two time frames, at about nine in ten (CO report, Table 3.26). Where both these issues were raised, marginal decreases were evident, with the proportion of such children subject to orders for shared parental responsibility decreasing slightly, from 72% to 70%. Where only one of these issues was raised, the likelihood of a shared parental responsibility order increased slightly after the reforms, rising from 80% to 84%.'

Kaspiew, Rae, et al, 'Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who used family law system services in 2011; and the 6,079 parents surveyed in the SRSP 2014, who experienced the system in 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 their post-reform experiences.

See in particular section 5.3.3 entitled 'Influence on care-time arrangements of disclosure of family violence and safety concerns'. 53% of parents in both cohorts who disclosed family violence 'reported that this "very much" or "somewhat" influenced their child's parenting arrangements. This was similar to the corresponding proportion of parents who disclosed safety concerns (2012: 56% and 2014: 53%)' (p 111).

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children. The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

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The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility is consistent with the aim of the 2012 reforms.

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This chapter examines recent empirical evidence on post-separation parenting arrangements, with a particular focus on arrangements where children have little or no contact with one parent. It demonstrates that a range of factors is linked with circumstances in which fathers have little or no contact with children, but that contact with services and courts is supportive of maintaining, and in some circumstances, increasing fathers' involvement with their children' (p 224-225).

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This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

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This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. The Survey of

FRSP Clients 2009 also revealed high rates of family violence in separated families. The data shows that 33% of clients reported being physically hurt by the person about whom they attended the service and 77% reported being seriously put down or insulted. The participating client reported the other party making threats to harm them, themselves (i.e., the other party) or others (including pets) in 43% of cases. Controlling behaviour on the part of the other party had been experienced by 50% of clients participating in the survey.' (pp26-27)

Family lawyers expressed concerns that arrangements were being made that were developmentally inappropriate or in the context of a history family violence, and such arrangements proved to be unworkable in practical terms' (p 214).

Laing, Lesley, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Faculty of Education and Social Work, University of Sydney, 2010).

This research reports on the experiences of 22 women who were involved in the family law system following their separation from a relationship in which they had experienced domestic violence. In particular see section titled: "'He just wants to see his children' – a lens for excusing men's behaviour" (from pp47-49) that draws on a number of excerpts detailing how fathers have manipulated police to harass and intimidate mothers (e.g. calling police to her house alleging she'd threatened to kill her children; turning up late for contact).

Moloney, Lawrie, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007).

This research was commissioned by the Federal Attorney-General's Department to provide baseline information to assist in informing the Australian Government's Family Law Violence Strategy. The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations. The study was based on a content analysis of two random samples of court files from the Melbourne, Dandenong and Adelaide registries of the former Family

Court of Australia (FCoA) and the former Federal Magistrates Court (FMC): 240 files from the general population of cases in which parenting matters were in dispute (the general litigants sample), and 60 files from judicially determined matters in which parenting was in dispute (the judicial determination sample). In summary, a total of 300 court files were analysed: 150 from the former Family Court of Australia and 150 from the former Federal Magistrates Court. It should not be assumed that this sample is representative of the divorcing population. In other words, the findings should not be generalised to this population. The research found that more than half the cases in the former FCoA and FMC in both samples contained allegations of adult family violence and/or child abuse. Note the discussion in chapter 8 which identifies that the 'most extensive work to date on the subject …has concluded in that country (Canada) that false denials are more common that false allegations.' Findings included that:

- Cases in the FCoA that required judicial determination were more likely than other cases to contain evidence of spousal violence that appeared to have some strong probative weight.
- Cases that seemed to contain the most severe allegations of spousal violence were especially likely to be accompanied by evidentiary material. Many of these cases required a judicial determination.

McIntosh, Jennifer et al, 'Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children' [2011] (86) *Family Matters* 40.

This article summarises key findings from two recent Australian studies of outcomes for two potential risk groups: school-aged children living in separations characterised by high inter-parental conflict (Study 1), and infants and pre-schoolers in the general population of separated families (Study 2). Both studies were commissioned by the Australian Government Attorney-General's Department.

See in particular at p 46, where it is noted that 'regardless of socio-economic background, parenting or inter-parental cooperation, shared overnight care of children less than four years of age had an independent and significantly deleterious impact on several emotional and behavioural regulation outcomes.' For example, young infants less than two years old living with a non-resident parent for only one or more nights a week 'were more irritable, and were more watchful and wary of separation from their primary caregiver than young children primarily in the care of one parent. Children aged 2–3 years in shared care (at the policy definition of five nights or more per fortnight) showed significantly lower levels of persistence with routine tasks, learning and play, than children in the other two groups' (p 46). They also showed 'severely distressed behaviours in

their relationship with the primary parent' which is consistent with attachment theory. However, by kindergarten or school entry (children aged around 4-5 years), these effects were no longer evident as the children were capable of, *inter alia* self-soothing and organising their own behaviour. That is, the child truly 'knows what tomorrow is' which makes them better able to straddle households in a shared overnight parenting arrangement (p 46).

See also at p 48 'The task continues to be to determine those arrangements and attitudes that will maximally support each child within his/her unique developmental context'.

Parkinson, Patrick, 'The ties that bind: Separation, divorce and the indissolubility of parenthood' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders.

Parkinson, Patrick, 'Violence, abuse and the limits of shared parental responsibility' [2013] (92) *Family Matters* 7.

In this article Parkinson argues that it is important to focus on current safety concerns rather than a history of violence throughout the relationship so as to direct resources to the parents and children at most risk as a result of post-separation parenting arrangements (pp 12-13). He nevertheless acknowledges that a history of coercive controlling violence remains important in relation to, for example, a child's attitude towards living with or visiting a violent parent. It is also important 'in assessing the mother's capacity for parenting and her attitude towards contact between the child and the other parent. For many women who experience this kind of subjugation and control, the psychological effects may have a greater lasting impact than the physical abuse. These effects include fear and anxiety, loss of self-esteem, depression and post-traumatic stress (p 14).

Qu, Lixia and Ruth Weston, 'Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms' (Commissioned Report, Australian Institute of Family Studies, 2010).

This report examines, 'the pathways that separating families have taken through the family law system, and the impact the changes to the family law system have had on these families. The Longitudinal Study of Separated Families examined relationships and wellbeing in separated families in Australia. Some 10,000 separated parents with children were interviewed for the first wave in 2008, as part of the evaluation of the 2006 Family Law reforms. This report presents findings from the second wave, when the parents had been separated for two to three years'.

See in particular at p 117 – 'the presumption of "equal shared parental responsibility" does not apply where there are reasonable grounds to believe that a child's parent, or another person in this parent's household, had engaged in family violence or child abuse. In Wave 2, as in Wave 1, decisions were less likely to be shared equally where respondents expressed safety concerns or said that their child's other parent had been abusive towards them during the preceding 12 months, with abuse in Wave 2 mainly taking the form of humiliating insults.'

Also, 'Although the emergence of safety concerns or experiences of abuse in the 12 months preceding Wave 2 was associated with a decline in the rate of shared decision-making, a substantial minority who reported safety concerns in Wave 2, whether recently emerging or longstanding, said that decisions were made jointly. For fathers, safety concerns mostly represented concerns about their child, and often related to their child's mother. Furthermore, quite serious behaviours, such as violence and anger management issues, were generally behind these concerns (see Chapter 3) (p 117).'

Weston, Ruth et al, 'Care-time arrangements after the 2006 reforms' [2011] (86) *Family Matters* 19.

This article examines the prevalence of different care-time arrangements for separating families after the 2006 reforms, parents' views about the flexibility and workability of their arrangements, characteristics of families with different care-time arrangements and the strength of the relationship between child wellbeing on the one hand and care-time arrangements and family dynamics on the other.

Note at p29: 'Across all care-time arrangements, children's wellbeing appeared to have been compromised where there had been a history of family violence, where parents held safety concerns (for them or their child) associated with ongoing contact with the other parent, and where the inter-parental relationship was either highly conflictual or fearful. Children in shared care-time arrangements appeared to be no worse off than other children where there had been a history of family violence or a negative inter-parental relationship.

However, mothers' assessments suggested that, where there were safety concerns, children in shared care fared worse than those who lived mostly with their mother.'

International

Jaffe, Peter G., Janet R. Johnston, Claire V. Crooks, Nicholas Bala, *'Custody disputes involving allegations of Domestic violence: toward a differentiated approach to parenting plans'* (2008) 46(3) Family Court Review 500.

Premised on the understanding that domestic violence is a broad concept that encompasses a wide range of behaviors from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim, this article addresses the need for a differentiated approach to developing parenting plans after separation when domestic violence is alleged. A method of assessing risk by screening for the potency, pattern, and primary perpetrator of the violence is proposed as a foundation for generating hypotheses about the type of and potential for future violence as well as parental functioning. This kind of differential screening for risk in cases where domestic violence is alleged provides preliminary guidance in identifying parenting arrangements that are appropriate for the specific child and family and, if confirmed by a more in-depth assessment, may be the basis for a long-term plan.

Regarding the credibility of allegations of child maltreatment, domestic violence and parental abuse of drugs and alcohol, the authors (at pp506-509) write there is virtually no research on the extent to which spousal abuse allegations are clearly false and maliciously fabricated, but this issue is becoming an increasing concern for the justice system …it is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators (earlier research sources cited in support).

Allegations of domestic and family violence - Other Resources

Co-location of State and Territory child protection and other officials in Family Law Court Registries.

Open via Department of Social Services: National Plan to Reduce Violence against Women and their Children website.

This initiative has funded the co-location of 16 child protection officials and 6 policing officials at family law court registries until 30 June 2025. It's intended outcomes include:

The intended outcomes of this program include:

- a more coordinated response to family safety issues (demonstrated in part by the sharing of data relating to information or intervention requests in matters where child abuse is suspected or alleged)
- judicial officers being able to make decisions with full knowledge of prior involvement by child protection and law enforcement agencies
- strengthened judicial decision-making, with family safety risks identified and addressed earlier in family law proceedings
- improved inter-jurisdictional understanding and cooperation, leading to better information sharing practices.

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – "Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family, or

- seeing or hearing an assault of a member of the child's family by another member of the child's family, or
- comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family, or
- cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family."

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Guidelines for Independent Children's Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

This document is intended to provide guidance to the Independent Children's Lawyer (ICL) in fulfilling his/her role. The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the family law courts, with information about the courts' general expectations of ICLs. The Guidelines set out these expectations as they relate to children in circumstances where allegations of child abuse and/or family violence are made, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.

Family Violence Best Practice Principles – December 2016.

Open via Federal Circuit and Family Court of Australia website.

Lighthouse.

Open via Federal Circuit and Family Court of Australia website.

This document explains the role of Lighthouse in the Court's response to cases which may involve family violence.

"The Courts are leading the way in helping families that have experienced family violence and other safety risks to navigate the family law system. Lighthouse plays a central role in the Court's response to cases which may involve risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect, by shaping the allocation of resources and urgency given to such cases."

The three parts of the Lighthouse project are:

- Screening (using the Family DOORS Triage risk screening process);
- Triage and case pathways; and
- Case management (including referral to the specialist Evatt List in certain registries).

Lighthouse operates in the family law registries in Adelaide, Brisbane, Cairns, Canberra, Dandenong, Darwin, Hobart, Launceston, Melbourne, Newcastle, Parramatta, Rockhampton, Sydney, Townsville and Wollongong.

Court-based parenting outcomes

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act*

1975.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

Section 61DA *FLA* and Section 70A *FCA* provide that, when making a parenting order, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility (Section 65DAC *FLA* and Section 89AC *FCA*). The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or person living with a parent) has engaged in child abuse or family violence. The presumption may be rebutted by evidence that equal shared parental responsibility would not be in the best interests of the child. Where the presumption applies, the court must also consider ordering "equal time" or "substantial and significant time" with each parent where it is reasonably practicable and in the best interests of the child (Section 65DAA *FLA* and Section 89AA *FCA*).

In addition to the primary considerations of the benefit of the child having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm, there are a number of additional considerations the court needs to look at when determining what is in the child's best interests. These include things such as the nature of the relationship between the child and his/her parents, the likely effect of changes in circumstances, the parent's capacity to provide for the needs of the child (including emotional and intellectual needs) and several additional factors outlined in s 60CC(3) of the *FLA* and s66C of the *FCA*. Section 60CC(3)(k) provides that in the event that a family violence order applies, or has applied, to the child or any member of the child's family, any relevant inferences that can be drawn from the order need to be taken into account.

Research indicates that children who are exposed to domestic and family violence may be significantly harmed [Family violence and children 2021].

Concerns may be sufficient to warrant an order for supervised changeovers and/or time; and a specified contact centre may be considered appropriate to provide the necessary supervision to lessen the risk of exposure to family violence. In cases where there is a risk of serious harm to the child or the primary caregiver, the court may decide that sole parental responsibility is more appropriate than trying to preserve an ongoing co-parenting relationship [Parkinson 2013]. The Court may also consider making an order that the child spend no time with the parent who inflicts family violence.

In addition to addressing the risk of ongoing domestic and family violence and associated safety concerns,

there may be other related considerations for judicial officers when making a parenting order. For example, a judicial officer may need to consider the extent to which ongoing conflict and violence between parents affects either parent's capacity to care for the child [Moloney et al 2007], or whether it is appropriate to make provision for support to be given during contact to a parent who may be coping with the effects of substance misuse, mental illness or domestic and family violence [Humphreys & Kiraly 2010].

Further, in order to determine those arrangements that will best support the child within their unique developmental context, a judicial officer should consider matters relevant to the child's age and developmental stage. In making this determination, a judicial officer may give weight to recommendations made in a court-ordered Family Report or other court-ordered expert report, or to submissions made to the court by an Independent Children's Lawyer (ICL). Research has identified the need for ICLs [Guidelines for ICL 2021] to be well trained; and to have the necessary skills to communicate with children and to understand and respond to their experiences of domestic and family violence and child abuse [Kaspiew et al ICL Study 2014].

The Family Violence Best Practice Principles comprehensively deal with the range of considerations that are likely to be important in framing orders at interim and final hearing stage in cases where there are disputed allegations of domestic and family violence and child abuse.

In some cases where consent orders are proposed it may be appropriate for the judicial officer to ask questions or request further information in order to closely scrutinise the suitability of the proposal, or to appoint an Independent Children's Lawyer or order a Family Report or expert report to determine what is in a child's best interests.

Where an application is made to the Federal Circuit and Family Court of Australia or the Federal Circuit Court of Australia for a parenting order by consent, the parties must formally advise the court whether any allegations had been made in the proceedings of family violence or child abuse or neglect (or risk thereof), or of mental ill-health, drug or alcohol, serious parental incapacity or any other allegation involving a risk to the child concerned AND whether a party considers that the child concerned has been or is at risk of abuse, neglect or family violence, and whether a party considers that he or she or another party to the proceedings has been or is at risk if family violence. Should any of these circumstances be advised, the parties must explain to the Court how the parenting order attempts to deal with the allegations (see Rule 10.05 of the FCFCA Rules).

There has been reported confusion among parents about the meaning of equal shared parental responsibility,

some believing that it is the equivalent of equal-time [Kaspiew et al 2009]. Research has shown that where domestic and family violence continues after separation, in particular where there are ongoing attempts to exercise control in parenting arrangements, some mothers feel pressured by their former partners/the fathers of their children into agreeing to equal-time, believing that the court would require it [Bagshaw et al 2011]. A 2015 study of separated parents conducted by the Australian Institute of Family Studies reports an increase in the number of children of parents with domestic and family violence and safety concerns having only daytime contact with the alleged perpetrator of family violence [Kaspiew et al Synthesis 2015].

Court-based parenting outcomes - Key Literature

Australia

Bagshaw, Dale et al, 'The effect of family violence on post-separation parenting arrangements The experiences and views of children and adults from families who separated post-1995 and post-2006' [2011] (86) *Family Matters* 49.

This article reports on the findings from the analysis of data from two national online surveys (one for adults and one for children), which collected quantitative data and also allowed for qualitative comments about family violence and its impact on parenting and parenting arrangements. The study included adults and children who had separated after 1995 and after the introduction of the Family Law (Shared Parental Responsibility) Amendment Act (Cth) in 2006. The researchers gained the views of a total of 1,153 adults (90%) and children (10%).

Many adults felt dissatisfied with service providers' acknowledgement and appreciation of the impact of family violence on adult and child victims. Adults were most dissatisfied with services for decision-making regarding planning for their children's care post-separation. Their concern for their children's safety was supported by children's own reports.

See in particular at p 53 – 'Some women felt powerless over arrangements to share care of the children with the fathers and felt they had been pressured into unfair agreements. For example, one woman who used services before the 2006 reforms said: 'The power he held over me during the relationship continued afterwards in regard to parenting arrangements and finances'. See also at p 55 where reports of confusion about the meaning of 'equal shared parental responsibility' are discussed.

Bailey, Alice, 'Separating safety from situational violence: Response to "Allegations of family violence and child abuse in family law children's proceedings"' [2007] (77) *Family Matters* 26.

The paper discusses the report: Moloney et al. 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007)- see below. The article notes the Maloney et al report provides evidence challenging a common myth that women frequently claim false allegations of family violence in child custody

cases and that unless allegations are accompanied by strong evidence, they will have little impact on post-separation child contact.

Fehlberg, Belinda and Christine Millward, 'Family violence and financial outcomes after parental separation' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This article provides and analysis of interviews conducted with 60 separated parents as part of a wider study on links between post-separation parenting and financial settlements, following major family law and process amendments in 2006.

The authors note that their interviews suggested that disclosure of family violence was discouraged in a context where there was pressure to support the abusive partner's involvement and agree to shared time' (p 239). The authors conclude that 'family violence often influenced parenting arrangements and thus indirectly influenced financial settlements. Family violence often affected mothers' child support receipt, including in CSA Collect/Child Support Collect cases. Mothers who described family violence that affected property settlements also commonly described problems obtaining child support from their ex-partner. Family violence that diminished or ceased after separation could still have a continuing influence, discouraging pursuit of legal remedies by those exposed. (at 24)

Humphreys, Cathy and Meredith Kiraly, 'Developmentally sensitive parental contact for infants when families are separated' [2010] (85) *Family Matters* 49.

This paper uses data from an initial research study which explored issues with infants where the children's court ordered high-frequency contact (4-7 days per week) between infants and their parents while the infant was living with foster or kinship carers. The infants originally came into care due to significant issues in relation to child abuse and neglect. The applicable issues for infants taken into out-of-home care are different from situations where infants' parents have separated. However, family law proceedings relating to separated parent of infants contain similar dilemmas in relation to contact orders (p 49).

Importantly, 'experiencing violence and abuse is also dangerous territory for infants. Babies who are "incubated in terror" show attachment disruption and poor neurological development, as the chemicals

released in a pervasive environment of fear are inimical to healthy brain development. Protection from violence and abuse is pivotal to the infant's healthy development and safety, particularly given their physical fragility. This issue cuts across all jurisdictions'…'Adversarial processes may not be optimal to finding the way through to the best interests of babies, particularly when some flexibility may be needed. This is true of both the Children's Court and family law jurisdictions. However, by definition, violence and abuse tramples on the rights of the most vulnerable (in this case, infants) and they may in the end need the protection of the court in order to safeguard their interests.' (p 58)

Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022). ANROWS.

This report sets out the findings of one part of a four-part research program that examines compliance with and enforcement of family law parenting orders. These findings are based on two elements: the views of 343 professionals who work with separated parents who completed an online survey, and those of 11 judicial officers who exercise family law jurisdiction and participated in one-on-one interviews. The other three parts of the research program are based on data collection from family law court files involving contravention applications, an online survey of parents and carers with family law parenting orders, and an analysis of the approaches applied to contravention in three international jurisdictions. (p11)

Systemic factors include shortcomings in the identification, assessment and management of risk. (p13)

When working with parents for the development of parenting orders, it is critical that practitioners ensure that safety and risk are adequately assessed and considered in the parenting arrangements. (p14)

This evidence demonstrates that the parents who obtain family law parenting orders are a particularly complex group, with concentrated levels of risk indicators. In light of the small proportion of parenting orders that involve contravention matters…, it is important to emphasise that the contravention regime is applied to a small subset of a particularly complex group of families. (p17)

Kaspiew, Rae, et al, 'Evaluation of the 2012 Family Violence Amendments' (Synthesis Report, Australian Institute of Family Studies, 2015).

Building on findings of the Survey of Recently Separated Parents 2012, the Longitudinal Study of Separated Families, and the 2009 AIFS Evaluation of the 2006 Family Law Reforms, this report examines the impacts of changes to the *Family Law Act 1975 (Cth)* in the area of family violence in three respects:

- Responding to Family Violence - a survey of family law practices and experiences which primarily involved online surveys of professional practices and perspectives
- Survey of Recently Separated Parents 2014 based on a large-scale survey of parents' experiences and perspectives
- Court Outcomes Project involving:
  - a quantitative analysis of patterns in orders for parental responsibility and time made in the former Family Court of Australia, the former Federal Circuit Court of Australia, and the Family Court of Western Australia
  - a national analysis of court filings data provided by those courts
  - an analysis of published judgments

See especially at p 49 relating to court orders for parental responsibility - 'The analysis demonstrates largely consistent levels in the proportions of orders for shared parental responsibility in the consent after proceedings and consent without litigation samples, with around nine out of ten children in each sample subject to orders for equal shared parental responsibility (CO report, Table 3.25). In judicial determination files, 40% of children were subject to orders for shared parental responsibility after the reforms, compared with 51% pre-reform. Overall, the proportion of children with shared parental responsibility outcomes where no allegations of family violence or child abuse were raised remained stable in the two time frames, at about nine in ten (CO report, Table 3.26). Where both these issues were raised, marginal decreases were evident, with the proportion of such children subject to orders for shared parental responsibility decreasing slightly, from 72% to 70%. Where only one of these issues was raised, the likelihood of a shared parental responsibility order increased slightly after the reforms, rising from 80% to 84%.'

Kaspiew, Rae, et al, 'Experiences of Separated Parents Study' (Evaluation of 2012 Family Violence Amendments)' (Report, Australian Institute of Family Studies, 2015).

This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments

project—the Experiences of Separated Parents Study (ESPS). This element is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who used family law system services in 2011; and the 6,079 parents surveyed in the SRSP 2014, who experienced the system in 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents' pre-reform experiences and the SRSP 2014 their post-reform experiences.

See in particular section 5.3.3 entitled 'Influence on care-time arrangements of disclosure of family violence and safety concerns'. 53% of parents in both cohorts who disclosed family violence 'reported that this "very much" or "somewhat" influenced their child's parenting arrangements. This was similar to the corresponding proportion of parents who disclosed safety concerns (2012: 56% and 2014: 53%)' (p 111).

Kaspiew, Rae, et al, 'Court Outcomes Project' (Report, Australian Institute of Family Studies, October 2015).

The 2012 amendments to the *Family Law Act 1975* (Cth) 'were intended to support increased disclosure of concerns about family violence and child abuse, and to support changed approaches to making parenting arrangements where these issues are pertinent to ensuring safer parenting arrangements for children. The Court Outcomes Project examined the effects of these 2012 reforms on court filings, patterns in court-based parenting matters and the judicial interpretation of key legislative provisions introduced by the amendments' (p vii).

It identified that arguments about family violence or child abuse have been raised more frequently since the 2012 reforms. This increase in disclosure of family violence and child abuse was a key intent of the reforms. Table 3.13 on page 45 sets out the extent to which allegations of family violence and child abuse were raised in the pre- and post-reform samples according to the way in which matters were resolved (by judicial determination OR by consent after the proceedings had been issued or by application for consent orders). The presumption of equal shared parental responsibility is not applicable where concerns about family violence or child abuse exist (p xii). Therefore, a decrease in the number of orders for equal shared parental responsibility is consistent with the aim of the 2012 reforms.

Kaspiew, Rae, et al, 'Post-separation parenting arrangements involving minimal time with one parent' in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter examines recent empirical evidence on post-separation parenting arrangements, with a particular focus on arrangements where children have little or no contact with one parent. It demonstrates that a range of factors is linked with circumstances in which fathers have little or no contact with children, but that contact with services and courts is supportive of maintaining, and in some circumstances, increasing fathers' involvement with their children' (p 224-225).

Kaspiew, Rae, et al, 'Independent Children's Lawyers Study' (Final Report (2nd Edition), Australian Institute of Family Studies, June 2014).

This report has examined the role of ICLs in the family law system. The capacity of many ICLs is recognised to be excellent (p xii). Issues identified throughout the report include the need for ICLs to have greater awareness of child development issues and the overall limitations of ICLs in consulting effectively with children. Indeed, some ICLs emphasised the delineation of their role from that of a social science expert. It is important to ensure ICLs do not go beyond their expertise (pp48-49). However, it was nevertheless thought prudent for ICLs to have more training in child development issues.

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family Law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. The Survey of FRSP Clients 2009 also revealed high rates of family violence in separated families. The data shows that 33% of clients reported being physically hurt by the person about whom they attended the service and 77% reported being seriously put down or insulted. The participating client reported the other party making threats to harm them, themselves (i.e., the other party) or others (including pets) in 43% of cases. Controlling behaviour on the part of the other party had been experienced by 50% of clients participating in the survey.'

(pp26-27)

Family lawyers expressed concerns that arrangements were being made that were developmentally inappropriate or in the context of a history family violence, and such arrangements proved to be unworkable in practical terms' (p 214).

Laing, Lesley, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Faculty of Education and Social Work, University of Sydney, 2010).

This research reports on the experiences of 22 women who were involved in the family law system following their separation from a relationship in which they had experienced domestic violence. In particular see section titled: "'He just wants to see his children' – a lens for excusing men's behaviour" (from pp47-49) that draws on a number of excerpts detailing how fathers have manipulated police to harass and intimidate mothers (e.g. calling police to her house alleging she'd threatened to kill her children; turning up late for contact).

Moloney, Lawrie, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, 'Allegations of family violence and child abuse in family law children's proceedings: A pre-reform exploratory study Research Report No. 15 — May 2007' (Australian Institute of family Studies, 2007).

This research was commissioned by the Federal Attorney-General's Department to provide baseline information to assist in informing the Australian Government's Family Law Violence Strategy. The study examines (a) the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003 in selected registries; (b) the extent to which alleging parties provided evidence in support of their allegations, and to which allegations were denied, admitted or left unanswered by the other party; and (c) the extent to which court outcomes of post-separation parenting disputes appeared to be related to the presence or absence of allegations. The study was based on a content analysis of two random samples of court files from the Melbourne, Dandenong and Adelaide registries of the former Family Court of Australia (FCoA) and the former Federal Magistrates Court (FMC): 240 files from the general population of cases in which parenting matters were in dispute (the general litigants sample), and 60 files from judicially determined matters in which parenting was in dispute (the judicial determination sample). In summary, a total of 300 court files were analysed: 150 from the former Family Court of Australia and 150 from the former Federal Magistrates Court. It should not be assumed that this sample is representative of the

divorcing population. In other words, the findings should not be generalised to this population. The research found that more than half the cases in the former FCoA and FMC in both samples contained allegations of adult family violence and/or child abuse. Note the discussion in chapter 8 which identifies that the 'most extensive work to date on the subject …has concluded in that country (Canada) that false denials are more common that false allegations.' Findings included that:

- Cases in the FCoA that required judicial determination were more likely than other cases to contain evidence of spousal violence that appeared to have some strong probative weight.
- Cases that seemed to contain the most severe allegations of spousal violence were especially likely to be accompanied by evidentiary material. Many of these cases required a judicial determination.

McIntosh, Jennifer et al, 'Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children' [2011] (86) *Family Matters* 40.

This article summarises key findings from two recent Australian studies of outcomes for two potential risk groups: school-aged children living in separations characterised by high inter-parental conflict (Study 1), and infants and pre-schoolers in the general population of separated families (Study 2). Both studies were commissioned by the Australian Government Attorney-General's Department.

See in particular at p 46, where it is noted that 'regardless of socio-economic background, parenting or inter-parental cooperation, shared overnight care of children less than four years of age had an independent and significantly deleterious impact on several emotional and behavioural regulation outcomes.' For example, young infants less than two years old living with a non-resident parent for only one or more nights a week 'were more irritable, and were more watchful and wary of separation from their primary caregiver than young children primarily in the care of one parent. Children aged 2–3 years in shared care (at the policy definition of five nights or more per fortnight) showed significantly lower levels of persistence with routine tasks, learning and play, than children in the other two groups' (p 46). They also showed 'severely distressed behaviours in their relationship with the primary parent' which is consistent with attachment theory. However, by kindergarten or school entry (children aged around 4-5 years), these effects were no longer evident as the children were capable of, *inter alia* self-soothing and organising their own behaviour. That is, the child truly 'knows what tomorrow is' which makes them better able to straddle households in a shared overnight parenting arrangement (p 46).

See also at p 48 ‘The task continues to be to determine those arrangements and attitudes that will maximally support each child within his/her unique developmental context’.

Parkinson, Patrick, ‘The ties that bind: Separation, divorce and the indissolubility of parenthood’ in Hayes, Alan, and Daryl Higgins (eds), *Families, Policies and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014).

This chapter considers the history and contemporary issues around reform to family law in Australia, particularly in relation to parenting orders.

Parkinson, Patrick, ‘Violence, abuse and the limits of shared parental responsibility’ [2013] (92) *Family Matters* 7.

In this article Parkinson argues that it is important to focus on current safety concerns rather than a history of violence throughout the relationship so as to direct resources to the parents and children at most risk as a result of post-separation parenting arrangements (pp 12-13). He nevertheless acknowledges that a history of coercive controlling violence remains important in relation to, for example, a child’s attitude towards living with or visiting a violent parent. It is also important ‘in assessing the mother’s capacity for parenting and her attitude towards contact between the child and the other parent. For many women who experience this kind of subjugation and control, the psychological effects may have a greater lasting impact than the physical abuse. These effects include fear and anxiety, loss of self-esteem, depression and post-traumatic stress (p 14).

Qu, Lixia and Ruth Weston, ‘Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms’ (Commissioned Report, Australian Institute of Family Studies, 2010).

This report examines, ‘the pathways that separating families have taken through the family law system, and the impact the changes to the family law system have had on these families. The Longitudinal Study of Separated Families examined relationships and wellbeing in separated families in Australia. Some 10,000 separated parents with children were interviewed for the first wave in 2008, as part of the evaluation of the 2006 Family Law reforms. This report presents findings from the second wave, when the parents had been

separated for two to three years'.

See in particular at p 117 – 'the presumption of "equal shared parental responsibility" does not apply where there are reasonable grounds to believe that a child's parent, or another person in this parent's household, had engaged in family violence or child abuse. In Wave 2, as in Wave 1, decisions were less likely to be shared equally where respondents expressed safety concerns or said that their child's other parent had been abusive towards them during the preceding 12 months, with abuse in Wave 2 mainly taking the form of humiliating insults.'

Also, 'Although the emergence of safety concerns or experiences of abuse in the 12 months preceding Wave 2 was associated with a decline in the rate of shared decision-making, a substantial minority who reported safety concerns in Wave 2, whether recently emerging or longstanding, said that decisions were made jointly. For fathers, safety concerns mostly represented concerns about their child, and often related to their child's mother. Furthermore, quite serious behaviours, such as violence and anger management issues, were generally behind these concerns (see Chapter 3) (p 117).'

Weston, Ruth et al, 'Care-time arrangements after the 2006 reforms' [2011] (86) *Family Matters* 19.

This article examines the prevalence of different care-time arrangements for separating families after the 2006 reforms, parents' views about the flexibility and workability of their arrangements, characteristics of families with different care-time arrangements and the strength of the relationship between child wellbeing on the one hand and care-time arrangements and family dynamics on the other.

Note at p29: 'Across all care-time arrangements, children's wellbeing appeared to have been compromised where there had been a history of family violence, where parents held safety concerns (for them or their child) associated with ongoing contact with the other parent, and where the inter-parental relationship was either highly conflictual or fearful. Children in shared care-time arrangements appeared to be no worse off than other children where there had been a history of family violence or a negative inter-parental relationship. However, mothers' assessments suggested that, where there were safety concerns, children in shared care fared worse than those who lived mostly with their mother.'

International

Jaffe, Peter G., Janet R. Johnston, Claire V. Crooks, Nicholas Bala, *'Custody disputes involving allegations of Domestic violence: toward a differentiated approach to parenting plans'* (2008) 46(3) Family Court Review 500.

Premised on the understanding that domestic violence is a broad concept that encompasses a wide range of behaviors from isolated events to a pattern of emotional, physical, and sexual abuse that controls the victim, this article addresses the need for a differentiated approach to developing parenting plans after separation when domestic violence is alleged. A method of assessing risk by screening for the potency, pattern, and primary perpetrator of the violence is proposed as a foundation for generating hypotheses about the type of and potential for future violence as well as parental functioning. This kind of differential screening for risk in cases where domestic violence is alleged provides preliminary guidance in identifying parenting arrangements that are appropriate for the specific child and family and, if confirmed by a more in-depth assessment, may be the basis for a long-term plan.

Regarding the credibility of allegations of child maltreatment, domestic violence and parental abuse of drugs and alcohol, the authors (at pp506-509) write there is virtually no research on the extent to which spousal abuse allegations are clearly false and maliciously fabricated, but this issue is becoming an increasing concern for the justice system …it is critical to emphasize that the making of false allegations of spousal abuse is much less common than the problem of genuine victims who fail to report abuse, and the widespread false denials and minimization of abuse by perpetrators (earlier research sources cited in support).

Neilson, Linda C, 'Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?' (Muriel McQueen Fergusson Centre for Family Violence Research and The FREDA Centre for Research on Violence Against Women, 2018).

This article considers how 'Canadian courts are responding to parental alienation claims', to evaluate the validity of concerns regarding the theory (pp 2-3). Common concerns include a lack of scientific support for the theory (p 5); the potential for inappropriate application in cases of family violence, particularly to undermine safety considerations (pp 5, 31-3); implicit gender bias (p 9); the potential for parental alienation claims to deflect attention from child best interest considerations (p 18); and impacts on domestic violence

evidence (p 22). The author concludes that courts continue to consider child best interest factors, but that judges often display implicit bias against mothers and domestic violence evidence in cases that endorse parental alienation theory (pp 45-6). Moreover, there is evidence of limited understanding of the impact of domestic violence on victims, and child development principles (p 46). Detailed ‘scrutiny of child best interest factors’, child-development principles, and trauma-informed practice should be adopted in place of single controversial theories and victim blaming approaches (p 48). The article includes detailed consideration of Canadian caselaw throughout.

Court-based parenting outcomes - Other Resources

Family violence and children (2021).

Open via Federal Circuit and Family Court of Australia website.

This webpage provides information about the effects of family violence on children and parenting behaviours, the protective factors for children, and risks to children on separation. It also provides contact details for help and advice organisations.

It states – “Examples of situations that may constitute a child being exposed to family violence include (but are not limited to):

- overhearing threats of death or personal injury by a member of the child’s family towards another member of the child’s family, or
- seeing or hearing an assault of a member of the child’s family by another member of the child’s family, or
- comforting or providing assistance to a member of the child’s family who has been assaulted by another member of the child’s family, or
- cleaning up a site after a member of the child’s family has intentionally damaged property of another member of the child’s family, or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child’s family by another member of the child’s family.”

The long-term impact of family violence on children is also discussed, and examples of the impacts of family violence on babies and toddlers, school-aged children and adolescents are listed.

Guidelines for Independent Children’s Lawyer (2021).

Open via Federal Circuit and Family Court of Australia website.
Open via Family Court of Western Australia website.

This document is intended to provide guidance to the Independent Children's Lawyer (ICL) in fulfilling his/her role. The Guidelines have also been issued for the purposes of providing practitioners, parties, children and other people in contact with the family law courts, with information about the courts' general expectations of

ICLs. The Guidelines set out these expectations as they relate to children in circumstances where allegations of child abuse and/or family violence are made, children from culturally and linguistically diverse families and communities, children with disabilities, Aboriginal and Torres Strait Islander children, and where applications arise for the authorisation of special medical procedures and other orders relating to the welfare of children.

Family Violence Best Practice Principles – December 2016.

Open via Federal Circuit and Family Court of Australia website.

Lighthouse.

Open via Federal Circuit and Family Court of Australia website.

This document explains the role of Lighthouse in the Court's response to cases which may involve family violence.

"The Courts are leading the way in helping families that have experienced family violence and other safety risks to navigate the family law system. Lighthouse plays a central role in the Court's response to cases which may involve risk relating to family violence, mental health, drug and alcohol misuse and child abuse and neglect, by shaping the allocation of resources and urgency given to such cases."

The three parts of Lighthouse are:

- Screening (using the Family DOORS Triage risk screening process);
- Triage and case pathways; and
- Case management (including referral to the specialist Evatt List in certain registries).

Lighthouse operates in the family law registries in Adelaide, Brisbane, Cairns, Canberra, Dandenong, Darwin, Hobart, Launceston, Melbourne, Newcastle, Parramatta, Rockhampton, Sydney, Townsville and Wollongong.

Relocation

It is common for victims of domestic violence to seek to move away from the geographical location where the abusive partner resides in an attempt to ensure their safety and their childrens' safety and escape the coercive controlling behaviours of their abuser. In addition, a perpetrator of family violence may seek to, or threaten to, relocate the residence of the children to exert control over or "punish" the abused partner. Such relocation may be proposed or unilaterally undertaken, and may involve relocation to intrastate, interstate or international locations.

Where parents are unable to reach agreement as to whether one party may change the place of residence of their child or children to another town, state or country, they may apply under the *Family Law Act 1975* (Cth) (*FLA*) or the *Family Court Act 1997* (WA) (*FCA*) to have the matter determined by the Federal Circuit and Family Court of Australia or the Family Court of Western Australia (collectively called here "the family courts"). In many cases where relocation is allowed the presumption of shared parental responsibility is rebutted.

Orders enjoining a parent, as opposed to a child, from relocating or to relocate are rare and should only be made to the extent "necessary to secure the best interests of the child" (*Sampson & Hartnett (No. 10)* [2007] FamCA 1365 (22 November 2007) per Bryant CJ and Warnick J at 58). (See also *AMS v AIF* [1999] HCA 26; 199 CLR 160; 163 ALR 501; 73 ALJR 927 (17 June 1999) at [145], [191], [47] and *U v U* [2002] HCA 36; 211 CLR 238; 191 ALR 289; 76 ALJR 1416 (5 September 2002) at [144]-[145]). If parties cannot agree, they can ask the Court to make parenting orders, including:

- an order which allows the party to relocate with the child/ren or
- an order prohibiting the other party from relocating the child's residence outside of a certain area (for example, that the child's residence is not to be further than 30 kilometres from the child's current school, or that the child's residence is to be within a specific metropolitan area).

The Court may also make a recovery order where a party has unilaterally changed the place of residence of a child or children, requiring the return of the child.

Where allegations of domestic or family violence or child abuse are made, applications for orders allowing or prohibiting relocation are decided in the same manner as other parenting applications where there are

allegations of family violence or child abuse; there is not a specific subcategory of application related to relocation (see *Cowley & Mendoza* [2010] FamCA 597 (16 July 2010)). The best interests of the child are always the paramount consideration (section 60CA FLA; section 66A FCA), a primary consideration in determining a child's best interests is the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence (which is given greater weight than the benefit to the child of a meaningful relationship with both parents) section 60CC FLA; section 66C FCA and the Family Courts are required to consider the risk of family violence section 60CG FLA, section 66G FCA. The considerations are the same whether the application is to relocate intrastate, interstate or internationally.

Relocation cases can be 'amongst the most difficult decisions for family court judges' [George & Gallwe 2016] due to their highly sensitive nature [ALRC 2010]. There is a high incidence of family violence in relocation applications. A 2012 study of litigated relocation disputes characterised 80% of relationships as 'high conflict or abusive' [Kaspier et al 2011].

In some cases, family violence is a driving factor behind relocation. For example, in *Stringer & Nissen (No 2)* [2019] FamCAFC 185, the mother unilaterally relocated to another town to escape family violence by the father without consent to remove the child from the risk of exposure to family violence. The Full Court of the Family Court of Australia overturned interim orders that the parties have equal shared parental responsibility and that if the mother did not return to their prior town and live with the child, the child live with the father). The Full Court found that the interim hearing judge did not appropriately weigh the mother's allegations of family violence, concerns for the father's alcohol abuse and an existing protection order when determining the child's best interests. Furthermore, if family violence was appropriately found, the presumption for equal shared parental responsibility would not have applied, resulting in an alternative parenting outcome in favour of the relocated mother. Ainslie-Wallace J noted that the conclusion that the child's best interests were to live in the first town was effectively a coercive order which required the mother to return to the father's place of residence.

In Russell & Russell [2012] FamCA 99 (7 March 2012) Young J allowed a mother who alleged a history of violence perpetrated by the father to return with the child to India, despite the father's stated intention to remain in Australia regardless of the Court's decision. The mother had limited English skills, poor work prospects and no family support in Australia and there was a high level of conflict between the parties exacerbated by cultural issues. Both parties' extended families remained in India. Young J found the presumption of shared parental responsibility was rebutted due to the conflict between the parties, their lack

of communication and cultural issues.

A 2016 English study reported that unsuccessful applicants to relocation disputes often felt like courts had "put [their] abuser right back in control" when deciding to increase other-parent contact, rather than allow relocation [George & Gallwe 2016]. In its 2010 report, the Australian Law Reform Commission also noted that victims may not feel safe from violence if they remain proximate to their abuser [ALRC 2010], or isolated from support systems located elsewhere.

Relocation - Key Literature

Australia

Australian Law Reform Commission, Family Violence—Improving Legal Frameworks, Consultation Paper 1 (2010).

Abstract: Following a 2009 National Council Report, the Australian Law Reform Commission ('ALRC') inquired into the interaction between state and territory family violence and child protection laws and the federal *Family Law Act 1975* (Cth).

The ALRC notes that relocation disputes are highly sensitive, as "refusing to make relocation orders in situations involving family violence has serious repercussions for the safety of victims and their children". It recognises that many relocation disputes are associated with unilateral moves after separation but prior to court proceedings. This may give rise to a recovery order under pt VII of the Family Law Act or the Convention on the Civil Aspects of International Child Abduction (Hague Convention).

Behrens, J. & Bruce Smyth, Australian Family Court Decisions About Relocation: Parents' Experience and Some Implications for Law and Policy. (2010) 38 *Federal Law Review* 1-20.

The project reports on in-depth semi-structured interviews with parents (11 mothers and 27 fathers) who had a contested court order in relation to relocation between 2002 and mid–2005 and a detailed analysis and coding of judgments in relocation cases for the same period.

The themes that emerged from the interviews included:

- the pre-court circumstances were important in predicting outcome;
- a high prevalence of high conflict and/or abusive relationships predating the relocation dispute, including a significant minority of short, unhappy relationships with separation occurring during pregnancy or shortly after the birth of a single child;
- the relocation dispute was one of many sources of conflict and dispute between most parents we spoke with;
- smoother paths after relocation for parents who were in less high conflict relationships, and for whom this was really a 'relocation only dispute';

- relocation as a significant point of transition in parent–child relationships,
- those applying to relocate giving complex, multiple reasons for their decision, often including the poor quality of their relationship with the other parent.

Horsfall, Briony and Rae Kaspiew, 'Relocation in separated and non-separated families: Equivocal evidence from the social science literature' (2010) 24 *AJFL* 34.

Abstract: The article examines social science evidence relevant to the issue of relocation. It aims to identify and analyse the literature on the impact of relocation on children, young people and adults in separated and not separated families. The article concludes that relevant research is diverse and contested across psychological and social variables. Emergent themes from surveys of international studies and Australian family law court decisions include that socio-economic difficulties often underlie frequent relocation and significant negative outcomes, and that domestic violence is a potential issue in relocation disputes.

See in particular Part 3 on 'Domestic violence, post-separation parenting and relocation'. The article outlines United States based research by Bowermaster (1998) on relocation and family violence, which suggests that aspects of relocation disputes may be linked to "the greater likelihood of litigation in high conflict couples and the controlling tendencies of abusive husbands seeking to restrict women's movements" (p 49). The authors also note that Australian legal literature recognises the potential for abusive partners to engage in vexatious litigation as a means to exert control, which raises the possibility of children being exposed to the harms inflicted by family violence and for "relocation to be intended, in part, to protect a parent and children from further exposure" (p 50).

The article concludes that research investigating relocation in the particular context of parental separation is scarce, with limited social science literature being a barrier to accurately informing practice, policy and decision-making in the Australian context of relocation disputes.

Kaspiew, Rae, Juliet Behrens and Bruce Smyth, 'Relocation disputes in separated families prior to the 2006 reforms: An empirical study' [2011] (86) *Family Matters* 72.

Abstract: This article reports on the findings of a mixed-method research project that examined relocation

cases litigated prior to the 2006 reforms to the family law system. The study was based on an analysis of 190 court judgments made between 2002 and 2004 in the Family Court of Australia, and qualitative interviews with 38 parties to relocation disputes between 2002 and mid-2005. A key finding from the study is that most litigated disputes over relocation between separated partners occur in the context of fractured inter-parental relationships, being the product of conflict rather than the single source.

In particular, the article reports findings from the judgment sample that among litigated relocation disputes, 80% of relationships could be characterised as ‘high conflict or abusive’, with allegations of violence being raised in nearly 70% of cases (p 73). When asked of their reasons for relocating, 8% of litigants reported doing so to ‘escape family violence, threats or the drug scene’ (p7 4). The authors also highlighted the gendered nature of relocation disputes, with 88% of the parties who made the application being women (p 73).

See also findings from the interview sample that the majority of relationships described by parents were ‘marked by significant levels of conflict, with allegations of abuse and family violence relevant in the majority of cases’ (p 75). Of 38 participants, 24 reported significant conflict before, during and after the dispute (most of whom reported family violence and some alleged instances of child abuse). A smaller group of 4 participants were marked by the most severe levels of family violence and mental health problems, citing a ‘complete, or almost complete, diminution of contact between one parent and the children after the dispute’ (p 75).

The authors also note the need for greater empirical examination of parents’ and children’s experiences in relocation disputes (p 77).

Parkinson, Patrick, ‘The realities of relocation: Messages from judicial decisions’ (2008) 22 Australian Journal of Family Law 35.

Abstract: This article examines relocation decisions since the law changed in July 2006 to place a greater emphasis on the importance of involving both parents in the lives of children. The analysis of these 58 relocation cases indicates that it is harder for a primary caregiver to relocate than before the 2006 amendments. The authors note that in a number of the cases where a relocation was allowed, an order was also made for sole parental responsibility. The article also notes it is harder to justify a relocation overseas than within Australia.

The caselaw analysis demonstrates the importance of lawyers and mediators helping parents to 'reality test' the costs and benefits of a proposed relocation, and also to give realistic advice to a parent who wants to oppose a relocation. Issues for parents wanting to relocate include the risks of residential mobility, and the costs and burden of the children's travel. Issues for parents opposing a relocation include whether there would be a significant diminution in the quality of the relationship between the parent and child if the relocation occurred, whether there might be evidence of a history of violence, and whether it is reasonable and practicable for that parent to relocate also.

Parkinson, Patrick and Judith Cashmore, 'When Mothers Stay: Adjusting to Loss After Relocation Disputes' (2013) 47 (1) *Family Law Quarterly* 65.

This article reports on the experiences of fifteen mothers over a 4-5 year period following the conclusion of a relocation dispute where the initial application to move was unsuccessful. Eight of the surveyed mothers indicated that in hindsight, it had been better for their children to stay in close proximity to their father (all of whom said the children were "fairly" or "very" close to their father). The level of toxicity in the father-mother relationship was found to be one of four key factors affecting mothers' adjustment to the result.

See in particular that three of the four mothers who had not adjusted to being unable to relocate reported "high levels of acrimony or hostility" with the father (p 83-84). Hostility and anger were also reported by three mothers who had adjusted to the outcome. Toxicity in these relationships had varying causes, with several cases involving allegations of verbal and emotional abuse during the relationship and controlling behaviour post-separation.

See also findings at pp 69-70 that six of the fifteen surveyed mothers reported instances of family violence. Of these, one participant reported recurring violence throughout their cohabitation, a second reported a standalone incident of physical assault, a third reported the existence of a restraining order whilst cohabiting, and the remaining three reported having restraining orders post-separation.

International

Rob George & April Gallwe, 'How do parents experience relocation disputes in the family courts?' (2016) 38(4) *Journal of Social Welfare and Family Law* 394.

Abstract: This article reports the findings of an empirical study of parents who were involved in relocation disputes in England, expressing their views on the experience of being involved in such a case. The authors consider the origins of the disputes and parents' perceptions of how their cases were resolved, as well as some initial discussion of the aftermath of the cases as seen in the first few months.

The authors also note that relocation cases are known to be amongst the most difficult decisions for family court judges. See in particular p 405, where two mothers who had been subjected to violence and abuse by the relevant fathers described having their relocation request denied. In both cases, the court reinforced contact time between the father and children. This included one case where, although the father had a protection order made against him after stalking the mother, the court refused the relocation application and approved significant overnight contact each week with the father. The mother reported that this outcome felt as if they had "[put] our abuser right back in control".

Relocation - Other Resources

Children: Relocation, travel and the Hague Convention – Federal Circuit and Family Court of Australia (2021).

This page provides information for parents about reaching agreement about relocation, court applications which may be made where agreement cannot be reached, overseas travel and passports, that it is an offence to take or retain a child outside of Australia contrary to an order or authenticated written consent, agreeing to or preventing children being taken overseas, formalising travel arrangements, emergency court contact details, Hague convention applications and practice directions in relocation matters.

Children: Recovery orders - Federal Circuit and Family Court of Australia (2021).

Information on this page includes:

- What is a recovery order?
- Who can apply for a recovery order?
- How do I apply for a recovery order?
- How is a recovery order implemented?
- What is a location order?
- How do I apply for a location order (including a Commonwealth information order)?
- What is a publication order?
- My child has been taken overseas without my permission.

Relocation - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Relocation - Cases

Stringer & Nissen (No. 2) **[2019] FamCAFC 185 (23 October 2019) – Family Court of Australia (Full Court)**

At [45], the Court found:

"The allegations of family violence, together with the mother's concern as to the father's alcohol abuse were matters on which she relied to demonstrate that it would not be in the child's best interests to live with the father and his Honour ignored a fundamental integer of the mother's case which was that there was a risk to the child from being exposed to family violence. The orders she sought for time would however, provide for the maintenance of the child's relationship with the father while he remained living with his mother. His Honour's approach was erroneous in principle and to the facts."

Behn & Ziomek **[2019] FamCA 298 (10 May 2019) – Family Court of Australia**

In allowing the mother's relocation with the child to her native Germany, McClelland DCJ held:

> There are, in my view, two elements to assessing whether the child faces an unacceptable risk in spending time with the father. The first is that the father has a history of engaging in controlling and coercive conduct in respect to the mother. The second is that the father's controlling nature has manifest itself in physical violence to the child. [200]

Russell & Russell **[2012] FamCA 99 (7 March 2012) – Family Court of Australia**

In finding the presumption of shared parental responsibility rebutted Young J observed:

> [334] Perhaps of more significance the submission was that he wholly minimised, failed to understand and acknowledge and had no comprehension of the extent of his violent actions and abuse of the wife, and largely in the presence of the child, as most events occurred in the one bedroom apartment where the family resided until separation.
>
> [335] I have found that the husband had intentionally lied on certain significant issues… I do not generally

believe him on issues of violence.

[336] …there are areas where her evidence was likely exaggerated or misstated however on the issues of and relating to her role as a woman and wife, her husband's attitude towards her, ownership of the P apartment, the first termination and his ownership of her and various levels of violence and mistreatment I do accept the wife's evidence.

And in allowing the wife's relocation to India:

[432] As I have found that the wife should have a sole parental responsibility order, the child should live with her and both in his circumstances and for the wife, her security, wellbeing, happiness and future life she should be therefore permitted to relocate to India with the child.

[433] The proposal for her to remain as a long term resident in Australia, in all of her current and likely future circumstances is inappropriate and would not lead to a better and more fulfilling life and upbringing for the child.

Byrne & Krilly **[2018] FCWA 158 (23 August 2018) – Family Court of Western Australia**

In allowing the mother to relocate to Europe with the child in circumstances that the child and mother would be closer to both the child's maternal and paternal extended family Duncanson J noted:

[151] Ms C reported as to the mother describing a "bleak" future in terms of continuing to reside in Australia. The mother spoke of isolation and the need for support. I consider that a move to Europe would be beneficial to R as he is likely to gain from his mother's security and happiness.

And held:

[182] There was family violence between the parties during their relationship and following separation. [listing incidents including pushing the mother into a glass window, which broke, being argumentative and aggressive towards the mother when he drank to excess, repeatedly accusing her of infidelity, monitoring the mother by installing a camera in their ensuite, stalking the mother and sending text messages saying he knew where she was, refusing to allow her to leave a hotel room with the child]

[192] The mother described herself as isolated, trapped and afraid.

Duncanson J found:

> [217] The mother has acted protectively of R including through very difficult times. The father's mental health was unstable, the mother feared for her safety and that of R. She has been left traumatised. She feels isolated and strongly desires the support of family. Her desire to return to Europe to be with her family has not waned.
>
> [218] Having weighed all the factors carefully, I conclude that the mother should have permission to relocate R to Europe. I consider this to be in R's best interests. I am mindful of the impact on R of a separation from the father. Their relationship is developing well and I am satisfied that their relationship can be maintained and continue to develop from a distance. Further, an order permitting the mother to return to Europe with R will be beneficial to her mental health and is likely to enhance her parenting of R. Her happiness is likely to impact positively upon him.

Eddon and Eddon **[2012] FCWA 104 (6 November 2012) – Family Court of Western Australia**

In considering the need to protect the child from harm (in a case where the father's Hague Convention application had prompted the mother's consent to return to Australia pending the outcome of the FCWA proceedings), Thackray CJ noted:

> [111] I find that the father's abuse of the mother would have had an adverse impact on Samuel, both by being exposed to the abuse directly and by the impairment of the mother's capacity to care for him to the extent of her ability. The mother did what she could to protect Samuel from the abuse, while at the same time trying to save her marriage. In my view, she was justified in removing Samuel from the home and then later keeping him in the UK where both she and Samuel would be safe.
>
> [112} It is impossible to predict whether Samuel will be exposed to such abusive conduct by his father in the future. The difficulty with a person who is prepared to conduct himself in the way the father did in one relationship is that he may do so again in other relationships. In this regard it is noted that the father has recently commenced another relationship, although his girlfriend has not yet met Samuel and was not called as a witness. I draw no adverse inference about her not having been produced as a witness, but it remains a matter of concern whether the pattern of behaviour will be repeated.

In finding in favour of the mother's application to relocate to the United Kingdom Thackray CJ noted:

> [164] It is not the function of this Court to punish bad behaviour, but it is the function of this Court to deal with the consequences of it insofar as it impacts upon a child. Whilst it is an entirely unsatisfactory for Samuel to be removed from the company of a father who I consider has much to offer to him, the physical and emotional health of the child's primary carer is a matter of the utmost importance.
>
> [165] Whilst the outcome is difficult, it is also clear, namely that the mother should be permitted to return to her homeland to enjoy the company and support of her family while she seeks to recover from the abuse she has suffered.

Hobbs & Roth **[2018] FCWA 163 (21 August 2018) – Family Court of Western Australia**

In allowing the mother's uncontested application to relocate with the child from a regional Western Australian town to Perth, Duncanson J considered:

> [43] There has been family violence between the parties as set out above. There continues to be family violence between the father and Ms D. The mother's sister was assaulted by a relative of the father. The maternal grandmother was assaulted by a relative of the father's partner. The mother was involved in an assault with a friend of the father. These incidents occurred in Regional Town A. The mother seeks to remove herself from that environment.
>
> [44] L has been exposed to problems of excessive alcohol consumption and violence in Regional Town A. The mother also wishes to remove him from that environment.

And found:

> [51] There has been family violence between the parties. The presumption that it is in L's best interests that his parents have equal shared parental responsibility for him does not apply. I intend to order that the mother have sole parental responsibility for him. She is able to make decisions about long-term issues for him in the future.

Peak & Cleary **[2017] FCWA 166 (24 November 2017) – Family Court of Western Australia**

In allowing the mother's application to relocate overseas, Duncanson J considered the evidence of Dr Watts that child did not have the same deep attachment to the father as to the mother and noted:

[194] The parties' relationship was one characterised by severe family violence. The mother has been left traumatised, with a sense of entrapment aggravated by a financial dependency upon the father.

[200] Both parties have exposed S to family violence in the past. That would not be a cause for concern for S in the care of the mother in the future and provided she does not drink to excess, S will not be at risk in her care.

[201] The family violence perpetrated by the father upon the mother was severe and has left her psychologically damaged. S is not exposed to family violence in the care of the father at this time and provided he does not abuse alcohol and drugs, S will not be at risk in his care.

Duncanson J held:

[204] Having weighed all of the factors carefully I have concluded that the mother should have permission to relocate S to Country A. I consider this to be in S's best interests. It is likely that the relocation will enhance the mother's parenting of S and her own happiness is likely to have an impact positively upon him.

Recovery orders

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- amend the parenting order framework by refining the list of 'best interests' factors, removing the presumption of equal shared parental responsibility and related equal time and substantial and significant time provision, and clarifying the circumstances in which a court can vary an existing parenting order;
- redraft provisions relating to compliance with, and enforcement of, parenting orders;
- amend definitions relating to the concept of 'family' to be more inclusive of Aboriginal and Torres Strait Islander culture and traditions;
- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view;
- clarify restrictions on communicating identifiable information arising in family proceedings; and enable standards and requirements to be prescribed for professionals who prepare family reports;
- makes consequential amendments to the *Child Support (Assessment) Act 1989* and *Federal Circuit and Family Court of Australia Act 2021*;

Amends the *Federal Circuit and Family Court of Australia Act 2021* to:

- allow registrars of the Federal Circuit and Family Court of Australia (FCFCOA) to be delegated the power to impose a make-up time parent order in contravention proceedings;
- bring forward the review of the Act by 2 years;
- provide that a judge of the Family Court of Western Australia can be dually appointed as a judge of Division 1 of the FCFCOA; and

Amends *Family Law Act 1975* and *Federal Circuit and Family Court of Australia Act 2021*

- to introduce 'harmful proceedings orders' and extend the 'overarching purpose of family law practice and procedure' and the accompanying duty to all proceedings instituted under the *Family Law Act*

1975.

More information can be found here:

www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

A parent may act inconsistently with family court orders and unilaterally remove their children from, or fail to deliver, or refuse to return their children to the care of the other parent. Where there has been a history of family violence this may be done in an attempt to ensure their own safety and their children's safety and to escape the coercive and controlling behaviours of the abusive parent.

Alternatively, removing the children may be a form of family violence and be done in an attempt to exert, or extend, control over or "punish" the other parent.

Division 8, subdivision C of the *Family Law Act* (FLA) gives the Federal Circuit and Family Court of Australia and Division 8, subdivision 3 of the *Family Court Act* (FCA) gives the Family Court of Western Australia (collectively herein referred to as the "family law courts") the power to make orders for the location and recovery of children within Australia. If children are believed to have been taken outside Australia parties may need to consider whether it is possible to bring an application pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

Where allegations of domestic or family violence or child abuse are made, family law courts considering applications for recovery orders must ensure the best interests of the child are always the paramount consideration (section 60CA FLA, section 66A FCA). A primary consideration in determining a child's best interests is the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence (which is given greater weight than the benefit to the child of a meaningful relationship with both parents) (section 60CC FLA; section 66C FCA). The Family Courts are also required to consider the risk of family violence (section 60CG FLA, section 66G FCA).

Where a child has been taken or moved within Australia from a person with parental responsibility, a recovery order may be sought, usually on an urgent basis: *Atkinson v Atkinson* [2017] FamCAFC 266 (13 December 2017). Recovery orders may also authorise stop and search, entry powers and the use of force to recover the child (section 67Q FLA; section 149 FCA). Pursuant to section 67U FLA; section 153 FCA the family law courts may make such recovery order as the court deems proper.

Family violence is commonly reported by parties to recovery proceedings and is often a critical factor underpinning judicial decisions. The contested and private nature of such allegations often complicates

interim recovery hearings where evidence remains untested. For example, Wilson J upheld the mother's appeal against the father's recovery order in *Pollard and Nordberg* [2019] FamCA 365 (7 June 2019) on the basis of family violence allegations against him, despite no expert report being admitted.

> *If I dismiss the mother's appeal, the recovery order will operate in such a way that the children are physically, and if necessary, forcibly, returned by police to the father in Victoria. If the allegations of family violence are proved at trial, that means I will order the children to be returned to a violent environment. It must not be overlooked that the mother has alleged that the father has been violent to the children, independently of the allegations of his violent behaviour towards the mother. I refuse to make an interim order returning the children to the father in circumstances where the father may at trial be found to have engaged in family violence. In my judgment this court must act protectively towards the children and remove them from any risk associated with family violence. To do so is consistent with the imperative recorded in s 60CC(2A).* [155]

Australian research suggests a connection between family violence and involvement in recovery applications. A 2022 study found that family violence and safety concerns were common drivers behind non-compliance with parenting orders, including unilaterally removing children [Kaspiew et al 2022]. A 2015 study of separated parents found that 20 per cent of mothers held safety concerns as a result of ongoing contact, with 63 per cent of those reporting previous attempts to limit the child's contact with the other parent as a result of such concerns [Kaspiew et al 2015]. However, in other cases, parents who previously experienced family violence may seek to escape their ex-partner, even where the perpetrator's contact with the children (and child contact handovers) can be made safe [Parkinson 2013].

Research also indicates that threats of enforcement litigation or non-compliance with parenting orders, such as threats of abduction, can form part of a pattern of control [Kaspiew et al 2022].

Recovery orders - Key Literature

Australian Law Reform Commission, Family Violence—Improving Legal Frameworks, Consultation Paper 1 (2010).

Abstract: Following a 2009 National Council Report, the Australian Law Reform Commission ('ALRC') inquired into the interaction between state and territory family violence and child protection laws and the federal *Family Law Act 1975* (Cth).

The ALRC notes that relocation disputes are highly sensitive, as "refusing to make relocation orders in situations involving family violence has serious repercussions for the safety of victims and their children". It recognises that many relocation disputes are associated with unilateral moves after separation but prior to court proceedings. This may give rise to a recovery order under pt VII of the Family Law Act or the Convention on the Civil Aspects of International Child Abduction (Hague Convention).

Kaspiew, Rae, et al, Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (ANROWS, 2022).

Abstract: This report presents findings from a research study which examines compliance with and the enforcement of parenting orders. The study is based on a survey of 343 professionals and 11 judicial officers from Australian Family Law courts. The relevant findings indicate that the drivers of non-compliance with parenting orders are complex. Systemic issues contribute, including shortcomings in the responses to family violence, safety concerns and limitations on the participation of children and young people.

The article raises two main issues relating to the enforcement regime. Firstly, there is potential for punitive responses to contraventions to disincentivise parents from seeking safer parenting orders. Secondly, there is potential for enforcement litigation to become part of an ongoing family violence dynamic, marked by a pattern of coercive control. From this perspective, non-compliance or legal action in relation to contravention may play a factor in ongoing abuse. In response to enquiries about the dynamics of families alleging contraventions, 66% of surveyed professionals reported that ongoing parental conflict applied to at least three quarters of relevant clients, followed by 46% reporting family violence and 22% reporting other safety concerns. A high percentage of professionals with family violence training nominated other reasons for parental non-compliance, including that it was no longer safe for the child or contravening party to comply

with an order. Almost one fifth of surveyed professionals referred to circumstances relating to family violence and safety concerns and “justifiable non-compliance” in these circumstances (p 49).

Kaspiew, Rae, et al, ‘Experiences of Separated Parents Study’ (Evaluation of 2012 Family Violence Amendments)’ (Report, Australian Institute of Family Studies, 2015).

Abstract: This report sets out the findings of a core element of the Evaluation the 2012 Family Violence Amendments project—the Experiences of Separated Parents Study (ESPS). This research is based on a comparison of data from two cross-sectional samples of the Survey of Recently Separated Parents (SRSP): the 6,119 parents surveyed in the SRSP 2012, who used family law system services in 2011; and the 6,079 parents surveyed in the SRSP 2014, who experienced the system in 2013. The family violence amendments introduced by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 came substantially into effect on 7 June 2012, meaning the SRSP 2012 survey represents parents’ pre-reform experiences and the SRSP 2014 their post-reform experiences. The SRSP 2012 and 2014 studies found that family violence is a common experience among separated parents, with a majority of participating parents in both cohorts reporting either physical or emotional abuse.

See in particular section 3.7.1, titled ‘Reports of current safety concern’ (pp 43-45). 17% of parents in the SRSP 2014 reported having concerns about their child’s and their own safety as a result of ongoing contact with the focus parent (consistent with SRSP 2012). This was significantly higher among mothers than fathers (mothers: 20%; fathers: 15%). Of those parents reporting safety concerns, around half in both studies reported that they had tried to limit the focus child’s contact with the focus parent because of these concerns; with mothers reporting at twice the rate of fathers (2012—mothers: 62% cf. fathers: 28%; 2014—mothers: 63% cf. fathers: 36%). Participating parents were not asked whether they lived overseas or cohabited at the relevant times of limiting contact.

Laing, Lesley, *No Way to Live: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (Faculty of Education and Social Work, University of Sydney, 2010).

Abstract: This research reports on the experiences of 22 women who were involved in the family law system following their separation from a relationship in which they had experienced domestic violence.

In particular, see the section titled ‘The emotional toll on women’ (p14-15) that outlines reports by women of feeling trapped due to their ex-partner using care issues to continue exercising control. One excerpt reads that: “He’s always there and I hate the – he’s got a say in my life for the next 18 years. Like if I want to move for work – like he doesn’t work, I do work. If I want to move for work, I pretty much have to ask him for permission. I can’t take the [children] with me” (p 14).

The author also outlines mothers’ reports of problems with the coordinated response to child protection at p 16, including barriers to contact services and a lack of ongoing case management of complex and high risk cases. This was found to result in mothers being left with the sole option of returning to the Family Courts if they continued to have fears for their child’s safety, which often depended upon financial resources or the availability of Legal Aid.

Parkinson, Patrick , ‘Violence, abuse and the limits of shared parental responsibility’ [2013] (92) *Family Matters* 7.

Abstract: This article argues that while supporting the maintenance of a child’s relationship with both parents is suitable for most separated parents, limitations on joint parental responsibility are also appropriate in cases where there are family violence concerns.

See especially the part on ‘Two safety priorities’ (p 14-15), which notes that a parent’s experience of coercive controlling violence may explain their resistance to regular contact between the child and the father, even if contact can be made safe through contact handovers. It may also explain the parent’s ‘desire to relocate a long way from the other parent when there is not another convincing rationale for the move other than to get away’ (p 14).

Recovery orders - Other Resources

Family Court of Western Australia, Recovery orders.

Open via Family Court of Western Australia website

Federal Circuit and Family Court of Australia, *Children: Recovery orders*.

Abstract: Open via Federal Circuit and Family Court of Australia of Australia website

Recovery orders - Cases

Atkinson v Atkinson **[2017] FamCAFC 266 (13 December 2017) – Family Court of Australia (Full Court)**

In finding that the primary judge did not err in failing to appoint a single expert before making interim orders including a recovery order after the father retained the child Ryan J noted (Johnston and Thackray JJ agreeing):

> [49] …the mother's application was for a recovery order after the father retained the child. The application demanded a prompt response and in my view an adjournment for in all probability many months would not have been in the best interests of the child.

Pollard and Nordberg **[2019] FamCA 365 (7 June 2019) – Family Court of Australia**

Wilson J upheld the mother's appeal against the father's recovery order on the basis of family violence allegations against him, despite no expert report being admitted:

> [155]If I dismiss the mother's appeal, the recovery order will operate in such a way that the children are physically, and if necessary, forcibly, returned by police to the father in Victoria. If the allegations of family violence are proved at trial, that means I will order the children to be returned to a violent environment. It must not be overlooked that the mother has alleged that the father has been violent to the children, independently of the allegations of his violent behaviour towards the mother. I refuse to make an interim order returning the children to the father in circumstances where the father may at trial be found to have engaged in family violence. In my judgment this court must act protectively towards the children and remove them from any risk associated with family violence. To do so is consistent with the imperative recorded in s 60CC(2A).

Hague Convention international return and removal of children

The Family Law Amendment Bill 2023 (Cth) is currently before Parliament. The Bill amends the *Family Law Act 1975* to:

- permit the appointment of independent children's lawyers (ICLs) in matters brought under the Hague Convention and require ICLs to meet with a child and give them an opportunity to express a view.

More information can be found here:
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7011

The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") is an international agreement which provides a means for recovery of or access to children outside of Australia. The Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations") give effect to section 111B of the Family Law Act 1975 (Cth) which enable both the performance of Australia's obligations, and the ability of Australia to obtain benefits under the Hague Convention.

The Hague Convention is a multilateral treaty, which provides a procedure for the prompt return of children unilaterally removed or retained away from their country of habitual residence so that parenting disputes can be decided in the jurisdiction where the children are habitually resident. An application under the Hague Convention for the return of a child can only be made to or from a country that is party to the Convention. Unlike most treaties, the Hague Convention requires other states to accept accessions to the Convention. The Hague Convention on the Civil Aspects of International Child Abduction is in force between Australia and the countries listed here.

Article 13(b) of the Hague Convention provides that a country may deny a return request if "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The best interests of the child is not a paramount consideration *De L v Director-General Department of Community Services (NSW)* [1996] HCA 5; 187 CLR 640; 70 ALJR 532; 136 ALR 201 (10 October 1996).

The dual objectives of the Hague Convention are the "promotion of the return of the child to the state of

habitual residence" and "taking measures to prevent child abduction" (per Watts J in *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65, [87]). It is possible, however, that Hague Convention applications may be used by a perpetrator of domestic or family violence, to coerce or attempt to coerce the return of an abused partner when they have escaped a situation of danger. Australian and international research indicates that most respondents to Hague Convention applications are now primary care-giving mothers [Freeman & Taylor 2020], many of whom seek to escape domestic and family violence or child abuse [Bozin 2016]. The requirement to demonstrate "grave risk" or that the return would "place the child in an intolerable situation" can be difficult to meet, even where there is a documented history of family violence and child safety concerns.

In the leading Australian case of *Murray & Director of Family Services ACT* [1993] FamCA 103; (1993) FLC 92-416, (1993) 16 Fam LR 982 the court refused an appeal seeking to prevent the return of children to New Zealand in circumstances where the father was a member of a Dunedin motorcycle gang and the mother alleged a serious history of and threats of domestic violence towards her. The court expressed the view that the powers to prevent return should be limited to the most extreme cases of risk, noting there was nothing in a return order requiring the mother to return, or for her or the children to reside in the same part of New Zealand as the father, and that it was offensive to suggest New Zealand courts and authorities would be unable to protect the mother and children from any risk of return.

In the more recent case of *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 a mother, who had fled from New Zealand and moved to Australia to escape an abusive partner with a history of child abuse with the assistance of New Zealand police, was initially ordered to return her children to New Zealand when the first instance judge accepted she was separated from the father and that she would return to New Zealand where the children could reside with her. This failed to take into account her history of returning to the abusive relationship, in spite of the disclosure of a protection order in favour of the mother. Ryan and Aldridge JJ criticised the role of the Secretary of the Department of Communities and Justice (NSW) as the Central Authority in pursuing the Hague Convention application matter while failing to obtain the full criminal antecedents or child protection records of the father whom it was aware had left Australia under threat of deportation, necessitating the lesser resourced mother to obtain his Australian and New Zealand antecedents and child protection records for the purposes of her appeal.

Hague Convention international return and removal of children - Key Literature

Australia

Australian Law Reform Commission, *Family Violence—Improving Legal Frameworks*, Consultation Paper 1 (2010).

Following a 2009 National Council Report, the Australian Law Reform Commission inquired into the interaction between state and territory family violence and child protection laws and the federal *Family Law Act 1975* (Cth).

It identified that many relocation disputes are associated with unilateral international moves after separation but prior to court proceedings. This may give rise to a recovery order under pt VII of the Family Law Act or the Convention on the Civil Aspects of International Child Abduction (Hague Convention). The Hague Convention is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. There is an exception to the requirement for the immediate return of a child, however, if it is established that the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

Bozin, Danielle, 'The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance between Comity and the Best Interests of the Child' (2016) 35(1) *University of Tasmania Law Review* 24-42, doi: 10.3316/INFORMIT.135379927197544

This article provides a critical analysis of divergent judicial opinions about how Australian courts should interpret the 'grave risk of harm' exception in the Hague Convention on Civil Aspects of International Child Abduction. Conflicting views about the extent to which the exception to a child's return should permit consideration of a child's best interests may be a manifestation of the 'balancing act' that must be performed during return proceedings. The Convention seeks to protect children from the harmful effects of international parental child abduction through prompt return, whilst also accommodating situations where non-return is justified on welfare considerations.

See in particular that since the Convention's creation, there has been a trend away from abducting by non-

custodial fathers to abducting by primary-caregiving mothers. The article notes that abducting mothers are often “principally motivated by a need to flee domestic violence and/or child abuse”, as well as a desire to return to their homeland, family and social support networks (p30). The article concludes that given that the ‘grave risk of harm’ exception is most often raised in circumstances of alleged domestic and family violence, how Australian courts interpret this exception is particularly important.

Chisholm, R & Fehlberg, B. (2022) The High Court and family law: The Hague child abduction cases. *Australian Journal of Family law*, 35: 39-67.

This paper provides a short overview and history of the Hague convention. It then reviews the six Hague cases that the High Court has decided and considers their contribution:

- De L v Director-General, New South Wales Dept of Community Services (1996) 187 CLR 640; (1996) 20 Fam LR 390; FLC 92–706; [1996] HCA 5
- DP v Commonwealth Central Authority (2001) 206 CLR 401; (2001) 27 Fam LR 569; (2001) FLC 93-081; [2001] HCA 39
- JLM v Director-General, NSW Department of Community Services (2001) 206 CLR 401; (2001) 27 Fam LR 569; (2001) FLC 93-081; [2001] HCA 39
- MW v Director-General of the Department of Community Services (2008) 244 ALR 205; 82 ALJR 629; 39 Fam LR 1; [2008] HCA 12
- LK v Director-General Department of Community Services (2009) 237 CLR 582; 2009) 40 Fam LR 495; [2009] HCA 9
- RCB v Forrest (2012) 292 ALR 617; 48 Fam LR 236; [2012] HCA 47

International

Freeman, Marilyn and Nicola Taylor, ‘Domestic violence and child participation: contemporary challenges for the 1980 Hague Child Abduction Convention’ (2020) 42(2) *Journal of Social Welfare and Family Law* 154, (UK) doi: 10.1080/09649069.2020.1751938

This article addresses two contemporary challenges for the 1980 Hague Child Abduction Convention: (i) domestic violence and (ii) child participation. The published literature on these topics, including the children’s

objections exception, is explored, as are the ways in which these challenges are addressed within some of the Contracting States to the Convention and through the Guide to Good Practice on Article 13(1)(b). Other current international initiatives are discussed, including the development of a child-friendly version of the Convention through The International Association of Child Law Researchers, as well as certain Contracting States (ie Switzerland and japan) including provisions specific to domestic violence in their enabling legislation.

The authors note that domestic violence and its treatment under the Convention have become critical issues in recent years, as the profile of abductors has shifted from non-custodial fathers to primary and joint primary carer mothers. Many of these women abduct to escape family violence or abuse. The article summarises existing literature at p 155 that the tension between discouraging child abduction and protecting victims of domestic violence manifests in the 'unjust treatment of domestic-violence victims under the Hague Convention' (Quillen 2014).

Trimmings, Katarina, Onyója Momoh, 'Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings' (2021) 35(1) *International Journal of Law, Policy and the Family* 1-19 (UK).

The focus of the article is on the intersection between domestic violence and parental child abduction. In particular, it considers the interpretation of the Article 13(1)(b) 'grave risk of harm' defence in cases involving allegations of domestic violence by the abducting mother against the left-behind father, and on the protection of such abducting mothers in return proceedings. The content of the article is divided into two substantive parts. The first part explores the courts' approach to the grave risk of harm exception to return in circumstances where allegations of domestic violence have been raised. The second part of the article examines the courts' approach to protective measures, including undertakings, in child abduction cases involving allegations of domestic violence.

Vesneski, William M. et al, 'U.S. Judicial Implementation of the Hague Convention in Cases Alleging Domestic Violence' (2011) 62(2) *Juvenile Family Court Journal* 1-20, doi: 10.1111/j.1755-6988.2011.01058.x

This qualitative study examined U.S. legal cases where abused mothers living abroad fled with their children

to the United States. These women subsequently faced child abduction lawsuits brought by their abuser. The cases are governed by the Hague Convention. Using content analysis, the study analysed 47 published U.S. state and federal judicial opinions involving the Convention and allegations of domestic violence. It finds that U.S. courts are reluctant to employ Convention provisions that could prevent children from being returned to their mother's abuser.

The Article emphasises that transnational family relationships have become more common in the past thirty years. The article notes that for abused women with children, ending these relationships is exceedingly complicated and thus mothers often turn to family members for assistance in repairing their lives. The authors also recognise that because the Convention focuses exclusively on children, it does not explicitly recognize domestic violence between children's parents as a reason to deny children's return to the habitual residence, even if return means placement with the children's abusive parent. This gap in the Convention is significant, because social science research suggests that many families experience both domestic violence and child maltreatment. The authors view that this gap "falls short of accounting for the actual, lived experience of battered women and their children" (p 16) and patterns of coercion inherent in domestic violence that prevent a woman from participating in decisions about where she and her children live.

The article concludes that "the failure of the Hague Convention and its U.S. implementation to recognize these dynamics creates an additional barrier to safety for women seeking to protect themselves from a violent partner" (p 16).

Zashin, Andrew A, Domestic violence by proxy: a framework for considering a child's return under the 1980 Hague Convention on the Civil Aspects of Child Abduction's Article 13(b) Grave risk of harm cases post *Monasky*, (2021) 33 Journal of the American Academy of Matrimonial Lawyers 571-592.

This review considers American cases that have interpreted the 'grave risk of harm 'test. The author observes that one can not separate undisputed violence from the habitual residence considerations (p574). The author observes that some US courts 'have aligned in their analysis of more severe fact patterns (e.g., agreeing that sexual abuse to a child is sufficient to create the grave risk of harm), the courts have continuously met cases of domestic violence with confusion and dissonance.' (p585) The author observes that grave risk cases can create a spectrum of harm, and where cases fall on the spectrum can illuminate the zone of danger. On one end are cases evidencing a grave risk of harm due to the psychological and physical abuse endured by a minor child, and on the other are cases where no abuse to the minor child or spouse exist, but where a

respondent parent argues that factors relative to the environment of the habitual residence create a grave risk of harm (p587).

Hague Convention international return and removal of children

- **Other Resources**

Australian Government, Attorney-General's Department, International family law and children.

This page provides information on the Hague Convention and links to resources for people in Australia, including:

- International parental child abduction—find out what you can do if your child has been, or may be, abducted to another country.
- International child access—find out how to make an application for access to a child under the Hague Child Abduction Convention or Australia's bilateral agreements with Egypt and Lebanon.
- Registration of overseas child orders—find out how to have overseas child court orders registered in Australia, or Australian orders registered in other countries.
- Information for responding parents—information for parents who have brought their child to Australia and may need to respond to a Hague Convention application for the return of their child to another country. Also, information if you are required to return your child to Australia by a court order or if you are voluntarily returning your child to your home country (habitual residence), including information on emergency housing, financial assistance, counselling and support services.
- International child protection—for information on the 1996 Hague Child Protection Convention.
- Support and assistance—contact details and links to organisations that can provide support in Hague matters.

Australian Government, Attorney-General's Department, Guide for applicants - Applying for the return of a child under the Hague Convention.

The guide helps applicants to understand what requirements must be satisfied to meet the terms of the convention.

Australian Government, Attorney-General's Department, Hague Convention on the Civil Aspects of International Child Abduction.

The Hague Convention on the Civil Aspects of International Child Abduction is the main international agreement that covers international parental child abduction. It provides a process through which a parent can seek to have their child returned to their home country. The Australian Central Authority in the Attorney-General's Department is responsible for administering the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The Australian Central Authority is only able to provide assistance in relation to children in a Hague Convention country, and the Hague Convention is in force between Australia and that country.

The Hague Convention on the Civil Aspects of International Child Abduction is in force between Australia and the countries listed on this website.

Australian Government, Attorney-General's Department, International parental child abduction.

This site provides information on international parental child abduction including:

- If your child has been abducted from Australia—what should you do?
- Application process for the return of an abducted child to Australia
- Bilateral agreements with Egypt and Lebanon
- If your child is at risk of being abducted from Australia:
  - Stopping your child leaving Australia
  - Preventing the issuing of a passport to your child
  - If you are thinking of taking your child overseas
- Hague Convention application statistics

It also includes a diagram of the application process for return of an abducted child to Australia.

Federal Circuit Court and Family Court of Australia, Children: Relocation, travel and the Hague Convention.

This fact sheet contains links to the Commonwealth Attorney General's Department information on the Hague Convention on the Civil Aspects of International Child Abduction and advises:

> If a child you have parental responsibility for has left Australia without your permission, you should contact the Commonwealth Attorney-General's Department on 1800 100 480 or go to [AG International child abduction] International parental child abduction for more information.
>
> For a list of applicable countries, and more information about the Hague Convention, see the Hague Convention page on the website of the Commonwealth Attorney-General's Department.
>
> If your child is in another country, you may want to seek private legal advice in that country about your options. The Department of Foreign Affairs and Trade may be able to assist left-behind parents in accessing an English-speaking lawyer in a non-Hague country.

Hague Convention international return and removal of children

- Cases

HZ & State Central Authority **[2006] FamCA 466 (7 June 2006) – Family Court of Australia**

The court acknowledged the limitations of the Hague Convention in cases where domestic and family violence is alleged:

[48] The operation of the Convention which has the effect of potentially sending a mother back into a situation of risk to her own physical wellbeing has been a matter of significant academic criticism…

[75]…As we have already indicted, the return of these children to Greece was anticipated to be in their mother's company. She had found accommodation for herself remote from that of the father. She led no evidence to suggest that the Greek authorities would be unable to provide her and the children with appropriate protection pending her utilising lawful means to relocate the children from Greece. The finding by the trial Judge that the mother had not persuaded her that the return of the children to Greece would raise a grave risk of harm to the children or otherwise place them in an intolerable situation was a finding clearly open to the trial Judge.

[78]…Given that these were children who were born in Greece and had spent effectively the entirety of their life in Greece until the mother unilaterally determined to retain them in Australia, Greece was clearly the appropriate forum for issues relating to the welfare of these children to be determined. In those circumstances it was appropriate for her Honour to place significant weight on the first of the objects referred to in Article 1 of the Convention namely the prompt return of the children who had been wrongfully retained in Australia.

Murray & Director of Family Services ACT **[1993] FamCA 103 (6 October 1993) – Family Court of Australia**

The Full Court in rejecting the mother's appeal characterised the evidence as:

"almost entirely directed at the prospective threat to the wife of a return to New Zealand and more particularly to a return by her to Dunedin."[170]

They said:

[171] Whilst there is nothing that requires the wife to return to New Zealand, it is obviously desirable and from the point of view of the children that she does so. However, there is no requirement imposed by this court that she or they must return to Dunedin. It is open for her to return to another part of New Zealand where the danger to her may be less and it is of course open to her to seek orders from the New Zealand courts both for personal protection and interim and final custody immediately upon her arrival in New Zealand. She can also, if she wishes, seek leave from the New Zealand court to take the children to Australia.

[172] As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

[173] It would be presumptuous and offensive in the extreme for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the courts.

[174] In our view and in accordance with the views expressed by this Court in *Gsponer's* case [*Gsponer v Director General, Department Community Services Victoria* (1989) FLC 92-001], the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available…

[175] For us to do otherwise would be to act on untested evidence to thwart the principal purposes of the Hague Convention which are to discourage child abduction and where such abduction has occurred to return such children to the country of habitual residence so the courts of that country can determine where or with whom their best interests lie. These children are New Zealand citizens who have lived all their lives in New Zealand and it is for a New Zealand court to determine their future.

***Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 (25 March 2020) – Family Court of Australia (Full Court)**

Ryan and Aldridge JJ criticised the role of the Secretary of the Department of Communities and Justice (NSW) as the Central Authority in pursuing the Hague Convention application matter while failing to obtain the full criminal antecedents of the father whom it was aware had effectively been deported from Australia:

[79] 'In this case, the application disclosed the father's final term of imprisonment in NSW. Even though the Requesting Authority knew that the father was permanently banned from Australia, had effectively been

deported and had lived in New Zealand for many years, it would seem that no attempt was made to establish his criminal antecedents or the involvement (if any) of child protection agencies in New Zealand in relation to his other children. The same applies in NSW. To be fair, the Requesting Authority and the Central Authority disclosed the mother's application for a protection order and thereby flagged that, on the mother's case, serious risk issues arose.'

[80] 'It is our understanding that systems are in place in NSW which enable the Central Authority to access/request information from the NSW Police. We assume New Zealand operates in the same fashion. Thus, the Requesting Authority and Central Authority were able to examine and present the father's complete criminal history and an entire set of COPS records. Instead, it was left to the mother and the ICL to gather records from New Zealand and domestically. It is no small thing to obtain records from abroad, particularly when time constraints are tight. Fortunately, the mother was granted legal aid, but, what we ask, if she was not? How would this young mother on social security benefits have managed to place this vitally important evidence before the court? The prospect that she would not have been able to do so is obvious.'

Wolfe & Director-General, Department of Human Services **[2011] FamCAFC 42 (4 March 2011) – Family Court of Australia (Full Court)**

Bryant CJ, Finn and May JJ noted the first instance judge's comments with approval:

"[i]n part, she relied on her own refusal to establish that a return of the children would place them in an intolerable situation". Her Honour disposed of this aspect of the mother's case by saying, correctly, in our view, that "[i]t is well established that, ordinarily, the objects of the Convention should not be frustrated by a parent's refusal to return with children to their country of habitual residence". [32]

Parental alienation

In general, the court will focus on the behaviour and conduct of children and their parents and carers rather than attempting to label behaviour and then take the label into account in determining appropriate orders.

The family law system has a range of tools to support an informed assessment of claims about child or parental conduct, through legislation, case law, judicial discretion and access to and testing of evidence from expert witnesses.

When a child does not wish to see one or both parents, this is one of the situations in which it is recommended that an independent children's lawyer should be appointed in a family law matter to assess the reasons for this (*Re K Appeal* [1994] FamCA 21; (1994) FLC 92-461).

In some matters, the phrase 'parental alienation' is raised by parties. There is considerable variation in opinion on what this phrase means. The phrase 'is employed by some professionals to describe parental conduct in separated families where the children are, apparently without good reason, reluctant or resistant to spending time with one parent' [Rathus 2020]. While the United Nations Special Rapporteur on Violence Against Women has described parental alienation as a 'pseudo-concept', their Report states that 'broadly speaking, parental alienation is understood to refer to deliberate or unintentional acts that cause unwarranted rejection by the child towards one of the parents, usually the father' [UN General Assembly 2023].

The phrase is not used or defined in any Australian legislation; however family courts have recognised:

- the phrase 'parental alienation' does not have one accepted meaning - *McGregor and McGregor* (2012) 47 Fam LR 498, 47,
- the conduct of one parent that obstructs contact of a child with another parent must be considered in the context in which it occurs – *Carter and Wilson* [2023] FedCFamC1A 9.

The phrase 'parental alienation' may be misused in family law matters as a tool to either minimise the court's focus on the actions of an abusive parent, or to mischaracterise the non-abusive parent's efforts to protect [UN OHCHR SR 2022] the child. For example, the Queensland Women's Safety and Justice Taskforce, in its enquiry into coercive control and domestic and family violence in Queensland, found that 'mothers who act

protectively in the best interests of their children to limit the contact their children have with a perpetrator-father are often accused of parental alienation within the family law system' [Women's Safety and Justice Taskforce 2021]. This tactic can penalise family violence victims for alleging abuse and uphold impunity for perpetrators of family violence [UN OHCHR SR 2022].

The lack of a consistent understanding of the phrase 'parental alienation' can lead to inappropriate outcomes in circumstances where the behaviour or rejection of a parent might be understandable, appropriate and / or justified – for example, one parent acting to protect a child from an abusive parent, or a child refusing contact because they are scared of the parent.

Therefore, in order to understand the parent's or child's behaviour, it is essential to consider the behaviour in context. For example, is one parent seeking to protect their child from the abuse of another parent? Is the child influenced by other factors such as their developmental stage; prolonged absence of a parent; normal adjustment difficulties with family transition; loyalty conflicts; and sibling influences? [Johnston and Sullivan, 2020]. Is the parent's behaviour part of a pattern of abuse?

Where one parent actively tries to turn a child against the other parent, for no legitimate reason, this behaviour may have significant negative impacts on the child's development and mental health [Kruk 2018], as well as the mental health of the parent who has not had contact with the child [Lee-Maturana et al 2019]. However, ordering a child to have contact with an abusive parent may also have damaging effects on the child [UN General Assembly 2023].

In circumstances where a child does not wish to see one of both parents 'reunification therapy' may be raised by a party/legal representative or expert witness. However, this term appears to mean a range of different things when raised in family law matters. Furthermore, there is a lack of empirical support for the effectiveness [Rhoades 2022] of some therapies that are described as 'reunification therapy' [Trane, Champion, Kelly 2022]. Notably 'some teenagers have reported adverse effects of programs they attended, and there is evidence that there is danger to some who are placed with abusive parents and prevented from having contact with … other family members who could monitor their well-being' [Mercer and Drew 2022].

Parental alienation syndrome (PAS) [Ralton and Ralton 2017] is not a recognised psychiatric disorder in the scientific community [Joint Select Committee 2021] (and was removed from the International Classification of Diseases by the World Health Organization in 2020 [UN General Assembly 2023].)

Parental alienation - Key Literature

Australia

Joint Select Committee, *Second interim report: Improvements in family law proceedings*, (2021: Commonwealth of Australia).

[4.84] As highlighted in the first interim report, the committee heard a diverse range of views on the extent to which a parent can be alienated from their children by another parent or family member. The committee acknowledges that parental alienation syndrome is not a recognised psychiatric disorder within the scientific community.

[4.85] The committee has heard evidence of a number of instances where a parent has denied the other parent access to their children, for no apparent reason other than spite or to achieve greater financial outcomes. In contrast, the committee has also heard that there can be a perception that parental alienation is occurring when there are actually other factors in play, such as family violence. The committee were also told by the Australian Institute of Family Studies that parental alienation was not something that was apparent in their research: … I would say that it's not an issue that's emerged in the context of our very extensive research in the family law and family violence space.

Committee view

[4.87] The committee acknowledges that there are instances where one parent will deny access to and seek to turn a child against the other parent after the relationship breaks down. In many cases, there will be a substantive reason for this behaviour, though that may not always be the case. The committee considers that better education around family dynamics and family violence for professionals in the family court system will assist the court to identify cases where parental alienation is occurring or where a parent is legitimately seeking to protect their child from harm. The committee has recommended that family law professionals undertake training in a number of areas, including family violence, complex trauma, family systems and the dynamics of parental alienation at Recommendation 15.

Lee-Maturana et al, Characteristics and experiences of targeted parents of parental alienation from their own perspective: A systematic literature review (2019) 71 *Australian Journal of Psychology* 83-

91.

Abstract

Objective: The aims of this systematic literature review were to identify and synthesise all relevant information about targeted parents' characteristics and experiences from their own perspective.

Results: Nine relevant articles were included after conducting inclusion criteria and quality assessment. Data were collated and analysed using guidance on the conduct of narrative synthesis in systematic reviews.

Conclusion: Targeted parents report consistent stories about the nature of the alienation tactics used by alienating parents across the included studies. Targeted parents expressed dissatisfaction with legal and mental health system services available to them. Further, despite feeling despair, frustration, and isolation, targeted parents appear to be resilient and seek out positive coping strategies. This review showed that research on targeted parents from their own perspective is sparse, and more studies are needed.

'Targeted parents reported negative consequences of being exposed to alienating behaviour, such as dissatisfaction with the legal and mental health systems, emotional and financial implications, and psychological distress… The lack of understanding of parental alienation by those involved in the legal and mental health systems may be contributing to increased feelings of anxiety and depression in targeted parents' at 89 (references removed).

Rathus, Z. A history of the use of the concept of parental alienation in the Australian family law system: contradictions, collisions and their consequences. (2020) 42 (1) *Journal of Social Welfare and Family Law* 5-17.

Abstract

'This paper presents insights into the history and current deployment of the concept of parental alienation in the Australian family law system. It begins in 1989…[and] traces aspects of the socio-legal and social science research, gender politics, law reform and jurisprudence of the following 30 years, paying attention to moments of significant change. … The history reveals an irreconcilable tension between the 'benefit' of 'meaningful' post-separation parent-child relationships and the protection of children from harm. When mothers' allegations of violence in the family are disbelieved, minimised or dismissed, they are transformed from victims of abuse into perpetrators of abuse – alienators of children from their fathers…'

‘It is impossible to provide a concise definition of 'parental alienation' (PA) … because of its contested position in scientific and legal literature. It is employed by some professionals to describe parental conduct in separated families where the children are, apparently without good reason, reluctant or resistant to spending time with one parent.’ (p.6, references removed).

Rhoades, H, ‘Book Review: Challenging Parental Alienation: New Directions for Professionals and Parents, Jean Mercer and Margaret Drew (eds)’ (2022) 35 Australian Journal of Family Law 290-294.

‘The book (see further reference below- International) also provides a valuable warning to readers outside the US about the dangers of reunification therapies, which appear to have flourished despite a lack of empirical support for their effectiveness. Their coercive approach provides a stark contrast to the trauma-informed programs for rebuilding parent-child relationships that are provided in Australia’s services sector, programs that were often designed in consultation with children’ at 294.

Women’s Safety and Justice Taskforce, *Hear her voice: Report one, Volume 2* ‘The Mountains we must climb’ (2021)

‘The Taskforce has heard that attempts by victims of coercive control to protect themselves and keep their children safe may be considered to be parental alienation in the family law system and counterintuitively act against them in that jurisdiction’ p274.

‘Perpetrators of domestic and family violence and coercive control often use family law proceedings and outcomes as a mechanism to continue to exert power and control over their victims. This undermines efforts by states and territories to continuously improve responses to domestic and family violence to protect victims, including children, and hold perpetrators to account and stop the violence. Community perceptions of the presumption of shared parental responsibility in the Family Law Act 1975 (Cth) often lead victims of domestic and family violence to believe they are compelled to offer equal shared care to abusive fathers. Victims are frightened that the court will view them as alienating the children from their father if they try to protectively limit contact. This potentially exposes children to significant harm and means victims are subject to ongoing power and control by the perpetrator during periods of contact over the children. Mothers who act protectively in the best interests of their children to limit the contact their children have with a perpetrator-father are often

accused of parental alienation within the family law system' at 276.

International

Johnston, JR and Sullivan, MJ, 'Parental alienation: in search of common ground for a more differentiated theory' (2020) 58(2) *Family Court Review* 270-292.

Abstract: The concept of parental alienation (PA) has expanded in popular usage at the same time that it remains mired in controversy about its scientific integrity and its use as a legal strategy in response to an increasing range of issues in family court. In this paper we describe how competing advocacy movements (for mothers, fathers and children) in the family justice field have, over time, helped shape the shifting definitions and widening focal concerns of PA - from children who make false allegations of abuse, to those who resist or refuse contact with a parent, to parent relocation, and to the emotional abuse wrecked upon children who are victims of a manipulative parent….

'… it is not a simple task to show that the child's beliefs, perceptions and behavior are unwarranted, that no adequate reason or legitimate rationale exists for the child's negative stance. The problem is that this is a "residual" or default definition and requires the PA proponent to undertake extensive hypothesis testing to prove a series of non-events. In practice, this often involves showing that abuse and/or deficit parenting on the part of the target parent did not occur. It should also involve showing other "reasonable" explanations for the child's negative stance do not exist- like the developmental stage of child; prolonged absence of target parent; normal adjustment difficulties with divorce transition and step-family formation; untenable loyalty conflict in response to parental conflict; and sib-ling influences' at pp276-277.

'The worry is that PA seems to be becoming an increasingly influential "all-purpose" or generic legal strategy in family litigation. Its uncritical admission in expert testimony in court can potentially bolster petitions for substantial changes in custody and orders to participate in unwanted treatments without ensuring due investigation into the multiple factors that contribute to the severity, longevity, etiology, prognosis, nature and effects of children's resistance or refusal of contact with a parent. PA may also be used to rebut relocation petitions and to counter a wide range of allegations of family violence and abuse. Unquestionably, some children need to be protected from harmful PA behaviors and family court may be the only recourse. If so, critical care with respect to the admission and usage of PA in court proceedings is needed to avoid misleading, simplistic and erroneous testimony. Without responsible stewardship governing the use of PA constructs, there is the potential for them to contribute to unjust, harmful and litigious outcomes' at 286.

Kruk, E, 'Parental alienation as a form of emotional child abuse: current state of knowledge and future directions for research' (2018) 22(4) *Family Science Review*, 141-164.

Abstract: This article examines the current state of research on parental alienation, which reveals that alienation is far more common and debilitating for children and parents than was previously believed. In extreme cases, one can make the argument that parental alienation is a serious form of emotional child abuse. Careful scrutiny of key elements of parental alienation in the research literature consistently identifies two core elements of child abuse: parental alienation as a significant form of harm to children that is attributable to human action. As a form of individual child abuse, parental alienation calls for a child protection response. As a form of collective abuse, parental alienation warrants fundamental reform of the family law system in the direction of shared parenting as the foundation of family law….

'…numerous studies show that alienated children exhibit severe psychosocial disturbances. These include disrupted social-emotional development, lack of trust in relationships, social anxiety, and social isolation. Such children have poor relationships with both parents. As adults, they tend to enter partnerships earlier, are more likely to divorce or dissolve their cohabiting unions, more likely to have children outside any partnership, and more likely to become alienated from their own children… Low self-sufficiency, lack of autonomy, and lingering dependence on the alienating parent are a third characteristic of alienated children. … Alienated children are more likely to play truant from school and leave school at an early age. They are less likely to attain academic and professional qualifications in adulthood. They tend to experience unemployment, have low incomes, and remain on social assistance. They often seem to drift aimlessly through life. Alienated children experience difficulties controlling their impulses, struggling with mental health, addiction, and self-harm …. They are more likely to smoke, drink alcohol, and abuse drugs, often succumb to behavioral addictions, and tend to be promiscuous, foregoing contraception and becoming teenage parents…' at 150-151 (references removed).

Meier, J, Dickson, S., O'Sullivan, C., & Rosen, L. (2022) The Trouble with Harman and Lorandos' Parental Alienation Allegations in Family Court Study (2020) *Journal of family, trauma, child custody & child development*, 19(3-4): 295-317, doi:10.1080/26904586.2022.2036286.

In this article Meier and colleagues respond to a study by Harman and Lorandos which in turn responded to a

study by Meier and colleagues.

The Harman J & Lorandos, D. study can be found here: (2021). Allegations of family violence in court: How parental alienation affects judicial outcomes. *Psychology, Public Policy and Law*, *27*(2), 187–208 https://doi.org/10.1037/law0000301. The Meier and colleagues' study that Harman and Lorandos critique can be found here: Meier, J., Dickson, S., Rosen, R., O'Sullivan, C., & Hayes, J. (2019). Child custody out- comes in cases involving parental alienation and abuse allegations, Final Report to National Institute of Justice.

This Meier and colleagues (2022) critique overviews this debate and points to 'pervasive design and methodological errors' in the Harman & Lorandos study and asserts that they 'undermine both the appearance and assertion of rigor in their approach; these problems and the foundational differences in their dataset from [Meier et al's] own disqualify their study from serving as any kind of credible test or disconfirmation of our study.'

Highlighting significant gaps in the research, Meier and colleagues (2022) conclude: 'There are genuinely important questions here – most fundamentally, how often are abuse allegations true, false, or knowingly fabricated in family court? How often are parental alienation claims deployed to nullify credible risk? Neither study can directly answer these questions, but they are at the root of the divide between those who espouse the view that parental alienation and false abuse allegations are common, and those who assert that abuse allegations are rarely fabricated but alienation is widely misused to deny credible abuse. Answering these questions requires reasoned and deliberate research and consideration by objective scholars and practitioners acting in good faith.' p20

Mercer, J and Drew, M, 'Introduction to parental alienation concepts and practices' In Mercer J and Drew, M. eds. *Challenging Parental Alienation: New Directions for Professionals and Parents*, (2021) Routledge.

Abstract: The idea of parental alienation has been used with increasing and alarming frequency in child custody decisions since its introduction in the 1990s, despite a lack of evidence showing that the basic concept applies in more than a few cases. For the system of ideas that relates a preferred parent's actions to a child's avoidance or rejection of the other parent, the term parental alienation belief system is used…. (US focussed resource but includes perspectives from Britain, Canada, and Australia)

‘There are several serious problems associated with the use of the parental alienation belief system in child custody work. One is the simple fact that there is no established method for discriminating between children who reject a parent for ample reason (e.g., experience of that parent as violent, physically, or emotionally abusive, or sexually predatory) and those whose rejection has been created or inappropriately influenced by the preferred parent…’ 7

‘…there are no data on incidence or prevalence of child avoidant behavior or of parent encouragement of such behavior. No information exists for determining how frequently there are false positive claims that actual encouragement of avoidant behavior has occurred, nor indeed how often there are false negative findings, the latter possibly meaning that children who have really been inappropriately persuaded are not identified and helped.’ 7

‘A second and serious parental alienation-related problem involves the recommendations of parental alienation proponents testifying in child custody conflicts. These recommendations invariably include some form of parental alienation treatment, sometimes called reunification therapy, but such treatments do not usually stand alone. Children sent for some treatments are by court order transferred to the custody of the nonpreferred parent and prohibited from contact with the preferred parent, for periods of time that may begin with 90 days but may be extended for years. Some teenagers have re-ported adverse effects of programs they attended…and there is evidence that there is danger to some who are placed with abusive parents and prevented from having contact with the preferred parent or other family members who could monitor their well-being. The burden on the preferred parent is extraordinarily heavy. The anxiety and concerns of the preferred parent for the child are likely to be great, particularly if there is a history of domestic violence.’ 7

Mercer, Jean and Drew, Margaret (eds) Challenging Parental Alienation: New Directions for Professionals and Parents, 2021, Routledge.

Book description: This book addresses the concept of parental alienation – the belief that when a child of divorced parents avoids one parent, it may be because the preferred parent has persuaded the child to do this. It argues against the unquestioning use of parental alienation concepts in child custody conflicts. Increasing use of this concept in family courts has led at times to placement of children with abusive or violent parents, damage to the lives of preferred parents, and the use of treatments that have not been shown to be safe or effective. The 13 chapters cover the history and theory of "parental alienation" principles and practices. Methodological and research issues are considered, and diagnostic and treatment methods

associated with "parental alienation" beliefs as well as those recommended by research and ethical evidence are analyzed. The connections of "parental alienation" with gender and domestic violence issues are discussed as are the experiences of individuals who have experienced "parental alienation" treatments. The book argues that "parental alienation" principles and practices should be avoided by family courts, in the best interests of children in custody disputes.

Trane, Sarah T., Champion, Kelly M., and Hupp, Steven D. A. Comparison of Parental Alienation Treatments and Evidence-Based Treatments for Children. In Mercer J and Drew, M. eds. *Challenging Parental Alienation: New Directions for Professionals and Parents*, (2021) Routledge.

Conclusion: ‘Psychology and other social sciences have delineated the importance of research methods for describing treatments as evidence-based. Parental alienation treatments lack the evidence required to be considered evidence-based by agreed-upon professional standards. In addition to the review provided in this chapter, a 2017 review also concluded that no rigorous research could be identified for parental alienation treatments. Moreover, their safety remains in question, let alone their effectiveness at reaching purported treatment goals. If treatment goals are the reduction of coercion among parents and children, psychology research has a lot to say about best methods and procedures for improvements in this regard. Indeed, methods almost universally suggest the need for parents to demonstrate improvements in their own emotion regulation skills, communication skills, and ability to create a safe and supportive environment for their children before their children can be expected to demonstrate such skills. It behooves the Court, attorneys, and other professionals involved with these most challenging cases to understand that there remains a distinct lack of evidence to assure that the existing parental alienation programs are psychologically safe or effective for families. While it is possible that these programs emerged with the best of intentions to assist distressed and desperate parents, they do not rise to the ethical imperative to create EBTs that warrant court-ordered participation.’ (p155, References removed).

UN General Assembly, *Custody, violence against women and violence against children Report of the Special Rapporteur on violence against women and girls, its causes and consequences* (Report of the Special Rapporteur on violence against women and girls, its causes and consequences, Reem Alsalem) (2023).

Abstract: ‘The report addresses the link between custody cases, violence against women and violence against children, with a focus on the abuse of the term “parental alienation” and similar pseudo-concepts.’

In Part III the report discusses the definition of what the Special Rapporteur describes as the ‘pseudo-concept of “parental alienation”’:

9. ‘There is no commonly accepted clinical or scientific definition of “parental alienation”. Broadly speaking, parental alienation is understood to refer to deliberate or unintentional acts that cause unwarranted rejection by the child towards one of the parents, usually the father.’

10. ‘The pseudo-concept of parental alienation was coined by Richard Gardner, a psychologist, who claimed that children alleging sexual abuse during high conflict divorces suffer from “parental alienation syndrome” caused by mothers who have led their children to believe that they have been abused by their fathers and to raise allegations of abuse against them. He recommended draconian remedies to address the syndrome, including a complete cut-off from the mother in order to “deprogramme” the child.’

11. ‘It was argued that the more that children rejected the relationship with their fathers, the more evidence of the alienating syndrome was observed. Gardner’s theory has been criticized for its lack of empirical basis, for its problematic assertions about sexual abuse and for recasting abuse claims as false tools for alienation, which, in some cases, have dissuaded evaluators and courts from assessing whether abuse has actually occurred. It has been dismissed by medical, psychiatric and psychological associations, and in 2020 it was removed from the International Classification of Diseases by the World Health Organization. Nevertheless, it has gained considerable traction and has been widely used to negate allegations of domestic and sexual abuse within family court systems on a global scale.’ (references removed- see original).

In Part IV: A of the Report there is discussion about the high rates of domestic violence in intimate relationships and observes:

‘Allegations of domestic violence tend to receive insufficient scrutiny by courts and to trigger problematic assumptions, for example that it causes little harm to the mother or child and that it ceases with separation. The consequences of domestic violence and its effects on children are also misunderstood and underestimated by judges, who tend to prioritize and grant contact with fathers. In doing so, judges fail in their duty to protect children from harm, giving abusive fathers unsupervised access to their children, including in

cases where judges have found that physical and/or sexual violence has occurred.' (references removed- see original) [12]

The Report states: 'The use of parental alienation is highly gendered and frequently used against mothers.' [14]

Further in Part IV: B of the Report there is a discussion about the tactics used to trump allegations of domestic violence. The Report states 'there are numerous ways in which allegations of domestic violence are sidelined and delegitimized through invoking parental alienation' including ignoring the history of domestic violence against mothers and children in decisions of custody and visitation rights; efforts to scrutinize domestic violence are not actively pursued and that despite a history of domestic violence; the 'pseudo concept' of parental alienation has been involved or mothers have been blamed for purposely isolating children from their fathers, even where the safety of the mother or the child was at risk. The Report states: 'By ignoring or undermining domestic violence in a family, courts fail to acknowledge the issue in their decisions, thereby presenting domestic violence as an exception rather than the norm in cases of parental alienation.'

In Part V the Report discusses the impact of parental alienation on the best interest of the child. The Report observes that '[i]n the context of domestic violence, there is a duty to listen [to ensure] that decisions are better informed and that the child's safety and welfare are promoted.'

23. 'When custody decisions are made in favour of the parent who claims to be alienated without sufficiently considering the views of the child, the child's resilience is undermined and the child continues to be exposed to lasting harm. It may also sever the stable and safe bond with the non-abusive primary caretaker. Submissions from Australia [and other countries] report cases where children were removed from the primary carer and compelled to reside with the perpetrator parent, whom they resist. In addition, submissions noted how police child protection services have enforced access and custody orders in cases where the child clearly did not wish to comply, traumatizing both the child and the mother.'

UN OHCHR, Special Rapporteur on violence against women and girls, its causes and consequences (SR), *https://www.ohchr.org/en/calls-for-input/2022/call-inputs-custody-cases-violence-against-women-and-violence-against-children* (2022).

Purpose: To inform the Special Rapporteur on violence against women and girls' report on the nexus between custody and guardianship cases, violence against women and violence against children, with a focus on the abuse of the concept of "parental alienation" and related or similar concepts.

'The tendency to dismiss the history of domestic violence and abuse in custody cases extends to cases where mothers or children have brought forward credible allegations of child physical or sexual abuse. In several countries, family courts tend to judge such allegations as deliberate efforts by the mothers to manipulate their child and pull them away from their father. This supposed effort by a parent alleging abuse is often termed "parental alienation." The term generally refers to the presumption that a child's fear or rejection of one parent, typically the noncustodial parent, stems from the malevolent influence of the preferred, typically the custodial parent.'

'Although these concepts lack a universal clinical or scientific definition, emerging patterns across various jurisdictions of the world indicate courts worldwide are using the concept of "parental alienation" or similar concepts explicitly or are allowing for its instrumentalization. The vast majority of those accused of 'alienating' their child while alleging abuse are women. Consequently, many women victims of violence and abuse face double victimization as they are punished for alleging abuse, including by losing custody or at times being imprisoned. Children who are victims of violence and abuse by a parent (in many cases the father) often continue to be subjected to such violence and abuse, against themselves and/or the other parent (in most cases the mother) post-separation, through imposed contact with the abusive parent. These dynamics often allow parents to be intimidated, coerced or forced by their abusive ex-partners and pressured by the courts to withdraw their allegations of abuse or to agree to a specific custody arrangement. In many instances, when given the risk of losing contact with their children and the high impunity the violence committed by their partner, women end up withdrawing their allegations or not reporting at all. According to experts, in many cases, the perpetrators of violence have deliberately inflicted violence on their children as a continuation of the violence inflicted on their partner who is the parent of their children and therefore a continuation of the attempt and process of controlling the target (i.e. the mother).'

Parental alienation - Cases

***Campi and Ferrin* [2022] FedCFamC2F 1621 (24 November 2022) – Federal Circuit and Family Court of Australia (Division 2)**

Newbrun J considered proposals for children to attend intensive family therapy in the context of mother's allegations of parental alienation by father:

[9] The Court has a real concern that the children may be exposed to a significant risk of psychological harm if they participate in the intensive therapy Reportable Intensive Family Therapy ("RIFT") model proposed by the Mother to be afforded by the psychologist Dr B. And further, the Court has a real concern that should the children be required to participate in the proposed intensive therapy RIFT model that they may well become even more resistant to spending time with the Mother; if this risk comes to pass, then the prospect of restoring the children's relationship with the Mother may become even more difficult.

[38] As to the Mother's proposed order that Dr B be permitted to conduct intensive four day family therapy RIFT model [Reportable Intensive Family Therapy], and provide an expert report in relation to the issue of parental alienation, the Court is of the view that such an order would not be in the best interests of the children, and nor would such an order be in the interests of justice, and in reaching these views, and in summary, takes into account the following matters having regard to rule 7.04 and section 13C(1)(c) *Family Law Act 1975* (Cth):

(a) The Court's concern that the children may be exposed to psychological harm if subjected to the proposed intensive four-day family therapy RIFT model;

(b) The lack of material before the Court relating to risk screening of the children prior to participating in the proposed intensive family therapy;

(c) The lack of material before the Court relating to the nature of the proposed intensive family therapy;

(d) The lack of any independent evaluation of the proposed intensive family therapy;

(e) The content of the Family Report does not suggest that expert evidence from a clinical psychologist such as Dr B and/or further family therapy is required to elucidate the issue of parental alienation;

(f) The Family Report writer, appointed under section 62G of the *Family Law* Act *1975* (Cth) to provide a Family Report, is well able to provide appropriate evidence and opinions in relation to the issue of

parental alienation (the Family Report writer, refers to and/or discusses the issue of parental alienation in paragraphs 76, 100, 102, 104, 108, 111, 112, 113 albeit she does indicate that the Court needs to conduct a further assessment of this issue). The Court is of the view that it is not necessary in this case for it to have a range of opinion on the issue of parental alienation;

(g) The content of the Family Report does not refer to and/or support Dr B's proposed intensive four day family therapy RIFT model.

Carter and Wilson **[2023] FedCFamC1A 9 (10 February 2023) – Federal Circuit and Family Court of Australia (Division 1)**

The full court (McClelland DCJ, Bennett & Campton JJ) observed that 'controversially… the primary judge also found that the mother's conduct in limiting the amount of time the child spent with the father and her insistence upon such time being supervised amounted to controlling conduct for the purpose of the definition of family violence as set out in s 4AB of the Act' [6]. The Full Court observed:

[71] Section 4AB of the Act is drafted in very wide terms in order to catch behaviour which is thought to be undesirable. In so doing, the section also catches behaviour which is both acceptable and necessary (for example, exerting control over a child in the exercise of the parenting powers). Therefore, in practical terms and save for blatant acts of family violence, an evaluation of evidence to ascertain the context in which alleged behaviour took place may be a precondition to the Court characterising behaviour as family violence within the meaning of s 4AB. Contextualising the behaviour calls for findings of fact.

[85] In placing the mother's behaviour in context, I assume that the relevant period during which the primary judge found that the mother's behaviour constituted family violence was from the child's birth until the first parenting order, that is, from 2016 to 30 January 2019. However, there is no analysis of evidence or reasoning by the primary judge as to why the mother's behaviour around the child spending time with the father "initially" (or otherwise) is evaluated as behaviour that controlled the child in the sense contemplated by s 4AB(1) as family violence.

[87] Whilst it is uncontroversial that the mother did not allow unsupervised time between the father and the child when she and the father were living separately and apart prior to orders being made, the primary judge does not identify the extent to which the father's limited participation in the first three years of the child's life is

attributable to the mother's behaviour, or why the control exercised by the mother was not consistent with steps taken by a parent who is acting protectively.

[88] The primary judge refers to the mother's behaviour as controlling of the child, the father and of the child's relationship with the father. However, his Honour's reasons do not include an analysis of the evidence or findings about the respects in which he was satisfied that the mother's behaviour exceeded legitimate parental control and should be characterised as family violence.

Frangoulis and Xennon **[2019] FamCA 103 (28 February 2019) – Family Court of Australia**

Berman J considered the father's application for reunification therapy with his child:

[49] … For reunification therapy to be appropriate I consider that there needs to be an assessment undertaken that would satisfy the Court that the potential risk to the child of engaging in what can be an intensive program is outweighed by the reasonable prospect of a successful reinstatement of X's relationship with her father.

[50] The concept of reunification therapy is not a matter of abstract consideration but rather, should be the subject of evidence that it is a proper therapeutic process and will be undertaken by a practitioner with demonstrated expertise.

[51] A report should be obtained from the nominated practitioner that brings to account the issues raised in the proceedings and provides an assessment as to the prospects of success, limited or otherwise.

Khoury and Ganem **[2021] FCCA 869 (1 April 2021) – Federal Circuit Court of Australia**

Among other orders the father sought orders for reunification therapy in circumstances where the mother argued it was not in the child's best interests to see the father because of controlling behaviours, disrespect of women and extreme religious beliefs [98]. The father denies allegations.[99] Per Bender J:

[100] As has been set out in this judgment, therapeutic reunification counselling to assist in rebuilding the relationship between X and the Father was not successful and was a distressing and unhappy experience for X.

[101] [expert witnesses] both expressed the view that a further attempt at such therapy could be too distressing for X, especially given her current levels of anxiety and fear and her resistance to spending any time with the Father.

[102] Therefore, the real question for this Court is whether the risk to X of a meaningful relationship with the Father is outweighed by the emotional and psychological risk to X in forcing her to undertake further counselling in the hope that a relationship with the Father might be achieved.

***McGregor v McGregor* (2012) FLC 93-507; [2012] FamCAFC 69 (28 May 2012) – Family Court of Australia (Full Court)**

In circumstances where it was alleged that the father had 'alienated' the children from the father the Full Court (Bryant CJ, Faulks DCJ & Ainslie-Wallace J) commented:

[47] '… it is clear to us that the term "alienation" does not enjoy one accepted meaning.'

***Ralton and Ralton* [2017] FamCAFC 182; (7 September 2017) – Family Court of Australia (Full Court)**

Parental alienation was considered in circumstances where the mother appealed against parenting orders on the basis that orders had been made with insufficient consideration of the alleged family violence of the father and the expert witnesses were biased (the Full Court (Bryant CJ, Strickland & Aldridge JJ).

[187] The primary judge was at pains to avoid the use of labels such as "parental alienation" or "enmeshment". Speaking of the Associate Professor's evidence, which included a discussion of these concepts, his Honour said:

> The issues that he raises with respect to the concept of alienation as a syndrome are well set out in the literature. However, to become focused upon the academic discussion of alienation and whether or not it is a syndrome – and it seems clear that it is not – becomes more of a distraction than anything in this individual case. What is necessary in this case is a careful analysis of the evidence of the parties, the circumstances confronting these two children in each of the households and the behaviours exhibited in order to ascertain what is going to be in their best interests. (quoting from the primary judgment at [70])

[192] … There is therefore no need for us to consider whether or not the evidence justified a finding of

parental alienation or enmeshment or whether or not they are valid concepts.

In the Matter Of: Re K Appeal **[1994] FamCA 21; (1994) FLC 92-461 (10 March 1994) – Family Court of Australia**

The mother died and the father was charged with her murder and was awaiting trial at the time of the hearing before the trial Judge. Those proceedings concerned applications by the maternal aunt and the paternal grandparents and aunt for custody of the only child of the marriage. The applicant father indicated that he supported the application of the grandparents and paternal aunt that they be granted custody of the child. The trial Judge made orders granting sole guardianship and custody of the child to the maternal aunt and permission for her to remove the child from Australia to the United States where she resided. The husband, grandparents and paternal aunt appealed against those orders.

[95] In this regard we lay stress upon the words "intractable conflict". There is a dispute of course in all contested custody cases and there is usually a degree of conflict, but we have in mind that category of cases where there is a high level of long standing conflict between the parents. In such cases the child is very much a pawn in the dispute and is often used as such by either or both parents. In these circumstances we think it important that the child have the support and assistance of an independent person and that the Court similarly have the assistance of such a person to present the child's point of view.

[96] If the child is alienated from both parents, the need for such representation is obvious. Where the child is alienated from one of them, this may or may not be for good cause and may have been largely brought about or contributed to by the conduct of the parent from whom the child is not alienated. In most cases it seems to us to be highly desirable for the child to have access to a person independent of the conflict who will have his or her interests at heart and who will be capable of assisting the child and putting both the child's view and submissions as to the child's best interests to the Court: see Law Council of Australia (1989) "Law Council Submission on Role of Separate Representatives" Vol. 4 No. 4 Australian Family Lawyer, 15. In this regard we also see the separate representative as having an investigative role which may be of great assistance to the Court. Further, the separate representative may well, in this and the previous category of cases, perform the role of an "honest broker" as between the child and or the parents.

Property proceedings

Where separated parties to a marriage or de facto relationship are unable to reach agreement as to the division of their property, they may apply under the *Family Law Act 1975* (Cth) (*FLA*) and the *Family Court Act 1997* (WA) (*FCA*) to have the matter determined by the Federal Circuit and Family Court of Australia or the Family Court of Western Australia or the Federal Circuit Court of Australia (collectively called here "the family courts"). State and territory courts have jurisdiction to hear defended property proceedings in limited circumstances. They may also, when making a protection order, impose conditions affecting parties' property, which may in some cases be inconsistent with proposed property orders.

Section 79 *FLA* (property of marriage) and Section 90SM *FLA* and Section 205ZG *FCA* (property of de facto relationship) give the family courts broad discretion to make property orders having regard to a range of factors and the need to be satisfied that any order is just and equitable in all the circumstances. Retrospective factors include the respective past contributions of each party to, for example, the acquisition and maintenance of property, the financial support of the couple or family, and the welfare of the couple or family in the capacity of homemaker or parent. Prospective factors set out in Section 75(2) *FLA* include the age and state of health of each party, future earning capacity, parenting responsibilities and entitlement to superannuation [Qu et al 2014]. It is important to note that after a decision handed down in 2012 (*Standord v Stanford [2012] HCA 52*), the Court must determine whether it is just and equitable to make an order altering the legal and equitable interests of the parties under s 79(2) at the beginning of the matter. Although this will not impact the majority of cases in practice as this threshold question will - in most cases- be easily satisfied, in cases such as *Stanford* it played a pivotal role in how the property matter was determined.

Sections 79 and 90SM do not specify domestic and family violence as a factor to be taken into account by the court when considering an appropriate property order. Rather, judicial officers are guided by case law. The leading authority is the 1997 decision, *Marriage of Kennon* [1997] FamCA 27 in which the majority stated that where there is a course of violent conduct by one party towards another during the marriage which is demonstrated to have had a significant adverse impact on that party's contribution to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions pursuant to section 79. The court emphasised that this principle would only apply in exceptional

cases.

It has been noted that the Kennon test sets a high threshold for recognition of domestic and family violence in the context of property settlement proceedings as parties alleging violence must prove, on the balance of probabilities, that the violence had a discernible impact on their capacity to contribute to the marriage, or to the arduousness of making such contributions [Fehlberg & Millward 2014]. Further, the Kennon test does not address the potential relevance of domestic and family violence to the prospective factors set out in Section 75(2) [ALRC FV – Improving Legal Frameworks 2010]. The family courts have increasingly recognised the relevance of domestic and family violence in property settlement proceedings; however the Kennon test is difficult to satisfy.

Where the parties have reached a property settlement by agreement, either before the commencement of or in the course of property settlement proceedings, and consent orders are filed with the court for approval, it may be appropriate for the judicial officer to inquire as to whether issues of domestic and family violence have been raised and whether consent has been properly given in order to be satisfied that the order is just and equitable in all the circumstances.

Australian research suggests that domestic and family violence may affect the share of property and other financial resources a victim receives in any post-separation property division with their violent former partner [Fehlberg & Millward 2014]. For example, following the 2006 reforms to the *Family Law Act 1975* (Cth), findings [Kaspiew et al 2009] indicated that mothers who had experienced violence were receiving a reduced share of property. The potential underlying issues were identified as, first, mothers trading off property entitlements in order to secure more time with their children, and, second, fathers seeking shared time arrangements in order to obtain a larger proportion of property [Kaspiew et al 2009]. A later study observed that a reported history of emotional abuse or physical harm may result in a victim feeling pressured or intimidated by the perpetrator/partner into receiving a lower share of the joint property division and being more likely to experience a sense of unfairness [Qu et al 2014]. It is important to note that there is no suggestion that the property settlement outcomes reported in these studies are reflected in the jurisprudential approaches of the family courts.

Property proceedings - Key Literature

Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation Paper No 1 (2010).

The ALRC notes that notably absent from the factors set out in ss 75(2) and 79(4) *Family Law Act 1975* (Cth) is the notion of fault. In *Kennon, (Re: Cassandra Kathleen Kennon (Appellant/Wife) and Ian William Kennon (Cross-Appellant/Husband) Appeal* (1997) FLC 92-757; [1997] FamCA 27 (10 June 1997)) the court recognised family violence as a relevant factor in determining property disputes under the *Family Law Act* (p.425). This paper goes on to critically analyse the application of *Kennon.*

Australian Law Reform Commission, *Family Violence – A National Legal Response: Final Report*, Report No 114 (2010).

Chapter 17 of the report deals with the jurisdiction and practice of the Federal Family Courts. It notes that s 79 of the *Family Law Act 1975* (Cth) permits federal family courts to make orders about the distribution of the property of parties to a marriage upon the breakdown of that marriage. Section 90SM governs how property is to be distributed between parties to a de facto relationship, and mirrors s 79 to a large extent (p.791). The report notes that in Kennon(*Re: Cassandra Kathleen Kennon (Appellant/Wife) and Ian William Kennon (Cross-Appellant/Husband) Appeal* (1997) FLC 92-757; [1997] FamCA 27 (10 June 1997)) , the court established the principle that 'when assessing a party's contributions, the court can take into account a course of violent conduct by one party towards the other that has had a significant adverse impact on that party's contribution or has made his or her contributions significantly more arduous than they ought to have been'. Further, '[w]hile family violence, in itself, is not relevant to an assessment of future needs of a party, the *consequences* of family violence—for example its effect on the state of the victim's health or physical and mental capacity to gain appropriate employment—can be considered when assessing future needs'. The report goes on to critically analyse the application of *Kennon* (pp.792-796).

Carson, R., Qu, L., Kaspiew, R., Stevens, E., Sakata, K., Horsfall, B. et al. (2022). Evaluation of the Lawyer-assisted Family Law Property Mediation: Legal Aid Commission Trial: Final Report. Melbourne: Australian Institute of Family Studies.

An evaluation of the lawyer assisted family law property mediation program which aims to assist parties (particularly women) with property pools < $500 K especially where they have experienced family violence.

Fehlberg, Belinda and Christine Millward, 'Family violence and financial outcomes after parental separation' [2014] (24) *Families, policy and the law* 235.

This article is based on an analysis of interviews conducted with 60 separated parents as part of a wider study on links between post-separation parenting and financial settlements, following major family law and process amendments in 2006. The authors note that while the family law courts have increasingly recognised the relevance of family violence in proceedings to divide property under the *Family Law Act 1975* (Cth), this test is difficult to satisfy, adjustments have been infrequent and small, and, further, most family law disputes are not decided by the courts (p.235).

The authors conclude: 'In our study, family violence often influenced parenting arrangements and thus indirectly influenced financial settlements. Family violence often affected mothers' child support receipt, including in CSA Collect/Child Support Collect cases. Mothers who described family violence that affected property settlements also commonly described problems obtaining child support from their ex-partner. Family violence that diminished or ceased after separation could still have a continuing influence, discouraging pursuit of legal remedies by those exposed'. The authors observe: 'In our study, family violence was often relevant to disputes and to disadvantageous processes and outcomes for both finances and parenting (property and child support) matters, and could add to financial difficulties for primary carers and children' (p.242).

Kaspiew, Rae et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute of Family Studies, 2009).

Chapter 9 examines the impact of the 2006 introduction into the *Family Law Act 1975* (Cth) of the presumption in favour of equal shared parental responsibility (s61DA), with a linked obligation on courts to consider making orders for children to spend equal (s65DAA(1)) or substantial and significant (s65DAA(2)) time with each parent where the presumption is applied. The report notes that the quantitative data suggested that mothers were receiving a reduced share of property following the reforms. This raised two issues

potentially underlying the trends. First, the bargaining dynamics and trade-offs made in negotiations that may involve both care-time arrangements and property settlement and second, the extent to which a party's responsibility for future care of the children might influence property division.

Qu, Lixia, et al, 'Post-separation parenting, property and relationship dynamics after five years' (Australian Institute of Family Studies, 2014).

For the first time in the Longitudinal Study of Separated Families (LSSF), Wave 3 included a module exploring post-separation property and financial arrangements. Chapter 6 'Property Division' looks at key relevant issues including the amount and nature of assets held, how they were divided after separation, and what mechanisms were used to support the finalisation of property division. Under the *Family Law Act 1975* (Cth), the post-separation property division regime remains discretionary in nature. Broadly the courts have the discretion to make orders concerning property interests 'as [they] consider appropriate' (*FLA* s 79).

A range of retrospective and prospective factors may be taken into account in the exercise of this discretion. Retrospective factors include the respective contributions of each party to, for example, the acquisition and maintenance of property, the financial support of the couple or family, and the "welfare" of the couple or family in the capacity of "homemaker" or parent (FLA s 79(4)). Prospective considerations include the age and state of health of each party, future earning capacity, parenting responsibilities and entitlement to superannuation (FLA s 79(4)(e) and FLA s 75(2)). Courts need to be satisfied that any order is "just and equitable" "in all the circumstances" (FLA s 79(2) and s 90SM(3)).

At 6.5 'Property division ratios reported by mothers and fathers', the report discusses factors associated with how property is divided including family violence/abuse. The authors state at p.106:

'Fathers who reported experiencing emotional abuse and/or physical hurt before or during separation indicated that mothers received a higher share (and thus the fathers accepted a lower share) compared with fathers who had not been the recipient of violence/abuse. Similarly, mothers who reported experiencing physical hurt inflicted by the other parent received a lower proportion compared with mothers who had not been the recipient of violence/abuse. However, there was no statistically significant difference between mothers who reported experiencing emotional abuse alone and mothers who reported no violence/abuse.

Mothers who experienced family violence/abuse before or during separation were more likely to be the one who left the family house. For example, one-half of the mothers who reported experiencing physical hurt

before separation indicated that she left the house at separation, compared to one-third of the mothers who reported no violence/abuse leaving the house. Excluding the variable of who left the house at separation from the model for mothers, the effect of physical hurt was statistically significant. It is likely that parents who experienced violence/abuse may have accepted the less satisfactory settlements due to fears of reprisal or simply wanting to get out of the negotiation process as quickly as possible due to their experiences'.

The report concludes, in relation to family/abuse abuse, 'A reported history of emotional abuse or physical hurt is associated with a lower share of property division and a greater likelihood of experiencing a sense of unfairness (p.115).

Smallwood, Emma, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence* (Women's Legal Service Victoria, 2015).

This research reports on a study involving 30 interviews with women experiencing family violence and 40 surveys completed by community service workers. This report includes case studies and discusses the experiences reported by the interviewees. See at pp.40-44, the report discusses the treatment of family violence by the Family court in relation to property matters.

Property proceedings - Other Resources

Federal Circuit and Family Court of Australia, Finances and property: Overview.

This webpage published by the Family Court provides general information on property and finances after separation.

Federal Circuit and Family Court of Australia, *Application for Consent Orders (do it yourself kit)*.

Part H of this document deals with details for property or maintenance orders. It notes that 'the Court may refuse to make the financial orders you seek if the proposed orders are not just and equitable'.

Property proceedings - Victim experiences

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

Note: To read a person's experiences, click their name below.

Bianca

Victim experiences - Angelina

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Cultural abuse] [Economic abuse] [Emotional and psychological abuse] [Following, harassing and monitoring] [People from CALD backgrounds] [Protection orders] [Risk] [Sexual abuse] [Social abuse] [Victim experiences of court processes] [Women]

Angelina was born overseas and English is her second language. She met Barry after coming to Australia on a student visa. She was working to support herself; and studying to improve her English skills and have her foreign professional qualifications recognised. Barry had a responsible job. Neither had been married or in a long-term relationship. They soon started living together as a couple, and Angelina applied for a partner visa with Barry as her sponsor. They registered their defacto relationship and separated after nearly twelve months. There are no children.

Early on in the relationship, Barry urged Angelina to get a different job that didn't involve night and weekend shifts so that she could be home to take care of the cooking and house, and available to go on short breaks and holidays with Barry. Angelina however enjoyed her job and was happy to work hard for good pay. Barry kept insisting until one day when Angelina was leaving for work, he hid the car keys. Eventually, he gave her the keys, but told her it was 'the last time' he would allow it. Barry tried, and failed, to find Angelina a full-time weekday job for higher pay, so she was forced to give up her shift work and become a 'housewife' to Barry. While bored and frustrated at home, she applied for countless positions without success. Barry pushed her to apply for roles that she had not yet qualified for; she resisted.

Barry took more and more control of their daily lives. He scheduled weekends away according to a strict

timetable that didn't suit Angelina; he took her on long car trips that Angelina found unpleasant, and wouldn't allow her to listen to the music she likes; and he chose destinations that she didn't enjoy. Angelina would not tolerate being dictated to, and they argued frequently. Often, Barry reminded her that he controlled her visa, and threatened to write to the immigration authority withdrawing his sponsorship. Barry had all of Angelina's immigration documents and details in his possession.

In time, Angelina got another shift job that she was reasonably content with. Barry was angry because she was earning less money and he complained that her English was getting worse. Barry demanded that Angelina transfer all of her wages to him, and he would then put an amount each week in a joint account that she could access to pay for groceries and household expenses. Again, Angelina questioned these demands asserting that she was happy to share, but was also entitled to her own money to buy, for example, gifts for him. Barry never deposited enough money in the joint account, and Angelina had to regularly ask for more, which she found humiliating. Meanwhile, Barry was free to spend his wage and the balance of Angelina's wage as he pleased.

Angelina was made responsible for cooking and household duties while also working and studying. He criticised and belittled her efforts around the house. He bought her clothes that she felt were age inappropriate and uncomfortable. Sex occurred on Barry's terms without any regard for Angelina's wishes. He told her she was required to sleep with him as a condition of the visa, and if she didn't, he would report her. He also told Angelina that Australian women manipulated men so they could have children, and acquire the majority share of income and assets before divorcing them. Angelina concluded that Barry had pursued her because he believed he could take advantage of her visa dependency.

When they first met, Barry spoke to Angelina of his many friends; however, the only person they ever saw was Barry's mother. Barry refused invitations for them to spend time with some of Angelina's close family members who lived nearby. He monitored her phone and internet activity. Barry objected to Angelina speaking her first language. On one occasion when she was on the phone to a family member in her home country, Barry wielded a knife demanding that she end the conversation and cook dinner. Angelina was aware that Barry also kept rifles at home.

Angelina was becoming increasingly isolated, demeaned and depressed by Barry's abuse. She started working more to get away from him. Barry then set up a whiteboard in the kitchen recording her rosters; he would ring and text her repeatedly at work demanding to know her shift times. Angelina says she felt like a slave: working long hours, being constantly monitored, and relinquishing her wages.

The situation became intolerable for Angelina and she left to stay with a friend. A family member encouraged her to get some advice from the support service at the local Magistrates' Court. She was referred to other services that helped her with her visa application and recommended she apply for a protection order. She also started seeing a psychologist as her emotional health and confidence had deteriorated markedly.

After separation, Barry went to Angelina's workplace and spoke with her employer more than once, embarrassing Angelina. He followed her; and Angelina believes he broke into her relatives' home and stole goods. Barry went to Angelina's home and took photos of her and the car licence plate. It was at that point that she rang the police, and then proceeded to obtain a temporary protection order. Police advised her that Barry had tried to avoid service. On the hearing date she felt pressured to accept a two-year undertaking for Barry to be of good behaviour towards her. Barry's lawyer told her it would be sufficient, and that a protection order wasn't necessary. She therefore offered an undertaking and Barry's lawyer agreed to it on behalf of Barry on the basis that she provide a reciprocal undertaking. Angelina felt humiliated by this tactic; she refused to provide the undertaking and insisted that the matter be heard. Barry gave the undertaking and the matter was dismissed. She felt the Magistrate was understanding of her circumstances and could see that Barry was an untruthful opportunist.

Barry has made no contact with Angelina since the court date. Angelina left the relationship with only her clothes and personal possessions. She is entitled to be reimbursed the wages she earned and to retrieve furniture she purchased, however she would rather forgo her rights than have any further involvement with Barry. Angelina is on medication to cope with the depression she has suffered as a consequence of Barry's abuse. She is trying hard to re-establish her family and social networks, and to complete her studies.

Victim experiences - Anna

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach of protection order] [Children] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [Parenting orders] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Sentencing] [Systems abuse] [Victim experiences of court processes] [Women] [Young people]

Anna and Nathan met one another at high school, however neither completed year 12. During their five-year relationship, they lived together for periods, on and off, and had a child who was aged two when they separated. Anna has experienced physical and mental health problems since early adolescence, which, as an adult, have prevented her from gaining a qualification or employment. She is on a disability pension and, as the primary carer of the child, receives parenting and public housing support. When younger, Anna took party drugs to cope with her anxiety and depression, but feels now that she has grown out of the habit. Nathan's drug taking and dealing and associated criminal activity have dominated his life for many years, and on one occasion resulted in a serious conviction for which he served a sentence of probation. Anna describes Nathan as extremely aggressive—and more so when taking drugs or alcohol—and possibly having a mental illness, though she believes undiagnosed. The child has been diagnosed with various behavioural disorders, which are now managed with medication and ongoing medical treatment. There are Family Court parenting orders in place granting Anna residence and allowing Nathan weekly contact, however Nathan rarely sees or telephones the child.

From early on in the relationship, Nathan would regularly (and wrongly) accuse Anna of cheating on him, he would often check on her whereabouts and who she was spending time with, and constantly monitored her money while refusing to make any contribution himself to rent and other joint expenses. On a few occasions when Nathan got drunk and felt that Anna was giving him attitude, he would put his hands around her throat

strangling her in front of others. Anna became pregnant when Nathan was on probation, and child protection was alerted to Nathan's physical and emotional violence towards her. On a visit during her pregnancy, a child protection officer told her the child would be taken away from her if she stayed with Nathan. Anna wasn't overly concerned because she had good family support around her and, with the help of a local youth service, was attending parenting and ante-natal classes and getting set up at home.

Nathan's physical violence did however escalate during and after the pregnancy. Nathan wielded a knife at Anna causing her to barricade herself in a locked room. While the baby slept, he strangled and beat her so badly that she blacked out and, with help from a family member, was taken by ambulance to the hospital and treated for multiple fractures, and facial and scalp wounds. Two months later, he yanked her arm forcefully, resulting in a serious elbow injury and lengthy recovery. Nathan was often drunk or stoned during these violent rampages, and would always flee the scene leaving Anna to fend for herself. On one occasion, Nathan assaulted Anna while they were walking with their child to the local shops. He took off with the child, leaving Anna on the street with severe cuts and bruising and torn clothes. Police were alerted and successfully applied to the court for a two-year protection order on Anna's behalf, with the child named as a protected party.

On the expiration of the first order, police obtained a further identical order, which is due to expire in the coming months. Anna has spoken to a local domestic violence support worker who is encouraging her to seek a five-year order. Anna reports feeling both frustrated and terrified because, despite having these orders and being on the police high-alert list, Nathan has repeatedly and flagrantly breached the orders, and continues to do so regularly, by stalking Anna and the child, ringing and letting her know where she has been and with whom, and threatening physical harm and death. Nathan has ready access to guns and knives and, on one occasion when he was facing the possibility of a jail term for another offence, threatened to shoot Anna's mother and Anna herself if Anna tried to disappear with the child. Anna has returned to police, repeatedly, to make statements attesting to Nathan's breaches, and at times, has had to appear at the hearing, self-represented (due to no access to Legal Aid), accompanied by a local domestic violence support worker, and intimidated by the prospect of Nathan being in the courtroom. Nathan would frequently seek and obtain adjournments for the breach hearings; and whilst he was often found guilty of breach, he has never received other than a fine as penalty. Following each hearing, Anna expected that the police would contact her to advise the outcome, but she found that she had to constantly ring and ask. She was only ever told about the fines, and can't say whether convictions were recorded, or whether Nathan has ever been charged with stalking, assault or any other offence related to his domestic and family violence towards her and the

child.

Anna believes that Nathan continues to be involved with criminal activities and that he is known to police. Although Nathan doesn't physically approach Anna, he continues to monitor her and the child through his family and friends. Anna feels constantly unsafe and under threat, and won't venture out of the house without people who can protect her and the child. Anna regularly changes her appearance and telephone number, and has recently changed the locks on her house. The police have cautioned her to lock herself in. Still young, Anna is desperate to establish a normal and happy life; however she feels trapped and damaged by Nathan's ongoing domestic and family violence, and by what she perceives to be the failure of the justice system to recognise the seriousness of Nathan's crimes and to punish him appropriately, and to protect her and the child adequately.

Nathan has only ever paid a negligible amount of child support; ultimately, his violence resulted in Anna having to obtain an exemption from claiming. Despite having contact orders, Nathan has always flouted the conditions, or not bothered to see or speak with the child at all. Anna would like to have the orders varied to disallow contact on the basis of Nathan's serious and ongoing violence, however she expects to be criticised by the court for seeking to prevent a relationship between Nathan and the child; and yet has had the experience of being told by child protection that if she remains with Nathan, the child will be removed from her.

Having tried and failed, time and again, over five years to secure proper protection from Nathan, at this stage, Anna can't see what else she can do to improve her situation. She doesn't have the financial resources to engage a private lawyer, and her health is so compromised that her prospects of future employment are limited. She is also very concerned about the daily and long-term impacts of the violence and fear on the child.

Victim experiences - Barbara

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Economic abuse] [Emotional and psychological abuse] [Monitoring] [Older people] [People with disability and impairment] [Physical violence and harm] [Protection orders] [Sexual abuse] [Social abuse] [Women]

Barbara was a 65 year old woman referred to the Seniors Legal and Support Service by a community health service following concerns that she was being physically, sexually, financially and psychologically abused by her husband of six years, Stan.

It was initially difficult to speak to Barbara as her husband was controlling and would not allow her to have contact with people he did not know. Barbara had reported to her community health service worker that her husband abused her by:

- Shouting, swearing and name calling.
- Rarely leaving her alone so that she was unable to have contact with anyone without his knowledge or presence. Barbara's only outing and contact with friends was through Church as she was permitted to attend the Sunday service.
- Intentionally tripping her on a number of occasions while knowing that she had multiple health problems and was physically frail.
- Sexually abusing her on a regular basis and refusing to take "no" for an answer.
- Terrifying her to the point that she feared taking any action in case he retaliated with abuse.

In addition, Barbara was financially dependent on her husband and he controlled all their finances. She was unable to receive social security benefits because of her husband's income and assets. Barbara owned the house she and her husband were living in and she was fearful that he would "trash the house" if she left him.

Barbara informed the Seniors Legal and Support Service that her husband became abusive soon after they married. His son was also disrespectful towards Barbara and she was anxious that he would move in with them. Barbara had no contact with her own daughter from a previous relationship although she did have a close relationship with her sister who lived in Adelaide. Her sister contacted her by phone daily but was unable to provide practical assistance due to distance. Her sister was also afraid of Stan.

Barbara had become socially isolated during her marriage to Stan and had lost contact with many friends and family at his insistence. She had several serious medical conditions and had been advised that her prognosis is poor and she should not expect to live long.

Barbara instructed the Seniors Legal and Support Service that she would like her husband out of her life so that she could “live in peace” for the remainder of her life.

The solicitor and social worker made initial contact by phone when Stan was at work. Barbara was provided with immediate advice on her options for a DVO and an ouster condition. Barbara was reluctant to act on this fearing that her husband’s abuse and violence would escalate if he discovered she had sought legal advice. Domestic violence counselling and support was provided to Barbara in partnership with community services to help her make clear decisions about her safety and future. Safety plans put in place while Barbara continued to live with her husband.

The Seniors Legal and Support Service solicitor helped Barbara to draft a DVO application with ouster condition when Barbara decided she would separate from her husband. Care was taken to ensure her safety during this process - Barbara was only seen in a safe place, and phone calls were only made to her mobile at times when it was safe to ring. The Seniors Legal and Support Service solicitor provided legal representation for her DVO application.

The solicitor also provided advice regarding Stan and Barbara’s Binding Financial Agreement and liaised with Barbara’s community health service worker to assist with an application to Centrelink for income support.

Later, the solicitor also assisted with a divorce application while the social worker continued to provide emotional support and counselling as Barbara coped with the trauma of living with an abusive spouse and then made adjustments to living on her own. A psychology service referral was given but Barbara’s frailty and unwillingness to trust “officials” meant she did not take this up.

With assistance over 15 months, Barbara was able to remove her husband from her home and live without

violence, fear and anxiety. Barbara also wanted closure by ending the marriage and all efforts were made by the Seniors Legal and Support Service to expedite a divorce application, however, Barbara passed away prior to the hearing.

Victim experiences - Ben

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Damaging property] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [Parenting orders] [Physical violence and harm] [Protection orders] [Risk] [Social abuse] [Systems abuse]

Ben and Alison were in a relationship for around 3 years. They have 1 child together, James. James is now 2 years old.

During the relationship, Ben experienced Alison to be very extreme in her emotions. There were times when Alison became very upset and angry in situations which seemed to be unprompted or arise out of relatively minor or unexpected disagreements. Alison often became very jealous and often, without reason, accused Ben of having affairs with other people.

Alison would often become angry and upset when Ben went out with any of his friends or family. If Ben was going out, Alison would often quiz Ben on whom he was going with and where he was going. Ben often did not spend time with his friends or family so that Alison did not become upset.

There were several occasions where Alison broke Ben's belongings, sometimes throwing them around. Sometimes, Alison physically assaulted Ben.

On an occasion, when Ben was driving, Alison accused Ben of having affairs with his friend's wife as well as a neighbour. Alison then punched Ben in the face with a closed fist while driving, causing Ben to bleed from his mouth and nose.

On another occasion, Ben's family invited Ben, Alison and James over to their home for Christmas lunch. Alison was unhappy about Ben seeing his family. Alison refused to see Ben's family and would not allow

James to go. Ben went over to his family's home alone. Upon his return, Ben brought back gifts for Alison and James from his family. Alison threw the bag of gifts at the wall breaking the items and pushed Ben in the chest and in the back as he tried to walk away from her.

Often unprompted or after a minor disagreement, Alison would demand that Ben leave their home. If Ben would not agree with something Alison wanted, she would threaten to call the Police on Ben or threaten to kill herself until he relented.

After Ben and Alison separated, Alison became increasingly threatening.

Alison told Ben to "watch his back" and talked about her friends in motorcycle gangs. Alison also sent text messages to Ben on many occasions with comments like "I dreamed you died. Let's hope dreams come true". Alison often threatened that Ben would never see James again.

Alison also became increasingly emotionally abusive towards Ben. Often, Alison made comments to Ben like "everyone thinks you are a disgusting and pathetic cunt". Alison was particularly derogatory about Ben's relationship with his son. She would tell Ben that James hates him; and make sexually explicit comments about Ben and James. Also, Alison often made taunting comments about Ben's sister who had died.

Initially after separation, Alison would only allow James to spend time with Ben in very limited ways or not at all. Ben did not have any risk issues affecting his parenting.

On one occasion, Alison agreed to meet Ben at a shopping centre so that Ben could spend time with James. During the time, Alison became very agitated about how Ben was putting a jumper on James. Alison started to verbally abuse Ben, and then accused him of having affairs during their relationship. Alison slapped Ben in the face. After this incident, Alison made a private application for a protection order against Ben. Alison did not attend any of the Court dates and the application was dismissed.

On another occasion, Alison stalked Ben whilst he was spending time with James. There was an occasion when Ben was at his parent's home with James at a time when Alison thought James should be having his nap. Alison sent Ben text messages demanding that he leave his parent's home. Alison was very controlling around James' time with Ben. Alison would demand that Ben send constant photos of James to her to prove that he was caring for James in accordance with her requirements. This included photos of James wearing the pyjamas she wanted him to wear, the right bed clothes in his cot and the right toys.

After Ben was unable to have any regular time with James, he invited Alison to dispute resolution to try and

sort out some arrangements for Ben. Alison did not respond to the invitation.

In the meantime, Alison told Ben that she was taking James to Bali for a short holiday. At first, Ben was concerned about agreeing to a passport for James. But after Alison threatened to kill herself, Ben agreed to Alison taking James overseas. Alison went to Bali with James and refused to return for over a year. Indonesia is not a party to the Hague Convention. On two occasions, at Alison's request, Ben sent Alison hundreds of dollars to pay for flights for Alison and James to return. Alison took the money but did not use it for their return.

Eventually, Alison returned to Australia with James. Ben initiated family law proceedings. Ultimately, the Family Law Court made final orders for James to spend regular but age appropriate time with Ben.

Ben did not particularly identify himself as a victim of domestic and family violence. Ben did recognise that the relationship with Alison had a damaging effect on his self esteem and sense of self; and engaged in counselling.

Victim experiences - Bianca

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Animal abuse] [Children] [Coercive control] [Emotional and psychological abuse] [Exposing children to domestic and family violence] [Factors affecting risk - strangulation] [Following, harassing and monitoring] [Legal representation and self-represented litigants] [Parenting orders and impact on children] [People living in regional, rural and remote communities] [People with children] [Physical violence and harm] [Property proceedings] [Protection orders] [Relocation] [Systems abuse] [Women]

Bianca and Tom were in a relationship for 13 years and have three children who were between pre and primary school age at separation. Both Bianca and Tom are tertiary educated with professional qualifications. Apart from when the children were infants, Bianca worked in professional, well-remunerated employment and was the sole income earner for most of the relationship. Tom had worked sporadically early in the relationship but stopped working soon after the birth of their first child and hasn't worked since.

Bianca met Tom through a mutual friend when she was in her late teens. It was her first intimate relationship. Tom had been in a previous relationship where his partner alleged domestic violence. Bianca says she has always been a high energy, driven sort of person who likes to get things done. Tom on the other hand lacks motivation and found employment difficult to maintain despite being highly intelligent. Bianca tended to 'mother' Tom from early in the relationship and took on all of the household duties while also working full-time, without being conscious of or concerned by the imbalance. This however emerged as a problem after the birth of their first child when Bianca's attentions necessarily turned to the baby, and she began asking Tom to help around the house. He mostly resisted, and when Bianca insisted, he did so begrudgingly. Even when Bianca was recovering from C-section births, Tom would refuse to bring the baby to her for feeding during the night, claiming there was no point in both of them being tired.

Over time, Bianca and Tom argued often about the division of labour. As the demands of children and work

grew, Bianca felt that Tom's failure to contribute in any useful way was unreasonable and intolerable. Tom claimed Bianca was constantly nagging him and trying to control him, and he would frequently become angry and verbally abusive towards her. She had experienced trauma as a child and suffered Post Traumatic Stress Disorder (PTSD) for many years as a result. Before and after the birth of their third child, Bianca began experiencing anxiety and panic attacks reminiscent of her earlier years. When hospitalised, she felt a sense of safety and calm that she realised was absent from her home life. Tom resented her time in hospital; he told her she needed to get over it, and that it was too much for him to have to look after the house and children while she was away receiving treatment.

After Bianca and Tom built their home on a small rural block, Tom developed an obsession with guns. He purchased five guns and went hunting most weekends. Tom's firearms licence required him to secure the guns in a safe in the house; Bianca had to constantly ensure that he complied with these requirements as he was lax. Tom regularly spoke about guns and shooting in conversation, he read books about serial killers and snipers, he would make home-made guns in his shed, and he even explained to Bianca on one occasion the steps involved in administering lethal poison without leaving a trace. As their relationship deteriorated, Bianca observed veiled threats in these behaviours and found them intimidating and troubling. During the relationship, Tom shot and killed Bianca's dog and pony for no valid reason. He also deliberately released her hand-raised cockatiel into the wild.

Bianca describes three physically violent incidents that occurred in the course of an otherwise increasingly dysfunctional relationship. As the situation worsened, Bianca felt she was constantly 'walking on eggshells' around Tom, trying to placate him and take the pressure off him so as to avoid any escalation of his anger, but his behaviour continued.

The first incident was when Bianca and Tom's first child was aged two. They had been arguing and Tom picked Bianca up under her arms and threw her across the room and into a door frame, causing bruising to the back of her head. Tom is more than a foot taller than Bianca, thick set, muscular and immensely strong. Bianca was in shock and terrified; she retreated to the other end of the house unable to comprehend what had happened. In the days following she sought help from a counsellor (who she continued to see for many years) and told Tom that it must never happen again.

The second incident was some years later, by which stage they had three young children. Bianca had arrived home late after a long and demanding day at work. Tom hadn't fed the children or made any attempt to prepare them for bed; the house was in chaos and Tom was playing violent computer games. Bianca was

angry and frustrated with Tom's selfishness and lack of effort. Tom called her a 'fat cunt' (knowing that this was particularly hurtful to Bianca who had suffered an eating disorder) and pushed her into the wall. In front of the children, he threatened to shoot himself in the head, and then walked out to the car parked in the yard. He was due to go hunting the next morning and he normally locked his guns in the car the night before. Bianca feared that he was going to retrieve a gun from the car and carry out his threat of suicide, so she rang the ambulance. Multiple ambulance and police officers arrived. Tom was taken to the hospital for review and then spent a couple of nights at his mother's house. On this occasion, Bianca did not tell police about the violence and abuse in the relationship; she didn't want to get Tom into trouble or make him angrier and therefore more abusive. She felt that if she decided to leave, she would need a plan to get away quickly to somewhere safe.

After the second incident, Bianca rang a domestic violence support service for some advice about how she might safely leave the relationship. Bianca believed they were more interested in reporting the incident to child safety than giving her any support as the victim of abuse. She felt insulted that a judgement had been made about her ability to protect her children and that she may be exposing them to harm by staying with a suicidal partner.

Bianca decided she needed to address the relationship problems with Tom before making any other decisions about leaving. She wrote him a letter and let him know that she wouldn't tolerate verbal or physical abuse and that they needed marriage counselling. Tom agreed and for a time, things improved between them. Soon enough though, Bianca reverted to taking on most of the household and parenting responsibilities and continuing to work full-time so as to avoid any instance where Tom may become angry and abusive. Tom spent most of his days playing computer games even when their youngest child was home from pre-school. The relationship deteriorated further: the arguments continued, and Bianca discovered that, at two separate times, Tom had placed a key logger on her computer in order to log her internet activity. When confronted, Tom claimed that he was trying to keep Bianca safe, a story she rejected. She told him she had nothing to hide, he could have all her passwords, but it was not acceptable for him to secretly monitor her.

One night, after a particularly heated argument, the third incident occurred. Tom started drinking scotch and went on to drink most of the bottle. He rarely drank alcohol; this was out of character. As Tom became more intoxicated, he became emotional about his past failed relationships. He said he should just die, and could understand how murder-suicides happen. He also threatened to wake the children up and ask them which parent they loved most. Bianca was very concerned by this talk, but felt it was likely to be caused by the alcohol, so suggested to Tom that he go to bed. She then tried to get up from the couch and Tom grabbed

her tightly by the wrists and held her in place for three hours, both by the wrists and through the weight of his body on hers. Meanwhile, he used Bianca's hands to hit himself hard and repeatedly in the face, saying 'I'd rather you punch me than leave me'. Bianca's hands turned blue, and despite her pleading, Tom would not release his grip, saying he couldn't let her go because she would escape and the police would take his guns away. Later, Bianca pleaded with him not to kill her, at which point he released his hands and placed them around her throat, squeezing tightly and saying 'you stupid woman, of course I'm not going to kill you; the reason I haven't already is that I don't want to'. Terrified for her life, Bianca decided to try and settle Tom down: telling him it was all a misunderstanding, that they could work it out in the morning after some sleep. Tom grabbed her by the wrists again and dragged her down the hall and into bed with him where he continued holding her. Bianca waited for him to fall asleep, got her phone out of her back pocket, switched it to silent mode, and texted two friends she knew would respond at that hour of night. They called the police and Bianca fled to the neighbour's house and waited. She felt she had no other choice, but was also extremely worried that Tom would wake up and a hostage situation may arise given that the children were still asleep in the house.

The police arrived promptly; they removed Tom and took him to the watch house and located the guns. The police initiated a protection order application on Bianca's behalf and the matter was dealt with the following day. Bianca was traumatised and exhausted and unable to properly process what was going on. The magistrate told Tom he didn't have to agree to an order naming the children as it would have family law implications for him. The police prosecutor asked Bianca if she would agree to a one-year order without admissions where the children weren't named. She wanted the matter over and felt sorry for Tom who was crying, so she agreed. Bianca later regretted this decision as the 'no admissions' condition meant that she had no evidence of domestic and family violence that she could use to substantiate her claims in the subsequent parenting proceedings in the Federal Circuit Court. She was however satisfied that it was appropriate not to have the children named on the protection order as she was and remains committed to the children having a relationship with their father. Bianca was informed by police shortly after Tom's guns were confiscated that they had been released to Tom's brother (with Tom's consent), who holds a valid gun license. In releasing Tom's guns to his brother, Bianca is concerned that he now has ready access to them.

On the evening of the third incident the police had asked Bianca if she wanted to have Tom charged with deprivation of liberty. She declined, and police did not take any steps to obtain evidence of the offence, for example photos of bruising on Bianca's wrists caused by Tom's grip. Some months later however, after time with her counsellor, Bianca made a complaint and gave a statement. Tom was represented, and on advice on

the morning of the trial, accepted a plea bargain and pleaded guilty to common assault in lieu of deprivation of liberty. No conviction was recorded and Tom was ordered to observe a six month good behaviour bond and pay a $500 fine. For Bianca, this was some acknowledgement of Tom's violence towards her, though somewhat mitigated; and she avoided the ordeal of cross-examination, which she had endured from Tom personally only weeks earlier at the hearing for the variation of the police-initiated protection order.

Bianca applied prior to its expiration to vary the police-initiated protection order by extending it for another year. The magistrate refused to grant a temporary order to bridge the gap between lodgement and expiry, insisting that the matter be heard. Tom made a cross application alleging abuse by Bianca in the form of name calling. Both applications were heard together. Bianca prepared all of her own affidavit material and engaged a barrister for the hearing. Bianca felt highly distressed and vulnerable in the courtroom and PTSD evidence was tendered to support a claim for protected witness status. The magistrate rejected the submission concluding that Bianca was articulate and intellectually well-equipped and did not require protection during the proceedings. As a result, Tom, self-represented in this matter, was permitted to cross examine Bianca for three hours. Tom taunted and demeaned her with his questions—Bianca felt it was another version of the abuse she had long-experienced—and the magistrate gave him considerable leeway. Bianca felt that the magistrate was demonstrating the need for procedural fairness, but equally that her evidence had been taken seriously. The Magistrate granted Bianca the one-year extension and dismissed Tom's application.

While the criminal and protection order matters were being dealt with, Bianca sought to address parenting and property issues.

A property settlement was reached with Tom fairly quickly, though Bianca queries its fairness. They jointly owned an unencumbered house worth $300,000. Bianca was the sole income earner and principal homemaker throughout the relationship. Tom made negligible homemaker contributions and earned no income. Bianca had accumulated $160,000 in super. Tom received the unencumbered house property, and Bianca received $85,000 in cash (paid by Tom's mother) and some furniture of little value.

The parenting proceedings were more prolonged and complex, requiring an interim and final hearing in the Federal Circuit Court. Essentially, Bianca sought to relocate to an area where she felt safer while maintaining her job position and yet still continuing the arrangements with Tom for some weekend contact. Relocation necessarily involved the children changing schools, and this became a central issue of contention. At the interim hearing, Bianca was ordered to resume living with the children in a certain area and to return them to

the local primary school. The interim order was very difficult for Bianca because it meant that she had to live in a small, rural town close to Tom and his family; she avoided going to shops or community spaces for fear of coming into contact with them. She needed medication to cope with her heightened anxiety. These circumstances continued for more than a year pending the final hearing and orders. After considerable expense and time, the final orders endorsed Bianca's initial application. She and the children, and her new partner and his two children, now live in the area she originally proposed, and Tom's contact arrangements continue unchanged.

Bianca and her new partner have bought a house, and they are settling in well together with their children as a combined family, while contact arrangements with Tom are mostly straightforward and without incident. Tom's moods around contact times remain unpredictable, and Bianca has developed ways of dealing with his moods so that her safety isn't compromised.

For the past five years post separation, Tom commenced a campaign of complaints to QPS and Child Safety regarding allegations of risk to the children in Bianca's care. While the process of investigation of Tom's complaints by these systems was humiliating and stressful for Bianca, both QPS and Child Safety have deemed Tom's complaints unsubstantiated on each occasion. Bianca has experienced numerous police welfare checks at her home, and felt violated by the unnecessary intrusion of these systems into her private life once again. Recently Tom has been encouraging the children to use their smart phones to covertly record their mother in her home and to 'airdrop' these recordings to him. Tom continues to denigrate Bianca and her partner in the children's presence. Bianca is concerned about the emotional harm caused to the children through their continued involvement by Tom and worries about the long-term psychological impact of Tom's sustained manipulation of the children upon them. It is difficult for Bianca to effectively parent under these circumstances. Tom has also deliberately contravened the Family Court Orders in place, retaining the children longer than permitted and picking them up from school on days when they are not in his care. Bianca believes that these actions are designed to continue to impress upon her that he is "in charge" and that she remains at the mercy of his unpredictable moods and behaviours. Bianca continues to feel helpless and traumatised but has little faith in the systems set up to support survivors of DFV in dealing with these more insidious and subtle manifestations of coercive control – especially technology facilitated abuse and the involvement of the children.

Bianca also experiences continuing stress in relation to the level of debt she has had to incur to meet legal expenses associated with the protection order, parenting and property matters. She estimates this at more

than $100,000. Bianca has borrowed from family and on credit facilities, and the repayments are unmanageable. While Bianca earns an annual salary of around $90,000, debt costs are disproportionate to normal living expenses and the costs associated with bringing up children. Tom pays no child support. Bianca has been unable throughout all these matters to obtain legal aid due to her income level. She has however been able to obtain Victim Assist for some relocation costs and the installation of a home security system.

Bianca has spent considerable time, personal effort, resources, and compromised health on securing her own safety, protecting the wellbeing of her children, and ensuring the children's relationship with their father, while coping personally with long-term domestic and family violence. She feels the police have been attentive, supportive and respectful in all their dealings with her. She will always value the support given by a particular female police officer at any hour of the day and night. Bianca also respects the court system and the judicial officers making the decisions, although she found those processes traumatic. She is proud of the time and effort she spent in preparing affidavit material for these proceedings, and believes it helped to achieve the best outcome for her children and herself.

Victim experiences - Brenda

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Economic abuse] [Emotional and psychological abuse] [Older people] [People with mental illness] [Physical violence and harm] [Protection orders] [Social abuse]

Brenda is a 70 year old woman who was referred to a Seniors Legal and Support Service, a State Government-funded service to respond to elder abuse.

Brenda lived with her husband Kevin in a caravan on her daughter's property. Kevin was physically, verbally and emotionally abusive towards Brenda. The police and a domestic violence prevention service helped Brenda to apply for a domestic violence prevention order after Kevin pushed and hit her on several occasions.

Brenda stated that the verbal and emotional abuse had continued after the protection order was made and that he also pushed her from time to time. She could no longer tolerate her husband's behaviour towards her and wished to separate from him.

Brenda's daughter and son-in-law decided they no longer wanted Brenda and Kevin living on their property and became "nasty" towards Brenda. They also blocked Brenda's access to the laundry located in their house.

Kevin told Brenda he intended to travel around Australia for six months in the caravan but Brenda didn't want to leave Brisbane and asked the Seniors Legal and Support Service to help her relocate safely.

She also asked for advice about financial abuse and exploitation from another daughter, Kim. Brenda had lent Kim $105,000 two years previously to help her to purchase her own home. Kim had since sold the house, initially refused to discharge the loan, and then later offered to repay Brenda $150 per week which she said

Brenda could access using her ATM card. Brenda was worried that there was no written agreement and a risk that her daughter would not make regular payments or cease repayments before the full amount was repaid.

Brenda had suffered Post Traumatic Stress Disorder following a home invasion when she was confronted by an intruder. As a result, she feared living alone, being unsupported or socially isolated. She acknowledged that her relationships with her daughters and son-in-law were tense and her relationships with her siblings were also poor.

The Seniors Legal and Support Service lawyer and social worker arranged for a meeting room at the local community centre and community transport so that Brenda could meet them there for a confidential discussion.

Safety plans were discussed with Brenda, including ways the legal service could contact her that would not jeopardise her safety.

The solicitor explained to Brenda that she should call the police if her husband continued to abuse her and clarified that she was required to report any breaches so that orders could be enforced to give her protection.

Brenda considered advice about putting in place a written repayment agreement with Kim but was reluctant to take that step, fearing she would lose her relationship with Kim and that Kim would retaliate by stopping all repayments. Brenda understood that the informal arrangement meant she still risked irregular or possible cessation of payments.

The social worker worked through future housing options with Brenda, taking into account her need for social contact and the financial constraints as a single pensioner once separated from Kevin. The service helped her investigate retirement village, private rental, over-50s private rentals and social housing rental options. Brenda was anxious about her financial survival as an ageing, single renter. The service advocated to the social/public housing authorities to take into account her vulnerabilities.

As a result of a range of supports and legal advice, Brenda was able to obtain a protection order; she learnt more about how the domestic violence legislation applied to her situation and understood her options in dealing with breaches. She also understood her options in dealing with the loan arrangements with her daughter and how to obtain a divorce. Psycho-social supports and practical assistance in securing housing meant Brenda was able to leave an abusive and negative home environment.

Social work support continued to provide Brenda with emotional support while she adjusted to the changes in

her life.

Brenda was satisfied that she had made informed decisions for her life and knows how to seek further help and advice from a range of sources should she require it.

Brenda had contacted the Seniors Legal and Support Service twice, about a year apart. She felt unable to act on the issues initially but was encouraged to recontact at any time.

Brenda is vulnerable due to her age and related health issues, social isolation and lack of family support. A protection order and access to ongoing support service advice have given Brenda some confidence and feeling of safety to deal with her situation.

Victim experiences - Carol

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Factors affecting risk] [Fines] [Following, harassing and monitoring] [Legal representation and self-represented litigants] [People with children] [People with mental illness] [Physical violence and harm] [Pregnant women] [Protection orders] [Sentencing] [Social abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Carol and Rod were both born overseas, sharing a country of origin where they met and lived together for some years before marrying and immigrating to Australia. English is their first language. They have two children who are now adults. Carol and Rod separated after twenty- five years; however they remain married to one another. Carol completed high school and obtained an industry qualification. She now works part-time. Rod is university educated, has a professional qualification and works in highly-remunerated employment. Throughout the relationship Rod worked overseas at remote locations for extended periods, returning home periodically. Rod continues to work in this manner, however Carol believes that he now returns only occasionally as he is concerned about being charged for multiple breaches of the protection order she has against him. Rod sends Carol his pay slips to show her how much money he is earning; he never paid child support. Carol believes that Rod has been mentally unwell for many years, though he's never sought help or a diagnosis. Carol believes Rod has not accepted that the marriage is over even after 12 years of separation; he continues to wear his wedding ring, and tells her and others that they're still together.

Carol describes their long relationship as turbulent and dysfunctional and recognises that Rod's controlling behaviours began in the early years and escalated after they arrived in Australia with their infant first child. When the couple were still living overseas and Carol was pregnant, Rod sought to isolate Carol from her close family and support network by insisting on buying property some distance away from the town where

her many family members resided. When Carol needed to buy business wear that was often expensive Rod would monitor her spending. On the advice of a friend, Carol carried a red texta pen so she could mark the tags as sale price before bringing them home for Rod to scrutinise. Carol opened a separate bank account of her own for her earnings and made sure the statements weren't posted to their address; Rod insisted however that her earnings be exhausted first on groceries and household expenses before he made a contribution. Once in Australia, as well as his financially controlling and socially isolating behaviours, Rod became physically violent towards Carol, often punching and at times strangling her over many years. Rod would not allow the children to eat meals with him and Carol; he told them he wanted their mother to himself. Rod also often told the children Carol was mad, and when the children were adults he announced to them and other of Carol's family members that she was dying. At one stage during a separation Rod tried to have Carol declared an unfit mother alleging alcoholism and mental illness; he subpoenaed her medical records, however was unable to substantiate his claims. Carol tried to leave the relationship on four occasions before their final separation. She returned each time because she found it too difficult to care for the children properly, she did not have adequate financial resources of her own, and Rod would regularly turn up at the homes of friends or family where she was staying and try to claim her back.

One evening Rod's behaviour became so terrifying to Carol that she believed he would kill her. Rod had pinned their older child up against the wall; Carol retaliated telling him never to touch the children. For years, Carol had put up with Rod's violence and abuse for fear that resistance would only exacerbate his behaviour; but she would not tolerate the children being harmed. Rod's response was to force Carol into a chair, strangle her and hold two knives to her throat. The following day Carol's neighbour told her that they thought an animal was being tortured in the garden. Somehow Carol managed to call the police; they attended quickly and, witnessing the marks on Carol's neck and Rod's state, took the matter seriously. As the police were arriving at the house, Rod took his shirt off and started drinking spirits from a bottle, though he'd not drunk previously that night. He tried to push past the police to get at Carol, and when stopped he smashed the glasses on the kitchen bench. The police handcuffed Rod and detained him elsewhere for the night while an officer remained and took a statement from Carol. She was extremely concerned that if the police took action against Rod, he would return the next day and kill her. The police persisted telling Carol that they must proceed and get a protection order on her behalf against Rod to ensure her safety. The matter was set down to be dealt with at the Magistrates Court the following afternoon, however Rod failed to appear and a warrant was issued for his arrest. The hearing proceeded and a final two-year protection order was made by the court prohibiting Rod from any form of contact with Carol and allowing Rod only supervised visits with the children.

Carol found the court experience intimidating and unfamiliar: Rod was represented by a private lawyer; she was required to be in the courtroom with Rod at close proximity and no screens or other protections were offered. On a positive note the court's domestic violence service arranged for her to sit in a separate waiting room before the hearing.

On the day the first protection order was granted, Rod withdrew hundreds of thousands of dollars from various joint accounts and a line of credit never previously used, and sent the money to overseas bank accounts Carol had no knowledge of. Carol does not recall signing any documentation for the joint line of credit and was astonished and distraught that the bank would allow it to be drawn down without her authorisation. Rod had on many occasions promised to financially cripple Carol.

Following the protection order—which Carol says marked their final separation—the children lived with Carol, and saw their father occasionally under supervision by family members or friends. Rod did not seek parenting orders from the Family Court to secure this arrangement or to increase his contact time. Eventually, family and friends told Carol that they could no longer supervise Rod's visits with the children because he did not spend the time with the children; rather he used it as an opportunity to question them about Carol.

Since separation Rod's abuse of Carol has been constant and menacing, and continues after 12 years. Being out of the country is no bar to Rod's capacity to abuse Carol. When overseas Rod rings or texts or emails Carol at least twice daily, and often more frequently. These communications are chaotic, disturbing and intimidating: they include taunts and insults; appeals to Carol to return to the marriage with pledges such as I love you, I'm worried about you, and I miss you; and goading with questions such as: Have I tipped you over the edge yet? Why are you making me having to kill you? He has sent pictures of dead children. He also sends Carol postcards, flowers, gifts and grocery deliveries. When in Australia, Rod has slept in the garden of the property where Carol lives (and owns jointly with Rod); he has broken into the property, stalked Carol and her friends in the local area, and twice followed her on overseas trips. On one occasion, knowing he was following her, Carol drove home quickly and locked herself in the house. Rod tried every door and window to gain access. While she sat behind the front door so that Rod couldn't see her, Carol called the police in whispered tones, again so as not to alert him to her presence; the police later told Carol that they did not give the call priority because they expected that if she were genuinely fearful she would be screaming.

Carol has been forced to seek multiple protection orders over the years, and still requires an order even though she questions how effective they are given Rod's serial and flagrant breaches. Due to Rod's regular periods overseas and generally elusive behaviour, service of orders has been recurrently problematic,

sometimes taking weeks for service to be effected. Carol has had to apply for substituted service. Rod has also prolonged and thwarted court proceedings by having his lawyer regularly seek adjournments on work grounds. Carol has been vigilant in recording Rod's breaches and regularly reporting them to the police; however she feels that she may be regarded as an annoyance by some police officers. Rod has nevertheless been charged and convicted on five occasions for breaches of protection orders. Each time he has received a fine, which Carol believes has no deterrent effect due to Rod's significant income, and the fine amount has reduced over time despite Rod's reoffending. At no stage has Rod ever been charged with stalking or strangulation offences nor have police ever discussed these possibilities with Carol, though they have mentioned to her that they believe a term of imprisonment is appropriate for a future breach conviction. Carol believes that imprisonment would make a difference to Rod's behaviour especially if he was also required to undertake a perpetrator intervention program as she feels that this is the best opportunity for his mental ill health to be addressed.

Carol has done her best to stay healthy and positive despite the history of abuse she continues to experience. She believes Rod is becoming more dangerous and the fear that Rod will one day kill her remains real and front of her mind. She avoids social media because she's very concerned that it would be another means by which Rod could track her. She has also given up on developing any intimate relationship as she knows that Rod would attempt to follow and intimidate her and any partner.

Carol's financial resources are limited, she earns a modest income, and has no assets of significant value other than the house property she resides in and owns jointly with Rod. Carol has for decades serviced the original debt on the property; she feels she can manage this with her earnings. Rod further mortgaged the property some years ago, and continues to service that liability. Carol's preference is to divorce Rod but this would require a property settlement. Carol knows this process will precipitate the sale of the house property and the equity will largely be exhausted in paying debts accrued by Rod and yet held in their joint names.

Carol has had a long engagement with court processes mostly as a self-represented party attempting to seek protection against Rod's violence and abuse. Her confidence has grown over the years, but she remains concerned that she is unable to secure the legal protection from Rod's abuse that she needs. On one occasion she received advice from legal aid for a breach hearing against Rod; but she has always appeared in protection order matters on her own. She believes that police have mostly taken her complaints seriously, though at times she has felt that she's an annoyance due to her frequent reporting of breaches, or that she's been disbelieved, for example looking to exploit the process to achieve a favourable financial outcome for

herself. Carol also feels that the Magistrates she has appeared before have rarely read or fully understood the material setting out the history of the violence and abuse, and that the penalties for breaches of protection orders are inconsistent, inadequate and Magistrate specific. Carol's concerns and fears continue unabated.

Victim experiences - Cassy

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Aboriginal and Torres Strait Islander people] [Breach] [Exposing children] [People affected by substance misuse] [People with children] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Women]

Cassy and Glen were in a relationship for five years and during that time had five children together aged between four and near newborn at separation. They are both Aboriginal and Torres Strait Islander, and neither has been in employment or received any post-secondary training or education. Their income during the relationship was in the form of various welfare benefits. Cassy used cannabis regularly from the age of 13, but has been clean since soon after the birth of their fifth child. Glen is a long-term speed and ice user; his drug taking increased during the relationship and made him more violent particularly when he was 'coming down' or when he couldn't access the drugs readily. Cassy was abused during her childhood by a family friend who was imprisoned briefly as a result, and later, by a close family member. Growing up, Cassy was also significantly involved in the care of a disabled relative.

Glen's violence towards Cassy started several months after their first child was born. Glen punched Cassy in the nose causing severe pain and bleeding. A passerby called the police and an ambulance took her to the hospital. A police-initiated protection order was issued allowing Cassy and Glen to continue living together on the condition that Glen maintained good behaviour towards Cassy. At that stage, Cassy felt committed to the relationship and hoped that she could influence Glen to stop his violence and drug taking. At Cassy's request, Glen was not charged with assault.

During Cassy's second pregnancy, despite the protection order, Glen's violence became more frequent and aggressive, though not as physically severe as previously. Cassy describes the violence as 'blow outs' now and then, rather than an exercise of ongoing control. This continued through to Cassy's third pregnancy when, at six months, Glen beat Cassy badly one afternoon before travelling together on a train with their two

children, and again at home the following morning. Cassy was taken by ambulance to the hospital and afterwards, with the children, went to stay with her sister for a week before returning to live with Glen. Again, police asked if Cassy wanted Glen charged with assault, and she declined and he was not charged. Cassy reasoned to herself that the violence was the price she was prepared to pay for having 'beautiful children' with someone who 'had his good sides, and wasn't always an arsehole'.

After their third child was born, when Glen's ice-use was escalating, Cassy started using ice occasionally, hoping that it might bring them closer together. Cassy felt she loved Glen and wanted the relationship to work; she also believed he was a great father and, despite his violence towards her, he would never harm the children. However, the violence continued. When Cassy found out she was pregnant with their fourth child, Glen seriously bashed her nose after an angry verbal exchange between the two of them, and when Glen was 'coming down' from an ice hit. Once again, the police were called and Cassy went to hospital for treatment.

Despite not having been charged for any of his assaults on Cassy, Glen had by that stage been convicted of a breach of the protection order, and received a two-year probationary order with a good behaviour bond and no conviction recorded. He was then convicted of drug possession and received an extended probationary period before being charged with the assault and rape of a relative and a relative's girlfriend respectively. Child protection was alerted and began visiting the home every week to check on the wellbeing of the children and how Cassy was coping. Cassy thought the situation was stable and manageable until child protection acted on a report from a third party claiming that Glen had harmed their son. Cassy does not believe that Glen would have done that, and observed that the child was happy and unharmed on the day in question. Child protection removed all the children from Cassy and Glen's care and resettled them with some of Cassy's relatives.

When Cassy was pregnant with their last child, Glen went into custody on remand awaiting trial of the assault and rape charges. Two days after the birth, child protection removed the child, again to one of Cassy's relatives. Given that Glen was now in custody, Cassy couldn't understand why the infant, or any of the other children, were deemed to be at ongoing risk. She accepted however that they needed to be protected from the violent relationship and believed that the children were being well cared for by her relatives. With the assistance of a lawyer, Cassy was able to ensure the child protection order was made for only 12 months rather than the longer period sought by the child protection department. She commenced supervised contact with all of the couple's children each week, and attended counselling sessions and a parenting program in

preparation for their return. She also stopped using illegal drugs.

While Cassy feels she had little support and understanding from police and child protection, she believes that she has benefited a great deal from the advice she received from her lawyers and counsellors. It is critically important to her that the children return to her care, happy and healthy, and she believes she understands the damaging effects of her violent relationship with Glen. When Glen is out of prison she is adamant that she does not want to continue the relationship, and that she will be careful to make proper, safe arrangements for him to have contact with the children.

Victim experiences - Celia

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Emotional and psychological abuse] [Factors affecting risk] [Myths and misunderstandings] [People with children] [Physical violence and harm] [Protection orders] [Responses in criminal proceedings] [Sexual and reproductive abuse] [Victims as (alleged) perpetrators] [Women]

Celia has been the victim of violence from Harry over a 20 year relationship. They have a child together.

There is an incident at their home. Police are called. Harry claims that Celia scratched his face. Police observe scratch marks on Harry. Police charge Celia with assault occasioning actual bodily harm and intimidation. Police apply for a protection order against Celia. Celia is required to leave the home; and cannot see her child.

Celia discloses to her lawyer that she has actually been the victim of serious physical and sexual violence by Harry for years. Harry has also been extremely controlling of her. Celia tells her lawyer that on the night in question, Harry had attempted to strangle her and tried to take her phone to stop her from calling police. Celia feared for her life and defended herself.

With the assistance of a lawyer, Celia defends the criminal charges and the protection order. The medical evidence confirms injuries to Celia from attempted strangulation; and the Triple 000 calls confirm Celia's version of events. The Court ultimately accepts Celia's account of violence.

The charges and the protection order against Celia are successfully dismissed.

Victim experiences - Celina

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [People from CALD backgrounds] [Physical violence and harm] [Protection orders] [Risk] [Social abuse] [Women]

Celina and David grew up in the same country of origin, however at the time they met through an online dating website, David had been living in Australia for 7 years, and Celina was still living in her home country with her mother. Celina also has a sister and family living in Australia. Both Celina and David have been married previously, are professionally qualified and aged in their thirties. David has a primary-school age child who lives with his former wife and spends regular weekend and holiday time with David. After Celina and David married overseas, David promptly returned to Australia and Celina applied to Australian Immigration for a joint visa for herself and her mother, with David as their sponsor. When the visa was granted, Celina resigned from her professional employment and travelled to Australia to live with David; Celina's mother followed a few months later to allow them some time to settle in together.

Celina speaks fondly of her early days living with David. She described him as gentlemanly, respectful, loving and enthusiastic about showing her the sights of the exciting city she had moved to. Celina had experienced stigma in her own culture due to being a divorced woman, and felt that her marriage to David restored her dreams for a good life and a family. She was committed to supporting David in caring for his child, and believes she made a genuine effort to build a relationship. When the child was staying with Celina and David, Celina would take care of the child's needs, prepare meals and do the housekeeping while David went to work. This was not a lifestyle Celina was accustomed to having been employed and independent for many years. Celina was unable to get employment while on a temporary visa and was therefore entirely financially dependent on David.

One evening, around a month after Celina arrived in Australia, David's behaviour towards her changed abruptly. It was the child's birthday and they had planned to collect the child from the mother's house and go out for dinner. Celina had prepared and wrapped presents. David refused to allow Celina to travel in the car on the basis that it would upset the child's mother. Instead, she was dropped somewhere close to a big junction on the way and was pushed out of the car by force. In the middle of an unfamiliar area, she walked down the street and stopped at a supermarket and decided to wait there as it was getting dark and she didn't know where else to go being still new to Australia. She was left for several hours until David eventually collected her. Celina found herself highly distressed, at night in unfamiliar surrounds, and confused and hurt by David's inconsiderate treatment. Not knowing what to do, she rang his parents and her own mother (all living overseas) seeking their advice and comfort. She pleaded with David's father to contact David and ask him to collect her. David's mother told her that David had a bad temper but he couldn't afford to have another marriage fail. Celina's mother advised that she must try hard to make the marriage work. When David collected Celina later that evening, he shouted abuse at her, claiming that she was trouble and had ruined the child's birthday, and that he didn't want a woman who wouldn't obey him. Once home, David left Celina in the car crying for half an hour then returned and grabbed and shook her violently. Considerably smaller than David, Celina felt scared and weak and asked him to stop; he then dragged her out of the car and pushed her away. Celina fell and hit her head on the concrete driveway resulting in a painful bump to her head and wounded right foot. David dragged her into the house where she laid crying and shaking on the floor while he had a meal. Seemingly to revive her, David began slapping Celina repeatedly on both cheeks, and then tossed a bucket of water over her face. Some hours later, Celina managed to get to her feet and make her way to their bed; however, David had gone to sleep in the child's bedroom, which Celina was shocked by so early in their time living together. In the days following, David apologised to Celina, but remained angry about her contacting the parents and sharing details of their marriage, which he believed should remain private.

Over time, David demanded that Celina take on more and more of the household duties and child caring responsibilities. David began scolding and verbally abusing Celina in the presence of the child who mimicked his father's behaviour towards her. Celina was not allowed a phone of her own; instead, David would give her his personal mobile while he was at work and he would use his office mobile to call her incessantly through the day, principally to tell her what he wanted done and to get details of the meals and snacks she was preparing for the child. When David returned home, he would check the activity and search history on his personal mobile and inspect the food in the fridge and cupboards. So demeaned by this suspicious conduct, Celina decided to document meals and activities through the day by taking digital photographs and loading

them on David's Dropbox so he could inspect and verify them. David only ever gave Celina small amounts of cash to cover public transport costs to and from the child's school; otherwise, she had no access to any funds. He also accused her of secreting spare coins for her own use. They argued daily about David's demands and Celina's resistance to comply. David would often skype his parents and complain to them about Celina being a bad wife, aware that Celina was listening.

Not long after the incident on the child's birthday, David had an argument with the child's mother at a changeover occasion and, in full view of the child, tried to strangle her. The child's mother called the police who subsequently issued a protection order against David. Celina believed that he was also charged with assault and the matter would go to a hearing. At the same time Celina's relationship with David was deteriorating, David was putting pressure on Celina to provide a character reference (character evidence) for the court. He told her it was her chance to do something for him and to save the marriage. His lawyer told her that a strong reference from her as David's wife would be highly persuasive to the court. Celina made a number of attempts to write a favourable reference, but felt conflicted and wronged given David's ongoing abuse. She kept the reference to herself, unsigned, knowing that the hearing date was still some months away.

As planned, Celina's mother travelled to Australia with David after he had been on a brief visit to their home country. They were to live together in the same house, and Celina's mother was to share the child's bedroom. David however insisted that the child sleep between him and Celina while the mother stayed in the other room. Celina tried to talk with David about alternative and more comfortable sleeping arrangements, but he wasn't amenable. One night, Celina was left with so little room in the bed that she fell out and injured herself. David handed her over to her mother and went back to sleep. Celina and her mother were forced to sleep together in a very small bed. Thereafter, they spent most nights on the couches in the living room. The marital relationship soured and sexual relations ceased, yet Celina continued to make an effort to look after David's child and keep the household going despite suffering diarrhoea, headaches, muscle and back pain, and feelings of stress and depression.

Another evening (in the presence of Celina and her mother), David skyped his parents, again complaining about Celina. During the conversation, Celina tried to correct David's claims and explain her experience of his behaviour. David called her (in their first language) a prostitute and accused her of having sex with her mother because they slept together. He then wielded a coffee cup as if to throw it at her when Celina's mother physically intervened. Later, as he became increasingly intoxicated, he told them both to leave the

house before he turned into an animal; he said he would refuse them food and drinks and get rid of them if they caused trouble with his child. He threatened to separate them and send Celina's mother back to her home country. When David was asleep, Celina and her mother went to a neighbour who called the police. Celina believed the police were sympathetic to her situation and could see that David was volatile and dangerous. While Celina and her mother were at the police station, David arrived and began arguing with the officers in an aggressive manner. The police returned Celina and her mother to David's home as they were unable to find emergency accommodation for them due to their not being permanent residents; again, David began arguing with the police, whereupon the police told Celina and her mother to pack their belongings and leave David's home as soon as possible. Soon after the police left, David destroyed the wedding photographs hung on the wall by smashing them in front of Celina. Celina and her mother were left totally helpless. Using the neighbour's mobile phone, Celina contacted her sister who was living interstate and sought her help. At that time, Celina destroyed the character reference she had written in relation to David's assault proceedings.

The police initiated a protection order application on Celine's behalf and, at the first mention date, secured a temporary protection order. Soon after, Celine and her mother relocated interstate to stay with the sister. A second mention date was set, however the police advised Celina that it wasn't necessary for her to appear in person. When she contacted the police after the mention, she was told that the application had been withdrawn because she had moved interstate.

Celina and her mother began living with the sister, however it was soon apparent that the sister and her family didn't have the financial resources to support them, and they were forced to leave and find alternative accommodation. Celina sought advice from a local domestic violence support organisation which she says provided them with advice and access to support when she and her mother were desperate and homeless. The service arranged refuge accommodation for them both, provided transport to the refuge and financial assistance to cover their ongoing needs, referred them to psychiatric counselling to cope with the stress and depression they were experiencing, and gave Celina advice and assistance in applying for a protection order on the basis of David's abusive and threatening behaviour. Celina and her mother also applied for and were granted the Centrelink Special Benefit soon after they moved interstate. Celina obtained a temporary protection order, however service was delayed as David's current address and whereabouts are not known. When eventually the matter was heard by the magistrate, Celina was unrepresented, whereas David had a solicitor and barrister acting for him. Feeling pressured, Celina accepted a written undertaking from David that he would not contact her, and would be of good behaviour and not commit any act of domestic violence towards her for one year. Celina and her mother sought advice from a community immigration lawyer, and

have now been granted permanent residency status. They are now both housed, safe and supported, and Celina is studying. Celina is not sure of the outcome of David’s assault charge; however, she believes he pleaded guilty and was placed on a good behaviour bond.

Victim experiences - Erin

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Coercive control] [Economic abuse] [Emotional and psychological abuse] [Exposing children to domestic and family violence] [Factors affecting risk] [Family consultants and expert witnesses] [Family law proceedings] [Myths and misunderstandings] [Parenting orders and impact on children] [People living in regional, rural and remote communities] [People with children] [Physical violence and harm] [Protection orders] [Social abuse] [Systems abuse] [Women]

Erin and Seth married and lived together for 12 years. Both are from rural farming backgrounds. They have three children who were quite young at separation. Erin has post-graduate qualifications and over some years has acquired recognised expertise. Seth did not finish high school, however has a diploma and farming-related experience. Erin had a troubled relationship with her own family through the marriage, which has continued after separation. She feels she was blamed for a poor choice in Seth and then for the marital breakdown. Erin has been excluded from the family farming business and assets but she places a strong value on family and has endeavoured to foster a relationship, especially so the children would know their grandparents, uncle, and cousins. There is also a history of antagonism by Seth's family towards Erin with the exception of one family member who has remained supportive.

Over the course of the marriage, Erin experienced negative, controlling interference from her own and Seth's families including verbal and physical abuse in the presence of the children. It became problematic to involve family in the care of the children while Erin and Seth attended to work responsibilities; consequently, they stopped doing things together so that one would be available to stay home with the children.

A significant rupture occurred in the family when Seth was involved in a serious accident making him lose confidence. Seth's own family farming business—in which he worked, and he and Erin had a part interest—was then sold. Seth struggled to adjust, and financial security from the farm sale took away the urgency to

work which was not a good combination. Erin says Seth had a career crisis and he insisted that she and the children travel around with him looking for other opportunities. It was during this time that Seth began denigrating Erin, blaming her for joint financial decisions they previously made, claiming she was inept and incapable of making basic decisions. Erin believed that Seth was jealous of her achievements and humiliating her was his way of dealing with his own deficits. She also believed that throughout the marriage Seth deliberately set about to isolate her from her professional and personal networks so as to limit her capacity to progress in her own work and life. Over time, the situation became intolerable to Erin. From time to time, she would drive away from wherever they were staying to get some brief respite. Erin was aware that Seth had an arsenal of guns (he and his father are hunters), and, as Seth's behaviour became more irrational, she became increasingly worried about how he might use them.

Eventually, Seth decided to move interstate to be closer to his family and to have time to find himself. He tried to deliver Erin and the children to Erin's family, but they refused to house them on the family property. Erin and the children were forced to live with Seth in motels for a number of months before Erin organised a rental house, a quite expensive one that was the only one he would agree to. Within weeks of moving in, Seth was spending more time away than at home, and would take the family car. Erin ended up having to pay for the rental house and purchase another car. The couple separated and a year after reaching a property settlement, Erin felt she and the children were emotionally able to move to a house she bought in her own right. She hoped to give the children a sense of stability as Seth's week about contact with them was erratic, and each changeover time was an opportunity for him to put her down in front of the children. In the time following separation Seth's abusive behaviour towards Erin escalated considerably. He also took deliberate steps to recruit Erin's and his own family as participants in the abuse. In one year after separation Seth again moved interstate and chose to see the children for only limited time on school holidays.

The couple divorced and agreed on a parenting plan, through solicitors, for the care of the children: they would live with Erin and spend four nights each fortnight with Seth. Seth never followed the arrangement; he would take or leave the children as he wished, and refused to consult Erin or comply with any routine.

Seth finally got a job and permanent accommodation on the farm where he worked. The couple's sons were then involved in an accident while at the farm with Seth. The youngest suffered a head injury and Seth didn't seek suitable medical support, driving him to town instead of calling an ambulance. It wasn't as serious as feared, but the child experienced health issues and was absent from school as a result. It was clear to Erin that she hadn't been given a truthful account of the accident. It became apparent to Erin that her family were

concerned about Seth's parenting, calling him irresponsible in front of the children on many occasions, and suggesting that he not have contact with them. Erin found herself having to stand up for the children's right to have both parents in their lives, resulting on further conflict with her own parents. Seeming to take advantage of this rift, Seth encouraged Erin's parents to call for a Justice Examination Order to be issued placing Erin under surveillance by police and psychologists for around a week. During his contact time, Seth began alienating the two older children from Erin. He would report to Erin that they were afraid of her and that she was violent and abusive towards them when in her care. What significantly damaged Erin's relationship with the older two children and prolonged proceedings was Seth's encouragement of the eldest child to make assault allegations against Erin. She was charged and released on bail, and the charges were subsequently dismissed. This was traumatic and humiliating for Erin.

On one occasion, Seth assaulted Erin in the children's presence and then drove off with all three children in the car. The police were called but no action was taken to return the children to Erin. As a consequence, Erin made an application to the Family Court for interim parenting orders. The first family report highlighted alienating and aligning behaviour by Seth in relation to the two older children and concluded that it was clear that Seth wanted Erin out of the children's lives. The court ordered that the three children live with Erin and have contact with Seth three weekends in every four. Counselling was ordered for all three children; however Seth later withdrew the two older children from counselling accusing the counsellor of not doing what he expected of her.

Seth subsequently breached the interim parenting orders. During this time, child safety initially removed the children from both parents and then, on application, delivered them to Seth's family pending a further interim hearing in the Family Court. Further interim parenting orders were made requiring that the children live with Seth and allowing Erin to have weekly two-hour contact visits at a safe house and periodic phone calls. Erin found these visits totally humiliating as she felt she was watched and listened to. She believes this forced the older two children further away from her because, as teenagers, they hated the space.

Erin was advised by her solicitor not to apply for a protection order as those proceedings may jeopardise or delay the proceedings in the Family court.

It was another 12 months before the parenting matters came to a final hearing in the Family Court. The second family report confirmed the alienation tactics highlighted in the first report. The judge acknowledged this conclusion and indicated that it wasn't appropriate for Seth to care for the youngest child for extended periods. There was however no broader recognition of Seth's violence and abuse. The judge did not give any

credit to the allegations regarding Erin's mental ill health. Seth tried to accuse Erin of being an alcoholic.

The family report writer was the only witness in the proceedings. The court ordered that the two older children live with Seth and be free to visit Erin as they wish, and that the youngest child return to live with Erin, with fortnightly weekend contact with Seth. Erin believes that the 12 month delay gave Seth the opportunity to cause a great deal of psychological harm to the two older children in continuing his alienating tactics. Whilst an Independent Children's Lawyer was appointed, Erin observed that the ICL met with the children only once and otherwise performed no obviously useful function; she found that she had to insist that the ICL explain the orders to the two older children as she was very concerned that they believed the court had ordered that they not have contact with her.

These parenting arrangements have continued now for 10 months. Child safety found that Seth's allegations against Erin regarding her mental ill health and unfitness to care for the children were unsubstantiated. Still, Erin has no meaningful contact with her two older children. There are the occasional texts and phone calls, but they are commonly abusive towards Erin; periodically, they involve coaxing their younger sibling into disclosing information about or making demands of their mother. Changeover for the youngest child typically occurs at a service station midway between the parents' houses. Seth uses these opportunities to put down Erin, and when the two older children accompany him, they remain in the car and turn their backs to her.

Seth's allegations against Erin were never substantiated and yet post separation and throughout the course of the Family Court proceedings, Seth was able to alienate their two older children from Erin and, consequently, the youngest child. Erin has felt frustrated by the lack of communication or connection between the various courts and agencies that govern her and her children's circumstances. She remains very concerned about her relationship with her two older children, and their relationship with their younger sibling, and whether there is any prospect that they will get the help they need to positively rebuild these relationships. While the court ordered counselling, it has only occurred once for the oldest two. There is now almost no communication between the oldest two children and Erin. Erin is frustrated with the court order allowing the older children to see her as they choose, believing it denies any hope of her having a good relationship with them.

Erin is now in financial trouble. While Erin was able to purchase her own home as a result of the early property settlement reached with Seth, since then she has had to borrow money on that security to fund her legal fees in the order of $100,000. Meanwhile, she has started a consultancy business, the returns from which are predictably modest through the building phase. She has received supplementary benefits from

Centrelink; however she is currently facing (what she believes are unfounded) claims that she was overpaid. At no stage was Erin entitled to legal aid, whereas Seth received legal aid funding throughout despite having significant financial support from his family. She has recently missed her daughter's birthday and is struggling to focus on her work. She feels like she needs a miracle. Financially, she lives day to day, trying to make sure she can provide well enough for her youngest child.

Victim experiences - Faith

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach of protection order] [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Myths] [People affected by substance misuse] [Physical violence and harm] [Protection orders] [Risk] [Social abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Faith and Ryan were in a relationship for around 15 years, and have five children together ranging from early primary to high school age at separation. Faith also has an adult child from a previous relationship. Faith is tertiary educated and employed in a professional role. Ryan completed an apprenticeship following high school and has worked periodically during the relationship; however is currently unemployed and receiving Centrelink benefits. Ryan had a work accident some years ago and received a significant compensation payout. He continues to take medication to manage his pain. The five children live with Faith in the family home. Ryan has contact with the children about one day each week, supervised by his parents at their home.

Faith and Ryan met in a social setting and began dating. Ryan went with Faith on her first work posting away from their home town. At that stage, Faith noticed that Ryan could get angry and frustrated easily. It was when Faith was pregnant with their first child that Ryan became abusive towards her. The abuse started as name calling; he would call her a 'fat ugly cunt' and a 'loser' if he felt he wasn't getting his own way or he objected to spending money. Initially, Faith would fire back her disapproval, but over time she became so diminished by the abuse that she said and did nothing, which would enrage Ryan even more.

Faith was employed through the relationship other than when the children were very young. She and Ryan had a joint bank account that her salary was paid into. Faith realised that if she didn't pay the bills immediately, Ryan would clear out the account. She describes a constant juggle with money, making sure there was enough available for household expenses and the family's needs. When Ryan was working, he would regularly spend his pay cheque at the pub on his way home, usually on alcohol and gambling. Despite

mostly working full time, Faith looked after the children's needs and took care of the house. Ryan was dismissive of the children.

As time went by Ryan's abuse became physical. He frequently spat on Faith, pulled her hair, dragged her through the house, smashed her head into the wall, and threw drinks over her, on many occasions in front of the children. During another pregnancy, Ryan strangled Faith because she had discovered he had been cheating on her; she managed to kick him away from her, but miscarried afterwards.

Faith had tried previously to end the relationship. Ryan was staying with a friend because he didn't want to be with the family; Faith was determined to stay in the house and keep the children together. At that stage, Faith's adult child was still living with them and he was regularly the target of Ryan's belittling and intimidating abuse. On one occasion, he kicked in the child's bedroom door while the child was in the room and threatened to kill him. Faith rang the police who attended the house four hours later despite her distress over the phone and her expressed fear that Ryan was going to kill the child. By the time the police arrived, Ryan had long departed. Police were hostile to Faith and told her she should be protecting the children from the violence; they didn't enter the house, inspect the damage, or advise her about protection orders.

Though Ryan wasn't living with the family, he would visit and stay from time to time. Faith put up with this in the interests of preserving the family as Ryan had threatened to get a court order to take the children if they separated. Ryan had convinced Faith that she was the cause of his behaviour and the court would see it that way too. Ryan's behaviour went through cycles: friendly and engaged followed by angry and violent. He claimed he had depression. He would kick Faith hard in the legs, or push her to the ground and kick her; she suffered extensive and painful bruising. Faith tried not to respond for fear that the violence would escalate. Ryan tried to isolate Faith from her family and friends, but they persisted in their support for her as they were extremely concerned for her wellbeing, knowing that she was struggling to make a break from the relationship. Despite their concerns Faith wouldn't and couldn't listen to their criticism of Ryan.

When Faith felt Ryan's violence and abuse had become extreme, on her sister's advice, she sought a protection order. The domestic violence support service at the court helped her prepare the application and explained the court process to her. Faith obtained a temporary protection order, but after pressure from Ryan, she failed to appear at the final hearing, and the magistrate dismissed the application.

Ryan told Faith he wanted a happy family life, and wanted them to try again to make the relationship work. Faith found Ryan beguiling when he was in this mood, and agreed to get back together. However, the

physical and emotional violence started again immediately, as well as socially isolating behaviours separating Faith from her family and friends, and controlling the family finances. He also told her over the phone of his five-step plan to destroy her. The plan involved: reporting Faith to her employer and ensuring that she lost her job; taking the children away from her; causing her to lose title to the house; reporting her to police for offences she hadn't committed; and destroying her name. Faith kept going, putting up with the abuse and focusing on the children's needs. On one occasion, Faith's sister rang her and could hear Ryan's verbal abuse in the background; she was so horrified that she called the police and asked them to check on the house. When the police arrived, Ryan ranted at them blaming Faith, and then he left the house. The police questioned Faith; she told them she hadn't called them, and that this was normal behaviour for Ryan. The police explained that it was domestic violence and suggested to Faith that she get a protection order. At that stage, Faith felt so controlled by Ryan that she was incapable of recognising his behaviour as domestic violence, and says perhaps it would have been better for her if the police had taken the matter over and applied for an order on her behalf.

It wasn't until after their fifth child was born that Faith took steps to seek protection. Ryan's violence and abuse had continued during periods of separation when Faith, having suffered a black eye, reached a point where she told him to leave and put his belongings in the front yard. Faith received legal aid funding and applied for a protection order, and Ryan responded with a cross application. The matters did not go to a hearing, and were settled by an exchange of mutual undertakings to be of good behaviour towards one another for two years. The legal aid lawyer had explained that if she breached an order, her job may be jeopardised. Faith believes she accepted this result because she wasn't ready to cut off contact with Ryan, but also felt that she was given very little advice about her legal options or their ramifications.

Following the undertakings, Faith and Ryan got back together, but soon separated for several months. Ryan would continue to drop by the house to see the children, and occasionally have sexual relations with Faith who was starting to work on getting him out of her life as she believed he was going to kill her. She described Ryan then as her 'heroin'; she couldn't stop wanting him, yet she knew he would kill her. After telling Ryan that she couldn't go on in the relationship, he convinced her to give him another chance promising her that he had changed, that he loved her and wanted to be together as a family.

It was only a matter of weeks before Ryan flared up. When they were separated and Ryan had begun a relationship with another woman, Faith booked a trip for herself, the children and her sister. When Ryan found out he became angry and verbally abusive. Faith locked herself and the children in a room and rang the

police who took two or three hours to attend the house, by which time the children were asleep. Ryan had tried to get in and snapped the key in the lock; he then went to sleep downstairs. Though the police were friendly towards Faith, they did not try to speak to Ryan; rather they stood at the front door and told her to get a protection order. Ryan soon left again, however it took Faith a couple more weeks to realise that she must do something to protect herself. She describes the moment that both defined her resolve and caused her to break down: she had rung Ryan for a reason she can't recall, and he put his new girlfriend on the phone who told her that she and Ryan had had sex in Faith's bed. Not long after, Ryan rang and described to Faith how he was going to kill her: 'I'm going to smash your head through the back door—it's glass—until you're all cut up. Then I'll drag you by the hair down the stairs, put you in the ute, drive up to the Gateway Bridge, and push you onto oncoming traffic, and then I'm going to jump off the bridge.' Faith notified the police and while they flagged her number so that she would in future receive a priority response, they didn't make any attempt to charge Ryan.

Faith was so emotionally depleted and distraught that she had to take time off work to get some help while she continued caring for the children. She was able to access counselling and began learning about the cycle of violence she had endured for nearly 15 years. She realised that Ryan had manipulated her thoughts and her sense of self, and she had to retrain how to think and rebuild herself as a person.

Ryan was calling the children three times a week, and Faith was keen to get a parenting plan in place. She was referred to a solicitor through her union. She proposed supervised contact on the basis of the suicide texts she'd been receiving from Ryan and was able to show the solicitor. While a plan was agreed to it never became a consent order because the solicitor failed to have it signed and filed. Ryan never complied with contact arrangements, and his abuse towards Faith continued. One night he called Faith's parents and said, 'tell Faith she's not going to make it to Christmas', and then hung up. This was the prompt for Faith to obtain a temporary protection order; and pursue the matter through to a final hearing. Faith, self-represented, had a number of witnesses at the court ready to give evidence, however Ryan appeared without having prepared any material. The magistrate issued a final protection order against Ryan on the basis of his consent without admissions. Faith was devastated as she wanted Ryan's domestic violence exposed and proven. The order is for two years with Faith and the children named as protected parties; Ryan is prohibited from coming near the house or school.

At the time the final protection order was made, Ryan applied to the Family Court for 50/50 shared care of the children and 75% of the value of the house property. He alleged in his material that Faith was using parental

alienation tactics. At the interim hearing, with a great deal of help from a friend in preparing her material, Faith was granted residence, and Ryan was allowed weekly contact one day each week supervised by his parents between specified hours. The judge prohibited Ryan from making phone contact. Ryan and Faith were then required to attend mediation in relation to property matters despite Faith providing the details of the protection order in her material. Faith also tried to explain that Ryan had failed to disclose his financial circumstances as ordered, which would include the injury compensation payment he received and did not put in their joint account. Faith had applied for sole ownership of the house arguing that she'd paid for it and all related expenses, while Ryan had made no contributions. The mediator was initially hostile and uncooperative, but as the session proceeded, attempted to identify options. Faith and Ryan returned to the court, before the judge they'd had previously, however the judge didn't appear to recall any of the details of the case, and urged them to talk and sort out their differences. The judge had also failed to read the family report, which he proceeded to read while they waited. Faith was shocked and despairing.

Faith noted that she, Ryan and the children were required to attend the court to be interviewed for the family report; they had to sit in the same waiting room as Ryan and his family before being relocated to a private area. There was no need to be present at the same time given that Ryan was interviewed first. The report recommended that Ryan complete an anger management program, undergo psychiatric assessment, not drink alcohol within 24 hours of seeing the children, and be supervised at all times with the children at his parent's house, or a contact centre. Faith explained to the judge that Ryan's parents had not adequately supervised in the past, and requested a contact centre. The judge declined stating that the family needed to be given a chance.

Faith tried to limit even email communication with Ryan. Her good friend assists with the children and contact logistics. Ryan has breached the protection order by turning up at the children's school and sending abusive emails. Faith reported the breaches to the police, but Ryan was not charged. At no time have the police indicated to Faith that criminal charges would be appropriate in relation to Ryan's repeated violence and threats. Faith believes however that the protection order has saved her life as Ryan is afraid of the police. She is beginning to feel stronger and more equipped to face the future now that she is receiving counselling support. She wants nothing to do with Ryan, and would prefer no changes to the current contact arrangements. If there is any contact with Ryan, Faith records it on her phone so she has evidence for the police and the court. The Family Court property matters have been finalised and she has been granted sole ownership of her house. Faith feels very fortunate that her workplace has been supportive throughout her long and traumatic ordeal. She is also grateful for the domestic violence court support service assistance she

received, however believes that a greater effort needs to be made to keep victims and perpetrators separate in the court house. She has found the court processes frustrating and lengthy, not helped by Ryan's deliberate attempts to delay proceedings. Sometimes Ryan pays around $40 a fortnight towards support for their five children.

Victim experiences - Felicity

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Family law proceedings] [Following, harassing and monitoring] [Legal representation] [People with children] [Pregnant women] [Protection orders] [Social abuse] [Spiritual abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Felicity and Jason were in a relationship for two years, during which time they married and began living together. They separated soon after the birth of their only child who was diagnosed with Autism at a young age. Both are university educated and professionally qualified. Felicity now works part time and is studying to gain further qualifications. Jason is in highly-paid employment and is also retraining in another discipline. Their child, and Felicity's two children from a previous marriage, live with Felicity in a house she owns. Jason has one child from a previous marriage; there are shared living and care arrangements in place with the mother, Jason's first wife.

Felicity recalls when she first met Jason that he wasn't a charmer, but intelligent and engaging, quite persistent, and even somewhat deceitful in his interactions with her. She found him interesting, and welcomed a male role model/father figure for her two children who she was pleased readily clicked with his child. While her children would have alternate weekends with their father, Felicity had been mostly sole parenting for some years while working in a demanding full-time job, and she felt they needed more adult support.

Felicity and Jason clashed from the start about parenting styles; Felicity put it down to the challenges associated with blending two families. Jason would often belittle his own child in front of her children, and early in the relationship he hit Felicity's four-year old to the ground in the presence of his parents. Felicity told Jason never to touch the child again. Jason's mother, who appeared to Felicity to be overly dominant in Jason's life and their relationship, told her that she must leave Jason to discipline the children as he decided.

The mother would ring Felicity daily.

Both Felicity and Jason come from strong religious backgrounds, however Jason insisted that Felicity and her children convert to his faith in preparation for the marriage. Felicity stopped going to the church she and her close extended family attended, and was required to attend Jason's church where she felt uncomfortable and yet Jason and his family put pressure on her to participate. In his early interactions with Felicity's family, Jason was so aggressive and confrontational in his views and behaviour that he alienated Felicity from them. Soon Felicity was no longer seeing or speaking to her family despite living only houses away and the cousins being close in age and friendship. They didn't attend Felicity and Jason's wedding.

Jason's behaviour towards Felicity became more hostile and controlling. On an outing with the children, Felicity fell over in public and hurt herself; Jason laughed while others went to help her. When Jason travelled for work, as he often did, Felicity would ask Jason why he never called to talk with her and the children while he was away; Jason angrily accused her of checking up on him, and dictating when he must report to her. Jason's mother told Felicity not to put demands on him. On their wedding night, Jason complained to Felicity about every aspect of the day, he threw a drink at her, tore a necklace from her neck, and pushed her up against the wall. A wedding guest witnessed the incident and went to seek help from other guests believing that Jason was about to hit Felicity; they intervened and took Jason away and he didn't return to Felicity for a couple of days.

Further conflict arose around Jason's demands for a child; he argued that Felicity had given another man children, and he was therefore similarly entitled. Despite her hectic work schedule and both being away regularly, Felicity was pregnant within a month of marrying.

When Felicity reprimanded his child for inappropriate comments, Jason held a knife to Felicity's face. She withdrew to another room to diffuse the situation, and refused to comply when he demanded that she eat a meal with them. Jason told her she was "a piece of shit" and to "get the fuck out of my house" by the time he was back from church. At the time, Felicity's children were holidaying with their father. Felicity packed some belongings and left to stay with a girlfriend, then travelled interstate for work; she made no contact with Jason until days later she told him she needed to come home and collect more belongings. Jason lectured her about sabotaging the family by causing trouble and leaving.

Felicity had leased her own house out so it wasn't available to move back into. She tried to talk to Jason's mother about getting Jason to agree to Felicity taking over the lease on their current shared property so that

when her children returned from holidays, they would be in familiar, settled surrounds; his mother refused, and told her she had to live with the situation she had caused. Jason told Felicity the relationship didn't need to end; she should have tried to reconcile and now she needed "to fix her act up". Jason then left for interstate to see friends. Felicity stayed on at the house as her children were coming home, she was pregnant, and she felt she had no other choices.

Felicity and her sister began having contact again. The sister commented to Felicity that every six weeks Jason would explode, then disappear for a week, then return in good and generous spirits, then the cycle would start over.

Around half way through Felicity's pregnancy, Jason became angry and insistent about wanting a boy. He disappeared for a few days and arrived unexpectedly at the hospital where Felicity was having a scan. When told by the radiographer they were having a boy, he said "good" and left the hospital. Another argument soon followed about the baby's name and christening arrangements. Felicity left to stay with her sister and, when she returned home, Jason threatened to shoot her (he had an unlicensed firearm), he threw her makeup and clothes out the window onto the concrete driveway, and again told her to get out of the house. Felicity managed to get to the car and drive away, then called the police, explaining the circumstances and that she was a government employee. When the police came to the house half an hour later, Jason had gone and Felicity's sister had arrived. The police did not ask for any details about Jason or the incident, they gave Felicity no information about available protections, and, before leaving, simply asked her if she'd be "right". With assistance from friends, Felicity moved all of her own and children's belongings out of the house while Jason was absent, sent boxes to friends' houses, and went to stay with her sister. This threw the family into chaos as they didn't have access to what they needed, including the children's school uniforms. Jason sent her abusive texts accusing her of ruining her children's lives, and questioning her faith and who she worships.

Felicity and Jason kept their finances separate: he provided the house, and she paid for all other expenses, unaware of his earnings or assets. Some months prior, Jason had pressured Felicity into buying a block of land together that they could develop. When it came time to settle, he claimed he had no money. Felicity solely funded the purchase despite the land being registered in joint names. At that stage, one month from giving birth, Felicity was committed to the mortgage on the land, she had tenants in her own home, and she was facing the prospect of having to pay rent on another house for herself and children.

Victim experiences - Fiona

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach of protection order] [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Family law - property orders] [Following, harassing and monitoring] [Myths] [Other criminal charges] [People affected by substance misuse] [People living in regional, rural and remote communities] [Physical violence and harm] [Protection orders] [Risk] [Sentencing] [Sexual abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Fiona and Tony were married and lived together for 25 years. Fiona was an early teenager when they met; Tony a number of years older. Fiona had not finished high school when she became pregnant with their first child. They now have two adult children: both of whom are employed and live independently; for some time after the separation one of the children lived with Tony and was estranged from Fiona. Tony has a criminal history relating to property crime. Tony was previously employed in a trade, and operated a related business using equipment jointly owned with Fiona. The business ceased operation some years ago, and Tony hasn't worked since. Tony has been a regular illicit drug user since a teenager. On leaving school, and when the children were young, Fiona acquired vocational qualifications and was employed in a well-respected, though modestly remunerated position, which she held throughout the relationship and continues in now.

From the start of the relationship, Tony was violent and abusive towards Fiona. He would accuse Fiona of showing interest in other boys, and struck and verbally abused her as punishment. Fiona recalls over many years being routinely smacked across the nose and face, punched in the stomach, and pushed into walls; and having her hair pulled and fingers bent back. Today, Fiona has a crooked nose and fingers. Tony would repeatedly tell Fiona that: she was a "fat, ugly, dumb slut"; she should cover herself up because fat people should never be seen in public; she was no good and would never do any better than him; and he needed to take drugs to cope with her. If she didn't rub his back in bed, she was forced to sleep elsewhere. Sex

occurred when Tony demanded it, and would often follow time spent in the outdoor shed where Tony watched pornography and bestiality videos alone. Fiona describes their sexual relations as non-consensual; she complied with Tony's demands to avoid the prospect of anything worse. For a long time, Fiona never alerted family, friends, or police to the habitual violence she was subjected to during the relationship. She dressed so as to cover her bruises (and because she had been made to feel so ashamed of her body); and when that wasn't possible, she gave another explanation for her injuries. She made sure that her outward demeanour did not betray her suffering; however she believes that a couple of people close to her probably knew or suspected.

Fiona says that, while the violence and abuse were a constant, it was Tony's relentless control of her—and attempts to control her—that characterised his behaviour towards her throughout the relationship, and during and after separation, to the present. If his clothes weren't folded or his lunch wasn't made, he would refuse to go to work, and Fiona would be made to call his workplace and explain his absence. If he was driving the car and had an accident or got a speeding ticket, it was Fiona's fault. If Fiona went out with friends, he would ring her repeatedly demanding to know where she was and when she'd be home. At times, he would make her come home and do a job around the house that he refused to do. At night, he would turn up the volume on the stereo so she couldn't sleep. Tony made no effort to help with child rearing, cooking, washing, cleaning, or mowing, and took no interest in the children's sporting or other activities. Fiona took care of all of these things while being employed full time. Tony was jealous of Fiona's good relationship with her work colleagues, and installed equipment in her car to record her conversations with a colleague she drove to and from work. He threatened to come to Fiona's workplace and tell people what she was 'really like'; he never did. On her birthday once, Tony deflated her car tyres.

In the early years, Tony would contribute a weekly amount to the mortgage repayments and household expenses, however over time he stopped these payments, and Fiona took on all joint financial responsibilities funding them from her wage. She never went on a holiday. When Tony stopped working, Fiona never knew what he did or where he went. She would come home from work and often find him in bed, and then he would leave the house late at night, refusing to tell her where he was going, saying he needed to get money, notwithstanding that she regularly gave him money. When their business ceased operation, Tony sold the equipment and other assets and took the money without accounting to Fiona; she believes that her share was in the order of tens of thousands of dollars. Their marital property was damaged and they received an insurance payout. Tony spent the funds without reference to Fiona, and the damage was never repaired.

While they were together, Fiona believed she had no choice other than to acquiesce to Tony's behaviour and demands, or risk further and more serious violence and abuse. She felt it was better to 'cop it' and get on with things than have situations deteriorate. The children were frequently exposed to Tony's treatment of Fiona; she feels it became somewhat normal for them, especially for her older child who often shielded the younger one.

One evening Fiona found she could no longer tolerate the violence and abuse. Tony had locked her out of the house, and she was forced to sleep at the neighbour's house. Neighbours were supportive of her, but knew little of her circumstances because she had not disclosed. One of the neighbour's family members, who she considers a friend, told her that she had to do something to address the situation. Fiona felt this was a turning point for her, giving her the strength and resolve to act. Fiona applied for a protection order, however after assurances from Tony that he had changed, she agreed to withdraw it. His behaviour immediately escalated; they separated, and continued living under the one roof. During this time, Tony would not allow her to lock her bedroom door, and she discovered that he'd set up hidden cameras in the bedroom that he monitored via equipment secretly installed underneath the house. Fiona successfully reapplied for an order, including a condition excluding him from the home. Her lawyer advised her to start keeping a record of Tony's behaviour, which she has diligently maintained since.

Initially Fiona obtained a temporary protection order (including the exclusion condition) against Tony, which was served on him, and he was aware of the conditions. In response both Tony and their adult child who lived with him at that stage brought applications for protection orders against Fiona based on, what Fiona describes as, gross, disgusting and untruthful claims; both applications were dismissed by the court.

Tony was charged and bailed on charges relating to breaking and entering the marital property, and stealing items. Fiona believes that the adult child was complicit. These charges did not go ahead.

Police advised Fiona that the final hearing of her protection order application had to be deferred so that other criminal allegations against Tony could be finalised. Those allegations related to Tony stalking Fiona based on his parking and waiting in the car near her workplace and home (neighbours and work colleagues are witnesses); following her on the roads; sending her repeated offensive texts; and tracking her on a dating website using false personas.

In the interim Fiona reported to police multiple breaches by Tony of the temporary protection order, some of which involved the behaviour already described, others involved Tony coming onto the marital property and

stealing further items, and humiliating and denigrating Fiona on Facebook.

The police ultimately charged Tony with stalking. He pleaded guilty and in sentencing him the court ordered that Tony be placed on a five year restraining order. A final protection order was also made for two years.

The marital property was sold, subject to Family Court orders. Fiona moved out of the property some time ago as she was too terrified to continue living there; it is in an isolated location. Fiona has a new partner with whom she now lives. They have installed a security system on their property, and whenever she is alone, she stays inside and locks the doors. She doesn't believe Tony is aware of the property's location. She is constantly vigilant about changing the routes she takes to work and the shops, and she avoids going to places she knows Tony frequents. She knows that Tony watches her and the new partner when they are in town together. In the past, Tony threatened to cut the brake lines on her car, burn the house down, kill her and leave her body in a barrel. She suspects that Tony had previously accessed her car and installed a GPS; she is having it investigated. Fiona believes that her fears are well justified; she is also scared for her new partner's safety.

Fiona engaged a lawyer for the protection order and property matters. The legal fees have been very costly, and continue to accrue while these matters remain unresolved. Tony's vexatious cross applications and deliberate delays in agreeing to property arrangements significantly increased Fiona's legal fees. Despite Fiona's disproportionate contributions and the violence and abuse she has experienced, Fiona and Tony were each entitled to 50% of the proceeds of sale of the marital property. Fiona's share was almost entirely consumed by legal fees. Following the property orders, the Federal Circuit Court Magistrate had allowed Tony to enter the property and remove the items he was entitled to; he took the opportunity to steal other items as well. When Fiona lodged a complaint with police, they told her it was a civil matter, and they couldn't assist. While Fiona believes that her lawyer is a good person and supportive of her case, she feels that he could have fought harder in seeking the legal redress and protection she needed as a result of Tony's prolonged violence and abuse.

Fiona has often felt frustrated by her involvement with police. She describes their responses as variable: at times, alert, supportive and effective; other times, uninterested, even irritated by her repeated complaints. On one occasion when Fiona had reported a breach, they told her it would be 24 hours before officers could attend the property. She suspects that she doesn't fit the usual victim stereotype of feeble, frightened, and crying, and that police and magistrates may have regarded her differently as a consequence. Fiona has dealt with multiple police officers at a number of different police stations. She feels that with complicated matters

like hers, victims/complainants should be assigned a single responsible officer who coordinates the police responses, rather than having to recount the facts and circumstances over and again. On one occasion a well-intentioned officer told Fiona she should move interstate and start a new life. Fiona feels adamant that she should not have to be the one who disrupts her life, work and relationships and is further punished for Tony's violence and abuse.

Victim experiences - Francis

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Coercive control] [Damaging property] [Emotional abuse] [Exposing children] [Following, harassing and monitoring] [Myths and misunderstandings] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Protection orders] [Risk] [Systems abuse] [Victim experiences of court processes] [Women]

Francis and Mark were together for 23 years. Francis has been significantly hearing impaired since birth and wears hearing aids. She grew up in a loving but strict family environment, and met Mark when she was still a teenager, having had little experience with intimate relationships or independent living. They both completed year 10. Francis has limited TAFE qualifications and has worked periodically throughout the relationship when her child rearing responsibilities permitted; Mark ran his own one-man business for a time. For a number of years their income was derived predominantly from social security benefits. Mark has a history of misuse of alcohol and drugs, however Francis observed that he had developed ways of minimising its influence. The couple has three children at separation.

Mark began controlling and demeaning Francis early in the relationship. He became verbally abusive and aggressive when she was planning to go out with friends, he called her a "slut", and would punch the walls or doors or damage household goods. Francis says she "would pay for [her outings] for a long, long time after". While Francis had few friends and had moved away from her home city and family to be with Mark, over time she decided a night out wasn't worth the humiliation and fear. And yet these things came to characterise her experience of the relationship over many years and were made worse by a pervading feeling of insecurity due to her poor hearing. She describes crying every day, despairing at her situation.

Francis had thought often about leaving the relationship, and would at times tell Mark that she wanted it to end, however Mark would express remorse for his behaviour and plead with her to stay. Francis says her

main reason for continuing in the relationship was a growing fear of what Mark may do if she were to take steps to get away. It was also the reason Francis denied the occurrence of domestic and family violence to family, friends and police for so long. Mark became more violent towards Francis once they began having children. His abuse would always build from a verbal rage to wanton household property damage that would sometimes result in physical injury to Francis. This was the repeating pattern, and for Francis the occasions were too numerous to fully recount. There were however some incidents that were so concerning to neighbours that they called the police, but Francis felt too frightened to disclose the details of the violence knowing that Mark was nearby and likely to retaliate. Instead, she made up an account to shield the reality of the violence. Francis recalls that one night she locked herself and the children in the bathroom, and Mark punched the door in and smeared blood across the wall, in a rage about having to cook dinner.

Francis told police Mark had thrown a saucepan and didn't show them the blood or damage to the bathroom; she had tried to ring Mark's parents but couldn't go ahead with the call because she was worried her voice may be too loud and Mark would hear her. Police offered Francis little or no opportunity to make a proper statement and blamed her for fighting with Mark in front of the children.

On another occasion, when the couple was out with the children, Mark and his friends tried to pressure Francis into taking drugs, which she had never done or been prone to. Mark began calling her names, and on the way home he smashed the car interior while Francis drove. Once home, Mark damaged the guard at the front of the car and punched the laundry wall so violently he broke his hand. The following day Francis told him she would leave, but he pleaded with her not to and promised a special holiday, which never happened.

Not long after, Mark was arrested on charges unrelated to violence at home, of which he was later convicted. Although he avoided imprisonment, Francis believes, to some extent this was due to a favourable reference she felt she was pressured by Mark and his lawyer to provide to the court. Due to the nature of the charges Francis changed to part-time work so she could be with the children outside school and daycare hours, and continued to put up with Mark's violence and abuse. Later, Mark was charged with another serious offence. Pending his trial, a child protection order issued requiring that Mark move out of the family home and that he have no contact with the children for several months. Mark reacted angrily to these conditions, repeatedly demanding to see the children and continuing the violence.

Following another violent incident that involved Mark hitting one of the children, Francis told Mark to leave the holiday house the family were renting and get counselling. Initially, Mark complied. Four months later, after he was acquitted, he returned to the family home at midnight without Francis's consent, attacked Francis, and

tried to throw her off the upper storey of the house when their young son physically intervened. Francis threatened to call the police but Mark pursued her around the house while the youngest child became more and more distressed. By this stage, Francis could see that the two older children were profoundly affected by their long exposure to the violence. Francis also discovered that Mark had access to a gun, and he began making threats to shoot her and a police officer.

After confiding in a friend and her local doctor, Francis decided to apply for a protection order, and for Legal Aid to assist with the application. Appearing to give little weight to the long history of violence and abuse, the magistrate declined to include an exclusion order. However, after further submissions by her solicitor, Francis did manage to secure a temporary order with the minimum condition that Mark be of good behavior and not commit domestic and family violence. Francis believed this was of little or no protection to her and the children, and was terrified that service of the order would precipitate further violence by Mark.

Following advice from police, and with the assistance of a local service, Francis and the children were immediately resettled at a shelter. Multiple adjournments (at Mark's request) occurred before Francis obtained a two-year final protection order. Mark's ongoing harassment of her parents about access to the children and car resulted in Francis having to reapply for Legal Aid to seek a variation of the order to include her parents as protected parties. This process took months longer because Mark evaded service.

The current protection order prohibits Mark from having contact with the children until a Family Court order is in place stipulating the terms of any contact. At this stage, the children have told Francis they don't want to see their father. Francis has begun talking with her Legal Aid solicitor about a Family Court application. Francis acknowledges that she did not disclose the domestic and family violence to police on a number of occasions, but feels her fears and perceptions of future risk of harm were justified. She believes police did not provide her with a safe and receptive opportunity to give her account of the violence. Francis also observed the difference in attitude of the magistrate who failed to recognise the nature of Mark's violence, and the magistrate who demonstrated an understanding of her circumstances and its impacts.

Victim experiences - Gillian

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Damaging property] [Emotional and psychological abuse] [Exposing children to domestic and family violence] [Family law proceedings] [Following, harassing and monitoring] [People affected by substance misuse] [People with children] [People with mental illness] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Systems abuse] [Victim experiences of court processes] [Women]

Gillian and Kyle were in a defacto relationship for around six years. They have two children together, both very young at separation. Gillian has a certificate qualification and has been consistently employed in her specialised area of work. Kyle has a trade qualification, however was unemployed for most of the relationship due to a chronic pain condition. Kyle is a heavy drinker and prescription drug user; and Gillian suspects he has a form of anxiety and depression, however is not aware of any diagnosis. Kyle also has a police record including offences relating to unlicensed firearms, drink driving and assaulting police. Gillian has an older child from a previous relationship who lived periodically with the father and with Gillian and Kyle. Gillian has a good relationship with the child's father.

Gillian and Kyle met through Gillian's previous partner and father of her eldest child. The relationship was on again-off again at the start. Looking back, Gillian recalls feeling a little insecure as a single mother with a young child, and confused and hurt by Kyle frequently putting her down and then apologising afterwards. Gillian made allowances for Kyle's behaviour knowing that he was finding it difficult to cope with his mother's death and had to undergo surgery. Kyle's health deteriorated and Gillian spent some weeks caring for him. He developed longer term chronic pain, and started relying on a range of prescription medications while resuming a heavy drinking habit. Gillian describes Kyle's reaction to his misuse of alcohol and medication as psychotic and terrifying. He is considerably bigger and stronger than Gillian and would, when in that state, throw heavy objects at Gillian and smash up the house.

Gillian had decided to leave Kyle when she discovered that she was pregnant with their first child. Given the pregnancy, she felt she needed to try and make the relationship work. However, Kyle's verbal and emotional abuse of Gillian worsened during the pregnancy, and after the birth, his drunken rages and throwing episodes became a regular occurrence, even when Gillian was holding the baby. Not long before Gillian gave birth to their second child, Kyle gave Gillian a solid shove in her stomach. When they were away on a holiday, Kyle became aggressive and violent when Gillian refused to give him her account access card. She had often given him money, which he'd recklessly spent; this time she wasn't prepared to lose the only money she had for family and household expenses. Kyle grabbed and held Gillian forcefully until she was screaming and a friend had to pull him off her. She was severely bruised on her arms and neck as a result.

Over time, Gillian learned to anticipate his behaviour and take preventative action to avoid being harmed. She says she got good at devising escape plans for herself and the children. Sometimes, she would sleep in the car overnight; other times, they would seek refuge at her mother's house.

Gillian lost contact with friends during her relationship with Kyle as they didn't want to be around him when he was drunk and abusive. Gillian has a close relationship with her mother who had re-partnered, however she tried to shield her mother from a lot of the trauma she was experiencing. Kyle's behaviour was revealed to some extent however at Gillian's mother's wedding where he was extremely intoxicated and became aggressive towards the groom. Gillian wanted the relationship with Kyle to be over, but didn't know how to make it happen.

In the year that Gillian gave birth to their second child, and for the first time in their relationship, Kyle found work interstate. Gillian was keen for him to earn some money and was grateful for some time apart despite having to look after three children by herself. Kyle didn't help with the children in any event, and Gillian realised when he left that life and the household were so much more functional and stable. It was when he returned home for brief visits that everything seemed to fall apart. Gillian decided during this time that she must end the relationship; she had also discovered that Kyle had started seeing a former girlfriend. Gillian packed up her gear, put it into storage and moved with the children to her mother's place. She felt she couldn't stay at the house because she knew that Kyle would return and wreck it and possibly harm her and the children.

Kyle moved elsewhere with his former girlfriend. He would harass Gillian with phone calls and text messages at all hours, up to forty each day, tormenting her with the details of his new relationship. Towards Christmas in the year of separation, Kyle told a friend he'd bought a handgun and was heading to Gillian with it; he told his

sister (who passed on to Gillian) that “the bitch needs a bullet”. Gillian immediately packed up her gear again and, with the children, relocated interstate for two months as she believed Kyle was extremely dangerous.

On returning, she went to apply for a protection order, but was told by the court support workers that too much time had elapsed since the threat and she would need to wait for Kyle’s abuse to resume. Before long Kyle began driving past Gillian’s mother’s place, texting Gillian’s eldest child, and repeatedly texting and screaming down the phone at Gillian, threatening to kill them all and telling her it was a shame she hadn’t died during a recent operation. This time, Gillian proceeded with a protection order application. She was represented, with legal aid funding. Initially, she obtained a temporary order for 12 months, however it was another year before the matter could go to a hearing as Kyle sought multiple adjournments, which Gillian believed was a deliberate tactic to frustrate her and the process. On the hearing date, Kyle arrived late, by which time the Magistrate had issued a two-year protection order on the basis that he didn’t deserve to be heard if he couldn’t be bothered to arrive on time. Kyle had also cross applied for an order against Gillian; however his application was dismissed as his allegations were unsubstantiated. Kyle tried to intimidate Gillian in the courthouse and precinct on mention dates.

Gillian found the first few years post separation particularly harrowing. She had a new baby, as well the two older children, and was feeling emotionally rattled, fearful and unsafe. She reported breaches of the protection order by Kyle to the police; however she feels they never took her seriously and no charges resulted. Gillian received counselling that helped her to restore her confidence and capacity.

During the period leading up to the final protection order, Gillian tried to find ways of giving Kyle contact time with the children without compromising her safety. She was advised to arrange it away from home in a busy, public space. She would take the children to the park where they could play with Kyle. This worked for a time until Kyle’s constant verbal abuse towards her became intolerable. Gillian’s mother and new partner then took over the supervision for a while, but they too were subjected to Kyle’s abuse and threats.

With a view to applying to the Federal Circuit Court for parenting orders, Gillian arranged supervised contact through a private contact centre. Kyle didn’t respond to the proposal and went without seeing the children for many months. The parenting order application was also unduly prolonged over a two year period due to Kyle’s repeated delays and failure to comply with judicial directions (eg that he have liver function testing). There was a three-day trial. An independent children’s lawyer (ICL) was appointed. Gillian was represented, but this time without legal aid funding. She sought orders allowing supervised contact on the basis that Kyle was a chronic alcoholic and prescription drug misuser and the children were not safe in his sole care. Gillian

had kept (and produced as evidence) numerous photographs of Kyle using drugs, notes written and signed by Kyle attesting to his own behaviour, and hundreds of text messages verifying her allegations. The judge issued self-executing orders requiring that if Kyle failed to complete a certain drug and alcohol course and deliver the necessary material to the ICL by a certain date, contact would be disallowed. The ICL signed off on Kyle having complied with the order and the judge accepted this, despite, in Gillian's view, Kyle not completing all the requirements originally imposed by the judge. On a further court date, Kyle was granted unsupervised contact for five hours every second weekend.

Fairly certain that a 12 hour course was unlikely to have remedied a 30 year drinking habit, Gillian took steps to ensure that the children were supervised by one of Kyle's family members whom she trusted. This is working well. Changeover now occurs at a large service station, which Gillian finds unnerving so she makes sure she has a friend to accompany her.

Gillian has sole parental responsibility for the children, and must only give Kyle notice of medical issues or a major relocation. Kyle had been paying negligible child support, and then stopped. Gillian got approval to relinquish child support on family violence grounds, while maintaining her full entitlement to the family tax benefit.

Around this time, Kyle posted a message on Facebook directed at Gillian: "I hope you die excruciatingly". She immediately went to the police and applied for a new protection order. This time the police were supportive. Gillian was not eligible for legal aid funding so appeared at the hearing self-represented, having prepared the necessary affidavit material. On this occasion, Kyle didn't appear at all, and the Magistrate issued a two-year protection order in his absence. The order includes no contact conditions together with a prohibition on emailing, social media and any other form of harassment.

Kyle previously owned the house he and Gillian lived in. Unknown to Gillian, he mortgaged the property and squandered the loan funds. Just prior to the birth of their first child, the loan was recalled and Kyle was unable to repay. Gillian's mother and new partner bought the property for the amount Kyle owed. Gillian and Kyle and the children stayed on as tenants. They were entitled to whatever equity there was upon the sale of the property. In due course the property was sold leaving only a few thousand dollars after expenses. Kyle applied to the Federal Circuit Court for a property settlement seeking a share of the equity. Gillian expended more than $10,000 in legal fees responding to Kyle's claim, and in the end the court dismissed the application on the basis that there was no property to divide.

Gillian has made sure that Kyle is unaware of her mobile and landline numbers and her address. She has told the children that they must never disclose their address to Kyle; that they are free to see him at his home, but he is never to visit theirs.

Gillian believes that it has been important for her safety to have protection orders in place against Kyle. She has become familiar with how the system works and confident to act when she needs to. She is grateful to her solicitor who was prepared to believe her story and take whatever steps necessary to ensure her protection and the wellbeing of her children. Gillian found her engagement with court processes frustrating as Kyle was permitted to repeatedly delay proceedings on spurious grounds. She found it mostly helpful to have the same judge presiding over their various matters in the Federal Circuit Court, although the time delay in the parenting proceedings meant that the judge lost touch with the facts and, in Gillian's view, made a questionable final ruling. This was in contrast to the Magistrates Court where there was a different Magistrate at every mention and facts had to be revisited each time. Gillian questions the value of the ICL in her case; very little weight was given to Kyle's violence and abuse in the context of determining the children's best interests. The judge however was focused on ensuring safety at changeover.

Gillian has spent more than six years post separation accessing the legal system to secure parenting arrangements and her own safety. It has come at great cost to her emotionally and financially. She is however getting on with rebuilding her life. She is distrustful of people, wary of any signs of violence and abuse, and finds it very difficult to contemplate an intimate relationship.

Victim experiences - Hilary

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach of protection order] [Children] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Parenting orders] [People with children] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Systems abuse] [Victim experiences of court processes] [Women] [Young people]

Hilary and Bruce were in a relationship for 17 years; they married and had three children who were primary and pre-school age, and two years of age on separation. Hilary has an adult child from a previous relationship who was pre-school age when Hilary and Bruce got together and lived with them until late teens. Hilary is tertiary qualified and has worked in a specialist professional role throughout the relationship other than during periods of maternity leave. Bruce has a trade qualification and held a well-remunerated position with a company for many years before resigning and starting his own business.

Hilary's early observation of Bruce was that he was a perfectionist regarding how work was done on their house and cars, he wanted to make the decisions about these matters and got extremely stressed when things didn't go as planned, he was eager to fix other people's problems and enjoyed their praise and gratitude. Hilary felt she understood and accommodated these traits in Bruce, along with his need for his own space and to spend regular time away with friends. When they met, both Hilary and Bruce had their own homes. In time, the properties were sold and together they bought a house on a big block with a work shed for Bruce. As a result, they were in a comfortable financial position with a small mortgage, good incomes pooled in a joint account, and relatively low outgoings.

Bruce's behaviour became concerning to Hilary when she discovered she was pregnant with their first child. Bruce was angered by the news: Hilary had conceived quickly, however Bruce had wanted it to be later, and expected to be able to control the timing. He even contacted Hilary's family members to express his displeasure. Witnessed by Hilary's child who was excited and happy about the news, Bruce came into the

bedroom where Hilary was sitting on the bed, wielded two knives and threatened to hurt himself, tipped Hilary onto the floor by lifting the mattress, and punched his fist into the wall. Hilary's child was distressed and screaming and calling out to her mother that she was going to ring the police. Hilary tried to reassure the child that she would sort it out and everything would be okay. Hilary believes that this incident and many others since have been a source of trauma for the child into adulthood.

Bruce's behaviour settled down once he got used to the idea of having a child. Hilary says he was an attentive and doting father to the first child, especially when very young and Hilary returned to part-time work at Bruce's insistence. Hilary felt they had no financial pressure for her to resume working so soon, and had been looking forward to the break and spending quality time with the baby and her older child. Bruce however told Hilary that if she didn't work, he wouldn't either, and he would leave her.

When Hilary was on maternity leave following the birth of their third child, Bruce was forced to resign from his long-held position due to unresolvable clashes with work colleagues. Hilary says he became depressed and took casual jobs he didn't enjoy. He then announced to Hilary that he was going to start his own business. Their comfortable financial position had suddenly deteriorated and Hilary became stressed about earning only a part-time wage and having to find additional money to fund the business setup.

Bruce was disappointed that their second child was a girl and appeared upset and angry on the few occasions he visited the hospital. On the day Hilary was discharged from hospital, he insisted that Hilary host lunch with friends at home. Hilary was exhausted, and refused. Bruce stormed out of the house and retreated to the shed. Bruce's childish, tantrum-like behaviour escalated over time to physical violence towards Hilary. At the close of a demanding year in her job, Hilary finished work one evening hoping to get some help from Bruce around the house and with the children. Instead, he went to bed and let the children run amok. Hilary questioned him on his lack of support, and he tussled with her and kicked her hard, resulting in pain and extensive bruising to her arms and hip. The day care mother who looked after the younger children noticed the bruising and tried to counsel Hilary to see someone, however Hilary felt she wasn't ready to get help, or to even recognise the reality of Bruce's violence. On a subsequent occasion, Hilary tried to discuss with Bruce her concerns about the amount of equipment and vehicles that was accumulating in their yard. He reacted angrily and struck her on the hip with an extension cord while she was holding their youngest child.

At this stage, Hilary realised there was something seriously wrong in the relationship and let her family know. One family member identified Bruce's behaviour as domestic and family violence and urged her to take decisive action. Hilary however couldn't afford to leave the home and rent elsewhere, and she knew that

Bruce would dig his heels in. Hilary moved into a family member's house with the children temporarily to seek safety and to organise counselling. She tried repeatedly to get an appointment but was unable to. Eventually she found help; her focus then was to try and understand what had gone wrong in the relationship and whether it was retrievable. She and the children then moved back into the family home and Bruce agreed to attend joint counselling. On a rare occasion when Bruce was open to discussing the relationship, when asked by Hilary why he was violent towards her, he told her that it was to discipline her. After three counselling sessions Bruce refused to continue, saying there was no point. Hilary continued, knowing that the relationship was over, but needing guidance with the separation process.

By now Bruce was no longer contributing to the joint account. He agreed to pay only the house utility bills. The mortgage repayments, direct debits and children expenses were all paid from Hilary's modest wage. Hilary was forced to ask Bruce for grocery money, which he gave out in meagre amounts after much complaint and verbal abuse, further humiliating Hilary each time. Hilary was aware that Bruce was making money from the business having seen him receive considerable amounts of cash from the sale of stock. Bruce told Hilary not to expect any more money from him, and that she needed to work more.

One evening, while they were still living together, Hilary again expressed her frustration to Bruce at his failure to help with the children. An argument ensued and Bruce punched his fist through the door. Bruce then rang the police alleging that Hilary had verbally abused him. The police arrived at the house and interviewed them separately. Hilary had not planned to get the police involved as she felt ashamed by what was going on and didn't want Bruce in any trouble, but after some probing by the police, Hilary detailed the violence and abuse she had been experiencing. They urged Hilary to apply for a protection order, and to seek a condition preventing Bruce from entering the property. Hilary obtained a temporary protection order, which only required Bruce to be of good behaviour towards her and the children. Hilary says she wanted Bruce off the property but knew that if he weren't allowed access to the shed, his behaviour would only worsen. The Magistrate commented that these matters could be dealt with at the final hearing when Bruce had an opportunity to put his case. When the temporary protection order was served on Bruce, he became extremely angry and verbally abusive towards Hilary, and told her she was mentally ill.

Due to financial constraints, Hilary attempted to put in place separation-under-the-one-roof arrangements. She notified Centrelink, relocated Bruce's belongings to a spare room in the house, and told him she would no longer be cooking, washing or providing other benefits to him. Again, he reacted angrily. On a number of occasions he rang the police complaining that the dinner leftovers had been fed to the dog. Hilary could tell

that the police believed Bruce's complaints were exaggerated, yet she always felt they were supportive of her own situation.

Just prior to the final hearing of the protection order application, Hilary was served with Bruce's cross order application. The matter was adjourned to allow Hilary the opportunity to seek legal advice and representation. Hilary returned to the family home that day to find what she describes as a 'romantic note' from Bruce, which she interpreted as disingenuous and, once again, temporarily relocated with the children to a family member's house. Bruce resumed living at the family home, and verbally abused Hilary's adult child causing Hilary to alert police. Hilary and the children returned to the home, the family still governed by the temporary protection order requiring Bruce to be of good behaviour towards them. One of the children developed a fever and became quite unwell, and Bruce refused to help, choosing instead to watch television and send text messages on his phone. Hilary took the television remote control and phone away from Bruce hoping that this would prompt a better response; it didn't, and the following morning when Hilary was preparing to leave for work and drop the children off to day care and school she discovered that Bruce had taken her car keys. Hilary tried to look for the keys; Bruce became angry and told her to get out of his room, then grabbed and pushed her forcefully into a chair while the children were present and becoming increasingly distressed. Hilary told Bruce to stop because he was hurting her. He then rang the police and waited at the front of the property for their arrival. Hilary also called the police to report a breach of the temporary protection order. It took some hours for the police to arrive, by which time Bruce had left and Hilary gave her statement regarding the breach. Bruce was charged with the breach, and the matter was heard, but Hilary hasn't ever been advised of the outcome.

At the final hearing of the protection order application (which included Bruce's cross application), Hilary sought a variation to include an ouster order as she could no longer tolerate Bruce being on the property. Both Hilary and Bruce had legal representation. Hilary's lawyer told her beforehand that the particular Magistrate listed to hear the matter would require that Bruce be given access to the shed, so there was no point in pushing for an ouster order. Hilary reported that the Magistrate was irritated by having to deal with the matter, telling them both that while separation can be difficult they needed to sort the issues out like adults. Bruce's cross application was dismissed; and based on the Magistrate's comments in the court room, Hilary believed that Bruce was granted access to the shed between certain hours on certain days, however when the paper order issued there was no such specification.

Consequently, Bruce continued to come and go from the property as he pleased, including into the house.

Hilary knew the latter behaviour was a breach of the order but felt uncomfortable about bothering the police with repeated breach complaints. When Hilary applied for a renewal of the order, she requested a variation denying Bruce access to the house. She felt admonished by the Magistrate for not reporting the breaches, and for being so petty as to not allow Bruce to use the toilet in the house. Bruce made another cross application against Hilary, and at the same time applied for the matter to be heard at a different courthouse, claiming a potential conflict of interest as a result of Hilary's family connections. The matters were adjourned and Hilary and Bruce appeared for a mention before a different Magistrate who Hilary felt acted fairly and reasonably, in contrast to her previous experiences. The Magistrate expressed the view that Hilary and the children should stay in the house and made a further temporary order against Bruce in accordance with Hilary's application; he also made a temporary order against Hilary requiring that she be of good behaviour towards Bruce. The final hearing of both applications is pending.

When Hilary is at home with the children she tries to stay indoors and keep them distracted and settled, however when Bruce sees her, he often verbally abuses her. She has changed the locks on the house. Hilary feels intimidated by Bruce's presence on the property, and her greatest concern is that he will attempt to take the children away so as to reassert his control over her. There are currently no parenting orders in place, though they have an informal arrangement where Bruce cares for the children one day each weekend. Hilary had been loath to involve the Family Court in matters relating to the children as she feared the process would be damaging to them, however she believes now that securing orders would be in their best interests. She is also aware of the need to make an application for property orders to clarify her financial situation. Based on Bruce's business returns, a child support assessment has issued requiring Bruce to pay an annual total of $500 for the three children. Hilary otherwise wholly supports the children from her wage.

Victim experiences - Ingrid

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [Parenting orders] [People affected by substance misuse] [People from CALD backgrounds] [People with children] [People with mental illness] [Pregnant women] [Protection orders] [Questioning witnesses] [Risk] [Sexual abuse] [Systems abuse] [Victims as (alleged) perpetrators] [Victim experiences of court processes] [Women]

Ingrid and Scott met overseas in Ingrid's home city. Scott was taking a break from a job that he said had caused him post-traumatic stress disorder and a persistent back injury, for which he received benefits and self-medicated using marijuana and medicinal painkillers. Ingrid has post-graduate qualifications and was working in a well-paid position at the time. The relationship developed quickly and Ingrid was soon pregnant.

During the pregnancy Scott resigned from his job while Ingrid continued to work. Ingrid found that she often had to ask Scott and his friends not to smoke marijuana near her. After the birth, they lived with Ingrid's mother who helped with the baby. Ingrid received part-paid maternity leave, which she used to support the family. Scott refused to make any contribution to rent or other living expenses and, when asked, would angrily yell and throw things, including a computer on one occasion. Ingrid felt fearful of these early behaviours, but didn't react, trying not to hurt Scott's pride or add to the damaging effects of his job.

Scott persuaded Ingrid to move to Australia where he grew up. He went ahead alone to prepare for the family's arrival, and Ingrid and the baby were to follow when Ingrid's visa issued, and the baby was around nine months old. Scott did very little in that time: he lived off friends, failed to look for a job and eventually sought help from his father to find accommodation. Scott then insisted on returning overseas to collect Ingrid and the baby.

Once back in Australia, Scott pressured Ingrid into paying off his credit card debt, which she was not liable for. Ingrid's maternity leave money soon ran out. Ingrid also understood that Scott had or was due to receive a significant lump-sum compensation payment from his employer for his post-traumatic stress disorder but he kept the detail from Ingrid. One day Scott fell in the kitchen, further injuring himself, resulting in his increased use of marijuana and painkillers, which Ingrid observed made him angry and depressed.

Increasingly, Scott would verbally and emotionally abuse Ingrid and damage household property. Ingrid felt isolated with a very young child, no family or friends nearby, and no car licence. Scott made frequent sexual demands of her that she found distressing and painful.

In time, Ingrid was employed again, Scott enrolled in a university course, and the child went to day care. Scott also began rehabilitation for his injury and psychologist appointments for his post-traumatic stress disorder. Ingrid felt that life had become more normal and bearable until one day Scott threw a piece of furniture around the kitchen in a rage about medical expenses that had to be paid to treat a condition Ingrid had developed. Ingrid took the child into the bedroom and locked the door. Scott never struck Ingrid or the child, but would raise his hand menacingly in anger. Scott was well over double Ingrid's weight.

When not at university, Scott spent more and more time during the day and night drinking and taking drugs with his friends while Ingrid worked and cared for the child. Without asking Ingrid, Scott invited a female friend to stay because she needed somewhere to live. Scott's drug taking made his behaviour more abusive and irrational. He would accuse Ingrid of lying about her whereabouts, and, despite her resistance, his sexual violence towards her escalated. He wrote her a letter complaining that the child was taking up too much time and that she was not paying him enough money.

Ingrid reached emotional breaking point and sought psychological help through her employer. She moved into another bedroom and they began living separately under the one roof. Scott discovered from reading Ingrid's emails that she had made a male acquaintance. He became very aggressive, repeatedly texting her (and the male friend), demanding that she leave without the child, reminding her of his weapons licence, and threatening suicide. Ingrid could not afford other accommodation and refused to leave the child in Scott's care. While she had no intention of leaving her job and uprooting the child from day care – and in any event had no funds – to return overseas, Scott had hidden her passport, which she managed to retrieve before finally leaving.

With the help of support services, Ingrid and the child were housed temporarily in a motel then moved to a

shelter. Inevitably this caused upheaval with work and day care, but Ingrid was grateful for the assistance she received with visa matters and an application for a protection order. Initially acting for herself (while Scott had a lawyer), Ingrid was unable to obtain a temporary order and the matter went to trial, for which she was granted Legal Aid. Ingrid describes an intimidating courtroom experience where: during cross-examination, she was yelled at by Scott's barrister, and the Magistrate was unable to respond effectively; she was not allowed to give evidence of the sexual violence because she was told it could no longer occur due to separation; and she was told that because there was no physical violence or harm, the texting, suicide threats and reference to a weapons licence were minimised and not considered sufficiently abusive to establish domestic and family violence. The court dismissed Ingrid's application and she was denied a protection order.

Despite strict security controls, Scott was able to locate the shelter where Ingrid and the child were living. Concerned about the risk to the shelter and its other residents, and the complications associated with moving to another shelter, Ingrid decided to stay with friends. Again, Scott revealed to Ingrid an address in the vicinity. Distraught, Ingrid searched for an explanation, and then discovered Scott had sewn a GPS tracking device in the back of a doll that he'd insisted Ingrid take for the child. Ingrid went immediately to the police and gave a statement. Initially police told her she couldn't get a protection order because there was no physical violence, but she persisted and the court granted a temporary protection order. At the final hearing, Ingrid was unrepresented and Scott's lawyer offered a protection order without any admission of facts. Ingrid resisted because she knew that Scott's behaviour was abusive and he should be held responsible. The Magistrate declined to make a final decision on the basis that Family Court matters were pending; and instead extended the temporary order. While an interim parenting order was put in place for shared care, there are multiple problems regarding changeover and other arrangements and Scott flouting the order. The matter was referred to mediation, however precluded from proceeding due to risk of domestic and family violence.

Scott soon sought a cross order against Ingrid fabricating evidence of her beating and raping him, which at the final hearing she was able to resist using audio and social media records she had diligently gathered, and ultimately was granted a final protection order, however the child and others are not listed as protected parties. Before the hearing, Scott had also tried to run Ingrid over in his car. Scott continues to breach the good behaviour provision of the protection order and the terms of the parenting order. Scott has never been charged with breach, or with any criminal offences relating to the stalking and monitoring, attempting to run over Ingrid, or the false affidavit evidence.

Ingrid agreed to settle final parenting orders with Scott, avoiding a trial. Ingrid finds changeovers distressing and demeaning: Scott yells commands at her. She is concerned about how they will jointly manage ongoing parenting decisions and arrangements in the best interests of the child while she endures ongoing abuse. Scott is still unemployed and demands that Ingrid pay him child support. Ingrid would like to visit her home city with the child, but expects that Scott will take any steps to prevent them from going. They were together for only three years, and yet Ingrid feels she and the child will live with Scott's abuse and its harmful consequences for many years yet.

Victim experiences - Jane

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These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Family law proceedings] [Following, harassing and monitoring] [Legal representation] [People with children] [Systems abuse] [Victim experiences of court processes] [Women]

Jane and Richard met at university and later married. They had two children together, and finally separated after 25 years. Both are tertiary educated, however Richard assumed the primary earner role early in the relationship and priority was given to his professional advancement. Jane supported Richard's career pursuits —which involved a number of relocations, here and overseas—and became the primary carer of their children who are in their mid to late teenage years. The children live with Jane and have limited contact with Richard who continues to live and work overseas and returns periodically. There are no Family Court parenting orders, however there are consent orders dealing with the settlement of marital property between Jane and Richard and access to children during school holidays. Jane had completed a Graduate Diploma whilst raising the children, and had been in unrelated paid employment for brief periods when the family was based in Australia. However she had not attained any significant experience or career progression as caring for the children was her main priority. Just prior to separation Jane accepted a full-time job that for the first time utilized her degree. She supports herself and the children from her modest income; and under the terms of the consent orders, Richard is discharged from any responsibility to pay child support. The property settlement entitles Jane to funds from the sale of a house property, which she intends to use to purchase a home for her and the children.

Marrying so young, Jane had little experience of relationships or what to expect. Richard always earned a high salary and from the outset took charge of their finances and purchases. As a couple they bought a number of real estate properties, which he referred to as his own, despite their being registered in Jane's

name and clearly shared assets. Without the qualification and experience she'd hoped to obtain, Jane could only work in low-paid positions; and, after having children and living as expats overseas, was unable to work at all. Richard belittled Jane for her lack of financial contribution, and regularly monitored her weekly spending against the allowance he had allocated that was often insufficient for essentials. She was required to show Richard receipts for all of her expenditure. Richard could become enraged when he believed Jane had overspent or acted without his approval, and would often throw and break items precious to Jane to show his displeasure with her and to intimidate her. Early in the relationship when Jane freely expressed her opinions with Richard, he threw a coffee cup toward her head which flew out an open window and travelled 5 metres before smashing on the neighbour's brick wall. On another occasion he ripped up certificates of her achievement in music. If she went out he would call her regularly to check on her movements and who she was with. Over time Jane tried to follow his instructions so as to avoid his angry outbursts; however she found herself becoming increasingly isolated, anxious and depressed, diminished by Richard's abuse, and lacking in self-esteem. Meanwhile, she was caring for two children, for the most part by herself, and coping with the additional challenges of establishing a home and friendships, and raising a family in various overseas locations. Despite Jane's 'anything-for-peace' approach, Richard repeatedly criticised her mothering and homemaking abilities; and the children would often express concern for how she was feeling after Richard had finished his abusive rants.

Jane became distressed about how one of the children was coping and behaving and managed to get Richard's approval to spend money on therapy on the basis that it was about the child. It was during this time that Jane realised that she needed help herself, and began attending therapy sessions in secret, knowing that Richard would be outraged and refuse to pay if he found out.

Jane describes an emotionally traumatic separation that was prolonged over five years as she struggled to find ways to persuade Richard to address the problems in their relationship together. Jane felt she had to try hard to do what she could to save the marriage, but at the same time was learning to understand and deal with the fact that Richard had controlled her behavior for so many years. She decided that it was best to return to Australia, settle the children into their final years of high school, retrain, get a job and try to rebuild herself while Richard remained in his overseas position. When he visited from time to time, Jane tried to arrange couple counselling, but Richard would either get angry or disengage.

Eventually Jane felt the marriage was over and she engaged solicitors to take the necessary steps to deal with issues relating to the children and property. In the years that followed Jane spent $100,000 of her own

and family funds on legal fees, an outlay that has significantly eroded her financial resources. She reports having competent and supportive advisers, however believes that they were unable to effectively deal with Richard's evasive, manipulative and dishonest conduct in relation to disclosure of income and assets, preservation of assets, child support, mediation, and settlement of consent orders. She reports that Richard would send numerous emails to her solicitors based on the assumption that her solicitors would read them and then charge her. She feels that it perhaps would have been preferable to take the matter to trial where Richard's conduct and credibility could have been assessed by a court, but concedes the merits of her legal advice that the financial and emotional cost of this option would have been prohibitive. Richard continued to humiliate Jane through this process by cutting off services and insurance, cancelling the children's school enrolments, and reneging on agreements. In particular he reneged on a signed Mediation agreement for settlement. Richard also systematically used the Child Support system to continue the emotional and financial abuse. For instance, despite several international flights and maintaining business interests and assets overseas, Richard was able to convince Child Support that he had no income. Richard has also driven onto the property Jane is renting after she asked him not to. She finds him intimidating and at one stage considered applying for a protection order against him. Jane reflects that at no point has Richard ever been held accountable or borne any consequences for his abusive behaviour.

When the consent orders were finally put before the court for approval, the judge acknowledged they were unjust and inequitable to Jane, but the reality of her situation dictated that she would be unable to afford the cost of having the multiple contested matters adjudicated on by the court. While Jane knows that she did not receive the share of the marital assets that she was entitled to, she feels fortunate that her settlement funds will be sufficient to be financially comfortable provided she continues working and spends prudently. She is finally able to work toward full registration in her chosen career, which she was unable to pursue previously.

Victim experiences - Jennifer

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Animal abuse] [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Following, harassing and monitoring] [Myths] [Older people] [People living in regional, rural and remote communities] [Police-initiated orders] [Protection orders] [Risk] [Sentencing] [Victim experiences of court processes] [Women]

Jennifer and Frank are in their sixties and were in a relationship for five years. They have both been married previously and have adult children. Jennifer has always worked in various skilled positions, and entered retirement well self-funded, with superannuation savings and an unencumbered house property. Frank did not complete high school, however Jennifer believes he is highly intelligent with good commercial sense, and runs a seemingly successful business. Their relationship progressed quickly, and before long Frank had moved into Jennifer's house. Frank had told Jennifer that he was divorced, but she learned much later, after having contact with his first wife with whom she became friends, that Frank had lied about this. Frank ran his business in a rural town a few hours' drive from where Jennifer had been living for many years. Given the uncertain economic climate, Frank convinced Jennifer that it would be prudent to move to the town and keep a better eye on the business. Jennifer believed Frank was envisaging a 12-month plan, which she embraced as a welcome change from city life. With Frank's strong encouragement, Jennifer bought an acreage property on the outskirts of the town, funded by a mortgage using the equity in her house, with Jennifer and Frank as joint borrowers.

While Jennifer very much enjoys the rural setting and lifestyle, she describes signing the contract on the property as 'signing her death warrant'. Having moved in—along with Jennifer's two much-loved, blind and aging dogs—Frank became immediately violent. Jennifer is a confident and capable person, and thought Frank respected her for this; and yet if Frank didn't get his own way, he began damaging the flooring and

woodwork, breaking things, and throwing objects across the house, including coffee cups past Jennifer's head, into the wall. One winter evening, having urged Jennifer to have a shower upstairs, Frank propped the pool gate open allowing one of her dogs to wander in and fall into the pool, leaving it to drown. At Jennifer's inconsolable distress, Frank said aggressively 'he's dead, fucking get over it'. Jennifer believes that Frank resented her self-confidence, and relished trying to 'bring her to her knees'. When they bought identical smartphones, their accounts were synchronised inadvertently, and Jennifer became aware that Frank was having relationships with other women, as she was able to read the incoming and outgoing text messages. Frank quickly arranged for the accounts to be desynchronised. The situation was intolerable to Jennifer, and she felt she had to bring an end to the relationship; with the help of her family, she managed to get Frank to move out of the house.

Frank's intimidation and abuse of Jennifer escalated on separation. Jennifer was forced to make the total monthly mortgage repayments on the property as Frank refused to contribute. Her retirement income could not sustain this substantial outlay; and soon she had no choice but to sell her city property, and apply the funds to discharge the mortgage, taxes and other outstanding expenses. Jennifer is unable to sell the acreage property due to a depressed real estate market, and even if she could, she would not have sufficient funds to buy where she had lived previously. She feels trapped and vulnerable in a small town where Frank also lives and runs his business. And yet she felt that in order to function in that environment she must adopt a cordial attitude to Frank, or life would be unbearable. Frank is a tall, extremely heavy man, with an aggressive demeanour. Initially after separating, Frank would come around to the house and offer to help with the pool and other jobs; however the situation would often deteriorate quickly and, if Jennifer didn't accede to his various demands, Frank would yell profanities at her, and take the pool equipment or the car, returning them only when he decided Jennifer was behaving properly. Frank then began stalking Jennifer by coming to the house at night, peering into and rapping on windows, and going through the garbage bins and letterbox. Jennifer became increasingly fearful of Frank's behaviour, and called the police on a number of occasions.

For the most part, Jennifer feels the police were approachable enough, but ineffective in advising her of her rights or available protections; one officer referred to an incident as 'just a domestic'. This was the case until one day Frank arrived at the house demanding that he and Jennifer resume living together; he threw a coffee cup over the balcony, and when Jennifer tried to close the automated swing door as he was storming out of the garage, he stopped the door in its tracks, buckled and broke it, and told her, 'I'll get you, you fucking bitch'. That night, once police were alerted, they took charge of the matter, and obtained a temporary protection order on Jennifer's behalf and charged Frank with intimidation and criminal damage to property.

Jennifer recalls feeling dumbfounded by their heavy-handed turnaround, and terrified of how Frank would react, most particularly towards her, given the comprehensive and damning statement she had provided the police. She also didn't realise she would end up in court.

Jennifer felt frustrated and diminished by the court process. She was cross examined by Frank's lawyer for a lengthy period, and subjected to attacks on her character and behaviour. The prosecutor did not interview Jennifer prior to the hearing, and therefore had little or no understanding of the facts and context of the matter, most importantly the history of Frank's domestic and family violence towards Jennifer. Frank behaved inappropriately in the courtroom, and the (visiting) Magistrate threatened his removal from the court room. He also gave inconsistent evidence, which on the criminal damage charge wasn't believed, and ultimately he was fined, and a conviction recorded. He was acquitted of the intimidation charge as the Magistrate found there was a lack of evidence. Jennifer believes that had she been given an opportunity to provide a full account of the facts and context to the prosecutor, this would have been conveyed to the Magistrate. When she walked out of the courthouse, Frank yelled abuse at Jennifer and told her he was going to get her. Frank has recently successfully appealed the conviction, and successfully contested the issue of a final protection order.

Frank has never paid for the damage to the garage door, and while the Magistrate said the civil matter could be dealt with at a courthouse located in another town, the legal, travel and associated costs would have been prohibitive to Jennifer. She was also unable to claim on insurance without bearing a disproportionate penalty. There is some prospect of Jennifer claiming victim compensation; however she has not felt strong enough to begin this process.

Jennifer believes that she has done all she can to secure her home with cameras, lights and locks, and yet she feels profoundly unsafe. He has continued to intimidate her from the neighbours' fence line and from the street and elsewhere in the small town. Frank has also ingratiated himself to some of her children and their partners undermining her own relationship with them in his efforts to hurt and distress her emotionally. Despite having obtained the order on her behalf in the first instance, the police have now told her there is nothing more they can do for her. At this stage, Jennifer fears for her life and future, and can see no legal recourse for her protection. She has also discovered that Frank has had similarly violent relationships with other women in the past and also that Frank has told neighbours that Jennifer is mad and unbalanced.

Victim experiences - Julia

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Coercive control] [Damaging property] [Emotional abuse] [Exposing children] [Following, harassing and monitoring] [Myths and misunderstandings] [Parenting orders] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Protection orders] [Risk] [Sexual and reproductive abuse] [Social abuse] [Victim experiences of court processes] [Women]

Julia and Adam were in a relationship for three years, during which time they had a child who was just under 12 months old at separation. They both completed secondary education and apprenticeships in different fields. Julia was employed until the child was born and is now the primary carer and in receipt of a Centrelink sole parent pension. Julia and the child live with Julia's mother. Adam is employed and required to travel often as part of his work. They have an informal arrangement where Adam has supervised contact in a public location with the child (and Julia present) for a couple of hours one day a week, or as his work permits; Julia has been happy to accommodate his changing schedule. However when Adam threatened to apply for residence of the child, Julia began investigating Family Law orders. Adam is a frequent user of cannabis, and suffers from memory loss, depression and mood disorders as a result of a brain injury he received several years ago in a car accident. While Julia doesn't believe Adam would do anything intentionally to harm the child, she has observed that his attention span is limited, he forgets to watch the child, he smokes in the child's presence and leaves dangerous items within reach. Julia is also concerned about the unhealthy influence of Adam's family. Julia is consulting her doctor about the anxiety she is experiencing from her abusive relationship with Adam.

Since Adam's brain injury, his mother has held power of attorney over all of his affairs and otherwise dominated his recovery, rehabilitation and decision making. Julia believes that this loss of control over his life led Adam to assert control over Julia. She was also made to feel responsible for Adam's emotional care, even

though she felt that the brain injury was used as a ready excuse for Adam's abusive and dysfunctional behaviour. He objected to her working in a male-dominated industry, she wasn't allowed to continue dancing, and restricted her from spending time with her family and friends. He threatened to turn up at Julia's workplace and make a scene so she would lose her job. During her pregnancy, they moved into and renovated a house Adam had inherited from his deceased father. Adam would dictate who could visit and when. At least every second week, and increasingly so through the pregnancy and after the child was born, Adam would rage out of control, and throw Julia's belongings out the front of the house and tell her to leave. By this stage, Julia had discovered that Adam also had a serious drug problem, and became very concerned about the potential effects on a newborn. Once Julia stopped work to have the baby, Adam would regularly tell her that he was the only one working, and she needed to shut up and do as she was told. Julia would respond by saying that she was entitled to her own opinion regardless of whether agreed, but realised that there were times that this would produce an explosive reaction in Adam involving his screaming in her face and standing on her feet so she was unable to move. Adam gave Julia money only to buy groceries and nappies, and refused to pay for new clothes for Julia who had lost a considerable amount of weight due to stress. They had a joint account, but Adam would withdraw any available money denying Julia access to funds; he would mostly spend the money on cannabis. Julia's mother would often pay for items Julia and the child needed. Adam also insisted that Julia not take contraception as he wanted another child; Julia was forced to comply, but did not want to subject another child to Adam's violence.

The control exercised by Adam's mother extended to their relationship. They were unable to pay bills without her approval and, soon after the birth, Julia was forced to put the baby on formula milk so Adam's mother could have the baby for overnight stays. Adam first hit Julia when she was holding their six-week-old baby. Yelling, dragging Julia through the house and throwing her out the front of the house became the norm in the relationship. Julia would regularly have bruising that she tried to conceal from friends, or she would simply not go out to avoid the embarrassment of having to explain her circumstances and justify staying with Adam so that the child had the care of both parents. Julia believes Adam was oblivious to the consequences to her and the baby; he would become so blind with anger that there were no boundaries to his violence. Adam's mother often witnessed Adam's violence and made no attempt to stop him. Julia regularly felt her own life was in danger, however always left the house to stay with her own mother if she believed the child was at risk. Julia has noticed that the child is now fearful around men, and cries at the sound of a deep voice.

Julia attempted to leave Adam on a number of occasions, however Adam threatened that the court would punish her for taking the child away from him. Julia's greatest fear is losing the child. As he'd done previously,

when Julia indicated that she would like to return to work, Adam threatened to sabotage her chances. While Adam didn't harm Julia's two cats, he did threaten not to allow her to take them if she left. Julia felt she could no longer deal with Adam's manipulation so, for her own preservation, acquiesced to his behaviour and didn't bother pursuing any of her own interests. Julia's mother was concerned for her wellbeing and tried to talk to Adam, which resulted in a terrifying road rage incident. Adam repeatedly tried to exclude Julia's mother from their lives.

On one occasion following Adam's violence, Julia rang the police from her mother's house. She was very reluctant to send the police to interview Adam as he had always told her that if she involved the police, he would say that she was the perpetrator, and would make sure she lost care of the child. Julia reports that the police were reasonably supportive; they gave her information about available counselling, and suggested she move in with her mum and keep away from Adam. They did not however encourage her to seek a protection order as they indicated that it may jeopardise her relationship with the child. At the time, Julia was confused by this approach and, in hindsight is dismayed, as she believes that a protection order would likely have prevented more violence and suffering.

Julia did leave the relationship and took the child to live with her mother. While Adam's physical violence stopped, his abuse continued in the form of threats in text and voice messages including that he would send people to get her, that he would take the child, and that she deserved to be put in the gutter and kicked in the back of the head. Julia found these threats particularly frightening as she was often at home alone at night with the child while her mother worked night shifts. Again, she contacted police with the detail of Adam's behaviour and they urged her to attend the station and have a protection order taken out. When she arrived, with the text and voice messages on her phone, she was told Adam's threats weren't sufficient to justify an order or to charge him with any offence such as stalking, and she would have to make an application for a protection order on her own behalf at the court. Julia felt embarrassed and distressed when she left the station, believing they thought she was simply trying to get attention. Julia then rang a police information line as she needed advice on the application process, and remarkably they told her to try another police station. When she did this, the police were more interested in Adam's involvement with illicit drugs than the immediate threat of Adam's violence and referred her to the court to obtain a protection order.

Julia downloaded the relevant forms and sought assistance from the court's domestic violence support service. She appeared before a magistrate and obtained a temporary protection order against Adam. Julia felt that the magistrate had read her file carefully, took her circumstances seriously, and reassured her that she

was doing the right thing for the right reasons. It was explained to Julia that she would be notified of a return date once Adam had been served; she was also aware that service may be delayed given Adam's frequent absences for work.

Julia is also preparing a Family Court consent order application proposing that she have residence of the child and Adam have contact on similar terms to the current informal arrangements.

Adam has Julia's mobile number so he can make contact in relation to arrangements for the child; however he is not aware of where Julia and the child live. Adam's abusive behaviour continues in texts and phone calls when he unreasonably demands to see the child at short notice and Julia doesn't comply. His anger escalates quickly, his language is profane and threats of violence continue. Julia has blocked Adam on Facebook, but believes that he posts on his own Facebook page long tirades accusing Julia of preventing him from seeing the child, and as a consequence she has been verbally attacked online by his followers.

Julia feels her life is starting to get back to normal now that she is dealing with the domestic violence and parenting matters, and she and the child are living away from Adam and in a safe and supportive environment with her mother. She is seeing friends again who she was cut off from when she was with Adam; Adam would either disallow visits or make them feel uncomfortable when they did visit. Many of Julia's belongings including furniture were damaged from Adam throwing them into the yard, so when it came time for her to move to her mother's house, she was left with very little. While Julia's experience of the court support service is very positive, she remains concerned that the police disbelieve her, and she is therefore unlikely to seek their help in the future. Julia is keeping copies/recordings of all text and voicemail messages from Adam, and she has applied for legal aid to fund legal representation for the protection order hearing. Adam has transferred his accounts and assets to his mother and told Julia that she won't get a cent. Julia has applied for a child support assessment.

Victim experiences - Leah

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Dowry related abuse] [Economic abuse] [Emotional and psychological abuse] [Exposing children to domestic and family violence] [Following, harassing and monitoring] [Parenting orders] [People from CALD backgrounds] [People with children] [Physical violence and harm] [Pregnant women] [Protection orders] [Sexual and reproductive abuse] [Social abuse] [Victim experiences of court processes] [Women]

Leah and Ethan were both born overseas, share a country of origin, and speak English as a second language. They are both tertiary educated. While they didn't know one another, their respective families decided they were a good match and so they married. In a sense, it was an arranged marriage; Leah says she proceeded with it out of respect for her parents, and was too young to have any idea of what marriage involved. Sometime before the marriage, Ethan had come to Australia on a student visa and was later granted permanent residency. Once married, Leah travelled to Australia on a tourist visa and was later also granted permanent residency. Leah and Ethan were in a relationship for five years, however continued to live, separated under the one roof, for a further five years. They have two children, the older born overseas, the younger born in Australia.

Leah and Ethan married overseas according to certain traditions and customs. These influences had not been strong in Leah's upbringing, so she found the experience strange and unfamiliar. She recalls being derided publicly by Ethan's family about dowry and other issues. Following the wedding there were numerous events and ceremonies over many days. Ethan made no contact with Leah during that time until he approached Leah's father to advise that he couldn't look after Leah for a while as he needed to sort out visa problems.

Eventually Leah and Ethan travelled to Australia. They lived in a motel until they found a house to rent. Leah felt insecure, nervous and isolated. Ethan left for work each morning, and told Leah to lock the house and not

go out. Ethan did not give Leah any money; rather, he would take her to the shops to buy the groceries and he would pay. Leah had no experience of cooking or cleaning or running a household; if she were in her home country, she would have received a great deal of help and support from her family. Leah tried to learn about housekeeping on the internet. Ethan monitored her internet usage, and kept the passwords. Ethan wouldn't buy a vacuum cleaner and made Leah pick up dirt with her hands. He was angry often, complaining that the house wasn't clean and Leah was a burden. Leah was rarely allowed to call her parents, and when she did, the call had to be on speaker. Ethan bullied Leah about being a vegetarian, and told her they couldn't have a relationship if she didn't eat meat. As a result Leah began to eat meat, but when she ate meat Ethan would call her a 'pig' and ridicule the way she ate.

On one occasion, Ethan went on a work trip which was meant to be for two days, but he didn't return for ten days. He left Leah with no money or phone access. Leah had only enough packet noodles to eat once a day. She was terrified of being alone for that period; she stayed up all night in front of the television and tried to sleep during the day.

Leah and Ethan travelled overseas for a month when Leah was in the early stages of her first pregnancy; it was a work trip for Ethan. Leah was unwell with morning sickness and unable to leave the hotel room. Ethan would not allow her to order food claiming it was too expensive. She went for days without food, was exhausted, and lost a significant amount of weight. Leah then went back to her home country to stay with her parents for the balance of the pregnancy and the birth. They were extremely worried about her health, but were unaware at that stage of how Ethan was treating her.

After the birth, Leah and the baby returned to Australia to live with Ethan in a house he had purchased. Leah describes herself as a slave throughout the relationship. Ethan called her from work multiple times a day to check she had showered, cleaned the house and done the other chores he required. He stipulated who Leah could and could not have contact with, and what she was able to wear, insisting that Australian dress was not appropriate. Leah did however become more assertive regarding matters affecting the child's wellbeing. Ethan refused to spend money on a pram, car seat and other usual baby items, and resisted when Leah asked for money to buy baby food and other essentials. Ethan would verbally abuse Leah in the shopping centre and, when home, would push her, pull her hair and grab her around the throat. Ethan would also rape Leah regularly despite her cries for him to stop. On one occasion he dragged her by the hair and violently raped her while the youngest child was sleeping alongside the bed. Leah never wanted Ethan to come near her; she had no contraception, nor any understanding of it. Leah rarely left the house, and even within the

house, she stayed mostly in one corner of her bedroom near the television, going to the kitchen only when required to cook. She never went to the upper level of the house.

Leah's parents visited for a few months during and after Leah's second pregnancy. Leah told Ethan that she needed the help and her parents would pay for most things. The parents were shocked to witness first hand Ethan's treatment of Leah. Her father was distressed by what he felt he had allowed happen to his daughter and suffered a long period of depression.

Despite the debilitating effects of Ethan's violence and abuse, Leah looked for opportunities to become less dependent on him. She studied and gained a further degree, got a job, opened her own bank account, and paid for the groceries from her own money. Ethan objected to Leah's new independence and suspected she may be planning to leave. He stopped work so he could be at home to monitor her. He hid recording devices and sensors around the house. Leah confronted Ethan, asking him to explain his behaviour, and then turned off or broke the devices.

Over time, Leah did gather the courage to leave. She knew she had to be careful as Ethan was likely to become angry and violent and would try to stop her. Leah sought advice from a community legal service about applying for a protection order. Whenever Ethan was out, she began shifting her belongings to the neighbour's house. She organised alternative private accommodation and, while her parents were still visiting, in a single day, got their help to move in and look after the children so she could attend the Magistrates Court. The legal service had prepared the necessary documents and a solicitor met her at the court ready to apply for a temporary protection order. When Ethan discovered Leah and the children had left, he called and messaged her repeatedly, threatening to report her to the Federal Police. Ethan agreed to a one year protection order. He also had Leah put on an immigration watch list to prevent her from leaving the country with the children.

Ethan organised mediation to make contact arrangements. Leah felt that Ethan manipulated the mediator, and that the mediator did not listen to her requests or concerns, including that she did not want to be in the same room as Ethan during the process, despite the mediator being aware of the protection order. Leah was not happy with the outcome allowing Ethan contact for 11 nights across 28 days, but she agreed nevertheless. Ethan rarely complied with the contact arrangements. Leah instructed a lawyer and a hearing date was set in the Federal Circuit Court to deal with property matters. Meanwhile, Ethan continued to message Leah about getting back together. Leah ignored his pleas, but was concerned that he would use the children to continue controlling her.

Leah says the protection order was effective as Ethan's harassment by text stopped and she was otherwise free from any form of contact with him. Leah did not seek to apply for another order on its expiration as she believed she would need to engage a lawyer, which she couldn't afford. Leah remains frustrated and concerned by Ethan's care of the children; in particular, the younger child does not want to spend time with Ethan. The older child, a mature and independent teenager, moves freely between the two houses. Ethan is unreliable and rarely confirms arrangements with Leah. The older child tends to be the liaison and buffer between them.

Property matters have now been settled by consent. Ethan was reprimanded by the Federal Circuit Court judge for his failure to disclose his financial position. While Leah was represented by a lawyer, she felt she must settle as she did not have the resources to fund the matter to a trial. Ethan is required to sell the house they lived in, and the profit along with superannuation is to be shared equally. Leah received a much smaller sum than she expected from the sale of the family home and most of it will be spent on the considerable debts and expenses she has to discharge including legal fees.

Leah experienced years of physical, sexual, financial, emotional and social abuse. The abuse was seriously detrimental to her sleep and health. Now that she has left the relationship and taken steps to protect herself, she feels safer however, she believes Ethan is spying on her and that he has made contact with her neighbours. She also believes that Ethan tries to control her through the children. Leah has had to retrain as her previous employment was beginning to cause health problems. She cares for herself and the children on a part-time wage and minimal welfare while she is studying. Ethan pays no child support. Leah is determined to improve her circumstances and build a good life for her children. She believes that because of insufficient funds she was unable to achieve fair results through the justice process. She has immense praise and gratitude for the assistance she received from the community legal service and social workers.

Victim experiences - Leyla

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Cultural and spiritual abuse] [Emotional and psychological abuse] [Family Court order] [Following, harassing and monitoring] [Forced marriage] [People from CALD backgrounds] [People with mental illness] [Physical violence and harm] [Protection orders] [Sexual and reproductive abuse] [Social abuse]

Leyla is 15 years old.

Leyla moved to Australia from Iraq when she was 12 years old. Leyla lives with her parents, siblings and uncle.

Leyla's mother told Leyla that arrangements had been made for her to marry an older cousin in Iraq. In preparation for the marriage, Leyla's family travelled to Iraq and paid a dowry. Leyla's parents told Leyla that after the end of the next school term, she would no longer be going to school. Leyla's older brother told Leyla she didn't need to go to school now because soon she would be married. Her new role would be to look after her husband and their home.

Leyla did not want to get married. Leyla wanted to keep going to school. She likes school. For Leyla, it feels very important to her that she finishes her education.

Leyla told her mother that she did not want to get married. In response, Leyla's mother told Leyla that she was bringing shame on her family. Leyla's mother slapped Leyla in the face and pushed her, causing her to hit her head against the wall. Leyla's mother took away her mobile.

Leyla told her teacher about her family's plans to force her into marriage. Her teacher made a report to the child protection agency, who contacted the Australian Federal Police.

Leyla left home with the assistance of the Australian Federal Police. Leyla now lives in youth supported

accommodation.

Once Leyla left home, she also disclosed that her uncle had been sexually inappropriate towards her, including exposing himself to her. This allegation was investigated by police and child protection.

The Australian Federal Police referred Leyla to Legal Aid. With the representation of Legal Aid, Leyla made an application to the Family Law Court for orders placing Leyla's name on the Family Law Watch List and restraining her family from removing her from Australia or from forcing her into marriage.

Leyla's family have made ongoing threats to Leyla. Leyla's brother sent Leyla a message over Facebook saying "If you don't come home soon, then Dad will have you killed". With the assistance of Legal Aid, Leyla reported this behaviour to the police. Police applied for a protection order to protect Leyla.

Living in supported accommodation, Leyla feels very isolated from her religion, culture, family and friends. Leyla has struggled with her mental health; and at times, has felt suicidal.

Victim experiences - Lisa

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Animal abuse] [Breach of protection order] [Children] [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [Legal representation] [Myths and misunderstandings] [Parenting orders] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Sexual and reproductive abuse] [Social abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Lisa and Sean were in a relationship for four years, and had a child together who was aged around two years at separation. Also living with them was Lisa's primary school aged child from a previous relationship. Both of these children have disabilities and special needs. Lisa has adult children too; they have families of their own and live independently. Sean was still married to someone else when he and Lisa met through work. Lisa did not complete high school; however she has spent some years studying to gain qualifications that will enhance her employment prospects. Sean qualified in a trade and has held a well-remunerated position for at least as long as Lisa has known him. Sean has an illicit drug habit and misuses alcohol.

When Lisa and Sean moved in together, Sean wanted Lisa to stop work and be a stay-at-home mum. This was unfamiliar to Lisa as she had always worked to support herself and her children through years of mostly single parenting. Initially, she was thrilled by Sean's generosity and the prospect that they could establish a happy, stable family life together without the pressure of her having to earn money. Over time however, Lisa realised that this was Sean's way of asserting his control over her. Details also emerged about Sean that she hadn't previously been aware of, in particular his history of serious drug use and ongoing use. In the first year of their relationship, Sean expected Lisa to support him through the difficulties he was experiencing in divorcing his wife and then with the illness of a close family member. Despite also having to study and care

for a child with disabilities, Sean insisted that Lisa's focus be on him. This was an intense time for Lisa; she miscarried, and then later successfully conceived.

During Lisa's pregnancy, Sean's behaviour towards Lisa became violent and abusive, and his drug use increased. He objected to Lisa making contact with her former work colleagues (especially males), and monitored her Facebook activity. The reception on Lisa's phone network was so poor that Lisa was mostly unable to call friends. Sean, on the other hand, was in regular phone and Facebook contact with female friends, one of whom sent him provocative photos of herself. When Lisa suggested this was inappropriate, Sean got angry and told her she was jealous and paranoid. When Sean was coming down from a drug bender, he would anger easily, and shout at and belittle Lisa's other child. This infuriated Lisa and she tried to stand her ground with him; Sean told her she wasn't allowed to shout. On one occasion, Sean returned home, smashed his phone in front of Lisa, and then flung a heavy jacket and zipper across her pregnant stomach resulting in bleeding and long-term injury to the child. She spent over a week in hospital and was distressed knowing that her other child was in Sean's care while he and friends had long sessions of alcohol and drug taking.

After their child was born, they moved to an isolated regional town so that Sean could take up a higher-paid position. Lisa only had access to the Centrelink family allowance payments to buy groceries, clothes and other household expenses. Sean made the mortgage repayments on the house and spent the balance of his wage as he wished. When Lisa asked him to supplement the family benefit payments, which were insufficient to cover the family's needs, he would become aggressive and argumentative. Lisa was blamed for living costs and anything else that Sean refused to take responsibility for, including falling asleep at the wheel while driving, with Lisa and the children as passengers. Lisa has an 'inside' dog that she and her other child remain very close to. Sean made the dog live outside with his own dog, which inevitably resulted in fights. Sean told Lisa she needed to put her dog down; she resisted and kept the dog.

Sean made no effort to help with the care of the children, the dogs or the home. Lisa attended to all of these things even when their child was an infant and awake through the night with feeding and teething troubles. Early one morning, Lisa asked for help with the baby; Sean told her she was lazy, and went back to Facebooking his friends. Again, Lisa was exasperated by his response and kicked a large, empty water bottle along the floor towards him. Sean grabbed and threw her against the wall, dislocating and disfiguring her shoulder. While Tina screamed in pain, Sean yelled abuse at her for an hour before driving her to the hospital. He then apologised profusely, begging that Lisa not pursue charges. The hospital gave Lisa the

name of a local domestic and family violence service, and referred them both to joint counselling, which they attended briefly. Sean refused a recommendation to attend all male counselling.

It was six months before Lisa was given an appointment for surgery to correct her serious shoulder injury. Meanwhile, she endured significant pain, and Sean subjected her to further violence. A particularly frightening incident involved Sean lifting Lisa up and throwing her through a door frame. She managed to head butt him and knock out two of his front teeth. She later suffered another miscarriage and prolonged bleeding. When it came time for Lisa's surgery, a family member came to help out. This angered Sean too. When they left, Lisa was exhausted, managing her post-operative pain with medication, looking after the baby and older child, and sleeping on the couch to avoid confrontation with Sean. One evening, he demanded that Lisa have sex with him—as he always had—and, for the first time, she refused. He followed her around the house obsessively, and when in the baby's room, punched his fist through the wall beside her head. The next morning, Sean left for work as if nothing had happened. Lisa packed up the children and her belongings, contacted the local domestic and family violence service and organised a Centrelink support payment, and drove to another state. Lisa arranged for her other child to stay with the child's father with whom she has a healthy and constructive relationship; and Lisa and the baby went into temporary crisis accommodation until she could get set up in a rental house. She asked Sean to send money to assist as she knew he had extra cash.

Lisa had settled the children into their new home when Sean arrived wanting to see them, and seeking a reconciliation. Lisa agreed on the basis that they live in a city location. They moved into Sean's former marital home (of which he was now the sole owner under Family Court orders) and resumed an intimate relationship. Lisa insisted on a lease in the event that things did not work out with Sean. She paid the rent and utilities bills, and Sean made the mortgage repayments. Before long, Lisa experienced further serious health problems, and required extended hospital treatment. Sean refused to take leave from work to care for the children, so she was forced to take them with her to the hospital. At this point, Lisa told Sean to leave the home as she'd had enough. She asserted her rights as lessee of the property. Periods of making up and breaking up followed, however they continued sexual relations.

Sean's lawyers served an eviction notice on Lisa claiming that the property was to be sold. She vacated, and Sean moved back in; he had no intention of selling the property. Sean would often stay over at Lisa's new address, and she agreed to informal and regular overnight contact arrangements. When she refused further sexual relations, and soon after her hospital treatment, Sean made an application for 50/50 shared residence of their child, notwithstanding the child's very young age and special needs. Lisa applied for a protection order

against Sean, but he persuaded her to withdraw it before service claiming that he would otherwise lose his job.

Over the following twelve months, the windows in Lisa's house and car were repeatedly smashed, and her house was broken into on multiple occasions. She is certain that Sean and his friends were the offenders. Sean also parked out the front of the house from time to time in different vehicles, and publicly abused and demeaned her on Facebook. On police advice, Lisa obtained a temporary protection order against Sean. Sean also made a cross application falsely alleging that Lisa misused alcohol during her pregnancy causing long-term harm to their child. Both applications were heard together: Lisa was granted a 12 month protection order; and Sean's application was dismissed. Lisa reported a breach of the temporary order involving Sean and others throwing rocks through her car windscreen and into her house near sleeping children. Police told her they were busy, and a photographer would attend in 24 hours. The current order allows Sean to ring the children at certain hours over the weekend. He is often stoned or drunk when he calls, and Lisa can never predict whether he'll be cooperative or aggressive.

Family Court parenting and property proceedings resulted in Sean having fortnightly access; there were two family reports prepared but the findings were not followed by the court. Lisa suspects that the protection order hearing was deferred pending the outcome of the Family Court matters, which were scheduled for a later time. Sean was told by the judge at the interim hearing that he would not succeed on his shared residence application; he persisted regardless.

Sean was legally represented, Lisa was not. She has been unable to access Legal Aid, and continues to do her best to manage these legal matters herself, with considerable difficulty. Lisa is however appreciative of the understanding and practical help she has received from local community legal services, domestic and family violence services, and court support. Lisa is still concerned for her own safety and the safety of her younger child. She believes that Sean is incapable of taking proper care of the child who often returns home after contact visits with cuts, bruises and rashes. Lisa felt frustrated and intimidated by the delays in the resolution of the protection order and parenting and property matters, and Sean's contribution to that delay.

Victim experiences - Melissa

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Aboriginal and Torres Strait Islander people] [Breach] [Damaging property] [Emotional and psychological abuse] [Exposing children] [Myths] [People affected by substance misuse] [People with children] [Physical violence and harm] [Pregnant women] [Protection orders] [Risk] [Sentencing] [Sexual and reproductive abuse] [Victim experiences of court processes] [Women]

Melissa and Ben were in a relationship for 17 years and had five children together, aged from toddler to early teens at separation. Melissa identifies as Indigenous. She has post-secondary qualifications and has been employed in a professional role for many years, apart from when the children were very young. Ben has always earned a high income from his trade job when not serving jail sentences for various convictions. Their combined income enabled, for the most part, comfortable material living circumstances. Melissa describes Ben as having been both generous and irresponsible with money. Their relationship was characterised by Ben's regular absences for work; and a number of periods of separation due to Ben's violence towards Melissa or his imprisonment as a consequence.

Early in the relationship, when they were living together, Ben began calling Melissa offensive and demeaning names, hitting and spitting on her, and forcing her to have unwanted sex; during some of these occasions, he would also be using illicit drugs. After three months, Melissa moved out and lived with family, returning briefly one evening with a (non-intimate) male friend who Ben assaulted. Ben was charged with and convicted of assault, and the police obtained a protection order on Melissa's behalf. Over many years Melissa had a number of protection orders.

Having spent a considerable period away from Ben, Melissa reinitiated contact as she wanted to have a child. Ben's violence towards Melissa escalated during her first pregnancy, as did his drug use. He would hit Melissa in the head, try to strangle her, and threaten her with knives. While Melissa knew these were

breaches of the protection order, she was too afraid to contact police as Ben would smash the phone and hold his hand over her mouth when she screamed.

Melissa left Ben again after the birth of their first child. When the child was three weeks old, Ben came to Melissa's residence, took the child out of her arms, and bashed her badly. A witness alerted police and Ben was charged with and convicted of assault. On another occasion, when Melissa and the child were not home, Ben broke into the residence and viciously damaged and wrecked her furniture and appliances, and sliced her mattress. He also kicked in the door of her friend's house and smashed household items. Ben went to jail for these offences, and Melissa moved elsewhere with the child.

Melissa was a single mother, working part-time and studying, and didn't see Ben for two years. During his jail term, Ben wrote to Melissa threatening to 'get her' on his release. Melissa took the letter to police, and believes that Ben's jail term was extended as a result, however she is not sure whether it was treated as a breach or parole matter; the police didn't advise her.

When Ben was out of jail, Melissa contacted him to ask if he wanted to see the child; she also wanted a second child. She says she'd felt lonely and longing for love, and Ben responded positively and warmly. However, soon after they resumed living together, and Melissa became pregnant, Ben's sexual violence started again. There were times when Melissa ran up the street naked and hid at a neighbour's house to escape Ben's force. He also continued the abusive name-calling, and told Melissa he hoped she got cancer and her body was maimed.

After the birth of their second child, the child safety services were briefly interested in the family's welfare. Melissa believes it was likely the police who alerted them to Ben's violence. Aware of the risk of the children being removed by child safety, Melissa stopped reporting the violence and abuse, notwithstanding its increasing severity and danger. Ben had once pushed her down the stairs while still pregnant and she'd sustained extensive blood loss from her injuries. On another occasion, he raped her while menstruating; and police arrived after being alerted by a neighbour. Police took a statement from Melissa and questioned her as to why she was still living with Ben. They expressed irritation that they'd been through this multiple times before with her, yet offered her no referral to support services. Melissa was shocked and distressed when she learned that child safety had visited the school and daycare to question her children without first speaking with her.

This pattern of violent and abusive behaviour—and police and child safety responses—continued for years.

When Melissa was pregnant with their fifth child, Ben came home in the early hours of one morning, in the aftermath of an intense drug bender, and began sexually assaulting Melissa. She physically attacked him, terrified of how he would react, fled the house carrying her own injuries. A family member returned to take care of the children and call the police. Melissa made a statement to police, and advised child safety of the incident. She and the children went to stay temporarily with a family member before returning to the home where Ben had stayed on. Child safety visited on a number of occasions, but never suggested the children would be removed. Melissa felt that they were more interested in hygiene than safety, and because she kept an immaculately clean and tidy house, they didn't appear concerned. The police did not charge Ben with breach of the protection order.

After the birth of their fifth child, Melissa left hospital early so that Ben could depart for his regular work stint away. On her return home, Ben spat in her face. Melissa says this was the point at which she snapped. She decided she would no longer tolerate Ben's behaviour, and rang the police. Ben left the house for an extended period, during which Melissa understands he got into trouble with his job and the law.

Ben continued working and contributing to the mortgage and family living expenses. Melissa was on leave from work following the birth of their fifth child. Given their combined incomes, she had never been on welfare benefits; however she became increasingly concerned about the violence and volatility in the family and applied for Centrelink assistance to protect herself and the children. She was also worried about how the children had been affected by their long-term exposure to Ben's violence and abuse, and sought counselling from a local service, which she found very supportive and helpful.

Ben returned after nearly twelve months. Melissa believed it was an attempt to reconcile, which she briefly and regrettably allowed. She was also aware that Ben was due to go to jail again, and could appreciate that he wanted to see the children. Melissa has Family Court residence orders for the first child, and no orders in relation to the remaining children. They have never lived with Ben other than when he and Melissa were residing together, and Ben never sought contact during his many absences from the family. Melissa is now considering the merits of seeking orders for her other four children.

Melissa believes the periods of separation imposed by Ben's terms of imprisonment and working away from home probably gave her the time she needed to recover from the acute impacts of Ben's violence and abuse, and to get on and work and care for the children. However, these circumstances also prolonged the violence and abuse over 17 years. Melissa says it is unlikely that Ben would reform if required to undertake behaviour change courses as part of his sentencing.

Reflecting on her involvement with the court system, Melissa believes that domestic and family violence isn't treated with the seriousness it deserves, that perpetrators can avoid service or attendance and matters have to be constantly adjourned, and that penalties are often fines or 'a slap on wrist'. Ben would taunt her that 'DV was just a piece of paper', and recklessly breached his protection orders on countless occasions. As to police and child safety, Melissa feels she received very little constructive support, and at times felt that she and the children were treated as a burden and frustration to these systems.

Victim experiences - Mira

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [People from CALD backgrounds] [People with children] [Risk] [Women]

Mira and Thomas met overseas through their work. Mira was born overseas, with English as her second language; and Thomas is an Australian citizen. They married and had their two children overseas. From Mira's perspective they were together for approximately fifteen years, however Mira says that Thomas is likely to believe that they are still together. Mira now lives in Australia with the children who are in high school. Mira arrived in Australia on a spousal visa and is now on a bridging visa, awaiting the issue of a spousal visa. Early in the relationship Mira stopped working to enable Thomas to pursue his career, which then required significant relocations to other countries so he could upgrade his qualifications; and has always involved Thomas travelling regularly and being away from home for lengthy periods.

Thomas's controlling and obsessive behaviours were apparent to Mira from the outset. He repeatedly pressured her to go out with him; and despite her telling him that she needed time following the end of a previous serious relationship, he persisted. Thomas would regularly send Mira gifts and deposit money into her account. She told him she did not want these inducements and he must stop. Undeterred, and knowing how important Mira's faith and traditions are to her and her family, Thomas announced to Mira that he had converted to her religion. Mira was shocked by Thomas's preoccupation with her, and urged him to back off. He told her he would kill himself if she didn't marry him and sat in the cemetery for hours brooding. Mira felt worn down by Thomas's fanatical efforts to win her over and yet was impressed by his religious conversion. Eventually she felt obliged to marry him, and hoped that over time she may grow to love him.

Mira committed to helping Thomas advance in his career and to raising their two children, however their

relationship was constantly fraught. Starting with their wedding, Thomas insisted on organising their shared life as he wanted it, and demanded Mira's support for his obsession with extreme sports training and competitions. Events and holidays were meticulously planned without consultation with Mira. She and the children were expected to comply and if Mira expressed an objection she was bullied and intimidated, and on one occasion Thomas strangled her in front of his friend who was staying in their home. Thomas controlled the couple's finances and required Mira to account for her spending and produce receipts. Thomas would then be away from the family for weeks at a time, with no contact, and Mira was left to parent alone. It was during these extended breaks that Mira felt she must tell Thomas that she was unable to continue in the relationship and that it was best they divorce. Whenever she tried to raise the issue with Thomas, he became angry and morose, and would lock himself in a room threatening to kill himself and accusing Mira of bringing harm to the family. On two separate occasions, Thomas wielded a knife at Mira, again threatening to kill himself. Mira was terrified of what he may do, including harming her and the children. The first time, acting on the advice of Thomas's family, Mira rang the local domestic violence support service, and they arranged accommodation for her and the children until Mira knew Thomas had left the country. The second time, they relocated to a friend's house.

After living in various overseas locations for a number of years, Mira decided that it was in the children's best interests to settle in Australia. They have been here for a few years, and in Mira's mind, the relationship with Thomas is over, though she believes that he does not want it to formally end so as to avoid any adverse financial consequences to himself. Thomas stalked Mira and the children whenever he returned to Australia. She has told him not to come near the house, but he now harasses Mira's family by telephone. They jointly own two house properties, in Australia and overseas. Mira knows that if she were to apply for a protection order or to seek property orders in the Family Court, Thomas would be enraged and she could not predict what he might do. She fears he would become uncontrollable and be arrested. Thomas currently pays for the children's education and living expenses; she would rather defer addressing her own legal issues than risk losing his financial support, though she remains fearful of him. Mira does what she can to encourage the children's relationship with Thomas despite his minimal genuine interest or involvement in their lives. Mira is aware that for as long as these matters are unresolved, she and the children will continue to experience Thomas's obsessive control over them.

Victim experiences - Rosa

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Cultural abuse] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Following, harassing and monitoring] [Interpreters] [People from CALD backgrounds] [Protection orders] [Risk] [Social abuse] [Women]

Rosa and Ken were both born overseas, and have completed tertiary education. English is Rosa's second language and she requires the assistance of an interpreter for other than basic communications. Ken is in highly-paid professional employment. They first made contact through an internet dating website, and then met in Europe for a holiday. The relationship developed quickly: Rosa arranged a tourist visa for Ken to stay for a few months with Rosa in her home country where they married and Rosa became pregnant. Ken's work then took them to another country where they settled briefly—together with Rosa's high-school aged child from a previous marriage—and their baby was born. Less than a year later, they all moved to Australia, again for Ken's work. Ken came on a temporary work visa with Rosa (as his wife) and the children as dependents. They separated only two months after arriving in Australia, when the infant was aged six months. Rosa advised Australian Immigration of the separation and related circumstances, and was granted a visa extension. While Rosa was in full-time work in her home country, she has not been employed since her departure.

Rosa explains that she noticed problems with Ken's behaviour during his first work posting (prior to coming to Australia). Ken began getting angry and upset, they argued often, and on one occasion he smashed a computer. He told Rosa that if she didn't trust him, the relationship was over. Once a week he would tell her she had to go back to her home country. After their arguments, Ken would tell Rosa he cared for and looked out for her. Yet during her pregnancy, Ken forced Rosa to do various activities that were not comfortable for her. Rosa was reluctant to disrupt her older child's schooling and opposed the move; it proceeded

nonetheless, and the child experienced considerable educational difficulties as a result. Meanwhile, Rosa was having great difficulty learning English as the course Ken made her attend was at too high a level. Once the baby was born, Rosa believes that Ken misled her about citizenship matters so that the child could be granted citizenship of Ken's home country.

When the family relocated to Australia, Ken began calling Rosa demeaning names, he told her she was stupid, and insisted that she learn and speak English rather than her native language. Again, he regularly told her she had to go back to her home country, but that she must leave the baby in Australia. He said he didn't want Rosa, only their child. Ken often used the child's citizenship as a threat to Rosa, asserting that there was no point in her seeking help from police because she had no legal rights in relation to the child. Their first month in Australia was spent in a motel while they waited for their belongings to be shipped. They then moved into an apartment, and Ken soon departed interstate for work. Unexpectedly one evening he arrived home, giving Rosa a fright. He told Rosa he was missing the baby. Rosa says, without thinking, she handed Ken the baby and they went out into the garden while she continued cooking. When dinner was served, Rosa and her older child realised that Ken had left the apartment with the baby. Rosa contacted Ken on his mobile; he told her he wanted a divorce, he was posting her a document, he had paid a year's rent on the apartment, he would pay her a minimal amount per week, and he was taking the child. Rosa called the police immediately. The police attended and stayed for approximately 20 minutes and tried to reassure Rosa as she was very nervous, upset and concerned because she was still breastfeeding the baby. They told her the child would be okay and could have a bottle. She did not find them helpful and later called the police again. Different officers attended and told Rosa the father had not stolen the child, and the child would be okay with him. Rosa became increasingly distressed, and rang the police a third time, and throughout the following day and night, pleading with them to find the child. She also tried to track Ken down without success.

Eventually, three days later, a police officer advised Rosa to go the Family Court and seek an order authorising that a PACE alert be put on the child's passport, which meant the child was placed on the airport watch list. A duty lawyer assisted Rosa; it was discovered that Ken had already filed an application for divorce and residence of the child. He alleged in his affidavit material that Rosa wasn't feeding the child and she tied the child down. Later, when the child was returned to Rosa, both child safety and a psychologist interviewed her and provided reports that found Ken's allegations were unsubstantiated.

Rosa was granted legal aid to fund legal representation in the child proceedings. Rosa was seeking residence. Rosa saw the child for the first time one and a half months after Ken had taken the child from the

apartment; initially she had supervised contact, which had been delayed due to problems locating an interpreter. After a number of Family Court appearances, the child was returned to Rosa's full-time care and Ken was granted weekly unsupervised contact. Both parents were prohibited from taking the child out of the country and Ken was prohibited from entering the apartment.

With the assistance of a local support service, Rosa obtained a one year protection order; Ken is required to be of good behaviour. Rosa represented herself as she was not entitled to legal aid on that application. She is entirely financially dependent on Ken as she is unable to receive Centrelink benefits and cannot find appropriate work given her limited English and childcare responsibilities. Rosa would have to text Ken weekly to ask for money to cover her living expenses. In response, Ken would repeatedly taunt Rosa by threatening to cancel her visa and take the child. Rosa also discovered that Ken had hired a private detective to follow and watch her.

Australian Immigration contacted Rosa after receiving notice of the divorce querying her intentions. She has sought advice from a community legal service about her visa status, and the implications of her older child turning 18. A student visa for the older child is an option; however a course of study would require funds that Rosa does not have access to.

Ken regularly breaches the contact orders, returning the child to Rosa late. Rosa attempted to photograph his arrival on her phone and he became verbally abusive. Further, in breach of the protection order, Ken bangs noisily on the door to Rosa's apartment demanding that she open the door and give him the child. On one occasion, the child was sleeping, and Rosa told him to wait until the child was awake. Ken persisted and Rosa rang the police. During his angry outbursts, Ken often slaps himself in the face and pushes himself against railings; he also asks Rosa to hit him. Rosa believes he may have a mental illness. Rosa feels frightened by Ken's behaviour, and continues to feel highly vulnerable given her financial dependence on him. She is not sure if Ken's work visa will be renewed. If his visa is not renewed the family will have to leave Australia, most likely to different countries. This is very distressing for Rosa as she fears she may be separated from her youngest child.

Victim experiences - Sally

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Emotional abuse] [Following, harassing and monitoring] [Myths and misunderstandings] [Parenting orders] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Protection orders] [Risk] [Sexual abuse] [Victim experiences of court processes] [Women]

Sally and Carl were in a relationship for around fifteen months, though they never lived together. They both have children from other relationships. Sally has an intellectual disability that affects her comprehension, communication and general coping skills, and she takes medication to help her manage anxiety and stress. She never received a diagnosis for her disability but has difficulty reading and writing, concentrating and remembering things. Sally has however completed secondary schooling and was employed prior to having children. Sally and the father of her children have a good and workable relationship as parents, and have Family Court consent orders that accommodate their circumstances and capabilities, and ensure that their children's best interests are served. Sally says that the children more often live with their father than with her, and she feels that this is best for them. Carl has, over the years, experienced problems with his mental health, misuse of alcohol, anger and self harming. He has been employed in unskilled jobs briefly, from time to time.

From early in the relationship, Sally recalls Carl wanting to control when and how often they saw one another. While Sally was pleased to have found companionship in Carl, she also values her privacy and being able to live in her own home. Carl would insist that she travel at night to see him, which she found frightening as she would have to use public transport. When she refused, Carl would become angry and repeatedly call and text her (often tens to hundreds of times in a single day), or arrive at her home unannounced. Carl would press Sally to take and send to him (via smart phone) highly personal photos of herself, which, sometimes, she did, and Carl would then threaten to share the photos publicly with others if Sally didn't comply with his demands.

Carl also appeared jealous of Sally's relationship with her former partner and father of her children, complaining to Sally whenever he was present at her home caring for the children.

Carl's behaviour worsened and became more violent and intimidating to Sally when he was drinking alcohol. There were two occasions a couple of months apart where Carl injured Sally badly around her head, face and chest by pulling her hair and throwing her against walls and cupboards, resulting in her admission to hospital. On the first occasion, a social worker spoke to Sally at the hospital about her options, and the police were alerted. At that stage, Sally was not prepared to apply for a protection order as she felt she could cope with the situation, and she still wanted to make her relationship with Carl work. On the second occasion, as well as severely bashing Sally, Carl stole money from her purse, and demanded that she participate in sexual acts, which she refused. Sally telephoned the police who, on the strength of her complaint and her injuries as evidenced by the hospital records, initiated a protection order application on her behalf.

A temporary order was granted by the court, however Carl made service difficult and contested the order, resulting in Sally having to obtain Legal Aid assistance and return to the court on three occasions before a final order was granted requiring Carl to be of good behaviour towards Sally for a period of six months. Carl was at all times unrepresented. Sally's lawyer had initially tried to pressure her into an exchange of mutual undertakings with Carl where they would both agree not to be violent towards the other, however Sally was not satisfied with this option, and the final order (as granted) was offered by way of compromise. Sally felt that six months wasn't long enough, and that she needed protection for two years. She was however happy with the "good behaviour" condition as she still wanted ongoing contact with Carl.

Following the protection order, Carl did at times, though less often, text and ring Sally repeatedly, however he no longer made physical contact. Sally changed her phone number more than once, but would forget and would call or text Carl using her new number resulting in Carl learning of her new contact details. While the protection order has expired, Sally feels very safe and settled now, having received financial help from Victim Assist to change the locks on her home and attend regular counselling. She no longer has any contact with Carl.

Through this process, Sally has had a positive experience with police and support services; however she feels that the Legal Aid lawyer could have better represented her needs. Sally is often confused about the nature, effect and origin of the various orders that have affected, or continue to affect, her and her children, and she will need ongoing support to ensure that she understands and her interests are protected.

Victim experiences - Sandra

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Animal abuse] [Breach of protection order] [Children] [Coercive control] [Emotional abuse] [Exposing children] [Following, harassing and monitoring] [Myths and misunderstandings] [People affected by substance misuse] [People with children] [People with disability and impairment] [Physical violence and harm] [Protection orders] [Risk] [Sexual abuse] [Systems abuse] [Victim experiences of court processes] [Women]

Sandra and Gary lived in a defacto relationship for some six years, though not continuously due to Gary's violence towards Sandra. They have two children together, both boys, aged approximately three and one on separation; the younger boy has a serious genetic disability with limited life expectancy. Sandra had previously been in an abusive relationship, and suffers from post-traumatic stress disorder as a result of a physical assault by a stranger. She completed secondary education and is employed in a sales position. Gary is on a disability support pension, earns little or no additional income, and has an alcohol and drug dependency. Gary has had protection orders made against him in two different states as a result of his perpetration of domestic and family violence in two separate prior relationships.

Gary's violence towards Sandra began around six months into their relationship. He would strike out at her physically, splitting her lip; emotionally abuse her, diminishing her self-esteem; and be forceful in his sexual demands, which Sandra would strongly resist rather than acquiesce to. Sandra has a horse she has cared for and been emotionally attached to for many years. Gary would threaten to shoot the horse, or slit the horse's throat; he also threatened to kill Sandra's parents. The violence continued after their first child was born when, for example, Gary karate kicked Sandra in the leg while she was holding the young child. Both Sandra and the child were hospitalised, and Child Safety formally intervened and arranged for their temporary safe accommodation. Sandra has not ever fully recovered from her leg injury, which requires expensive surgery.

Sandra confided in close friends about the violence she was experiencing and her concerns about bringing up

children in that environment. Whilst she was alert to their advice to leave the relationship, she also believed that doing so was likely to escalate Gary's violence. Sandra sought counselling during the relationship, intentionally without Gary's knowledge, to develop strategies to cope with the violence. Sandra had attempted on numerous occasions over the years to leave the relationship and relocate to areas a considerable distance away from Gary to ensure her own and her children's safety. On the birth of the second child, Sandra and the first child moved into a refuge while the newborn was being treated in intensive care at a nearby hospital for his disability related problems and before relocating the three of them to another city. On each occasion, Gary would track down Sandra and the children and seek to re-enter their lives. Focused on acting in the best interests of the children, Sandra would allow Gary to return provided he could be a responsible father towards the boys, not get into trouble with alcohol or drugs, not be violent, and not attempt an intimate relationship with Sandra.

However Gary's violence and dysfunctional behaviour continued. Sandra reported the violence to police in a range of locations, and obtained protection orders either on her own behalf or police-initiated. Following instances of attempted strangulation, stalking and telephone harassment Gary was convicted of breaches of these protection orders, resulting in brief periods of incarceration in the local watch house and suspended sentences. Gary was never charged with criminal assault or stalking.

When Sandra and the children finally left, she obtained a temporary protection order against Gary stipulating email contact only between them, as well as Family Court parenting orders stipulating that Sandra have residence of the children and Gary have contact with the first child every second weekend, and the second child for 8 hours of every second weekend. Gary paid Sandra negligible child support; Sandra was supporting the children almost entirely from her own resources. Sandra had been concerned about Gary's veiled threats not to return the older child to her, when this in fact transpired and the child remained with Gary for 28 days without attending school for eight of those days. Sandra qualified for Legal Aid and, after some delay, succeeded in child recovery proceedings against Gary. Whilst Sandra believed that Child Safety was diligent in its conduct of their part of the proceedings, she expressed frustration that police did not intervene immediately due to a belief that they have no powers in Family Court matters.

Subsequently, Gary sought a variation of the Family Court parenting orders to alter changeover from a supervised contact centre to parent-managed arrangements. In time, Sandra agreed, hoping that this would help the children feel more normal and relaxed about moving between parents; she also acknowledged that the contact centre was expensive and involved lengthy car trips, which weren't good for the children. During

these negotiations, Gary succeeded in securing repeated adjournments of the final protection order hearing on the basis that the Family Court orders ought be finalised first. Once finalised, on an occasion when she felt too intimidated by Gary to be present for the changeover, Sandra asked a male friend to be there on her behalf; he was intoxicated and an altercation ensued with Gary and his new partner. Soon after, the final protection order hearing took place, and while Sandra obtained a two-year order against Gary, with the children named as protected parties, Gary applied for and obtained an identical order (commonly referred to as a cross order or mirror order) against Sandra.

Sandra reported that on the many occasions she'd had contact with police, she experienced understanding and supportive officers who were focused on ensuring that she and her children remained safe. There was only one occasion she recalled when an officer doubted the veracity of her account that Gary had arrived angry and intoxicated at her home at midnight while she and the children were asleep then escaped without trace; and queried why she hadn't taken photographs of Gary trying to enter the house. Sandra also believed that her experiences of the legal and court processes were generally positive, and despite not having perpetrated violence against Gary, she felt safer overall for having the final protection order, and confident that she would never be in breach of the order against her.

Victim experiences - Sara

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

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The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Breach] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Engaging interpreters and translators] [Exposing children] [Following, harassing and monitoring] [Parenting orders] [People from CALD backgrounds] [People with children] [People with poor literacy skills] [Protection orders] [Women]

Sara and Victor were born and married overseas, and had a child together before coming to Australia, initially on refugee visas. It was a 12-year relationship that ended around a year after their resettlement, when their child was in primary school, and they'd been granted permanent residency. Sara worked as a qualified professional overseas and plans to study in Australia to have her qualifications recognised here. However, she must first study to improve her English proficiency as she currently needs an interpreter for other than basic communications. Sara believes that Victor was not educated beyond primary school. Neither has worked in Australia, however both have commenced studies.

Before their move to Australia, Sara was supporting the family financially and running the household while Victor refused to contribute his welfare benefits (received while in their country of origin). Victor became suspicious and jealous of Sara and the child's interactions with Sara's work colleagues and friends. Sara felt that Victor would improve once they came to Australia, however the situation worsened. When Sara was at home, Victor would lock the house and watch her from the outside; and when she went out, he would follow her. When Victor began hurting their child with household objects, Sara feared for his and her own safety, and took steps to end the relationship. Victor would send members of the local cultural community to which the family belonged around to their house. They would tell her that Victor felt sad and rejected, which she found very distressing given Victor's behaviour towards her and the child.

After a couple of attempts, Sara and the child left the house, and, with the help of local support services, they relocated and Sara was given advice about her legal options. She obtained the necessary forms from police.

The police were not willing to assist Sara to obtain a protection order and she was not successful in obtaining legal aid. Despite this, with the assistance of a local non-legal support agency she represented herself and successfully applied to the Magistrates' Court for a protection order against Victor with the child named as a protected party (after a series of adjournments over three months). Victor has not attempted to follow or make any contact with Sara since, and she has been careful to ensure that her address is not disclosed to anyone who may be in contact with Victor. Sara received Legal Aid and interpreter assistance to apply to the Family Court for child residence and contact orders, which she obtained following a mediation process. Victor is only allowed restricted weekly telephone contact with their child, however he does this less and less often.

Sara struggles financially as she is unable to work until she completes her studies, and a significant portion of her welfare benefits is spent on private rent as she is currently not able to access public housing. She reports however that Centrelink and the local support services have been very helpful. While, importantly, Sara feels that she and the child are safe, she also feels very isolated and somewhat concerned about the conduct of some members of the local cultural community who she believes continue to convey misleading messages to Victor on her behalf without her consent.

Victim experiences - Susan

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Children] [Coercive control] [Emotional and psychological abuse] [Exposing children to domestic and family violence] [Family law proceedings] [Following, harassing and monitoring] [Legal representation and self-represented litigants] [Parenting orders and impact on children] [People with children] [People with mental illness] [Physical violence and harm] [Pregnant women] [Protection orders - breach] [Protection orders - management of application proceedings] [Protection orders - undertakings] [Risk] [Sexual and reproductive abuse] [Victim experiences of court processes] [Women]

Susan and Neil were in a relationship for three years and had a child born in the year they separated. Susan is university educated, professionally qualified and has always been in well-remunerated employment apart from during leave following the birth of the child. Neil did not complete high school, however trained in a trade and earns a modest salary. Neil has a history of intermittent drug and alcohol misuse, and when younger attempted suicide on a couple of occasions during periods of depression. After separation, Susan consulted a psychiatrist to deal with the anxiety she experienced as a result of the abusive relationship, and took medication for a time until she felt it was affecting her capacity to function properly; she was also concerned that she may be prejudiced in the Family Court if her Medicare records revealed that she was taking a medication that was indicated for bipolar disorder (but prescribed to Susan for anxiety).

Susan and Neil casually dated for a brief time some years before living together when Neil was going through a difficult divorce. Neil became resentful and obsessive about Susan dating other men after the brief relationship ended. They eventually got back together and Neil quickly moved in with Susan at a property she owned. While the first six months of their relationship were happy and without incident, in the remaining two and a half years tension and conflict grew between Susan and Neil, there were periods of separation and reconciliation, and Neil's behaviour became abusive. Susan's income was considerably higher than Neil's

and, while she did not highlight the point and was happy to make a greater contribution to joint expenses, Neil would accuse Susan of belittling and humiliating him for his limited earning capacity. Increasingly he became frustrated and angry, and would lash out at Susan. Neil is more than a foot taller than Susan; and is athletic and strong. On one occasion, when loading a large and heavy metal crate in the car, he threw it so as to hit Susan who was standing nearby. She was knocked off her feet, her thick-lens glasses cracked and the impact caused a black eye and bruised lip. On another occasion, Neil grabbed Susan around the neck and held her down on the bed.

When Susan became pregnant, she found intercourse painful and preferred to avoid it. Neil began seeking sexual satisfaction elsewhere. While Neil was away visiting his parents, Susan discovered videos of Neil's sexual encounters with multiple other women (as well as herself) on his computer. When Susan confronted Neil on the phone, he was enraged that she'd invaded his privacy. Susan then discovered that Neil was having an affair with one of these women. Neil returned to try to salvage the relationship and Susan allowed him back as she didn't want to raise the child alone. Soon after, Susan discovered on Neil's phone that he was contacting a former girlfriend on Facebook. Susan left Neil a week before the baby was born and went to stay with her parents; however they told her she must return and try and make the relationship work. Neil made her apologise and taunted her about having no interest in her welfare.

For three months following the birth, Neil's behaviour settled down and they both focussed on adjusting to being new parents though Neil had little to do with the day-to-day care of the infant. Neil came up with a business idea that involved selling internet-based camera systems to away-from-home workers. Susan funded the establishment costs as Neil didn't have the resources himself, however the enterprise did not succeed and ended in financial loss. Neil set up a remotely-controlled camera system in the home, and monitored Susan's movements in every room, including when she was showering and breastfeeding. She repeatedly asked him to disable the system, and at one stage feared it had been hacked. She recalls one occasion, as she walked out of the bathroom, the camera moved to follow her.

Six months after the birth of their child, Neil told Susan that he would marry her only if she agreed to go to a swingers club with him; she refused and told him the relationship was over. Susan left and returned to her parent's house for a couple of days when Neil's parents became involved. Eventually he told Susan that he 'could live with it' if she did not wish to go to a swingers club and the relationship continued for one more month.

Neil was known for his outbursts of road rage. He would throw heavy objects out of his van while driving, with

reckless disregard for the consequences. He was required to attend a police interview about an incident where he allegedly smashed another car with a crow bar. When Susan told his parents, again he was enraged that she breached his privacy. This came shortly after yet another fight about Neil's infidelity; it was the tipping point for Susan and she decided to leave Neil for good. Their child was seven months old at the time.

Susan went home with the intention of retrieving some of her personal possessions. Neil should have been at work but she found him in the backyard shed drinking and playing computer games. Susan packed a bag and gathered her personal documents and, with the baby, went to stay with her parents. Susan never returned to Neil. He stayed on in the property for a time and changed all the locks even though the property belonged to Susan's family and he had not sought permission to do so.

Susan engaged a lawyer immediately and put in place contact arrangements. The child lived with Susan, and Neil had contact for certain hours three times each week under Susan's supervision. Neil would at times run away with the child in the pram, which made Susan feel anxious and concerned about the child's safety. Susan was also keen to get the joint financial matters settled with Neil. She had contributed significantly by way of income, property and parenting, and proposed a cash payment that she felt reflected Neil's contribution. Neil, acting for himself, approached her one day (when Susan attended the home they had shared to supervise contact) and made an irrational counter offer seeking far in excess of his share. He also demanded that she sell all her properties, leave her job and live with him at a place of his choosing. Susan described Neil's behaviour as menacing and intimidating, and she was concerned about what he may do next. In the following days, Neil badgered Susan repeatedly by text about his proposal. When Susan rejected his offer, Neil verbally and offensively abused her and threatened blackmail with sex videos. She told him she would go to the police if he continued; he took no notice, and his texts became more threatening. In time, Neil accepted the cash sum originally offered by Susan.

Susan kept copies of all of Neil's texts and applied for a protection order against Neil. She was granted a temporary order; however the magistrate refused to name the child on the order. The police delayed in serving the order on Neil and, as a result, Susan was unable to have him charged with an almost immediate breach. This was the first of numerous encounters with police over an extended period where Susan felt her circumstances were not taken seriously nor responded to appropriately. Once served, Neil made a cross application and obtained a reciprocal temporary order against Susan. The final order hearing was conducted over two days; Susan was represented by a solicitor and barrister, Neil was self represented. Susan found

the experience of being cross-examined by Neil harrowing and upsetting, and she became quite emotional in the process. She accepts that the magistrate had a duty to ensure Neil was given full opportunity to put his case. While Neil's application was dismissed and a final order granted in Susan's favour, it took some months for the magistrate to hand down the judgment; the matter had apparently been overlooked. Susan was not awarded costs even though the magistrate recognised that Neil's application had no substance and was a case of 'tit-for-tat'. The delay resulted in interim Family Court parenting orders being made before the final protection order issued. Contact was ordered to continue three times each week as previously, however Susan would be required to come into contact with Neil at handovers contrary to the conditions of the protection order.

Following the hearing, Neil actively and regularly flouted the protection order. A neighbour witnessed Neil entering the property which he had once lived in with Susan and where she still had many belongings stored. He was subsequently charged with breaching her Temporary Protection Order. Neil would leave notes and photos for her in the child's bag after contact visits; they were principally designed to rattle Susan, occasionally under the false guise of concern for the child's welfare. On one occasion, Susan made an audio recording of Neil urging her to read a letter he'd written her while acknowledging that he wasn't legally able to. When she refused, he told her things would end badly. On another occasion, Neil left his go-pro camera in the child's bag with footage of him telling the child that Susan had tried to kill Neil. Susan made multiple breach complaints to the police notifying them that she was fearful Neil would kill her; however she was ignored.

A significant breach of the protection order occurred at handover one evening. Handover took place at a public venue frequented by families and most of what ensued was captured on CCTV footage and Neil's own go-pro footage. Neil alleged that Susan's car wasn't safe to drive and refused to hand over the child, slapping Susan's hands away as she reached out for the child. Susan called the police for assistance; they suggested she sign a one-off waiver of the protection order to allow Neil to drive the child to her home, and took the matter no further. Susan was unable to get legal advice at that hour of night, so remained in the car park unable to reverse and leave as Neil was standing behind her car. Neil then sat on the bonnet of the car while Susan was locked inside breastfeeding the child; he filmed her, called out insults and accused her of being unsafe with the child. Susan rang a family member and arranged for them to collect the child; she then tried a different police station. The police arrived, however refused to take a statement claiming it was a Family Court matter. Later, when police viewed the CCTV footage, they said Neil had simply deflected not assaulted her, and his actions didn't constitute a breach of the order. Susan felt aggrieved by the police treatment of her,

and with the assistance of a domestic violence support service, lodged a formal complaint, which was never addressed.

In preparation for a further interim hearing in the Family Court, a family report was prepared. Susan had obtained the CCTV footage of the incidents already described and past medical records evidencing Neil's mental instability and suicide attempts. Recommendations were made regarding contact in Susan's favour. On the day prior to the hearing, handover occurred. Neil had read the report. He approached Susan and told her he would get her. Susan went immediately to the police station to make a breach complaint. They took a statement after initially resisting, but said her claims were unsubstantiated as she had no recording of the interaction. Susan's lawyer, on the other hand, had cautioned her against using recording devices as the Family Court did not regard the practice favourably. Susan tried to submit this fresh evidence at the hearing, however it was not accepted by the Court and the matter was adjourned for some months. Neil continued to refuse any order which excused Susan from being present at handover stating he did not have the financial means to pay for an independent third party.

Susan (with representation) applied for a variation of the protection order to secure better protection at handover. Neil, for the first time, was represented. Susan's barrister was concerned that if the matter proceeded to a hearing, Susan may say something in cross-examination that may prejudice the parenting proceedings. Consequently, Susan accepted an undertaking from Neil that he wouldn't communicate with her during handover or otherwise except in an emergency. Susan agreed to communicate in writing with Neil via a website specifically designed for separated parents. Neil continues to send abusive text messages and emails to Susan. At another handover occasion, he opened the car door while Susan was driving out of the carpark; she had to stop suddenly while he retrieved a piece of paper from the child's bag. Again, she reported the incident to the police and requested fingerprinting; they wouldn't take a statement and told her to come back later, they also told her that fingerprinting would be of no value.

Susan travelled overseas with her son (with Neil's consent and the Family Court's knowledge) to visit her sister. Knowing Susan was overseas with the child and unable to attend the mention, Neil made an application for the protection order to be dismissed. He later withdrew the application.

Further interim parenting orders issued allowing a transition to overnight contact for one night during the week, and daytime contact on the weekend. Susan made an urgent application to the Family Court for further changes after another incident where Neil, with a female friend, approached Susan in a supermarket and told her he was 'gonna get her' while she was holding their child. Neil's contact time changed to three nights every

second weekend, with collection and drop-off at day care. At considerable relief to Susan, handover involving contact with Neil was no longer necessary.

The final Family Court hearing is pending. Susan is assisting her lawyer in gathering records to evidence Neil's parenting deficits and mental ill health. Susan is seeking sole parental responsibility and would be prepared to accept 4-5 nights contact each fortnight. Susan is concerned that Neil not having representation will adversely affect the outcome; however her lawyer is confident that his motives and behaviours will be exposed in cross-examination.

Susan estimates having spent more than $200,000 on legal costs; she has had to sell one of her properties to finance the litigation, and will need to mortgage her other property to fund the final Family Court proceedings. Susan believes that it has been very important for her to be legally advised and represented throughout, though she attends mention dates in the Magistrates Court personally to avoid additional costs. Susan and the child continue to live with her parents for protection and to recover financially. Susan has re-partnered but continues to be fearful of Neil and believes he is capable of killing her. She dreads having to reapply for a protection order on the expiration of the current order given the lack of support she has received from the police. Susan believes the police have failed in their duty to respond to Neil's multiple breaches, despite Susan's concerted and consistent efforts to provide comprehensive statements and supporting evidence where possible. Neil's abusive behaviour and Susan's need for protection continue three years after separation.

Victim experiences - Trisha

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Family law parenting order] [Following, harassing and monitoring] [Interpreters] [Legal representation] [People from CALD backgrounds] [People with children] [Physical violence and harm] [Protection orders] [Risk] [Social abuse] [Women]

Trisha was born overseas and English is not her first language. Initially, Trisha required an interpreter for other than basic conversational English, however over time her skills and understanding have improved somewhat. Trisha and Jarrod met over the internet, made contact with each other a number of times overseas, and subsequently married in Australia. Trisha came to Australia on a prospective marriage visa and, when married, was issued a temporary spousal visa. Trisha completed high school and was previously in unskilled employment. Jarrod was born in Australia and completed a trade following high school. Jarrod has two children from a previous marriage: an adult who lives independently, and a younger teenager who came to live with Trisha and Jarrod, together with Jarrod's mother. Trisha and Jarrod have a young child who was aged two at the time the four-year relationship broke down.

Jarrod was in employment and told Trisha that he was happy to support her while she studied English and looked after the household. Trisha noticed early in the relationship that Jarrod's behaviour was secretive and suspicious. He told her not to disclose their living circumstances to Centrelink, and often asked Trisha what her plans were. He also helped her apply for permanent residency, but insisted when completing the forms that they not fully disclose their financial position. Jarrod held a joint bank account with his mother and household and living expenses were also incurred jointly. Trisha was excluded from these arrangements and felt unable to open Jarrod's mail because it was also addressed to his mother. Over time, this became more concerning to Trisha and caused arguments between the couple.

Jarrod became increasingly abusive towards Trisha through the relationship, yelling and swearing at her, refusing to give her money, not allowing her to make phone calls, demanding that he know her whereabouts.

Jarrod's children and mother made Trisha feel unwelcome in the family. Trisha recalls reading a text from the teenaged child on Jarrod's phone making insulting personal comments about Trisha and her culture. On discovering that Trisha was pregnant the teenaged child became angry towards Trisha, damaged her personal belongings, burned her clothes and pushed her down the stairs. Jarrod and Trisha lived in the car for five days, all the while Jarrod repeatedly urging her to go back to her home country because he couldn't manage the teenager's reactions. Trisha agreed to go, but felt resentful, questioning why she was being made to leave.

Trisha returned to Australia after six weeks in her home country. Jarrod told her he was lonely, so she resumed living with the family and the child was born. Jarrod's abuse continued. Having not allowed Trisha a phone, Jarrod was aware that Trisha's laptop was her only means of communicating with her own family. On one occasion, Jarrod grabbed the laptop from Trisha and she ran after him to retrieve it. Jarrod held Trisha's throat hard in one hand and grabbed her shirt with his other hand and pushed her backwards. Trisha fell and hit her head on the floor; she felt dizzy, and when trying to get up from the floor, Jarrod spat on her face and pointed with his finger at her chest calling her a "fucking Asian" and accusing her of coming to Australia to get money from the government.

Trisha decided that she could not live with Jarrod's domestic and family violence any longer. She contacted her friend who called the police for her. Concerned for Trisha's safety, the police told her to go to her friend's house so they could interview her. Trisha was extremely distressed; she showed the police the broken laptop and marks on her neck, and gave a statement. Trisha can't explain what happened next, but became aware that the police obtained a protection order on her behalf against Jarrod. She has the paper order in her possession, but isn't certain of the conditions as it was not translated in her first language. She believes the duration of the order is two years.

While Trisha was not required to attend court for the protection order hearing, to make arrangements regarding parental care and responsibility for their child, she and Jarrod had to attend phone mediation and then, failing agreement, the court. The Family Court made an order, effective until the child reaches pre-school age, that (among a number of other conditions) the child would reside each week with Trisha for four nights and with Jarrod for three nights. Trisha received legal aid representation and interpreter support for part of this process, however given her limited understanding of English and the legal system, Trisha feels

that she didn't have enough time to consider the family report, and was pressured into consenting to the orders without being satisfied they were in the child's best interests and not knowing what her rights would be as the child gets older.

Trisha believes the protection order has been important in reducing her fear of Jarrod, and her concerns about him harming the child. She says however that Jarrod does not respect her as a mother; and she continues to worry about the child being in the presence of Jarrod's children both of whom are drug users and have police records. She also believes that Jarrod does not share her expectations for high standards of education for the child, and is worried about having to return to the court before the child reaches pre-school age to make fresh arrangements for the child's care and responsibility. Trisha and Jarrod have been unable to reach a property settlement; Jarrod asserts without grounds that Trisha should pay off all his debts. Trisha receives a Centrelink single-parent benefit, which she is doing her best to spend carefully so she can save for the child's future. She is concerned however that, despite her phoning Centrelink to advise of the care arrangements (as set out in the Family Court order), she is receiving too much money and may be forced to repay. At times, Trisha has felt so overwhelmed by these anxieties that she has had suicidal thoughts. Counselling offered through a local domestic and family violence service has helped and supported her through these very difficult times.

Trisha is now a permanent resident; she has a driver's licence, and has purchased a car with her modest savings. Her English has improved considerably, and she has commenced studies so that in time she can secure stable and rewarding employment. While Jarrod is no longer a direct physical threat to Trisha and contact changeovers occur without problems, he continues to send her abusive texts, and his mother and children stalk her periodically.

Victim experiences - Yvonne

Cautionary note: some people may find reading these victim experiences distressing or traumatising.

These de-identified victim experiences summarise the content of interviews undertaken with people who have experienced domestic and family violence and legal system engagement. The interviewees' names and some minor details of their narratives have been changed to protect their identities. In many cases the names have been selected by the interviewees.

The key words align with the contents covered in the National Domestic and Family Violence Bench Book.

Key words: [Coercive control] [Cultural and spiritual abuse] [Damaging property] [Economic abuse] [Emotional and psychological abuse] [Exposing children] [Legal representation] [Myths] [Parenting orders] [People from CALD backgrounds] [Physical violence and harm] [Protection orders] [Risk] [Sexual and reproductive abuse] [Social abuse] [Victim experiences of court processes] [Women]

Yvonne and Emir were in a relationship for around 13 years, and had four children together. Emir was born overseas; he did not complete high school, he is multi-lingual, English being a language acquired later in life, and he has periodically run small businesses. Yvonne was born in Australia, is university educated and runs her own business. They met in Emir's home country when Yvonne was in the early years of her professional training. Within a year, they married and had their first child, and decided to resettle in Australia, Emir on a spousal visa. The children now live with Yvonne and her new partner in a home they own. The youngest child has contact with Emir pursuant to Family Court orders. The three older children have declined any contact.

When Yvonne first knew Emir he was gentle and quiet, but also strongly committed to his faith and spiritual beliefs. He followed a rigorous daily worship practice, and over the years required that the children strictly comply. In the early years Yvonne found Emir's faith and dedication captivating, and was happy to participate even though she never felt like she really belonged. When they moved to Australia, Emir was drawn to a philosophy that aligned with his beliefs, and began attending places of worship. Soon he became very involved in his new-found faith community, following their ascetic lifestyle regimes, and volunteering. Meanwhile, Yvonne had three more children over six years; and worked full-time when she wasn't caring for young children. Emir was opposed to contraception as he believed it was unnatural, and he refused to have a vasectomy as he felt it would diminish his masculinity. Rather ironically, it was the women from the faith community who urged Yvonne to consider contraception; she did so and never disclosed to Emir because

she knew he would vehemently object.

Yvonne describes feeling a great deal of tension around multiple issues that Emir had strong views about and that Yvonne was unable to discuss with him without heightening the risk of conflict and his expression of hatred towards her. Emir exercised a high level of control over the daily lives of Yvonne and the children. The children were made to do hours of prayers in the mornings and evenings, which made them late for school and behind with their homework. Emir would dictate how prayers should be performed, and then often change the rules without explanation. If the children did it incorrectly, Emir would hit them across the face, or swing them around on one arm. While Yvonne experienced some physical violence, she says the children were frequent victims and subjected to the constant threat of more severe harm.

When Yvonne was heavily pregnant with their second child, Emir had insisted that she attend worship with him. They had to travel by train; Yvonne was tired and asked him whether it was necessary for her go. Emir became angry and pushed her towards the train line. Yvonne was terrified and walked kilometres to a family member's house and stayed overnight. On another occasion, soon after Yvonne was home following the birth of their youngest child, a friend called to offer to look after the other children to give Yvonne and Emir a break. Emir declined, and Yvonne questioned him. He slapped her across the face twice while she was holding the baby, and told her never to question his authority especially in front of the children.

Increasingly, she felt unable to communicate with Emir about any difficult issue, so she shut down completely. Yvonne became even more isolated as a result of Emir excluding Yvonne's family from the home as they didn't adhere to the rules of his faith. Emir did not allow the children to attend an important family wedding despite Yvonne being a bridesmaid. Yvonne says she felt constantly strained and under pressure; she didn't have any friends other than a small number in the faith community, nor did she believe she should.

Yvonne and Emir had separate bank accounts, but shared resources, although Emir would accumulate cash amounts from Centrelink payments or odd jobs and hide them from Yvonne. Finances were always tight for the family; Emir reprimanded Yvonne for even modest spending despite the fact that he earned little or no money and Yvonne was the consistent wage earner. Yet, Emir insisted on family trips overseas which were related to faith, these were expensive and required many months of saving to afford. Yvonne found these trips distressing with young children, and especially when pregnant, as the living standards were poor and public spaces generally unsafe. An incident that was particularly disturbing to Yvonne and the children occurred while they were on one of these trips. Emir believed that his younger relative had infringed a sacred ritual, and punished the child by burning an imprint deep in his hand. Family looked on, horrified. Since then,

when Emir believed his own children to be disobedient, he would threaten similar punishment. The level of fear experienced by Yvonne and the children grew in increments over time; eventually Yvonne believed she would be killed. Her sister had expressed the feeling to her that she would arrive one day and they would all be dead.

Yvonne had tried to leave the relationship twice before final separation when she arranged for a family member to call a friend in the faith community and pass on a message to Emir that she and the children were leaving. Shelter accommodation was organised through a local domestic violence support service. From there, Yvonne worked with a lawyer to obtain a protection order and with a psychologist to try to identify and understand her experiences over the past many years. Yvonne received critical support from the shelter and these professionals. On the first mention date, Emir appeared with his lawyer and supporters from the faith community. He denied any domestic violence but consented to a two-year protection order without admissions. Yvonne's lawyer guided her through the process and ensured that she felt safe in the court and protected from any direct approaches from Emir or his lawyer. Yvonne felt the order was important to have because she was fearful of how Emir would react to her taking the children away.

Again, with the assistance of her lawyer, Yvonne participated in mediation with Emir over the telephone in an effort to make arrangements for the children. This process failed as Emir denied all of the circumstances surrounding the breakdown of the relationship. Ultimately, Yvonne made an application to the Family Court. A separate representative was appointed for the children, and a psychologist was consulted to ascertain the children's wishes. The three older children, who were then aged in their early to mid-teens, made it clear that they did not want to see their father. Orders were made by the court granting Yvonne residence; and Emir, contact only with the youngest child once a fortnight at a supervised contact centre, gradually moving to overnight contact. Yvonne was required to email Emir to keep him generally updated about the children, and to facilitate email contact between the children and him. There was to be no phone contact. Yvonne believes that the psychologist could identify serious risks in Emir's behaviour, particularly towards the children, justifying a highly protective approach to contact conditions.

Three years elapsed between separation and the Family Court orders. After the shelter, Yvonne and the children stayed in various forms of accommodation, and sought the help of multiple services for financial, legal and emotional support. Once the orders were settled, Yvonne and the children moved further away, necessitating a change in handover arrangements for the youngest child who, by that stage, was having overnight contact with Emir. On one occasion, Emir's relative contacted Yvonne telling her that Emir and the

youngest child had been crying together for hours. Yvonne knew this was out of character for the youngest child and became very concerned when the handover time passed at the agreed location. Emir returned the child late to a different location very close to their new home resulting in one of the children becoming extremely anxious about what Emir might do and needing significant counselling help in the aftermath. Yvonne observes how profoundly affected the three older children are by Emir's prolonged abuse.

Yvonne is seeking further assistance from her lawyer to have the original contact orders reinstated as she believes the overnight contact is potentially detrimental to the youngest child. Meanwhile, the child is not having contact with Emir. Yvonne believes they have a good relationship, and Emir considers the child to be his favourite.

Property matters remain unresolved. The couple have land and money in Emir's home country, but Yvonne has insufficient resources to take the necessary legal steps to facilitate a settlement of joint assets. She has received legal aid funding for past applications, but no longer qualifies, and has limited capacity to personally fund further actions. Yvonne is in a new relationship now, which she feels is going well, however she is cautious and on alert for any signs of the abuse she was subjected to for many years. She and her partner are building a business together, and caring for Yvonne's four children. Yvonne feels she and the children are through the worst of their ordeal, though she believes there is always a risk that Emir will snap.

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